

WHY CHURCHES SHOULD NOT INCORPORATE

by Gary North

"Then too, because of the intrusion of the federal and state governments into the sphere of church incorporation, some are advocating disincorporation by churches. Given the vulnerability of the church as an incorporated legal entity to statist controls, we should not forget the total vulnerability with disincorporation. In some court cases, the results are proving to be especially disastrous. If our weapons against an enemy prove to be somewhat defective, does it make sense to throw away those weapons and disarm ourselves?"

R. J. Rushdoony (1984)

The issue of church incorporation is now boding. The courageous stand taken by Everett Sileven and other Nebraska pastors against the illegitimate extension of State power over the churches reminds us that the churches have already gone far too far in their capitulation to the State. The State's officials ~~claim that each~~ step into the arms of the State is "minimal" or "just a matter of record-keeping," and before we know it, the State controls the churches in innumerable ways. Church leaders are capitulating step by step. The result is the transfer of sovereignty from the Church of Jesus Christ to the messianic, bureaucratic State. Those few far-sighted, principled church leaders who dare to resist may find themselves in jail, as Sileven has and as Robert Gelsthorpe has.

Now is the time for Christians to reconsider the question of the two sovereignties, Church and State. This means that church leaders must reconsider the almost automatic process of incorporating their churches. Lawyers almost invariably recommend this. So do most local officials (except in Virginia where, by the grace of God, it is illegal for churches to incorporate). But is it wise to follow the advice of lawyers in every case? Is it wise to comply with this request of local or State officials? And why are they so interested in getting churches to incorporate, anyway? Why is it so very convenient for them? Why not just create a trust with a board of trustees, as all churches do in Virginia?

The Question of Limited Liability

When I first started working with R. J. Rushdoony in the early 1960s, even before we had developed the outlines of the Christian reconstruction position, I was convinced by his views that the corporation is morally reprehensible because it involves a State-granted privilege of limited liability. No Christian social thinker was more implacable than Mr. Rushdoony in his opposition to the limited liability corporation – and limited liability is basic to the modern corporation. He fully understood that on this point, he was an intellectual heir of Southern Presbyterian theologian-economist Robert L. Dabney, and in conversations with me, he frequently referred to Dabney's classic article attacking the corporation. (It was Rushdoony's non-profit corporation, Ross House Books, which co-published Volume III of Dabney's *Discussions*. Volume III contains Dabney's essay, "The Philosophy Regulating Private Corporations.")

In 1970, Rushdoony's excellent collection of essays was published, *Politics of Guilt and Pity*. Part III, "The Politics of Money," contains his major statement against all limited-liability institutions, "Limited Liability and Unlimited Money" (chapter 8). Limited liability is a legal status which permits an organization to contract debts in the name of the organization alone. Its members are in no way personally liable for the debts of the organization. He argued that the existence of the privilege of limited liability corporate status is immoral, that it leads inescapably to irresponsible management, and that it leads also to State sovereignty over all such limited liability institutions.

I was persuaded. When I wrote the first chapter of *Introduction to Christian Economics*, I reprinted (pp. 15-16) a lengthy section

from his essay regarding the illegitimacy of limited liability laws. "Liability is inescapable; by limiting the liability of the company which contracts a debt, or permits a fraud, the liability is then passed on to innocent parties. Limited liability thus shifts responsibility away from the responsible to society at large. A partner or shareholder in a company will exercise cautious and conscientious control over his company, if his liability for the debts and frauds of that company are not limited to the extent of his investment. The result is sound, moral, and careful management of a company by actual owners. But, with limited liability, a premium is placed on profit irrespective of responsibility. The shareholder is less concerned with buying responsible ownership and more concerned with buying a share in profits. And then, as the State further protects the shareholder against liabilities in his irresponsible pursuit of profits, the shareholder becomes less and less concerned with the responsible and moral management of his company." (*Politics of Guilt and Pity*, pp. 256-57.)

Hessen's Defense

Because I was so forthright in my opposition to this aspect of the corporation, Robert Hessen sent me a preliminary draft of his book, *In Defense of the Corporation* (Hoover Institution, 1979). He asked me to respond to his arguments. I neglected to do so, but they did bother me. They bother me most of all because so many of the critical arguments against the corporation have been offered by Ralph Nader. This book is an eloquent answer to Nader.

On the question of limited liability, Hessen writes: "Contrary to popular belief, limited liability does not discriminate against creditors to the benefit of shareholders. Creditors cannot be compelled to accept a limited liability arrangement. They can, and often do, insist that one or more of the shareholders become personal guarantors or sureties for the debt. This fact explains why limited liability is often an illusory feature for a new or unstable corporate enterprise. When creditors do accept limited liability, they do so . . . by means of an Implied contract. Because creditors have a choice in the matter, limited liability cannot be viewed as a State-created privilege that benefits the corporation at the expense of the creditor" (p. 18).

He is correct. But then I began to consider the implications of the creditor's decision to make a contract with a limited liability organization—any limited liability organization (trust, limited partnership, or corporation). Why would he do this? The obvious answer: because he thinks it will benefit him. When a person decides to sell on credit or loan money to a church, trust, or corporation, he is saying to himself: "Yes, there maybe a slightly greater risk of loss as a result of a default on the debt. Nevertheless, I want the business. I am willing to bear somewhat greater risk in order to get the business. Yes, I am in effect self-insuring against loss. I will therefore have to accept a reduced rate of profit. But the deal still looks reasonable. Most corporations pay their debts most of the time. If there weren't limited liability protection, this business opportunity probably would not exist. So I'll bear some of the risk they are unwilling to bear, since I think I can afford it for the sake of my business."

It is not true (or at least Rushdoony and I did not show) that limited liability shifts responsibilities "to innocent parties" or to "society at large" (Politics, p. 256). Risk is transferred to people who are willing to share in the risk. Thus, our original argument was misguided, or at least incomplete. What we should have argued is that in a free society, men should be allowed to form limited liability societies and institutions in any form, simply by declaring their intention not to accept personal liability for their debts.

We have to see the limited liability contract not as a means of escaping responsibility as such, as I once argued, but as a means of sharing risk with those who are willing to do so at some price. This is what I neglected to consider when I adopted Rushdoony's argument in my *Introduction to Christian Economics*, which I now intend to revise.

Every person is entitled to revise his thinking. After all, the

progress of the Church over time has come with improvements in **creedal** formulations and theology. The same is true of science, business, and every other area of life. Men sometimes make mistakes in one period of their lives that they attempt to overcome later on. The problem comes, however, when someone makes a flip-flop in his thinking, but neglects to inform others that he has in fact flip-flopped, or why his **old** arguments were wrong, and why his new arguments are correct. That's why I need to offer this "position paper." Some things that I wrote in the past may be misleading people. My thinking has changed. So has **Rushdoony's**. Neither of us holds to our original arguments against corporations as such, but we now no longer agree with each other concerning the wisdom of incorporating churches. I am utterly opposed; he is completely in favor, as he says forthrightly in his **Chalcedon Position Paper No. 50** (June, 1984).

State-Created Privilege

Is the corporation innately a privileged institution? Hessen argues that it is not. But he bases his arguments on the historical fact that the features that supposedly constitute the corporation's privilege—the right to sue, perpetual legal life, and limited liability—are available to other forms of organization, including trusts (chapter 2: "Are Corporations Creatures of the State?"). Because **these** benefits are supposedly State-granted, Nader has argued, the corporation has certain responsibilities to the State and to the public. Hessen's book is an attempt to overcome Nader's assertions.

There is little doubt that Hessen is correct with respect to pre-nineteenth century corporations. They did exist in common law long before the modern period. But this argument is insufficient to overcome **Nader's** argument. There is equally no doubt that the growth of influence and numbers of limited liability corporations has come over the last century, when the State began to encourage the creation of corporations.

Rushdoony appealed to history in **his** 1970 case against the corporation. He argued that limited liability was unpopular with moral people and with state legislatures in the early nineteenth century.

Very early in the history of the United States, some states made legal the limited liability company, but such concerns were not too commonly established. They were regarded as essentially irresponsible, and they failed to attract capital. After the Civil War, the moral and industrial climate changed, and, as in England, such concerns began to succeed. Limited liability did not become legal without extensive opposition. The opponents of limited liability believed that it would in the end destroy capitalism. They believed, in fact, that a principle of responsibility which is basic to free enterprise was at stake in the issue (p. 256).

In short, opposition to corporations was a moral issue in the early nineteenth century, and the proponents of the corporation have always been immoral people: "**The** proponents of limited liability were for a **laissez faire** attitude regarding moral issues. A Gresham's law factor enters in with their **laissez faire** **immoralism**: morally bad concerns drive out good ones" (p. 257). Neither of us accepts this rhetoric any longer. The question is, where did we go wrong? **Were** we incorrect in arguing that the limited liability is innately immoral? Yes. Were we also incorrect in arguing that the State does, in fact, grant a privilege to those who apply for incorporation? Yes. Hessen's arguments to the contrary, modern political practice rests on this assumption. Nader speaks for most politicians and most judges. They perceive the corporation as a creation of the State. The corporation wasn't necessarily the creation of the State two centuries ago, but it is now.

We never get something for nothing in the affairs of civil government. As **Rushdoony** noted in 1970, "since limited liability

was in effect a state subsidy to commercial firms at the expense of the public, it was inescapable that what the state subsidized, the state would eventually control" (**Politics**, p. 257). This is exactly how the State's officials view incorporation today. Some of Pastor Sileven's persecutors have stated this openly. He was told by one judge that since the State of Nebraska incorporated his church, the State has a right to establish laws to regulate any aspect of **his** church. Sileven went to jail to uphold the sovereignty of the local church against just this sort of argument on the part of public officials.

A. Notification or Licensure?

Here is where Mr. Rushdoony and I no longer agree with each other. I think he was correct in 1970, at least with respect to how the State operates. If it gives a privilege—or any legal immunity it sees as stemming primarily from State sovereignty—it will assert sovereignty over the privileged organization. Only if common law historically has recognized the legal immunity of a particular organizational form (e.g., trusts), irrespective of statute laws granting such privilege, is the organization somewhat safe from statist interference.

Rushdoony writes the following concerning the necessity of notifying the state concerning the incorporation of a church:

The incorporation of a church or Christian agency of any kind was simply a legal formality notifying the state of the existence of such a body and its **immunity** from statist controls. In recent years, the statist have turned that notification **into** a form of **licensure** and control. The matter can be compared with filing a **birth** certificate. When the birth of Sarah Jones is recorded by her parents and doctor, **permission** for Sarah Jones to exist is definitely not requested; rather, a fact is legally recorded. Similarly, in American law religious trusts, foundations, or trusts **did** not apply to exist but recorded their certificate of birth, their incorporation. The current Internal Revenue Service doctrine is that the filing is a **petition** for the right to exist. This turns the historic position, and the **First** Amendment, upside down. It asserts for the federal government the **"right"** to establish religion and to control the exercise thereof. As a result, a major conflict of church and state is under way.

Some of this argumentation is brilliant, but the argument unfortunately conceals as much as it reveals. The "historic position," as he showed in his 1970 essay, was that the State sees itself as granting a fundamental legal immunity to corporations which is not granted to business partnerships, namely, the right of the shareholders to escape liability for the debts of **the organization**. So dangerous **is this grant of immunity**, he once argued, that it leads to "a greater readiness by corporations to assume debt. After all, the homes and incomes of those involved are not at stake, but only their limited investment. The effect of this has been to replace a hard money economy with an inflationary credit economy. It is interesting to note that both paper money and limited liability became entrenched in the United States after the Civil War" (p. 260). And the Civil War, he shows in **The Nature of the American System (1965)**, was a humanist war against Christian institutions—not just in the South, but throughout the nation. Corporations began to flourish under the growing statism of humanism. He ignores this issue now. I don't think we dare ignore it.

B. The Threat to Church Freedom.

What must be understood is that Rushdoony was absolutely correct in 1970 when he argued that a State-granted privilege has become (and always potentially was) a means for the State to exercise control over corporations. It was not that the State merely recognized the right of private organizations to write limited liability clauses into its by-laws. It was that the State became the sole source of the legal privilege to write in such clauses. As is true of money, which was also based originally on

voluntary exchange and experience, the State later asserted sovereignty over the operation of what was originally a **market-produced** institution.

We dare not be naive. Today's State has asserted this legal sovereignty to grant limited liability protection to corporations. If you want limited liability protection in a business, you must **announce** your intention through incorporation. And once you do this, the bureaucrats assert their legal control over you. It may not have been this way originally, although Rushdoony was correct in 1970 in pointing out that the rapid spread of limited liability corporations came only after the **nineteenth-century** humanist State actively began to license **corporations**. Whatever used to be true about the supposed mere announcement of the existence of a corporation, the bureaucrats **now** claim the right to enforce certain obligations on corporations and to tax them, unless the bureaucrats decide to exempt the corporation from taxation.

An unincorporated church, in contrast, is **automatically** tax exempt. So why promote incorporated churches? Why acknowledge implicitly that the State grants anything to the Church? Why should Christians submit "papers of implied subordination" to the State?

What I am arguing here is the very opposite of what **Rushdoony** is arguing. He downplays the vast changes in today's legal order, and has relied on a vague appeal to a distant past—a world which might once have been, but which is no longer. He understood this very well in 1970. His warning concerning the implicit statism of incorporation was justified. Now he has called for churches to incorporate. He has turned against all those who took his 1970 essay seriously and have sought ways to secure their churches from the threat of controls, registration, and regulation that he warned us that incorporation necessarily involves.

C. Separate Legal Structures.

First, let us be absolutely clear on one legal point: a corporation is not simply an association, as Rushdoony asserts today, and categorically denied in 1970. It is a special institution which is taxed differently from other organizations, and which has a special body of law which applies to it.

Second, let us also understand that the Church is also a separate kind of legal institution, with a separate body of law which applies to it. The Church, in short, is not a twentieth-century corporation; it is a **trust**. Legal immunities automatically belong to a church, if it has **not** sought incorporation, and it can appeal to centuries of independent common law precedents: trust law that precedes and can supersede corporation statute law. This is why civil governments are trying desperately to get churches to incorporate.

We dare not join those who would trap the churches, even in the name of pragmatism. On this point, I disagree with the **Chalcedon Position Paper No. 50**: "Then too, because of the intrusion of the federal and state governments into the sphere of church incorporation, some are advocating **disincorporation** by churches. Given the vulnerability of the church as an incorporated legal entity to statist controls, we should not forget the total vulnerability with **disincorporation**. In some court cases, the results are proving to be especially disastrous. If our weapons against an enemy prove to be somewhat defective, does it make sense to throw away those weapons and disarm ourselves?"

Wait a minute! Who says that the Church of Jesus Christ is **totally** vulnerable if **disincorporated**? What is the evidence? If a church is "totally vulnerable" if it disincorporates, then **disincorporated** churches ought to be losing 100% of the cases brought against them. Total, after all, means total. Where is the evidence to prove that disincorporated churches have been successfully prosecuted more often than those churches that are incorporated?

The State of Virginia does not allow churches to incorporate. Churches use the trustee system of ownership. Anyone who wants to compare the rate of persecution of incorporated vs. unincorporated churches should start by comparing the

legal situation of Virginia's churches with the legal situation of the churches in adjoining North Carolina or Tennessee, or in any other state, for that matter. My guess is that no significant difference will be found. In fact, I will go farther; I think we will find that Virginia's churches are somewhat less subject to harassment and interference. For example, the Virginia legislature has exempted church day care centers from **licensure**.

Until such studies are available, we should not believe that disincorporated churches are "totally vulnerable," and that incorporated churches aren't. There are risks under any system of organization. Statist interference with churches is growing everywhere. But to frighten loyal but uninformed followers with the stick man of the "totally vulnerable" church is a high school debate trick. Unfortunately, the stakes today are a lot higher than winning a high school debate.

The important question is not whether disincorporation makes the Church **more** or less vulnerable temporarily; rather, it is this: What is morally right? It is not a question of **short-term** tactics. The question is: Should the churches conform to the desires of the humanist bureaucrats and **crawl** on their bellies to the State to beg for special privileges under the incorporation statutes? I say no. In 1970, Rushdoony would have agreed with me.

I agree entirely with his original position on the danger of State-granted privilege, at least as it applies to the Church. To advise Christians to incorporate **their** churches is to advise them to exchange their ecclesiastical birthright under God and common law for a mess of State-licensed pottage.

A Misleading Definition of the Corporation

In 1984, Mr. Rushdoony introduces his two-page defense of the corporation with these words: "One of history's most important doctrines is today widely **subject** to abuse, neglect, and attack. This is the concept of the corporation." He argues that "In any strict definition of the term, no corporation existed outside of the Biblical revelation nor apart from Scripture's doctrine of a people created by God's **covenant**."

But if this is true, then why was it only in the late nineteenth century, under the influence of atheist economics and Darwinian social theory, that the modern limited liability corporation came into prominence? Why didn't it flourish in Christian times? It existed before the nineteenth century, but it was not the dominant form of business organization. Wasn't it in fact actively promoted by the states after the Civil War? Wasn't its triumph in part the product of statism? In other words, shouldn't we look very carefully at the **historical circumstances** that have led to the vast expansion of the corporate form of organization? Shouldn't we also look closely at today's circumstances—how the State's officials regard the corporation as their creation?

He cites the Latin root "**corpore**," which referred to a body, and in Christian theology to the body of Christ, to defend his thesis. "In its original sense, the corporation, which means a body which does not die with the death of its members, has reference to the body of Christ. This corporation, Christ's body, has as its origin covenant Israel; the calling of twelve disciples to replace the twelve patriarchs of Israel had as its purpose to set forth the continuity of the corporate covenant community. . . The church thus, as the original and true corporation, has an earthly as well as a supernatural life."

He continues: "It is amazing that there is so little to be found on the significance to society of the doctrine of the church as Christ's corporation." Yes, it is amazing. It is an area that needs to be discussed. And the first thing which must be discussed is the close relationship between the growth of corporations and the growth of statism and humanism. Hasn't the State actively promoted the growth of corporations as a means of gaining **power** over private wealth? Isn't this one increasingly important reason behind the pressure on churches from State officials to incorporate?

Rushdoony today traces the history of the State to the **doc-**

trine of the corporation – political rule based on continuity. This is a uniquely Christian idea of rulership, he says. (Not in incomparably bureaucratic ancient Egypt and ancient China, it **wasn't!**) “It should be added that the church was not the only corporation set **forth** in Scripture: the family is another.” What was once in Rushdoony's eyes an immoral institution is now almost an archetype: for the Church, the State, and the family.

“What the corporation doctrine has enabled men to do is to transcend the limitations of their time and life-span. . . . Granted that corporations are not necessarily good (nor necessarily bad), it still remains true that the concept of the corporation has been important in history by giving continuity to the works of men.” He and I have both abandoned his 1970 arguments that the corporation is “necessarily bad.”

He now defines “corporation” as any institution which can legally survive the death of its members. This is too broad a definition. It neglects the key issue which he focused on in 1970: limited liability. Problem: What about the **State**-granted privilege of limited liability, the touchstone of the tremendous expansion of corporate business over the last pagan century? Silence. This is no time for silence.

The essence of the corporation, **as** Hessen argues, is not “perpetual duration” beyond the death of any or all of the original owners. The same feature is characteristic of trusts and certain forms of partnership. “Perpetual duration simply means that the articles of incorporation need not be renewed . . .” (p. 17). There is therefore no theological reason to single out the corporation as the form of biblical organization. It is trusteeship, as a development of the biblical **principle** of stewardship, which is fundamental, not the corporation. **Rushdoony's** case for “The Family as Trustee” was persuasive on this point (*Journal of Christian Reconstruction*, Vol. IV, No. 2, Winter, 1977-78). It is far more consistent biblically to organize a church as a trust, and common-law roots go far deeper.

Hessen's book has greatly influenced **Rushdoony**. His review of it (and other books published in 1979) in the undated and unnumbered *Chalcedon Book Notes* lauds it as “a carefully reasoned and judicious book, and a needed statement of the case for the corporation.” It was in this review that **Rushdoony** first announced his new view of the Church as a corporation. “The church is the great and original corporation, a body with a continuing life independent of its members. There is a theology of corporation which we have forgotten, in church and economics.” The problem is that he has overemphasized and overrated the doctrine of perpetual duration. Hessen denies that perpetual duration is anything unique to the corporation. By **implication**, there is no particular reason to praise the corporation as a unique institution because of its supposed manifestation of the characteristic of eternal life, which is the line of argument which **Rushdoony** takes in *Position Paper No. 50*. **Rushdoony**, unfortunately, has not followed Hessen's warning on this point.

State Authorization Becomes Control

What must be understood is that **Rushdoony** was absolutely correct in 1970 when he argued that a State-granted privilege has become (and always potentially was) a means for the State to exercise control over corporations. It was not that the State merely recognized the right of private organizations to write limited liability clauses into its by-laws. It was that **the State**

became the sole source of the legal privilege to write in such clauses. Like the origin of money, which was also based on voluntary exchange and experience, the State later asserted sovereignty over the operation of what was originally a **market**-produced institution. It claimed a monopoly over the granting of corporate charters, with their limited liability protection.

A church does not need to beg the State for incorporation in order to exist as a “perpetual” legal entity, and as a limited liability organization. It has that right under Gods law and under English common law as a trust institution. Trusts **register; corporations** apply. Until we recognize this fundamental organizational difference, we will continue to place our churches under the sovereignty of the modern humanistic State.

What we need to do is to recognize the validity of **Rushdoony's** earlier essay, “**The Family as Trustee**.” The trust is the most appropriate means of establishing a church, the “bride of **Christ**,” and the “family of God.” By adopting an uncritical and misinterpreted version of Hessen's defense of the corporation, **Rushdoony** has retreated from the “high ground; both theologically and institutionally, from which he used to defend the institutional sovereignty of the Church.

Conclusion

There can be no doubt that **Rushdoony** has heretofore **main**-tamed a strong stand against any subordination of the Church to the State. In “Accreditation and Certification,” *Chalcedon Position Paper No. 5 (1979)*, “Jurisdiction: By Christ or by Caesar?” *Position Paper No. 7 (1979)*, Taxation,” *Position Paper No. 21* (no date), he stated the case for Church sovereignty. So did Douglas Kelly, who used to work for **Chalcedon** and who is now a professor at Reformed Theological **Seminary** in Jackson, Mississippi: “Who Makes Churches Tax-Exempt?” *Chalcedon Report* (August, 1982). But by overemphasizing and misinterpreting relatively one minor aspect of Hessen's *In Defense of the Corporation* — perpetual **duration** — **Rushdoony** has, I fear, misled people who want to defend the Church of Jesus Christ against interference from the State. Anyone can make an error of Judgment, but the impact of such errors is always **magnified** when they come from stalwarts of the **faith** who have led the troops with valor and distinction in previous battles.

The **obvious** first step in asserting this independence from the State is to de-incorporate. The trustee form of organization is both theologically proper and safer in terms of the precedents of common law. Incorporation, in **today's world**, **is an** implied admission of institutional subordination to the State. Churches should therefore not seek incorporation or be incorporated. If this is inconvenient for lawyers and State officials, so be it. My attitude is **simple**: anything that's **inconvenient for lawyers and State officials can't be all bad**.

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(For information on how to de-incorporate a church, contact Michael Gilstrap, Geneva Ministries, **P.O.** Box 8376, Tyler, TX 75711. For a copy of *Politics of Guilt and Pity*, send \$9.95, plus a dollar for postage and handling, to Institute for Christian Economics, **P.O.** Box 6000, Tyler, TX **75711**.)

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