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Debts & Doubts at the Supreme Court

Michael Sean Winters | Mar. 26, 2014 Distinctly Catholic

The U.S. Supreme Court has been at the center of political controversies before, and all eyes were on the Court yesterday as it heard oral arguments in the cases brought by Hobby Lobby and Conestoga Wood, two for-profit companies challenging the HHS contraception mandate. My colleague Josh McElwee has a fine piece on the arguments and the protesters outside the Court here. [1] But, something else happened at the Court this week, something that may be more important to Catholics concerned about social justice: JubileeUSA and 79 religious groups filed an amicus curiae brief [2] urging the Court to grant certiorari on a case involving vulture funds and Argentina.

First, the Hobby Lobby case. Hard to tell from the questions which way the Court will go. But, the lawyer for Hobby Lobby, Paul Clement, at one point made an argument that I found interesting. He asked why the accommodation the administration granted to religious non-profit groups, which places the burden of coverage on the groups? insurance company or third-party administrator, could not be extended to for-profit corporations. Clement neglected to point out that these non-profit religious groups that are challenging the mandate claim that the accommodation is no accommodation at all and that their religiously grounded objection remains robust. I had, heretofore, thought that the Hobby Lobby decision would not likely have an effect on the cases brought by archdioceses and the Little Sisters. But, if the Court follows Clement?s logic, these religious organizations will not have a leg to stand on.

Clement also argued that there would be no ?parade of horribles,? if the Court rules in favor of Hobby Lobby, with firms objecting to laws requiring a minimum wage or banning child labor on religious grounds. I wonder why he thinks that. The former Archbishop of Boston, Cardinal William Henry O?Connell was deeply and vocally opposed to laws banning child labor on the grounds that only the parents should decide whether their thirteen year old goes to school or works in the local factory. There were plenty of religiously motivated Southerners in the 1950s and 1960s who could cite verses of the Bible to justify their opposition to integration of the races. The ?parade of horribles? is not some mere fantasy cooked up by opposition counsel. It is U.S. history.

Whatever the Court decides, the ramifications for First Amendment jurisprudence will be large. Still, the bigger decision the Court faces is whether or not to hear the case involving the predatory hedge funds and Argentina. I say this is a bigger decision because it has the potential to inflict greater harm on more people than providing contraception to anyone or not. It also has the potential to drastically limit the ability of countries to restructure debt in the future, which could turn relatively limited, albeit wrenching, sovereign debt crises into worldwide economic instability. If the Court sides with the hedge funds, we will most definitely have a real ?parade of horribles.?

The brief filed by JubileeUSA, an interdenominational group that fights for social justice worldwide, could not be more clear in stating its moral case: ?Because using law to dispossess the poor for the pleasure of the powerful offends not only the sense of justice embodied in United States policy, but the even more ancient principles of biblical justice revealed in the scriptures of our faiths, we respectfully submit this amicus curiae

brief requesting that the Court accept certiorari.?

In this case, the ?pleasure of the powerful? is attained by the predatory behavior of hedge funds which approach countries in desperate financial times and offer them the equivalent of a payday loan. In both cases, the extreme desperation of one of the parties negates any free market claptrap about the importance of property rights and the need to enforce contracts: These contracts are rotten at the beginning because one of the two parties is subject to extreme coercion. That has always been one of my problems with all the happy talk about the beauty of markets and importance of contracts: It tends to overlook the various ways our economy creates and maintains gross inequalities of power before the contract is signed. In this case, Argentina was not ?free,? still less sovereign, during its debt crisis. It was prostrate and these vulture funds came ?to the rescue? with a fake lift raft. A man who is drowning usually does not have time to reflect on whether or not the life raft is real or not.

What is especially galling is that these vulture funds are run by people who champion the free market, with all its risks and rewards, but here they wish to dodge their risk. When Argentina had its sovereign debt crisis in 2001, most creditors worked out a deal, taking a lower rate of return, renegotiating the terms of loans, etc. The debt restructurings are undertaken usually with the help and oversight of the IMF and while I think the terms are usually too cavalier about the human costs of the austerity programs they demand, at least the process helps a country climb out of the whole. But, the hedge funds chose not to be a part of the settlement. They demand full return on their predatory loans and if that full return means a country must slash its assistance to the poor, thems the rules of the market. But, did you see what vanished in this transaction. Where is the risk? These hedge funds go after countries where the likelihood of a default is well known ? that is why the countries are desperate. Then, when default happens anyway, the hedge funds say they are not subject to the market?s usual risks and rewards. Tails I win. Heads you lose.

In many cases, the loans were made to regimes that were sovereign only in the strictest legal sense of the word. As often as not, the regimes were corrupt, family enterprises that happily saddled the national treasury with debt while they hid their money in the Caymans and built fancy mansions or bought pricey cars for themselves. In such cases, the insistence of the hedge funds that a country freed from a prior, debt-creating regime, still owes them the full payment on their loans is yet more obscene. And, is it not odd that these champions of the free market who usually complain about government intrusion in the market are here insisting on the sovereign authority of government as guarantors of the loan? And are not these the same people who assured us that there would be no downside if the U.S. defaulted on its loan obligations during the debt ceiling fights in recent years? The hypocrisy is stunning. These are bad actors.

When Pope Francis issued his apostolic exhortation Evangelii Gaudium, some of our free market Catholics suggested that the pope really did not understand how markets work, that he was not an economist, that his understanding of the economy was crippled because of his Argentine roots, etc. I think the pope knew exactly what he was talking about and was quite clear-eyed about the contemporary economy. And, so I ask my free market Catholic friends: Do you defend this predatory behavior by these vulture funds? This is what the contemporary economy actually does. Leave aside your happy talk about the creativity of the markets for a minute and answer: Do you defend this behavior? Do you think the Supreme Court should side with the hedge funds? Just as Marxism, which sounded fine on paper to many (although not to us Catholics), nonetheless had to be judged by whether or not the people who lived under Marxist regimes lived well, so, too, must the free market economy be judged based on how it affects the real lives of real people.

This hedge fund behavior demonstrates precisely why the market must be fettered. The unfettered market all too easily helps the powerful become yet more powerful and consigns the poor and the powerless to further indignity. Law, not just property rights, must be humane if it is to continue to command respect. The pitchforks will come out if the laws do not assure a more or less humane society. The Court should grant cert in this case, and it should side with Argentina and, hopefully, drive a nail into the coffin of these vulture funds. And,

blessings on JubileeUSA for focusing the attention of believers on this important case.

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