# Corporate religious liberty & Christian ethics

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*For Romeo and Julia David*

## Abstract

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In recent years, the United States Supreme Court has heard a number of highly contentious religious liberty cases from a variety of corporate litigants, including houses of worship, religious non-profits, and for-profit enterprises. Concerning the primary legal subjects involved, theorists are in disagreement concerning *to whom or to what* legal rights to religious freedom should apply: Some argue that individuals and voluntary associations are most appropriate; others argue that groups of any type, whether voluntary or not, are of equal concern. How should the Christian tradition respond to these contentions? Judging the first position as unjustifiably narrow and the second as unduly broad, this doctoral thesis draws upon Christian ethical and group-ontological thought to argue that corporate religious liberty rights should apply to neither individuals nor groups *per se*, but rather to the religious, group-agential actions of coordinating individuals. Such a position finds a reasonable middle ground.

The thesis is divided into four substantive chapters. The introduction establishes the normative import of determining to whom or to what corporate religious liberty rights apply and emphasizes the pressing need for a Christian ethical account. Chapter 1 begins the development of this account by determining both the extent to which it already exists within Christian moral thought and the primary area in which it can be developed – namely, group ontology or the appropriate legal subjects concerned. After Chapter 2 anticipates objections to the use of group ontology in legal prescription, Chapter 3 constructs the promised Christian ethical account, using the modest group realism of

Thomas Aquinas to prescribe protections (and limitations) of corporate religious exercise within church and non-church organizational contexts. Chapter 4 answers a remaining query concerning the integration of a Christian, strong group realism (applicable to the Church alone) into the proposed account. The conclusion summarizes the ontological work done and suggests areas for further normative development.

## Long abstract

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In recent years, the United States Supreme Court has heard a number of highly contentious religious liberty cases from a variety of corporate litigants, including houses of worship, religious non-profits, and for-profit enterprises. With regard to the primary legal subjects involved, theorists disagree over *to whom or to what* legal rights to religious freedom should apply. Some theorists argue that individuals and groups featuring individual consent, including self-identificatory associations, are the only morally appropriate legal subjects of corporate religious liberty rights. Others argue that groups of any type, whether voluntary or not, are of equal moral concern and thus argue that corporate religious liberty rights should extend to groups like for-profit enterprises, as well as the individuals that may own and control them.

How should the Christian tradition respond to this disagreement, or polarization, between individual- and group-rights advocates? This doctoral thesis draws upon Christian ethical and group-ontological thought to bridge the individual-group divide and to clarify associated normative challenges, including overly expansive or narrow constructions of corporate religious freedoms and the reduction of the Church into a mere voluntary association. In response to these challenges, this thesis constructs an account of corporate religious liberty which holds that corporate rights to religious freedom are best understood to apply to neither individuals nor groups *per se*, but rather to the religious, group-agential actions of coordinating individuals.

This account of corporate religious liberty is normatively significant for at least two reasons. First, it describes social or group reality (i.e., group ontology) in a way that keeps

both individuals and groups in mind throughout the procedure of legal prescription. Second, it distinguishes between two forms of corporate religious liberty: first, a robust *freedom of the church* (applicable to distinctly religious actions) and, second, a less robust regime of *organizational exemptions* (applicable to religiously motivated secular actions). This two-doctrine account aims toward reasonable group protections, giving due attention to vulnerable third-parties, different group-types, and the distinct moral value of religion itself.

This thesis is divided into four substantive chapters that collectively provide a Christian ethical response to the question: To whom or to what does corporate religious liberty apply? The introduction sets the stage. It provides an overview of the contemporary American debate and summarizes political liberal and Christian ethical stakes in the thesis's guiding question. Three dimensions to this debate are addressed: the individual-group divide, the distinction between group-types, and the use of group ontology for purposes of legal prescription. The chapter shows that the political liberal debate is markedly polarized with respect to normative foundations because, in large part, it is unclear about the legal subjects concerned. Might there be a promising way forward, particularly from a Christian ethical perspective?

To this question, the first chapter responds somewhat positively. Chapter 1, *Corporate religious liberty in church teachings*, claims that the Christian ethical tradition, as represented by modern ecclesial statements on religious freedom, offers a way forward. But the tradition does so primarily with respect to normative foundations and not so much with regard to the issue of appropriate legal subjects. On this latter point, Catholic and Protestant reflections can be seen to track certain political liberal failures – such as overlooking ethically salient empirical differences between churches and non-church entities, clumsily straddling the individual-group divide, and reducing the Church itself into a mere voluntary association. The chapter concludes that a Christian ethical contribution to

the debate must draw upon its own group-ontological resources in order to respond adequately to the question of to whom or to what corporate religious liberty applies and, by extension, to navigate confidently the contemporary rights debate. In short, what is needed is a Christian ethical *and* group-ontological account of corporate religious liberty.

Before constructing this theory, Chapter 2, *Group ontology and skeptical arguments*, anticipates objections to the use of group ontology for legal-prescriptive purposes. Three positions are addressed: first, Justice Ruth Bader Ginsburg's attempt to eliminate the possibility of group agency for profit-making corporations; second, James D. Nelson's social theory of conscience, which reduces group agency to an unduly narrow range of group-types; and, third, Richard Schragger and Micah Schwartzman's argument, which holds that group ontology is both indeterminate and morally distracting for legal prescription. Especially through critical engagement with Schragger and Schwartzman, the chapter ends with a basic framework for legal prescription that integrates group ontology and (Christian) ethical thought in a methodologically appropriate way. This preferred method of legal prescription is taken into the next chapter, where it grounds a Christian and group-ontological theory of corporate religious liberty.

Chapter 3, *A modest account of corporate religious liberty*, constructs the promised theory. Summarily put, the account holds that corporate religious liberty rights are best understood to apply to group-agential actions, pursued for ends that are either distinctively religious or religiously motivated yet secular in nature. This account is arrived at through a retrieval of Aquinas's group-ontological thought and a subsequent integration of it into the method of legal prescription endorsed in Chapter 2. In particular, the chapter shows that Aquinas primarily understands groups not as things or persons, but as instances of coordinated activity. The chapter then demonstrates how the "anatomy" of Aquinas's modest group agent – as interpreted by John Finnis and Richard Ekins, especially – can be used to prescribe legal conditions necessary to support (and limit) corporate religious exercise

within church and non-church organizational contexts. The chapter concludes by highlighting conceptual and practical benefits of the account's modest group-agential focus, including: movement beyond the individual-group divide, preservation of churches' distinct normative value, and justification for degrees of governmental interference when disputes arise.

With the promised account outlined, Chapter 4, *Integrating the strong group agency of the Church*, addresses a remaining question: Assuming that the Church could be understood as a *strong* group agent (i.e., a group whose agency is *not* entirely attributable to members' coordinated actions), how should we integrate it into a theory that is built upon *modest* group realism? The chapter answers this question in three sections, primarily drawing upon Roman Catholic sources. The first section considers the extent to which certain strains of Catholic ecclesiology meet a stipulative definition of strong group realism. The second section then engages with medieval interpretations of the term *corpus mysticum* and the contemporary secularization John Locke's "true church" to explain (i) why the Church is not commonly described in strong group-realist terms today and (ii) how this situation affects proposals to recognize and legally protect the Church. Finally, the third section demonstrates how the Church (theologically understood as a *moral person*) could be integrated into and thus accounted for by my proposed theory. This integration relies upon individuals holding religious beliefs concerning the Church's strong group agency – that is, beliefs that individuals can coordinate around and thereby create a modest group agent.

As the thesis's conclusion reiterates, the question concerning to whom or what corporate religious liberty applies demands both a normative *and* an ontological response. This doctoral thesis provides a focused ontological response, offering a Christian perspective of corporate religious liberty that legally accounts for individuals and groups via protections granted to group-agential actions. Such an account could help Christian

communities to navigate better the moral challenges of current legal disputes and disputes to come.

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# 0 Introduction

In recent years, the United States Supreme Court has heard a number of highly contentious religious liberty cases from a variety of corporate litigants, including houses of worship, religious non-profits, and for-profit enterprises. Theorists and commentators are in disagreement concerning *to whom or to what* legal rights to religious freedom should chiefly apply. Some theorists, like Cécile Laborde and Micah Schwartzman, argue that rights to corporate religious liberty should apply only to certain types of voluntary associations.[1] Others, like Nicholas Wolterstorff and Douglas Laycock, argue that groups of any type – whether or not voluntary and self-identificatory in nature – are potentially of equal moral concern and thus claim that *pro tanto* rights to religious liberty should extend to groups like for-profit enterprises, as well as to the corporately empowered individuals that may own and control them.[2]

At their core, these two positions evince a concern over the proper normative ground and scope of corporate rights to religious liberty, with theorists like Laborde emphasizing the normative weight of individual rights and theorists like Wolterstorff

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[1] Cécile Laborde, *Liberalism's Religion* (London: Harvard University Press, 2017), chap. 5; Richard Schragger and Micah Schwartzman, "Against Religious Institutionalism," *Virginia Law Review* 99, no. 5 (September 2013): 918-985; and Richard Schragger and Micah Schwartzman, "Some Realism about Corporate Rights," in *The Rise of Corporate Religious Liberty*, ed. Micah Schwartzman, Chad Flanders, and Zöe Robinson (Oxford: Oxford University Press, 2016), 345–71.

[2] Nicholas Wolterstorff, "Freedom for Religion," in *Understanding Liberal Democracy: Essays in Political Philosophy*, ed. Terence Cuneo (Oxford: Oxford University Press, 2012), 298-304; and Douglas Laycock, "The Campaign against Religious Liberty," in *The Rise of Corporate Religious Liberty*, ed. Chad Flanders, Zoë Robinson, and Micah Schwartzman (Oxford: Oxford University Press, 2016), 231–42. See also Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford: Oxford University Press, 2010), 33 (stating that church autonomy claims can sometimes be referred to as "human rights of religious associations").

recognizing the normative import of group rights. Both positions do not recognize one type of right at the expense of the other, of course. Individual-rights theorists admit of group rights, albeit for groups of an explicitly voluntary sort; and group-rights advocates often, if not always, ground their claims with reference to the rights or interests of individuals. Nevertheless, the divide between these positions and their associated theorists is unmistakable. It is a divide between ultimate normative justifications (individual *or* group rights) and, by extension, a divide between the most appropriate legal subjects involved (individuals *or* groups).

It is fairly evident that the individual-group divide has and continues to polarize public discourse around corporate religious liberty. On the one hand, the American Civil Liberties Union brazenly declares that "[e]ighty-one percent of Americans say the law should not allow companies or other institutions to use religious beliefs to decide whether to offer a service to some people and not others."[3] On the other hand, Becket Law, the public-interest group behind the 2014 *Hobby Lobby* victory,[4] affirms that "[r]eligious freedom protects the rights of individuals to observe their faith at all times" and, notably, in *all* organizational contexts: "whether at work, at church, in the town hall . . . or elsewhere in the public sphere."[5] As the *Hobby Lobby* decision made plain, such protection may indeed involve a corporately made, religious-based decision "to offer a service [or

[3] "Religious Liberty," ACLU, accessed October 13, 2018, https://www.aclu.org/issues/religious-liberty.

[4] Burwell v. Hobby Lobby Stores, 134 S.Ct. 2751 (2014) (the federal government's contraceptive mandate violated the religious liberty rights of objecting closely held corporations, as protected under the federal Religious Freedom Restoration Act).

[5] "Individual Freedom: Protecting the Right to Live According to One's Conscience," Becket Law, accessed October 13, 2018, https://www.becketlaw.org/area-of-practice/individual-freedom/.

benefit] to some people and not others."[6] For certain individual-rights advocates, this is morally unacceptable and thus justifies persistent, even relentless, opposition to various religious freedom laws and accommodation regimes.[7] It is no wonder, then, that Douglas Laycock writes that "[o]pen hostility to religious liberty is breaking out all around us . . . [as seen] in the exaggerated reactions to *Hobby Lobby*, in the hysterical opposition to religious-freedom legislation, and in the growing attacks on exemptions even for religious nonprofits."[8] The individual-group divide is large and, indeed, may grow larger still.

In this doctoral thesis, I offer a Christian ethical perspective on the observed divide, responding to its underlying question: To whom or to what does corporate religious liberty apply? In short, I propose that corporate religious liberty rights are best understood to apply to the group-agential actions of coordinating individuals and not to individuals or groups *per se*. This proposal, substantiated through a Christian and group-ontological account of corporate religious liberty, is meant to bridge the individual-group divide. And, just as importantly, it is meant to respond to various challenges associated with that normative debate. The present introduction provides an overview of these collective challenges, as discerned in political liberal discourse and with respect to Christian ethical

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[6] ACLU, "Religious Liberty."

[7] American legal scholar Marci Hamilton provides a concise summary of religious liberty regimes (especially concerning state-level Religious Freedom Restoration Acts) that she considers to be "extreme" and reflective of a "self-righteous search for self-centered narcissism" among religious conservatives. See Marci Hamilton, *God vs. the Gavel: The Perils of Extreme Religious Liberty*, 2nd ed. (New York: Cambridge University Press, 2014), 346, 347–59. For a different perspective on the same regimes, see "State RFRA Bill Tracker," Baptist Joint Committee for Religious Liberty, accessed November 21, 2018, https://bjconline.org/stateRFRAtracker/.

[8] Laycock, "The Campaign against Religious Liberty," 232.

interests.[9] Its primary aim is to understand why this thesis's guiding question merits a Christian ethical *and* group-ontological response.

Section 0.1 begins by viewing the corporate religious liberty debate from a macro-perspective, highlighting disagreements over its appropriate subject matter (i.e., individuals *or* groups, and, if groups, the *kinds* of groups) as well as various explanatory reasons behind its current prominence. Section 0.2 adopts a closer perspective, focusing on the thesis's guiding question in order to understand what political liberal theorists consider its particular moral stakes to be. Section 0.3 then offers a preliminary reflection upon both the Christian ethical interests in the guiding question and the unique way in which the Christian theological tradition, inclusive of its group-ontological resources, can respond compellingly to the question posed. Finally, Section 0.4 details how the thesis's response – i.e., its promised account of corporate religious liberty – will be structured.

## 0.1 Corporate religious liberty in context

The question concerning to whom or to what corporate religious liberty applies is foundational for a basic theoretical understanding or definition of the term. Indeed, one's response to the question illuminates the legal subjects protected and thereby establishes, along means-end reasoning, the legal-subjective ends of corporate religious liberty legislation and rights (here, individuals and/or diverse group-types). Given the question's

[9] For purposes here, I consider "political liberal discourse" to involve political liberal or liberal egalitarian theorists who are currently making, or have made, important contributions to the religious liberty debate in the United States today. Among them, I include legal scholars such as Richard Schragger and Micah Schwartzman and political theorists like John Rawls and Cécile Laborde. As we will see, the way in which theorists like these conceive of corporate religious liberty has bearing upon the overall shape of a Christian response to relevant issues.

fundamental purpose, it should be unsurprising that proposed subject-based definitions generate heated disagreement. Let us consider two such definitions and then explore various reasons why the associated debate is so ethically polarized.

The term *corporate religious liberty* is relatively new to American legal discourse, having been popularized by legal scholars Chad Flanders, Micah Schwartzman and Zoë Robinson in their 2016 anthology *The Rise of Corporate Religious Liberty*. Focusing upon the adjective "corporate," they describe the term as applicable to "any organized body of people – groups, associations, and organizations," as well as to "those entities that have incorporated under law."[10] This is a broad definition of the term, which encompasses any group-type (from churches to for-profit corporations) and, as stated, is indeterminate with respect to the moral nature of religious liberty itself – e.g., whether it chiefly entails a liberty right, claim right, organizational autonomy broadly understood, or some combination of the above.

Despite the broad applicability and by extension the broad appeal of this understanding, corporate religious liberty according to Flanders et al. is not the only viable or most normatively appropriate contender. More narrowly construed, in regards to both organizational-applicability and moral ground, is Cécile Laborde's equivalent term *freedom of association*, which she describes as the "right of collective religious autonomy."[11] This term incorporates a specific understanding of the *type* of associations that can be said to deserve collective or corporate rights to autonomy in light of the normative (or liberal egalitarian) purposes of law. For Laborde, only those entities that can meet strict criteria concerning

[10] Chad Flanders, Micah Schwartzman, and Zoë Robinson, "Introduction," in *The Rise of Corporate Religious Liberty* (Oxford: Oxford University Press, 2016), xiii.

[11] Laborde, *Liberalism's Religion*, 171.

coherence and competence – that is, criteria of voluntary and self-identificatory association – can enjoy privileges and duties invoked by the term "corporate religious liberty." A broader definition, she contends, would risk group domination and disrespect for individual rights and political liberal values.[12]

The discrepancies between Flanders et al. and Laborde suggest that corporate religious liberty could be understood in different ways for diverse moral purposes or purposes of legal practice and theory. While a Labordean freedom of association is typically seen to entail a normative argument in defense of voluntary-associational autonomy and against for-profit exemptions, a Flanderian corporate religious liberty invites normative justification for any organizational-type. Indeed, insofar as the Flanderian conception is organizationally generally applicable, it could encourage the development of a form of corporate religious liberty specific to non-church entities, such as for-profit enterprises. This form could then sit *alongside* freedom of association (alternatively, "church autonomy" or "religious autonomy"[13]) and would operate according to its own normative principles.

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[12] On this point, Laborde writes: "If a group (*any group*) wants to discriminate on impermissible grounds, what kind of group must it be, for purposes of the law? The normative point is that, for some groups to be granted exorbitant powers to derogate from general rules of justice, they must fulfill strict conditions of voluntariness . . . . [O]nly those voluntary groups where the primary mode of association is identificatory have the relevant coherence interests. Religious associations have strong rights of 'incorporated conscience' (what I call coherence interests), but they have these rights only in virtue of being identificatory associations, where individuals identify with the projects and commitments that are at the core of the association's integrity." Laborde, 182 (italics in original).

Laborde largely follows James D. Nelson's social theory of conscience, which generally restricts "incorporated conscience" to voluntary, self-identificatory associations. I disagree with Nelson's theory and, by extension, Laborde's. See Section 2.2 of this doctoral thesis.

[13] The cognate "church autonomy" is used by Christopher Lund in "Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor," *Northwestern University Law Review* 108, no. 4 (2014): 1183–1234. And "religious autonomy," another synonym, is often invoked by the U.S. Supreme Court. For example, see *Hobby Lobby*, 134 S.Ct. at 2787 (Ginsburg, J., dissenting).

Whether a two-doctrine conceptualization of corporate religious liberty is ethically prudent will be considered below. For now, it is sufficient to note that the term "corporate religious liberty" has no settled definition within politico-legal discourse[14] and that, whatever its construal, it is understood according to pre-determined moral positions (such as Laborde's liberal egalitarianism) that often invoke some (ethically determined) purposes of law. Hence, disagreement over corporate religious liberty's legal-subjective ends matters ethically and, for many, the normative stakes involved are indeed high.

Before addressing those normative issues directly, we turn first to some explanatory reasons or theories behind corporate religious liberty's so-called "rise,"[15] that is, its ascent as an ethically pressing, current affair.

Consider two explanatory theories that address the multiple corporate religious liberty cases at the U.S. Supreme Court in recent years. Horwitz and Tebbe claim that the rise in litigation from corporate entities is happening *alongside*, not despite of, a disaffiliation of individuals from organized religion.[16] This claim, falling short of being explicitly causal, suggests that religious conservatives are mobilizing to protect their interests within the culture wars by securing victories at the Supreme Court. These victories are made possible, claim Horwitz and Tebbe, due to the "opening for group rights" afforded by recent case

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[14] Even the term "association" suffers from ambiguities in legal discourse due to its general definition. The *Corpus Juris Secundum* defines an association as follows: "An 'association' is a body of persons acting together, without a charter, but upon the methods and forms used by corporations, for the prosecution of some common enterprise." See 7 C.J.S. *Associations* § 1 (2018). This definition is agnostic with respect to the voluntary character of membership; and so the term "association," despite often being referenced with regard to voluntarism, can and does refer to other types of associations, such as business associations, that typically are not understood to be "voluntary" in their membership in the same way as churches.

[15] Flanders, Schwartzman, and Robinson, "Introduction," xv.

[16] Paul Horwitz and Nelson Tebbe, "Religious Institutionalism - Why Now?," in *The Rise of Corporate Religious Liberty*, ed. Micah Schwartzman, Chad Flanders, and Zoë Robinson (Oxford: Oxford University Press, 2016), 209.

law. Rulings from *Dale* and *Hosanna-Tabor*,[17] for example, have been "strategically exploited by legal advocates and sympathetic judges," such that, "[a]dvocates recognize that groups now enjoy *greater* protection than individuals in some areas of law."[18]

Another explanatory theory claims that a large, administrative state is increasingly imposing regulations upon aspects of life that have acute religious significance, thereby increasing instances of litigation within courts.[19] Regulations from administrative agencies (e.g., the HHS contraceptive mandate), as well as the judicial activism of the Supreme Court (e.g., *Roe* or *Obergefell*, according to Supreme Court conservatives[20]) has manifested what Robert George refers to as a "tyrant state" – a state that has coerced citizens through undemocratic procedures and immoral, state-sanctioned positions.[21] In response to the overreach of the administrative state, religious individuals and their organizations seek redress in the courts, contributing to the rise of corporate religious liberty litigation.

A rise or emphasis upon corporate religious liberty is also discernible on a theoretical level in academic legal discourse. There are at least three notable strands of the

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[17] Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (expressive associational rights of Boy Scouts were violated with forced inclusion of a homosexual individual); and Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 132 S.Ct. 694 (2012) (church's school teacher was considered a "minister" for purposes of the ministerial exception).

[18] Horwitz and Tebbe, "Religious Institutionalism - Why Now?," 210.

[19] Laycock, "The Campaign against Religious Liberty," 231; Hiram S. Sasser, III, "US Attorney Manual Update Signals Hope for Religious Liberty," *The Hill*, February 21, 2018, http://thehill.com/opinion/civil-rights/374846-us-attorney-manual-update-signals-hope-for-religious-liberty; and Ryan T. Anderson, "Obama's LGBT Executive Order Undermines Pluralism and Religious Liberty," *The Daily Signal*, July 21, 2014, https://www.dailysignal.com/2014/07/21/obamas-lgbt-executive-order-undermines-pluralism-religious-liberty/.

[20] Roe v. Wade, 410 U.S. 113 (1973) (the right to privacy under the Fourteenth Amendment's Due Process Clause extends to an individual's decision to abort); and Obergefell v. Hodges, 576 U.S. ___ (2015) (the Fourteenth Amendment requires that states recognize marriages between two individuals of the same sex).

[21] Robert P. George, *The Clash of Orthodoxies: Law, Religion, and Morality in Crisis* (Wilmington, Del.: ISI Books, 2001), 129.

theory-related discussion. First, there is the topic of state and associational sovereignties. This has brought to the fore political theories of church-state relations dating back at least to the late-eleventh century.[22] In conversation with secular political liberals, much ink has been spilt over the type of argument proponents of *libertas ecclesiae* make. Critics wonder whether the term is used in normative, merely historical, or legally suggestive argumentation.[23] While proponents make a convincing case that the term is at least suggestive of a deferential position of the state towards religious associations, it seems that the liberal egalitarian emphasis upon individual rights and the state's ultimate sovereignty has taken the upper hand.[24]

A second theoretical discussion concerns whether religion is special and thereby worthy of constitutional protection. Liberals, from John Rawls to Laborde, generally do not advocate for the displacement of religion from constitutions; but they do claim that religion is not *uniquely* special for purposes of law.[25] This position grounds a growing trend within the legal academy to secularize or "disaggregate" religion to suit liberalism's egalitarian and conceptualist frameworks. With respect to the autonomy rights of religious groups, Horwitz and Tebbe note: "In that sort of climate [i.e., where religious freedom

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[22] Richard W. Garnett, "The Freedom of the Church: (Toward) an Exposition, Translation, and Defense," in *The Rise of Corporate Religious Liberty* (Oxford: Oxford University Press, 2016), 39; and Steven D. Smith, "The Jurisdictional Conception of Church Autonomy," in *The Rise of Corporate Religious Liberty* (Oxford: Oxford University Press, 2016), 20–21.

[23] Schragger and Schwartzman, "Against Religious Institutionalism," 932–56; and Smith, "The Jurisdictional Conception," 31–32.

[24] Smith, "The Jurisdictional Conception," 34–37; and Laborde, *Liberalism's Religion*, 162. Smith frames a defense of "freedom of the church" on individualist, theo-contractarian grounds, while Laborde argues that only the state has the ability to decide what competences and rights an association has within its jurisdiction.

[25] John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, Mass.: Harvard University Press, 2001), 28; Amartya Sen, *The Idea of Justice* (London: Penguin Books, 2009), 303-304, 366-370; and Laborde, *Liberalism's Religion*, 174.

itself is given less normative weight], group autonomy provides an independent constitutional reason to protect religious associations."[26] Indeed, primary recourse to group rights (as opposed to religious liberty rights) appears to be a new norm for religious or religiously inspired organizations, especially in situations that involve religious liberty claims pitted against the rights of women and sexual minorities.[27]

A third theoretical discussion concerns the historical development of corporate rights jurisprudence at the U.S. Supreme Court. Flanders et al. provide a "corporate turn" narrative that traces the Court's recognition of church autonomy rights, from *Smith*[28] to *Hosanna-Tabor*, as well as its recognition of diverse First Amendment rights for corporate entities, from *Citizens United*[29] to *Hobby Lobby*. Flanders et al. describe both halves of this corporate turn to be "*seemingly* separate,"[30] as if they are related either conceptually (i.e., involving corporate bodies at the least) or causally via doctrinal development (i.e., *Hosanna-Tabor* informing *Citizens United* and *Hobby Lobby*). It is unclear in which direction Flanders et al. intend to go, however, since the first path is uninteresting and the second path mistaken. For one, the fact that the relevant cases from *Hosanna-Tabor* to *Hobby Lobby* all involve corporate bodies is uninteresting: What does it matter if *Smith* and *Hosanna-Tabor*,

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[26] Horwitz and Tebbe, "Religious Institutionalism - Why Now?," 210.

[27] John Finnis, *Religion & Public Reasons: Collected Essays*, Vol. V (Oxford: Oxford University Press, 2011), 37–38. Finnis writes: "The mentality which regards same-sex marriage as conceivable, let alone desirable or reasonable, involves a truly radical break with human experience and reason. The consequent unjust impositions on religious or religiously motivated activities and associations are probably best resisted by pointing, not to religious liberty, but to the way these impositions infringe associational freedom and parental rights . . ."

[28] Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) (the Free Exercise clause permits the state to prohibit the sacramental use of peyote and to deny unemployment benefits for individuals discharged for using the drug).

[29] Citizens United v. Federal Election Commission, 558 U.S. 310 (2010) (the First Amendment protects the political speech of corporations).

[30] Flanders, Schwartzman, and Robinson, "Introduction," xv–xviii (italics mine).

as one set, and *Citizens United* and *Hobby Lobby*, as another set, involve group entities? As a conceptual matter, this seems unremarkable. Perhaps, then, Flanders et al. wish to go down the second, causal path. But this direction is unpromising because, as a causal matter, the move from *Hosanna-Tabor* to *Hobby Lobby* involves no obvious doctrinal link, simply because *Hobby Lobby* justified for-profit exemptions on grounds other than those supplied by church autonomy doctrine.

The legal historian Adam Winkler provides a more convincing narrative of doctrinal development. Winkler's account begins with the founding of Jamestown by the Virginia Company (a for-profit corporation) and addresses the first corporate rights case that won corporations the ability to sue and to be sued. It then continues through a series of property rights cases, which culminates in the "civil rights" era of corporations that began in 1963 and reached an apex in the concept and practice of corporate religious liberty. Winkler thus contextualizes the expansion of corporate rights within the long history of Supreme Court opinions – from cases involving legal standing to property rights to civil liberties.[31] This broad historical approach seems more sound than the impression Flanders et al. create of a direct and rapid development from one area of doctrine (church autonomy) to other areas (corporate free speech and free exercise) that are doctrinally unrelated. Nevertheless, both narratives speak to the same moral concern – namely, that group entities increasingly are recipients of legal protections once deemed appropriate to natural persons alone. For these authors, there is great cause to worry.

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[31] Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights* (New York: Liveright Publishing Corporation, 2018).

Common to the theories surveyed is the dispute concerning group and individual rights or, differently put, the ethically appropriate legal subjects involved. Different circumstances – from growth of the administrative state to the institutional development of corporate rights jurisprudence – may have led to this particular dispute. But whatever its explanation, the dispute revolves around the same question: To whom or to what does corporate religious liberty apply?

## 0.2 Legal subjects and why they matter

Having viewed the corporate religious liberty debate from a macro-perspective, I now examine its central, definitional (or subject-based) dispute more closely in order to understand better the moral stakes involved. I here focus upon specifically political liberal stakes, so as to contextualize Christian ethical contributions, which can be seen to follow the wider political liberal debate. Three areas are of particular interest here: the individual-group divide, the distinction between group-types, and the use of group ontology for purposes of legal prescription.

From a political liberal perspective, the individual-group divide is normatively complex, with some theorists clearly favoring individuals over groups, and others deferential to groups while cognizant of individual rights involved. Consider the following perspectives. Legal scholars skeptical of group rights, including (to a certain extent) Paul Horwitz and Nelson Tebbe, question whether corporate freedoms are compatible with individual rights. For them, this issue is of high moral importance not only for the group domination implied, but also for the growing legal recognition of corporate rights at the

U.S. Supreme Court in recent decades.[32] Kent Greenawalt, another legal academic, echoes an individualist focus. With regard to religious organizations in particular, he notes: "A common concern about freedom for religious groups is that their freedom can often stand in opposition to maximum religious liberty for individuals against whom the groups act."[33] And Laborde explicitly considers overly generous (or organizationally inappropriate) collective freedoms to be "exorbitant," in conflict with "individual freedom and rights against discrimination,"[34] and ultimately disrespectful of citizens as free and equal.[35] Common among these three views is the idea that group rights can harm individuals, undermining their autonomy and their rights to certain goods or services promised through constitutional, statutory, or other governmental means.

The latter point concerning governmental provision touches upon a related normative issue at play – namely, the nature of state sovereignty, especially as seen against the (religious) autonomy of voluntary associations and other non-state organizations, such as newspapers, libraries, and certain universities.[36] For some political liberals, the state *must* have final jurisdiction over issues pertaining to the rights of free and equal citizens. Lacking this authority, the state is unable to protect its citizens from abusive situations that can occur within organizations or by virtue of one's associational identities. That citizens

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[32] Horwitz and Tebbe, "Religious Institutionalism - Why Now?," 210.

[33] Kent Greenawalt, *Religion and the Constitution*, Vol. 1, *Free Exercise and Fairness* (Princeton: Princeton University Press, 2006), 292.

[34] Laborde, *Liberalism's Religion*, 171.

[35] Laborde, 173–74.

[36] Paul Horwitz, *First Amendment Institutions* (London: Harvard University Press, 2013), 14–15. These types of entities are what Horwtiz calls "First Amendment Institutions." Horwitz argues that these institutions contribute in a special way to public discourse, and so, for the sake of that discourse, should enjoy robust autonomy rights, held against government interference with respect to their core functions or activities.

actually want the state to have this authority, that is, to enforce certain terms of a governing social contract, is an assumption of political liberalism.[37]

Not all political liberals are so critical of group rights, of course. Some view robust protections or autonomy rights of organizations as morally necessary. Legal philosopher John Finnis, for instance, defends a general freedom of association in order to resist a "substantial shrinking of private life, or invasion of it, by coercive law."[38] Legal scholar Robert Post echoes a related sentiment pertaining to individuals and culture. The modern state, he writes, "so pervasively deploys law as a method of channeling behavior that it has become very common to protest that contemporary law actually undermines culture . . . . [It] deracinates and suppresses culture."[39] And, in an effort to further combat the abstractions of law, Horwitz himself argues in defense of robust protections for certain types of organized groups. He writes, "the infrastructure of society extends well beyond the state itself and includes a number of central institutions in which some of the most important speech and social interaction takes place."[40] Given these moral stakes, which are unmistakably tied to the moral worth of individuals, corporate religious liberty is not so easily categorized as the illiberal doctrine some make it out to be.

A reason for this complexity or blurring between individual- and group-rights positions pertains to the distinction between types of groups. Many theorists who largely

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[37] Laborde, *Liberalism's Religion*, 163.

[38] John Finnis, "Equality and Religious Liberty: Oppressing Conscientious Diversity in England," in *Religious Freedom and Gay Rights: Emerging Conflicts in the United States and Europe*, ed. Timothy Samuel Shah, Thomas F. Farr, and Jack Friedman (Oxford: Oxford University Press, 2016), 26.

[39] Robert Post, "Law and Cultural Conflict," *Yale Law School Legal Scholarship Repository*, *Faculty Scholarship Series* 180 (2003): 488.

[40] Horwitz, *First Amendment Institutions*, 84. Horwitz is relatively skeptical of the moral appropriateness of group rights for for-profit corporations, however. He categorizes business firms within the "borderlands" of so-called "First Amendment Institutions." See Horwitz, chap. 10.

favor individual rights argue that group rights are indeed permissible, but only when granted to certain types of organizations. More often than not, the organizations identified meet strict criteria of voluntary membership and self-determination or identificatory coherence. Protections for such groups, it is argued, advances the religious freedom and rights of individuals.[41] Other theorists, including certain justices on the *Hobby Lobby* Court, argue that non-voluntary groups such as for-profit enterprises could (under certain circumstances) enjoy group rights, as well. Whatever the circumstances, however, the given rationale behind such corporate protections is not entirely dissimilar to the individual-rights focus of certain constructions of church or religious autonomy. As Justice Alito puts it, "protecting the free-exercise rights of [for-profit] corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies."[42] In short, individual rights are directly involved, but, notably, they are the rights of *certain* individuals.

The moral implications of the two positions above are starkly different from each other. The first position effectively restricts corporate religious exercise to certain voluntary associations, while the second permits it within a wider array of group-types. The former seeks to protect all associating members directly, while the latter emphasizes the rights of corporately empowered individuals (i.e., those who have the authority to determine the religious ethos of a corporate entity and whose personal rights are inescapably at stake). Many argue that recognition of these differences alone should be

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[41] Laborde, *Liberalism's Religion*, 178. See also *Hobby Lobby*, 134 S.Ct. at 2795 (Ginsburg, J., dissenting) ("Religious organizations exist to foster the interests of persons subscribing to the same religious faith").

[42] *Hobby Lobby*, 134 S.Ct. at 2768.

more than enough to justify adoption of the first, church-autonomy position. However, it is important to note that the second, more organizationally expansive position is never held out to be of equal presumptive strength as church autonomy. Indeed, in light of their public-serving nature and (assumed) religiously heterogeneous memberships, the religious liberty rights of for-profit enterprises are typically subject to a higher degree of governmental interference.[43] Differences in organizational- or group-type (differences that are deemed ethically salient) are at work here. We note therefore that the moral stakes of corporate religious liberty pertain not only to individuals and groups, but also to the *types* of groups identified. This distinction adds another dimension to the individual-group divide, as well as to the larger moral picture.

Following from the distinction between group-types is another morally contentious issue to address: namely, the use of group ontology for purposes of corporate-rights prescription. Laborde claims that group ontology, especially when phrased in terms of corporate personhood, "distract[s] attention from the underlying facts and interests that ought to guide our legal and moral assessment of the rights and duties of different groups." Continuing, she writes:

> [Conceptions of personhood] often offer rhetorical tools to advance preferred policy positions, but do not engage the interest that grounds particular right claims, nor do they provide a sense of how those interests are implicated within groups. For some purposes – such as corporate liability – the law might well treat a group *as if* it were a person; but this says nothing about whether it is a real, preexisting person. Instead of engaging in the semantics of group ontology – 'What is a group?' – we should be asking

[43] For example, Horwitz argues that for-profit firms have various rights. But he conditions this by stating that since such firms are not fundamental to public discourse (e.g., to the promotion of a culture of free speech), their rights are not as robust as those of First Amendment institutions like churches and universities. See Horwitz, *First Amendment Institutions*, 243–47.

> a different, interpretive question: 'How would giving this group specific legal rights and duties affect our social relations?'[44]

The "group ontology" to which Laborde refers is the sort that determines whether groups can have agency and thus moral personality. A procedure of legal prescription that incorporates the conclusions of such an ontology, she argues, will ascribe legal rights to the moral person identified, doing so *without* due attention to other morally relevant facts and interests, such as the rights of vulnerable individuals within the group which may be unduly trumped by group rights prescribed.

Laborde's argument – adopted from James D. Nelson, as well as Schragger and Schwartzman[45] – is cogent. Corporate personality is by no means a panacea for corporate-rights disputes in general or corporate religious liberty disputes in particular. However, one should be skeptical of the tacit assumption that group ontology and the related question "What is a group?" are to be understood in terms of corporate or moral personality alone. Finnis, for instance, recognizes group agency while emphatically eschewing the distracting metaphor of corporate personality. By his understanding, group ontology entails a vision of social reality in terms of coordinated activities and this, he claims, helps view social and group life as best or as accurately as possible.[46] Moreover, while this proposed perspective is empirical or descriptive in nature, it has an unmistakable ethical significance: Indeed, one cannot engage in Laborde's fact- or interest-finding exercise, which is necessary for "legal

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[44] Laborde, *Liberalism's Religion*, 173 (italics in original).

[45] Laborde's argument follows those of Richard Schragger, Micah Schwartzman, and James D. Nelson, whose argument I examine and respond to in depth below: see Sections 2.2 and 2.3.

[46] John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998), 24-25. Finnis does not use the term "group ontology" and instead opts for the language of "social theory." See Sub-section 3.1.3 below.

and moral assessment,"[47] without first seeing social reality *as it is*, that is, without blinders that cause short-sightedness due to unreasonable, pre-determined moral positions. One can imagine, therefore, that group ontology understood as a general descriptive tool could help provide the empirical data required for moral reflection. If this holds true – which I think it does – then group ontology need not be feared when used in corporate-rights prescription, especially when used to identify the group-subjects involved.

So, the question concerning to whom or to what corporate religious liberty applies raises a number of ethically contentious issues relating not only to the individual-group divide, but also to the distinction between group-types and the use of group ontology in legal prescription. Each of these issues adds a particular dimension to the corporate religious liberty debate. The first demarcates a basic normative disagreement, involving whether corporate religious liberty rights should apply chiefly to individuals *or* groups. The second indicates that the "corporate" aspect of corporate religious liberty should entail a principled distinction between types of groups, since empirical differences between group-types can be ethically salient when group rights are involved. And the third dimension suggests that group ontology can be used to identify the appropriate legal subjects concerned. In a certain respect, this third dimension is the most fundamental, given the fact that conceptualizations of what groups are influence the descriptions of social reality observed. In turn, these descriptions should be used as empirical data for legal and moral evaluation.

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[47] Laborde, *Liberalism's Religion*, 173.

## 0.3 A Christian ethical perspective

This doctoral thesis operates upon the methodological assumption that a clear view of group or social reality contributes to (the construction of) an ethically appropriate regime of corporate religious liberty. On this ground, the thesis's foundational argument holds that, descriptively speaking, groups are best understood in terms of actions (specifically, *group-agential* actions) and that, normatively speaking, such a group-ontological vision can improve upon ethical contributions to the corporate religious liberty debate – particularly with respect to the basic question concerning to whom or to what corporate religious liberty applies.

This argument, of course, presumes that ethical contributions to the current debate are indeed inadequate – normatively, descriptively, or in both regards. As for political liberal contributions, this introduction has pointed to descriptive inadequacies especially. The emphasis of this doctoral thesis, however, is not upon the political liberal. Rather, it is upon the Christian ethical. Hence, this thesis seeks to offer a Christian ethical perspective on the current debate, responding specifically to its underlying question: To whom or to what does corporate religious liberty apply? To this question, current Christian ethical responses mirror certain political liberal inadequacies; Chapter 1's examination of ecclesial statements on (corporate) religious liberty shows this to be the case. For purposes of this introduction, it will be useful to preview some of these inadequacies, as well as related areas for development. We can do so in particular by noting Christian ethical stakes in the three normative issues raised above.

First, with respect to the dispute over individual and group rights, we note that the Christian ethical tradition has a foot in both camps of the individual-group divide. While some like Oliver and Joan O'Donovan may prefer to drop rights-language associated with the dispute, Christian ethicists in general recognize the underlying moral value or dignity of

individuals and the groups that shape them.[48] William Cavanaugh, for instance, cites Jewish and Christian scripture to make this point. He writes: "It is not the case that only individuals are made in the image and likeness of God. The image of God in Genesis 1:27 seems to apply to the whole human race: 'in the image of God he created him [*adam*, singular]; male and female he created them [plural],' which is why many versions of the Bible translate *adam* with the corporate noun like 'humankind.'"[49] Advancing a similar claim, Jacques Maritain provocatively states that "[t]he person is a whole, but it is not a closed whole, it is an *open* whole." He substantiates this statement along social and Aristotelian-Thomistic lines, writing: "Man is a political animal, which means that the human person craves political life, communal life, not only with regard to the family community, but with regard to the civil community."[50] Implicit in statements like these is the belief that undue interference with man's social or corporate life violates an essential and ethically salient aspect of the human person – that is, the state of being in communion with each other (e.g., through familial and civic community) and with God himself, in whose image and likeness humankind is created.

What makes interference "undue," of course, is a matter of Christian prudence. Hence, commentators on church-state relations make statements similar to that of Dietrich

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[48] Oliver O'Donovan and Joan Lockwood O'Donovan, *Bonds of Imperfection: Christian Politics, Past and Present* (Cambridge: William B. Eerdmans, 2004). On a related point, theologian John Milbank laments that "'modern Christianity' often no longer sees the cosmos as sacred, nor regards our human moral nature as continuous with our biology and with cosmic order in general, . . . [T]his is a result of the late medieval collapse of a participatory, analogical or 'symbolically realist' world-view rooted in a more authentic tradition, which eastern Christians continue to maintain." John Milbank, *Beyond Secular Order: The Representation of Being and the Representation of the People* (Chichester, West Sussex: John Wiley & Sons, 2013), 231–32.

[49] William T. Cavanaugh, "Are Corporations People?: The Corporate Form and The Body of Christ," in *Field Hospital: The Church's Engagement with a Wounded World* (Cambridge: William B. Eerdmans, 2016), 16.

[50] Jacques Maritain, *The Rights of Man and Natural Law* (London: The Centenary Press, 1944), 7–8 (italics in original).

Bonhoeffer, who writes: "In both Protestant and Catholic political theory the question of the form of the state is always treated as a secondary problem . . . . No form of the state is in itself an absolute guarantee for the proper discharge of the office of government."[51] We take it then that that which is "due" or "proper" to the human person as such is, at minimum, ethically attentive to both a person's inherent dignity and the social contexts in which he or she is found. In church-state contexts, such attentiveness can result in a number of practical forms, from established state religions to American separationism.[52]

But more broadly applied, this moral attention, for some, requires (or at least lends itself to) the enumeration and enforcement of various *individual* and *social* rights. Take, for example, Maritain's extensive list of rights:

> [T]he fundamental rights, like the right to existence and life; the right to personal freedom or to conduct one's own life as master of oneself and of one's acts, responsible for them before God and the law of the community; the right to the pursuit of the perfection of moral and rational human life; the right to the pursuit of eternal good (without this pursuit there is no true pursuit of happiness); the right to keep one's body whole; the right to private ownership of material goods, which is a safeguard of the liberties of the individual; the right to marry according to one's choice and to raise a family which will be assured of the liberties due it; the right of association, the respect for human dignity in each individual, whether or not he represents an economic value for society – all these rights are rooted in the vocation of the person (a spiritual and free agent) to the order of absolute values and to a destiny superior to time.[53]

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[51] Dietrich Bonhoeffer, *Ethics*, ed. Eberhard Bethge, trans. Neville Horton Smith, 6th German (London: Collins, 1964), 352. See also Abraham Kuyper, "Third Lecture: Calvinism and Politics," in *Lectures on Calvinism* (Peabody, Mass.: Hendrickson Publishers, 2008); and Pope Paul VI, "Pastoral Constitution of the Church in the Modern World (Gaudium et Spes)," in *The Documents of Vatican II: All Sixteen Official Texts Promulgated by the Ecumenical Council, 1963-1965*, ed. Walter M. Abbot S.J., trans. Very Rev. Msgr. Joseph Gallagher (Piscataway, New Jersey: New Century Publishers, 1966), para. 76.

[52] For a concise defense of religious state establishment in Britain, see Nigel Biggar, "A Reply to Theo Hobson," *Theology*, 115, no. 3, (2012): 175-179. For an American counterpart, see Nicholas Wolterstorff, "A Religious Argument for the Civil Right to Freedom of Religious Exercise, Drawn from American History," in *Understanding Liberal Democracy: Essays in Political Philosophy*, ed. Terence Cuneo (Oxford: Oxford University Press, 2012), 329-352.

[53] Maritain, *The Rights of Man*, 44–45.

Maritain's list escapes an overly individualistic articulation of legal or natural rights, not just by asserting rights to free association and the like, but primarily by grounding the source of all rights in a socially and temporally transcendent moral order – which, for Maritain, is tied to God himself. In a Christian ethical paradigm, this grounding itself (and not the adoption of rights-language *per se*) is a fundamental feature.[54] Thus, the basic moral question regarding "due" or "proper" interference in man's social or corporate life must always be answered with respect to this transcendent source. For, by intending man to be social, God himself has care for both individuals and groups.

With regard to the second dimension of the corporate religious liberty debate – the area concerning *types* of groups involved – Christian ethical deliberation (and ethical deliberation in general) must consider two things: (i) empirical aspects of, and differences between, group-types, and (ii) the moral justifications and social effects of extending rights to the legal subjects identified (e.g., the groups themselves and/or individuals within the various group-types). The first consideration is fundamental because it illuminates the general nature of social relationships within groups. And this empirical information has ethical salience especially when group rights are concerned, since the extension of legal rights to groups *per se* can bear positively and/or negatively upon the individuals and social relationships that constitute the groups.

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[54] For example, see Ratzinger, *Truth and Tolerance*, 254. Ratzinger writes: "In the Ten Commandments God presents himself, depicts himself, and at the same time interprets human existence, so that its truth is made manifest, as it becomes visible in the mirror of God's nature, because man can only rightly be understood from the viewpoint of God."

For example, it is generally held that churches feature voluntary membership while for-profit firms do not.[55] A regulation that applies to all members of a group could be received differently as a normative matter by church congregants than by a business firm's employees. On the one hand, church members might claim that the regulation violates their religious belief, both individually and collectively. On the other hand, the firm's employees, assumedly of different religious persuasions, might claim that the regulation violates the beliefs of only a minority of individuals and that, on the whole, the regulation is welcome by most. Voluntary membership, of course, is but one descriptor; other descriptors may change the ultimate legal outcome. But already we see that empirical features such as the nature of membership can and do bear upon moral and legal evaluation.

As I discuss in Chapter 1, Christian ethical contributions to the corporate religious liberty debate generally tend to gloss over various empirical differences between group-types, specifically conflating the categories of "for-profit firm" and "religious institution." This tactic is unhelpful because it portrays the Christian position as morally unreasonable, as seeking robust religious-institution protections for whatever variety of profit-making organization, no matter the social consequences. But, as our example concerning voluntary membership shows, empirical differences between group-types can affect the ethical propriety of group-rights prescription. At the very least, regimes of corporate religious liberty should differ in strength or conditionality, depending in part upon ethically salient empirical differences between group-types. That said, a Christian ethical contribution

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[55] See *Hobby Lobby*, 134 S.Ct. at 2795 (Ginsburg, J., dissenting) (Ginsburg arguing that "[r]eligious organizations exist to foster the interests of persons subscribing to the same religious faith").

should look to the *full array* of empirical factors and ethical stakes since, to reiterate, considerations beyond the moral effects associated with voluntary association can also be vitally important. For example, respect for group autonomy, the rights of business owners, recourse to reasonable legal alternatives, and a variety of other factors could justify the prescription of group rights to a particular type of group (in a given circumstance) *despite* the (perceived) negative effects tied to one salient group-descriptor.[56]

Nevertheless, the general point still holds: A consideration of empirical distinctions between group-types is vital for legal and moral evaluation in the corporate religious liberty context. Christian ethical contributions to the debate should leave no doubt that this consideration has been taken into account. Fortunately, the Christian tradition has the conceptual resources to view and describe group or social reality as best or accurately as possible. Indeed, identifying differences between group-types should not be a problem, given its group-ontological heritage.

We thus consider a third Christian ethical stake concerning to whom or to what corporate religious liberty applies – namely, the use of group ontology for relevant legal-prescriptive purposes. Laborde, we recall, thinks group ontology "distract[s] attention from the underlying facts and interests that ought to guide our legal and moral assessment of the rights and duties of different groups."[57] But a Christian ethicist should think otherwise. Group ontology properly understood can draw attention to, and not distract from, the full range of facts and interests involved in social life in general and corporate-rights

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[56] For example, see Burwell v. Hobby Lobby Stores, 134 S.Ct. 2751 (2014) (in which a least restrictive means of achieving a compelling governmental interest was found); and Zubik v. Burwell, 578 U.S. ___ (2016) (in which the Supreme Court ordered appellate courts to reconsider means both to protect the religious freedom of the organizations involved and to advance a compelling governmental interest).

[57] Laborde, *Liberalism's Religion*, 173.

prescription in particular. Two strains of group ontology, both found within the Christian tradition, are able to achieve this. First, there is an Aristotelian-Thomistic form of modest group realism, which views groups as the group-agential activities of coordinating individuals and not as things or persons. Second, there is a scripturally and theologically based form of strong group realism, which holds that the invisible Church is a moral person in a "strong" sense – that is, having a mind and intentions of her own, underived from those of her members.[58]

Christian ethical participation in the corporate religious liberty debate should have recourse to both types of group ontology. The first cuts through the opaque and ethically confusing descriptions provided by theories of corporate personality, an alternative form of group ontology; and the second helps preserve the normative value of churches and so strengthens moral justifications behind church freedoms while differentiating them from rights (potentially) enjoyed by non-church entities. The account of corporate religious liberty constructed within this doctoral thesis integrates both group ontologies, but it is primarily built upon the first – for it is the first ontology that permits a detailed empirical analysis of the diverse subjects involved (i.e., individuals, groups, and even the invisible Church), inclusive of the actions in which those subjects engage. Laborde's fact- and interest-finding requirement can therefore be met by this analytical and descriptive capability, which sees groups at a macro- and micro-level so to speak. Furthermore, the action-level perspective of this ontology is extremely useful, indeed vital, for moral and legal evaluation. This is so because moral theory itself, under which legal prescription

[58] For sources and explanation, see Sections 3.1 and 4.1 below.

should be found, is concerned with self-constituting acts.[59] Actions, in short, are the proper subject-matter of moral deliberation; and legal prescription, as an applied form of moral deliberation, must look to actions as well. Ethicists, Christian or otherwise, can appreciate this methodological point and, further, can appreciate how an Aristotelian-Thomistic form of modest group realism lends itself to (action-based) moral analysis.

In the end, the Christian ethical stakes in this thesis's guiding question are many. They touch upon the inherent dignity of the human person, which, in light of man's social nature, gives moral weight to groups as such. They reach into the ethically salient distinction between group-types and reveal this to be an area of descriptive theorization upon which current Christian contributions can improve, especially with regard to differences between church and non-church entities. Finally, they point to the group ontologies available to, and at home in, Christian moral reasoning: Strong group realism helps justify robust church rights (perhaps in an analogous way to theological anthropology grounding the rights and dignity of individual human persons), and modest group realism in particular facilitates moral analysis of group and social activities.

These ethical stakes, of course, point to conceptual resources within the Christian tradition that make a Christian ethical *and* group-ontological response available. Insofar as the question concerning to whom or to what corporate religious liberty applies merits Christian ethical attention, a Christian response would do well to deploy the range of moral and group-ontological resources available to it. In doing so, it can improve Christian engagement in the current debate over corporate religious liberty rights and even move

[59] See discussion on moral theory in Section 2.3 below.

that debate beyond political liberal impasses pertaining to the individual-group divide, the distinction between group-types, and the use of group ontology in legal prescription.

## 0.4 The task ahead

Having surveyed political liberal and Christian ethical interests in this thesis's guiding question, we now ask what a Christian ethical and group-ontological response looks like. At its most basic level, the response I propose takes the form of an account or theory of corporate religious liberty. Focused upon the legal subjects at stake (i.e., the "to whom or to what" of the rights involved), the theory holds that corporate religious liberty is best understood to apply to the group-agential actions of coordinating individuals. This position bridges the individual-group divide, distinguishes between group-types, and demonstrates an appropriate use of group ontology for legal-prescriptive purposes. To substantiate this position and thereby to construct the promised theory, this doctoral thesis progresses in four chapters.

Chapter 1, *Corporate religious liberty in church teachings*, searches for normative resources in modern ecclesial statements on religious freedom and assesses their contributions to the contemporary, American debate. The chapter notes that Catholic and Protestant churches have a well-developed theory of religious freedom in general and an emerging understanding of corporate religious liberty. The chapter demonstrates that the latter, corporate understanding requires development with regard to the issue of appropriate legal subjects. On this point, Catholic and Protestant reflections can be seen to track certain political liberal failures – such as overlooking ethically salient differences between group-types, precariously straddling the individual-group divide, and reducing the Church into a mere voluntary association. The chapter concludes that a Christian ethical contribution to the debate must draw upon its own group-ontological resources in order to

respond adequately to the question concerning to whom or to what corporate religious liberty applies and, by extension, to navigate confidently the contemporary rights-debate. In short, what is needed is a Christian ethical *and* group-ontological account of corporate religious liberty.

Before constructing this theory, Chapter 2, *Group ontology and skeptical arguments*, anticipates objections to the use of group ontology for legal-prescriptive purposes. Three positions are addressed: first, Justice Ruth Bader Ginsburg's attempt to eliminate the possibility of group agency for profit-making corporations; second, James D. Nelson's social theory of conscience, which reduces group agency to an unduly narrow range of group-types; and, third, Richard Schragger and Micah Schwartzman's argument that group ontology is both indeterminate and morally distracting for legal prescription. Especially through its critical engagement with the latter theorists, the chapter ends with a basic framework for legal prescription that integrates group ontology and (Christian) ethical thought in a methodologically appropriate way. This preferred method of legal prescription is taken into the next chapter, where it serves to ground a Christian and group-ontological theory of corporate religious liberty.

Chapter 3, *A modest account of corporate religious liberty*, finally constructs the promised theory. Summarily put, the account holds that corporate religious liberty rights are best understood to apply to group-agential actions, pursued for ends that are either distinctively religious or religiously motivated yet secular in nature. This account is arrived at through a retrieval of Aquinas's group-ontological thought and a subsequent integration of that thought into the method of legal prescription endorsed in the previous chapter. In particular, Chapter 3 first shows that Aquinas primarily understands groups not as things or persons, but as instances of coordinated activity. The chapter then demonstrates how the "anatomy" of Aquinas's modest group agent – as interpreted by John Finnis and Richard Ekins, especially – can be used to prescribe legal conditions necessary to support

(and limit) corporate religious exercise within church and non-church organizational contexts. The chapter concludes by highlighting conceptual and practical benefits of the account's group-agential focus, including: movement beyond the individual-group divide, preservation of churches' distinctive normative value, and justification for degrees of governmental interference when disputes arise.

With the promised account outlined, Chapter 4, *Integrating the strong group agency of the Church*, addresses a remaining question: Assuming that the Church could be understood as a *strong* group agent (i.e., a group whose agency is *not* entirely attributable to members' coordinated actions), how should we integrate it into a theory that is built upon *modest* group realism? The chapter answers this question in three sections that draw heavily from Roman Catholic sources. The first section considers the extent to which certain strains of Catholic ecclesiology meet a stipulative definition of strong group realism. The second section then engages with medieval interpretations of the term *corpus mysticum* and the contemporary secularization John Locke's "true church" to explain (i) why the Church is not commonly described in strong group-realist terms today and (ii) how this situation affects proposals to recognize and legally protect the Church. Finally, the third section demonstrates how the Church (theologically understood as a moral person) could be integrated into and thus accounted for by my proposed theory. This integration relies upon individuals holding religious beliefs concerning the Church's strong group agency, beliefs around which individuals can coordinate and thereby create a modest group agent.

In sum: The question concerning to whom or to what corporate religious liberty applies demands a normative *and* group-ontological response. This doctoral thesis provides an ontological response that focuses the normative reflections of the churches in a novel way – a way that legally accounts for individuals and groups via protections granted to group-agential actions. Such an account could help Christian communities to better navigate the moral challenges of current legal disputes and disputes to come.

# 1 Corporate religious liberty in church teachings

Drawing upon ethical and group-ontological resources within the Christian theological tradition, this doctoral thesis proposes that corporate religious liberty rights are best understood to apply to the group-agential actions of coordinating individuals, as opposed to individuals or groups *per se*. This position is mostly alien to political liberal discourse, where, generally speaking, one side subordinates group rights to the rights of individuals, and an opposing side seeks to strengthen (non-state) group rights in the face of governmental attempts to curtail them. This position is also unfamiliar to Christian ethical contributions to the same debate, as is seen in ecclesial statements that tend to discuss rights to religious freedom along the individual-group divide – but, admittedly, in a way that seeks to keep a foot in both sides of the normative chasm.

In this opening chapter, I seek to learn from this Christian ethical and specifically *ecclesial* contribution (the "churches' contribution") to the corporate religious liberty debate in the United States today. For it seems to me that a Christian ethical account of corporate religious liberty will have to navigate the individual-group divide to some extent, since neither individuals nor groups can be extracted from reality and thus from a Christian ethical purview. Indeed, with respect to this navigation, the churches' contribution is already attractive. To the question concerning to whom or to what corporate religious liberty applies, it can be seen to follow the "conjunctive" or "both/and" approach typical of Christian theological reasoning.[1] In the context of corporate religious liberty disputes,

[1] For example, see Cardinal Ratizinger's discussion of opposition, multiplicity, and unity in the Christian tradition in Joseph Ratzinger, *Truth and Tolerance*, 48-49.

this approach has normative merit inasmuch as it pursues a path of moderation or an empirical and ethical realism – a realism that regrettably escapes too many arguments put forth from either camp of the individual-group divide.

Thus, in terms of moderation, the churches' contribution to the contemporary debate is worth our consideration and subsequent emulation. Of course, this chapter's exploratory work does not refrain from constructive criticism. As I argue within, we ultimately cannot be content with the churches' approach to the individual-group divide because it, too, follows certain weaknesses (typical of secular political liberalisms) that reduce churches to mere voluntary associations or that fail to recognize ethically salient differences between group-types, for example, between churches and ostensibly religious for-profit firms. These shortcomings are indicative of problems inherent to the individual-group divide itself and to secularized, political liberal approaches to it. Inasmuch as the churches' contribution incorporates or follows these shortcomings, it should not serve as our final model for approaching corporate religious liberty disputes – thus, we require a renewed account of corporate religious liberty.

The aim of the present chapter is twofold: It seeks both to learn from and to critique the churches' contribution to the contemporary debate. As we will see, this exercise will lay bare foundational normative principles for ready incorporation into a *Christian ethical* account of corporate religious liberty. Moreover, it will suggest how the Christian tradition's group ontologies – whereby groups are understood to be coordinative actions and the Church herself to be a moral person – can help move past certain challenges of the individual-group divide, thereby constituting the *group-ontological* character of the promised, renewed account.

Now to this chapter's order and focus of investigation. I structure this chapter's investigatory and evaluative work within four sections that are meant to display the churches' understanding of corporate religious liberty from the ground up – from its basic

theological and normative principles to its legal applications with respect to specific group-types. This theory-based approach provides a detailed image of the logic that constitutes the churches' contribution to the contemporary debate; this image in turn facilitates a critical assessment of the churches' contribution.

With reference to modern ecclesial documents from the Catholic and Protestant traditions, Section 1.1 starts with an outline of the churches' conception of religious liberty in general. Section 1.2 then examines the churches' more established form of corporate religious liberty, a theory of "freedom of the church," and Section 1.3 elaborates upon the churches' nascent theory of "organizational exemptions," which pertains to non-church entities like for-profit firms. Finally, Section 1.4 concludes that, despite recognition of two group-specific forms of corporate religious freedoms as well as moral attention toward both individuals and groups, the churches' contribution to the contemporary debate still evinces weaknesses concerning: the individual-group divide, ethically relevant distinctions between group-types, and the use of group ontology for legal prescription. The Christian tradition's group-ontological thought is held out as a means to overcome those shortcomings, and a program for theoretical development – which preserves the churches' moral reflections while utilizing the tradition's group ontology – is outlined.

## 1.1 Religious liberty as Christian

In order to learn from the churches' contribution to the contemporary debate, it helps first to understand how the Catholic and Protestant traditions – as seen through modern ecclesial documents – view religious liberty in its conceptual grounding, legal dimension, and moral or practical limits. At the end of this section, I highlight two different types of religious liberty: a Protestant, conscience-based form; and a Catholic form, grounded in both conscience and a universally accessible order of moral and religious truth. Both can

support a regime of (corporate) religious liberty; but, for present purposes, I leave the final normative question ("*Should* one or the other support such a regime?") for later consideration;[2] for now, it suffices to appreciate the churches' moral reflections as a whole. We thus begin with an exposition of religious liberty according to magisterial documents of the Catholic Church.

### 1.1.1 Catholic social doctrine on religious liberty

The Catholic position on religious liberty is multifaceted and, while still met with a certain amount of internal dispute with respect to its theoretical ground, it is largely settled in the ordinary magisterium of the Church. A brief history of the Church's 1965 declaration on religious liberty, *Dignitatis Humanae*, is illuminative of the contemporary position.

Around the time of John XXIII's election as pope (1958), and prior to the Second Vatican Council (1962-1965), the Church's prevailing account of "religious freedom" was framed in terms of a *thesis/hypothesis* distinction. This distinction held that Catholicism is the one true religion and that, as an ideal *thesis*, the state should establish Catholicism as the favored religious system. Against this, the *hypothesis* held that, in cases where the Catholicism could not be established, the situation should be tolerated as an evil and that

[2] To anticipate: I construct a theory of corporate religious liberty by utilizing terms related to the idea of objective (moral and religious) truth. Specifically, I endorse Christian theological understandings of "religion" and "religious actions" (see Sections 3.2 and 3.3) as well as "the Church" and "churches" (see Chapter 4). My uses are primarily informed by Roman Catholic thought, but I also substantially reference Protestant theologians who endorse objective truths as well. Therefore, we might say that the truth/conscience dichotomy (attributed to Roman Catholic and Protestant ideas of religious liberty) does not hold so well once deeper analysis is made.

Catholics should work towards changing the "hypothesis" into the "thesis" when possible.[3] Within this context, the famous slogan "error has no rights" was applicable (especially to public worship since only the true religion could be practiced openly), "indifferentism" was battled (since not all religions are equal),[4] and "Americanism" condemned (due to its vision of religious toleration, religious freedom, and separation of church and state).[5]

Vatican II's *Dignitatis Humanae* changed this prevailing account. Largely through the intellectual efforts of John Courtney Murray S.J., an American theologian, *Dignitatis Humanae* navigates diverse arguments pertaining to the foundations of religious freedom. As a philosophical matter, *Dignitatis Humanae* holds that religious freedom rests neither on subjective conscience alone (as secular authorities argued) nor on truth alone (as the pre-Vatican II position held). Instead, what provides the necessary ground for religious liberty is the objective dignity of the human person.[6] While it may be tempting to read *Dignitatis Humanae* as departing from the pre-conciliar commitment to the truth of Catholicism and of an objective moral order, this interpretation is incorrect. In fact, *Dignitatis Humanae* views human dignity *as entailing* "conformity with truth and justice," that is, conformity to the "one true religion [that] subsists in the Catholic and apostolic Church."[7] The search for truth itself – particularly with respect to religious truth – constitutes human dignity. And in

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[3] Leslie Griffin, "Commentary on Dignitatis Humanae (Declaration on Religious Freedom)," in *Modern Catholic Social Thinking: Commentaries and Interpretations*, ed. Kenneth R. Himes O.F.M. (Washington D.C.: Georgetown University Press, 2005), 245.

[4] Griffin, 245.

[5] Griffin, 246.

[6] Griffin, 253.

[7] Pope Paul VI, "Dignitatis Humanae (Declaration on Religious Freedom): On the Right of the Person and of Communities to Social and Civil Freedom in Matters Religious," in *The Documents of Vatican II: All Sixteen Official Texts Promulgated by the Ecumenical Council, 1963-1965*, ed. Walter M. Abbot S.J., trans. Very Rev. Msgr. Joseph Gallagher (Piscataway, New Jersey: New Century Publishers, 1966), 676–77, para. 1 (henceforth cited by document name in italics and paragraph only).

order to fulfil this obligatory search, individuals must "enjoy immunity from external coercion as well as psychological freedom."[8]

Tied to the idea that human dignity entails an obligatory search for truth is the notion of a negative right (i.e., a *freedom from* government interference). Both ideas, Murray proposed, are consistent with traditional Catholic doctrine on church-state relations. A negative right or liberty avoided implications that Catholicism is not the true religion or that the erroneous conscience should have rights of its own;[9] and a conceptual foundation in the dignity of the human person contributed to this aim, while recognizing a general freedom to follow one's conscience (a position adopted by the United Nations and by a nascent World Council of Churches in 1948).[10] Murray's position was not instantly accepted by the Council in its deliberations. But by December 7, 1965, the argument passed with a final vote of 2308 to 70.[11] As the Methodist theologian J. Robert Nelson opined: "It was one of the freshest breezes blowing through the Church after Pope John XXIII opened the window."[12]

Fifty years after the promulgation of *Dignitatis Humanae*, the Catholic Church's understanding of religious liberty continues to straddle both sides of the conscience-versus-truth debate through appeal to human dignity. A reading of the *Compendium of the Social Doctrine of the Church* reveals the following dimensions of the Church's contemporary understanding. First, religious liberty is both theological and natural in origin, grounded in

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[8] *Dignitatis Humanae*, para. 2.

[9] Griffin, "Commentary on Dignitatis Humanae," 253.

[10] Griffin, 250–52.

[11] Griffin, 254.

[12] J. Robert Nelson, "The Ecumenical Reception of the Dignitatis Humanae Declaration of the Second Vatican Council," *Ecumenical Trends* 24 (May 1995): 67.

both the call of God and man's created nature. Hence, the *Compendium* states that freedom is "willed by God and inscribed in human nature" and thus serves as a precondition to the free response of faith.[13] Second, religious liberty pertains to truth ("the truth cannot be imposed except by virtue of its own truth")[14] and conscience (since conscience is required in the search for truth).[15] Third, despite a recognition of the normative import of subjective conscience, the Church holds that "[r]eligious freedom is not a moral licence to adhere to error, nor as an implicit right to error."[16] Hence, truth and specifically the truth of Catholicism are not downplayed by the Church.[17]

As a juridical matter, the Church holds that religious liberty is "not of itself an unlimited right." "Just limits" are to be determined in each social situation, with "political prudence," exercised in light of the "requirements of the common good," and as "ratified by the civil authority through legal norms consistent with the objective moral order."[18] The strongly moral-realist tone of this qualification is unmistakable. It is interesting to note that, in the *Compendium*, the often ambiguous term "common good" is immediately followed by invocation of an "objective moral order." This order, I take it, informs what the "just limits" are with regard to particular instances of government interference upon

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[13] Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* (Washington D.C.: United States Conference of Catholic Bishops, 2014), para. 421 (henceforth, cited with title and paragraph number only).

[14] *Dignitatis Humanae*, para. 1.

[15] *Compendium of the Social Doctrine of the Church*, para. 421.

[16] *Compendium of the Social Doctrine of the Church*, para. 422.

[17] This holds true despite certain attempts to relax this emphasis, especially within ecumenical settings or in Catholic institutions of higher education. Professor Leslie Griffin laments that the post-*Dignitatis Humanae* emphasis upon truth, spurred by John Paul II in his campaign against atheistic communism, has resulted in a curtailment of religious liberty *within the Church* despite gains won for religious liberty within politics. See Griffin, "Commentary on Dignitatis Humanae," 256–60.

[18] *Compendium of the Social Doctrine of the Church*, para. 422.

religious exercise. While appeal to an objective moral order tempts us to attribute a Puritan-esque attitude[19] of religious liberty ("religious liberty for me, not for thee") to the Catholic Church, such attribution would be a mistake. The general principle of religious freedom proclaimed by *Dignitatis Humanae* – a principle based on human dignity, truth, and conscience – prohibits this. Religious freedom, the Council writes, "means that all men should be immune from coercion on the part of individuals, social groups and every human power so that, within due limits, nobody is forced to act against his convictions."[20] Again, the pursuit of truth requires the freedom to search. So long as that search is conducted within "just limits," the Church respects the search itself, recognizing it as part and parcel of man's created nature and God-given dignity.

### 1.1.2 The World Council of Churches on religious liberty

A survey of Protestant ecclesial perspectives on religious liberty is outside the scope of this chapter. In its place, I outline a Protestant account of religious liberty based upon a collection of ecumenical statements endorsed or promulgated by the World Council of Churches between 1937 and 1965.[21] These documents overlap in time with the

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[19] Douglas Laycock refers to this attitude as the "Puritan mistake". See Douglas Laycock, "Religious Liberty: Not for Religion or against Religion, but for Individual Choice," in *Religious Liberty*, Vol. 1, *Overviews & History* (Grand Rapids, Mich.: William B. Eerdmans, 2010), 123.

[20] *Dignitatis Humanae*, para. 2.

[21] The World Council of Churches (WCC) was officially founded in 1948, and so I include within my historical purview pre-WCC documents that eventually and directly informed the WCC's position on religious liberty.

The World Council of Churches describes its own purpose as follows: "The Council was described [in the first Assembly] as an instrument whereby the churches may bear witness together to their common allegiance to Jesus Christ and cooperate in matters requiring united action. The Council was authorised to make public pronouncements to the churches and to the world but the nature and limits of the authority of

thesis/hypothesis- and Vatican II-doctrines of religious freedom and thereby show, at least incidentally, how Protestant churches preceded the Catholic Church in advancing religious freedom to establish an international standard.

One of the primary documents on religious freedom put forth by the World Council of Churches (WCC) is its *Statement on Religious Liberty*, adopted in 1961 by the WCC's Third Assembly. The document reflects the WCC's concerns over missionary activities and their continued legitimacy, threats from totalitarian regimes, and Protestant discrimination in Catholic countries.[22] It also reflects, and actively embraces, a contemporary Western endorsement of human rights and civil liberties.[23] Its most direct precursor, the WCC's *Declaration of Religious Liberty*, was released in 1948, the same year as the U.N. Declaration of Human Rights.

The text of the 1961 *Statement* is contained in eleven short paragraphs, the majority of which detail specific (legal) rights of religious freedom. The beginning paragraphs, especially the second, ground the WCC's theological vision of religious freedom. It reads:

> Christians see religious liberty as a consequence of God's creative work, of his redemption of man in Christ and his calling of men into his service. God's redemptive dealing with men is not coercive. Accordingly human attempts by legal enactment or by pressure of social custom to coerce or to eliminate faith are violations of the fundamental ways of God with men. The freedom which God has given in Christ

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these pronouncements were clearly defined." It also does not claim to speak definitively on the doctrines of each member church. It has no "particular conception of unity" that would impinge on member churches. See World Council of Churches, *The First Six Years, 1948-1954: A Report of the Central Committee, of the World Council of Churches on the Activities of the Departments and Secretariats of the Council* (Geneva: World Council of Churches, 1954), 4, 10.

[22] An excerpt from the "Report on Church and State," penned in Oxford, England in 1937 implies the situation of many Protestants within Catholic nations at the time: "It should also be evident that where in such a State there are majority and minority Churches the same essential liberty to carry out the Church's function should be enjoyed by minorities as well as by the majority. All Churches should renounce the use of the coercive power of the State in matters of religion." See World Conference on Church, Community and State, "Excerpt from the Report on Church and State, Oxford 1937," in *Main Ecumenical Statements on Principles Concerning Religious Freedom* (Geneva: World Council of Churches, 1965), 1.

[23] Ninan Koshy, *Religious Freedom in a Changing World* (Geneva: WCC Publications, 1992), 73–74.

> implies a free response to God's love, and the responsibility to serve fellow-men at the point of deepest need.[24]

The *Statement*'s "distinctive Christian basis for religious liberty" operates upon three sets of ideas: God's creative and redemptive work with man, man's free response to God (and neighbor), and the state's limited or "hands-off" role with regard to the relationship between God and man.

Complementary to its theological basis, the *Statement* adopts a philosophical argument for religious liberty, one seen to be at work in the U.N.'s declaration. In paragraph six, the *Statement* reads: "The recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family requires that the general standard [of the U.N. declaration] . . . should be given explicit expression in every aspect of society."[25] Without addressing the exact nature of "dignity" or of the "equal and inalienable rights" of man, the *Statement* leaves the reader to reach his or her own conclusions about them. It is reasonable to assume, however, that the *Statement*, at minimum, grounds these concepts in a philosophical anthropology, one to which we can attribute religious freedom as a "distinctive human right, which all men may exercise no matter what their faith."[26] A broadly philosophical position is further evinced in the *Statement*'s reaffirmation of the U.N.'s declaration, which, in the same clause, conceptually links freedom of religion to the

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[24] The Third Assembly of the World Council of Churches, "Statement on Religious Liberty, New Delhi 1961," in *Main Ecumenical Statements on Principles Concerning Religious Freedom* (Geneva: World Council of Churches, 1965), 35.

[25] The Third Assembly of the World Council of Churches, 36.

[26] Secretariat on Religious Liberty Division of Studies, World Council of Churches, *Main Ecumenical Statements on Principles Concerning Religious Freedom* (Geneva: World Council of Churches, 1965), 36, lines 13-14.

freedoms of thought and conscience.[27] While conscience is undoubtedly a topic of theological study, it is by no means unique to it. And, so, all things considered, the *Statement* can rightly be said to endorse a distinctly philosophical approach to religious freedom, which complements its distinctly theological conceptualization.

Whether philosophically or theologically argued, a practical conclusion of the *Statement*'s treatment of religious liberty is the limited role given to governments with respect to religious belief and exercise. Paragraphs seven through ten provide an extensive list of specified rights held by believers against the state. These rights include the freedom to worship in public or private, the freedom to preach and propagate one's faith, and the freedom to exercise religion in all aspects of one's public life.[28] Several decades of reflection upon religious freedom informs this list. The 1937 *Report on Church and State* renounced the "use of the coercive power of the State in matters of religion," the 1938 *Report on Church and State* affirmed the rights of churches against governments, and the 1948 *Declaration on Religious Liberty* asserted the freedom of individuals to express their religious beliefs in social and political communities.[29] By the time the 1961 *Statement* reaffirmed the 1948 *Declaration*, the WCC had accumulated a rich inventory of rights held against the state, in defense of individual and communal liberties.

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[27] The Third Assembly of the World Council of Churches, "Statement on Religious Liberty, New Delhi 1961," 36, lines 14-25.

[28] The Third Assembly of the World Council of Churches, 36–37, esp. lines 36-53.

[29] World Conference on Church, Community and State, "Excerpt from the Report on Church and State, Oxford 1937"; The Conference of the International Missionary Council, "Excerpt from the Report on Church and State, Madras 1938," in *Main Ecumenical Statements on Principles Concerning Religious Freedom* (Geneva: World Council of Churches, 1965), 3–4; and The First Assembly of the World Council of Churches, "Declaration on Religious Liberty, Amsterdam 1948," in *Main Ecumenical Statements on Principles Concerning Religious Freedom* (Geneva: World Council of Churches, 1965), 5–7.

Perhaps due to its forceful affirmation of rights in the face of (atheistic) totalitarian regimes and religious hegemony internationally, the WCC commits few passages to the practical limits of religious liberty. The *Statement* itself contains no paragraphs dedicated to the topic, opting instead to highlight – ever so occasionally – the need to exercise religious freedom with responsibility.[30] Of the passages that do address limitations, the WCC seems most concerned with restraints placed upon the church, as opposed to individuals or religious liberty in general. Since I discuss these church-related limitations in detail below, it is sufficient here to note that the 1948 *Declaration* considers religious freedoms to be justly curtailed by "non-discriminatory laws passed in the interest of public order and well-being."[31] Attention to this interest, I take it, constitutes the "responsible" exercise of religious liberty. The question arises immediately concerning what "public order" or "well-being" entails. Other than a recognition of man's need to respond freely to God and neighbor, which presumably helps form a working definition of "well-being," the WCC, in its statements on religious liberty, does not provide an answer to this question.

### 1.1.3 Summary

The preceding discussion illuminated several areas of convergence, and a noticeable point of divergence, between the Catholic Church and the World Council of Churches on religious liberty. In terms of commonality, both sides (1) affirm religious liberty's

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[30] The Third Assembly of the World Council of Churches, "Statement on Religious Liberty, New Delhi 1961," 35, lines 41-45; 37, lines 18-26; and possibly 35, lines 47-54.

[31] The First Assembly of the World Council of Churches, "Declaration on Religious Liberty, Amsterdam 1948," 7.

theological and philosophical bases, (2) view religious liberty as implying a negative right held by individuals and communities against (undue) government interference, (3) recognize a certain legitimacy of and role for the government in general, and (4) insist upon the responsible exercise of religious freedom.

A notable difference between both ecclesial traditions is the Roman Catholic emphasis upon truth, which entails not only the truth of Catholicism itself but also the truth of an objective moral order. Barring a related appeal to human dignity (which implies a philosophical and universal truth claim), an emphasis upon objective truth is more or less absent from statements put forward by the World Council of Churches. This point of course should not be taken to mean that the WCC, including the traditions or churches it represents, deny the existence of an objective moral order. Indeed, one could argue that the WCC's recognition of "God's redemptive dealing with men" already entails a moral objectivity supplied by God himself.[32] But the point I wish to stress here is that the *mention* of "objective moral truth" is noticeably absent in the WCC documents just examined. The concept may be implied, but it is not explicitly included.

An implication of the above is the portrayal of two different types of religious liberty: a Protestant form (grounded in conscience and entailing a direct relationship between man and God) and a Catholic form (grounded in conscience *and* a universally accessible order of moral and religious truth). Figure 1 provides a visualization.

[32] The Third Assembly of the World Council of Churches, "Statement on Religious Liberty, New Delhi 1961," 35.

**Figure 1. Catholic and Protestant conceptions of religious liberty**

| | Roman Catholic Church | Common | World Council of Churches |
|---|---|---|---|
| Conceptual bases | Grounded in conscience *and* truth | Inscribed by God in human nature (RC); part of God's creative and redemptive work (WCC)<br>Free response to God<br>Involving human dignity and inalienable moral rights | Grounded in *conscience* |
| Legal dimension | Negative right or liberty, held by individual or community against (undue) government interference | | |
| Moral limits | With requirements of the common good, ratification by civil authority, and legal norms consistent with *an objective moral order*<br>No moral license to error; *no* implicit *right of error* | Exercised within just limits, involving political prudence (RC); exercised with responsibility (WCC) | Involving respect for *non-discriminatory laws* passed by the state in the interest of public order and well-being |

At least two questions arise from these varieties of religious liberty, especially when considered against certain political liberal concerns. First, to what extent can either form normatively account for non-religious rights-claims "outweighing" religious ones? Second, at what point would either form judge a religious liberty claim to be unbridled and imposing upon the state's rightful competency or authority? These questions concern religious liberty's conceptual foundations (ought they be truth and/or conscience?) and just limits (in light of free conscience, religiously heterogeneous populations, and the state's governing role). I do not answer these questions here, but a Christian theory of corporate religious liberty will need to account for them.

We turn now to the churches' first form of corporate religious liberty, freedom of the church.

## 1.2 Freedom of the church

I view corporate religious liberty, as understood by the churches, to be of two general types. There is one form, *freedom of the church*, that pertains to religious organizations and their particular activities that are said to be free from government interference. Such activities may include the choice of ministers, teaching of doctrine, or engagement in worship. The second form pertains to any non-church entity, such as a religiously inspired charity or for-profit enterprise, that may object to a law of general applicability on religious grounds. This form of corporate religious liberty – to which I attribute the broad name *organizational exemptions* – covers any activity or function, whether ostensibly or overtly religious, that a non-church entity engages in as part of its religious belief or exercise.

In this section, I focus upon the first form of corporate religious liberty. My aim is to outline Catholic and Protestant conceptions of freedom of the church based upon the ecclesial statements already discussed as well as recent ecclesial and theological statements promulgated in response to the U.S. federal government's contraceptive mandate. By proceeding in this way, I hope to show doctrinal continuity between each tradition's understandings of religious liberty in general and of freedom of the church in particular. After summarizing my findings, I highlight a certain individualist character of Catholic and Protestant visions of freedom of the church, and I address the moral implications of this.

### 1.2.1 Catholic social doctrine on the freedom of the church

Freedom of the church has a primary emphasis in the Catholic tradition. This autonomy is framed as a liberty to engage in a variety of specific functions or activities. The *Compendium of the Social Doctrine of the Church* states:

> The Church therefore seeks: freedom of expression, teaching and evangelization; freedom of public worship; freedom of organization and of her own internal government; freedom of selecting, educating, naming and transferring her ministers; freedom for constructing religious buildings; freedom to acquire and possess sufficient goods for her activity; and freedom to form associations not only for religious purposes but also for educational, cultural, health care and charitable purposes.[33]

The Church's claims to freedom, or autonomy, in these specific areas are justified not only through truth- and conscience-based arguments, but also through identification of what the church is in contradistinction to the state.

According to the *Compendium*, the Church and the state are "by nature different because of their configuration and because of the ends they pursue." Hence, whereas the state (or "political community") attends to the "relationships and institutions that are at the service of . . . the temporal common good," the Church is "organized in ways that are suitable to meet the spiritual needs of the faithful." Constituting this distinction is the idea that each type of organization has its own competencies or expertise. The Church, for instance, has "no particular area of competence concerning the structures of the political community."[34] Moreover, the Church, writes Pope John Paul II, is "not entitled to express preferences for this or that institutional or constitutional solution," except with regard to

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[33] *Compendium of the Social Doctrine of the Church*, para. 426.

[34] *Compendium of the Social Doctrine of the Church*, para. 424.

their moral and religious implications.[35] In short, the Church respects the "legitimate autonomy of the democratic order" in recognition of the state's proper institutions (e.g., voting mechanisms) and end (i.e., the temporal common good).[36]

While Vatican II's *Gaudim et Spes* affirms that "in their proper spheres, the political community and the Church are mutually independent and self-governing,"[37] the Church encourages cooperation between both, by virtue of the fact that each "serve[s] the personal and social vocation of the same human beings." Neither entity is an end in itself, but rather a means, "intended for the service of man, to help him to exercise his rights fully, those inherent in his reality as a citizen and a Christian, and to fulfil correctly his corresponding duties."[38] Maintenance of proper relations depends in large part upon the "stable forms of contact and suitable instruments" that have developed over time in juridical experience between both spheres.[39] In the American context, one thinks of the Jefferson's Virginia Statute for Religious Freedom (1779), the Religious Clauses of the First Amendment (1791), and the Religious Freedom Restoration Act (1993). In the British context, such instruments include the Toleration Act (1689) and the Human Rights Act (1998), which

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[35] Pope John Paul II, "Centesimus Annus," promulgated May 1, 1991, para. 47, http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus.html.

[36] *Compendium of the Social Doctrine of the Church*, para. 424.

[37] Pope Paul VI, "Pastoral Constitution of the Church in the Modern World (Gaudium et Spes)," in *The Documents of Vatican II: All Sixteen Official Texts Promulgated by the Ecumenical Council, 1963-1965*, ed. Walter M. Abbot S.J., trans. Very Rev. Msgr. Joseph Gallagher (Piscataway, New Jersey: New Century Publishers, 1966), para. 76 (henceforth cited by document name in italics and paragraph only).

[38] *Compendium of the Social Doctrine of the Church*, para. 425.

[39] *Compendium of the Social Doctrine of the Church*, para. 427.

incorporated protections outlined within the European Convention of Human Rights (1953).[40]

The freedom of the church is also seen as an extension of religious liberty itself. Accordingly, freedom of the church is grounded in man's free response to God and his conscientious search for truth. A certain individualist character is here discernible, insofar as the search for truth belongs to the individual person his or herself. But this is not a radical individualism, since the freedom of the church and a Catholic vision of religious liberty in general take for granted the social nature of the human person. It may be reasonably inferred, then, that freedom of the church is morally justified in part due to man's social nature. Hence, because man is social by nature and religious association constitutes his or her well-being, the laws should safeguard man's religious associating from undue government interference.

A different normative justification is possible, however. Instead of focusing upon man's sociality, the law could emphasis man's individual consent. This is the consent involved in deliberately choosing to follow one's conscience or to embrace the conclusions arrived at in one's search for truth. In political liberal terms, this is an emphasis upon voluntary choice or voluntarism.[41]

The *Compendium* makes no explicit reference to voluntarism in its discussion of the Church's various rights or freedoms held against the state. Yet, it would be misleading to claim that the Church conceives of its freedoms in a manner wholly divorced from the

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[40] For historical discussion, especially of the United States, see Greenawalt, *Religion and the Constitution*, Vol. 1, 11–25.

[41] See historical discussion of voluntarism in Sub-section 4.2.2 below.

normative idea of voluntarism.[42] In fact, a voluntarist conceptualization of the Church's autonomy is taken up in a 2012 document published by the United States Conference of Catholic Bishops (USCCB). In a response to the federal government's contraceptive mandate, *Our First, Most Cherished Liberty* describes churches as voluntary associations. Churches, the document states, display the "American genius for voluntary associations." Such associations contribute positively to America's common life and they require no permission from the government to function.[43] Embedded within this description is not only an explicit recognition of the goods that voluntary associations provide to wider society, but also an implicit appeal to respect individual conscience as manifested within voluntary settings. This latter point is taken up more explicitly further into the document, where the bishops quote at length paragraph 2 of *Digintatis Humanae*, which emphasizes the freedom from coercion owed to *individuals* in matters of religious conviction.[44]

Any discussion of a Catholic vision of freedom of the church would be incomplete without brief reference to *Lumen Gentium* and *Gaudium et Spes*, the Second Vatican Council's two constitutions on the church. Summarily put, *Lumen Gentium* offers various non-reductive (i.e., non-individualist) models of the Church, which *Gaudium et Spes* picks up in

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[42] John Garvey, *What Are Freedoms For?* (Cambridge, Mass.: Harvard University Press, 1996), 146–51. Garvey argues that the church is a moral person distinct from its members. This "principle of group freedom" claims that freedom of the church is not the result of an aggregation of individual freedoms, freedom of contract, or association. Rather, the church is understood to have legal rights precisely because it is a moral unit that is "ultimate and unanalyzable." He seems to tie this argument to the fact that (hierarchical) churches have decision-making procedures or systems of governance that preclude democratic deliberation. However, it is not clear to me how a top-down system of governance creates a moral unit, separate and apart from all of the individuals that constitute it. But perhaps the idea of the church as moral person is made cogent through strongly metaphysical means. See Chapter 4 for an exploration of this idea.

[43] United States Conference of Catholic Bishops, "Our First, Most Cherished Liberty: A Statement on Religious Liberty," Approved March 2012, 5, http://www.usccb.org/issues-and-action/religious-liberty/upload/Our_First_Most_Cherished_Liberty.pdf.

[44] United States Conference of Catholic Bishops, 8.

its affirmation of the liberty of the Church *herself* to act in the modern world. These models include the Church as the mystical Body of Christ, the Church as the People of God, and the Church as sacrament.[45] While some commentators attribute a strongly democratic or individualist dimension to the model of the Church as People of God in particular,[46] this and the other models are rightly interpreted as emphasizing the active group agency of the Church herself. It should be noted that these models follow from the Council's decision to speak of the invisible Church of Christ as subsisting (Latin: *subsistit*), or existing fully, within the visible Roman Catholic Church. *Subsistere*, as a philosophical term, strongly connotes active agency with respect to the Church; and, as both Joseph Ratzinger and Guy Mansini O.S.B. remark, the ascription of that full and active agency to the Church was deliberately intended by the Council fathers.[47]

While it must be admitted that the agency attributed to the Church most directly pertains to matters of ecclesiology and soteriology, its moral and legal implications are clear. In effect, it is not because the Church is an association of contracting individuals that it deserves certain freedoms from government interference; rather, it deserves such

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[45] *Gaudium et Spes*, para. 3, 11, 44, 45, 88, and 92 (for "People of God" references), para. 32, 39, and 78 ("Body" references), and para. 9 and 48 ("Church as sacrament" references).

[46] Sweeping inferences were made when, in July 1963, the Second Vatican Council decided to move passages concerning the People of God, towards the beginning of *Lumen Gentium*. Proponents of democratization claim that this ordering gives the laity governing priority and reduces the traditional hierarchy to a subservient role. Others claim that this move somehow endorses a situation wherein the effects of baptism upon lay people confers the power of ordination and wherein the actual clergy are "just there" for good order. This set of positions is misguided, however. As Cardinal Dulles explains, the intention was to discuss the Church in general before addressing any of its particular component parts or dimensions. In fact, the laity are discussed only after extensive treatment of the hierarchy in a preceding chapter. Moreover, *Lumen Gentium*'s treatment of the People of God never suggests that the Church was ever a community of equals, lacking hierarchical leadership. It affirms that there were different ranks in the early church, as there still are today. See discussion in Avery Dulles S.J., "Nature, Mission, and Structure of the Church," in *Vatican II: Renewal within Tradition*, ed. Matthew Lamb and Matthew Levering (Oxford: Oxford University Press, 2008), 31.

[47] For sources and discussion, see Section 4.1 below.

freedoms because it, as a group agent having a "supernatural personality" independent of her members,[48] has particular salvific tasks to achieve in this world. On this latter construction, a Catholic vision of the freedom of the church is unmistakably non-reductive or non-individualist. Yet, despite this fact, nowhere in the *Compendium* or in recent statements made against the contraceptive mandate does the Church defend its rights through group-realist argumentation. I suspect this is a strategic choice, given the individualist commitments of modern political liberalism. At minimum, this choice shows a theoretical flexibility with respect to ecclesial models, such that one need not eschew group realism altogether even if opting for an individualist model for purposes of law.

To sum: The Catholic Church's understanding of its own organizational freedoms is as multifaceted as its conception of religious liberty in general. Freedom of the church appeals to the protection of truth and individual conscience,[49] the provision of goods to the wider society through voluntary association,[50] and a demarcation between the Church, as an active agent charged with man's religious and moral well-being, and the state, as safeguard of the temporal common good.[51]

### 1.2.2 Protestant conceptions of the freedom of the church

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[48] Jacques Maritain connects the philosophical ideas of *subsistere* (subsistence, from *Lumen Gentium*) and persona (personality) to speak of the Church having its (her) own supernatural personality. See Jacques Maritain, *On the Church of Christ: The Person of the Church and Her Personnel*, trans. Joseph W. Evans (London: University of Notre Dame Press, 1973), 18. See also Sub-section 4.3.1 below.

[49] *Dignitatis Humanae*, para. 2.

[50] United States Conference of Catholic Bishops, "Our First, Most Cherished Liberty," 5.

[51] *Compendium of the Social Doctrine of the Church*, para. 425.

Historic documents from the WCC and a recent statement from Protestant theologians in America understand freedom of the church in a way not dissimilar to their Roman Catholic counterparts.

Like the Catholic Church's *Compendium*, the International Missionary Council's *Report on Church and State* (Madras, 1938) provides an extensive list of church freedoms, referred to as the "minimum rights of religious freedom upon which the Church should insist." Divided into two sets, the list begins with rights:

> (a) to assemble for unhindered public worship
> (b) to formulate its own creed
> (c) to have an adequate ministry
> (d) to determine its conditions of membership
> (e) to give religious instruction to its youth
> (f) to preach the gospel publicly
> (g) to receive into its membership those who desire to join it

The second set includes rights:

> (a) to carry on Christian service and missionary activity both at home and abroad
> (b) to organize local churches
> (c) to publish and circulate Christian literature
> (d) to hold property and to secure support for its work at home and abroad
> (e) to co-operate and to unit with other churches at home and abroad
> (f) to use the language of the people in worship and in religious instruction
> (g) to have equality of treatment in countries pre-dominantly Roman Catholic, similar to that accorded by Protestant Governments
> (h) to have legal recognition for Christian marriages between nationals[52]

Both sets affirm rights held by churches against coercive state power, whether wielded through atheistic totalitarian regimes or Roman Catholic nation-states. Only a year prior, in 1937, The World Conference on Church, Community and State, wrote in defense of

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[52] The Conference of the International Missionary Council, "Excerpt from the Report on Church and State, Madras 1938," 3.

minority churches within atheistic and even predominantly Catholic countries. With respect to church influence, the Conference wrote, "All Churches should renounce the use of the coercive power of the State in matters of religion."[53] Presumably, in writing this statement, the Conference had in mind the prevailing thesis/hypothesis doctrine then held by the Roman Catholic Church.

Despite tensions with the Catholic Church on the scope of religious freedom, the WCC at this time was most concerned with limits to state power itself. The WCC did not endorse a blanket dismissal of state coercion in all matters of religious exercise, however. The 1948 *Declaration of Religious Liberty* concedes the following:

> The community [i.e., the social or political community] has the right to require obedience to non-discriminatory laws passed in the interest of public order and well-being. In the exercise of its rights, a religious organization must respect the rights of other religious organizations and must safeguard the corporate and individual rights of the entire community.[54]

This concession has important ramifications for the freedom of the church. It implies that churches *must* respect anti-discrimination laws in their normal operations. Therefore, the choice of ministers or even conditions of membership would be subject to state approval, specifically to anti-discrimination laws. In short, freedom of the church would be a freedom of a very limited kind. But the WCC avoids this situation. As early as the 1938 *Report on Church and State*, the church affirms a right to civil disobedience – or, less drastically, a freedom – with respect to its "essential activities" (i.e., the rights enumerated

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[53] World Conference on Church, Community and State, "Excerpt from the Report on Church and State, Oxford 1937," 1.

[54] The First Assembly of the World Council of Churches, "Declaration on Religious Liberty, Amsterdam 1948," 7.

in the *Report* and listed above). The *Report* reads: "[T]o the church chiefly involved must be left the ultimate decision as to when it must refuse to submit to such State laws . . . as will curtail essential activities, and to its individual members to choose when to suffer persecution or even death, rather than to disobey God."[55]

One means by which the WCC normatively justifies the freedom of the church is through theological premises. The 1938 *Report* states: "These are primarily the rights and obligations of men as children of God, and its [i.e., the Church's] own existence as the Body of Christ, in which the head speaks to members and through which he makes Himself known to all men."[56] But like the USCCB in its 2012 statement on religious freedom, the WCC offers secular justifications as well, appealing in the *Report* to: (i) the "variety of view-points" required for a "progressive" and "dynamic" political community, and (ii) church teachings that promote obedience to the authority of law, which in turn makes the "very rule of the State possible."[57]

Interestingly, the Catholic Church's *Compendium* does not offer a theologically corporatist defense of freedom of the church as the WCC does in its 1938 *Report*. (Though, the "Body of Christ" image is undoubtedly not foreign to Catholic social doctrine, despite its absence in the *Compendium*'s discussion of church freedoms.) Yet, the WCC's corporatist defense is brief (consisting of one sentence) and is couched within scores of arguments that emphasize the rights of the *individual* persons who constitute church membership. This

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[55] The Conference of the International Missionary Council, "Excerpt from the Report on Church and State, Madras 1938," 3.

[56] Secretariat on Religious Liberty Division of Studies, World Council of Churches, *Main Ecumenical Statements on Principles Concerning Religious Freedom*, 4.

[57] The Conference of the International Missionary Council, "Excerpt from the Report on Church and State, Madras 1938," 4.

suggests that the WCC holds a largely (but not exclusively) individualist defense of freedom of the church.[58] Consider the individualist character of the rights that begin the 1948 *Declaration*:

> Every person has the right to determine his own faith and creed.
>
> Every person has the right to express his religious beliefs in worship, teaching and practice, and to proclaim the implications of his beliefs for relationships in a social or political community.[59]
>
> Every person has the right to associate with others and to organize with them for religious purposes.
>
> Every religious organization, formed or maintained by the action in accordance with the rights of individual persons, has the right to determine its policies and practices for the accomplishment of its chosen purposes.[60]

Even the rights of religious organizations, collectively understood as the Body of Christ, are spoken in terms of the rights of individual persons. Though this should not be a surprise, given the WCC's conceptualization of religious liberty as implying a right of individuals to respond to God's creative and redemptive work, free from undue government coercion.

This individualist commitment is echoed in a recent statement from a collection of Protestant theologians, writing in support of a business's religious claims against the U.S. federal government's contraceptive mandate. Explaining the normative importance of individual conscience, the theologians note that "*all* work done in faith by God's people

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[58] As with the point concerning objective moral truth (see Sub-section 1.1.3), we should not take the WCC's individualist defense of freedom of the church as representing all Protestant traditions, especially as concerns the latter's ecclesiological thought.

[59] The First Assembly of the World Council of Churches, "Declaration on Religious Liberty, Amsterdam 1948," 6.

[60] The First Assembly of the World Council of Churches, 7.

[is] sacred, whether accomplished in the church and monastery or in the fields and courthouse."[61] They conclude: Christians are called to live "in accordance with the dictates of their faith and conscience," no matter the institutional setting.[62] While this argument is made with respect to for-profit enterprises, its individualist emphasis is no less applicable to churches and religious organizations.

Nevertheless, from a generally Protestant perspective, freedom of the church undoubtedly entails a right of groups themselves – as is inferred from the WCC's "Body of Christ"-argumentation. But it must be admitted that the broadly Protestant position more emphatically emphasizes freedom of the church in terms of individual rights. On this construction, group rights *follow from* or are *constituted by* individual rights – in this case, the religious rights or freedoms relating to one's personal response to God's creative and redemptive work in the world. The WCC and Protestant statements explored in this section do not evoke the famous Lockean definition of churches as voluntary associations.[63] Nevertheless, an individualist dimension, characteristic of Locke's voluntarist definition, is found in these statements. Indeed, it is a short step from the dignity of individual conscience to an asserted freedom of religious, *voluntary* association. Both involve individual consent; and the dominant political liberal order – of which the WCC's earliest statements and the contemporary *Hobby Lobby* dispute are part – values individual consent highly. Freedom of the church as individualist is to be expected.

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[61] Brief for 38 Protestant Theologians et al. as Amici Curiae in Support of Hobby Lobby and Conestoga, et al. at 15, Burwell v. Hobby Lobby Stores, 573 U.S. ___ (2014) (No. 13-354) (italics in original).

[62] Brief for 38 Protestant Theologians et al., at 23.

[63] See Sub-section 4.2.2.

### 1.2.3 Summary

To conclude this section, I elaborate upon the individualist dimension of freedom of the church, address the importance of understanding what a group – or specifically a "church" – is, and then summarize the Catholic and Protestant notions of the theory in question.

To start, we must be careful to articulate the exact nature of the individualist dimension of freedom of the church. The individualism in question is neither atomistic, as if individuals are independently self-sufficient, nor selfish, as if individuals pursue their self-interests alone. Rather, it is rooted in a set of relational ideas embedded within a broadly Christian conception of religious liberty. This set includes ideas that individuals are social by nature; that God created man to search for and be in communion with truth, that is, God himself; and that religious communities (i.e., churches) play a vital role in orienting mankind towards God.

A legal implication that follows from this relational-individualist understanding pertains to appropriate rights language and moral justification. It seems to me that freedom of the church is aptly described in terms of a legal right that not only inheres to the individual herself (i.e., an individual right), but also to her wider religious organization (i.e., a group right). I take this to imply two possible routes: First, legal rights that apply to a church, such as a church's right to choose its ministers, could be normatively justified in terms of what is best for each individual member. The argument in favor of free choice in ministers therefore runs as follows: Because individual members within a church associate for religious reasons, and since those reasons are in large part met or preserved by an organization's ministers, the church should have the legal freedom to choose its ministers without undue interference.

Alternatively, it seems that legal rights that apply to a group could also be normatively justified in terms of the nature or provisions of the group itself. Hence, insofar

as the group is understood to precede any given member or collection of members, and insofar as the group creates the conditions in which the attainment of particular goods is made possible, the law should recognize this inherent nature or purpose as morally valuable and therefore should extend legal rights to the group itself. On this understanding, a church's right to freely choose its ministers can be seen to belong properly to the group itself: The church persists longer than any particular member, and the church creates the conditions in which (some of) the religious interests of members are met. Consider the goods of communal worship, dispensation of clerically provided sacraments, or complex religious doctrines taught by an institution's trained theologians.

For some political liberals, understanding the freedom of the church as a group right is normatively dangerous, especially with respect to dissenting individuals and their rights.[64] Moreover, it is outright mistaken in terms of sheer logic since, by some political liberal accounts, the prescription of legal group rights *cannot* follow from conclusions about the nature of a group.[65] This latter position is of particular interest for me, as I think that we can and should make intelligible conclusions about corporate legal rights from a study of group ontology (i.e., understanding what a group *is*). I address this issue head-on in Chapter 2. For now, let it suffice to note that conclusions about group ontology can help us understand the ethically salient relationships between a group and its members. Hence, if a church is merely a voluntary association with no eschatological end or salvific purpose, its legal dissolution may not be of tremendous moral or religious import for the individuals who choose to associate in it. We build upon this and related intuitions later.

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[64] Hamilton, *God vs. the Gavel*, 347–59; and Laborde, *Liberalism's Religion*, 171–90.

[65] Schragger and Schwartzman, "Some Realism," 353-360.

Figure 2 below captures the conceptual, legal, and moral aspects of the churches' relational-individualist understanding of freedom of the church. To note: I see no significant difference between the Catholic and Protestant understandings of this freedom.[66]

[66] Based upon my source documents, I see no significant difference between the Catholic and Protestant conceptions of freedom of the church. While the WWC describes the Church as the mystical Body of Christ, serving a unique purpose made possible by the group itself, the Catholic Church, although silent on this issue in the relevant section of the *Compendium*, would not deny this. Moreover, while the Catholic Church describes itself as a voluntary association, this is a common strategy to take within the American legal context. Protestants, too, follow this Lockean move, given the respect it garners in secular political-liberal circles and in some Christian ones, as well.

As regards legal construal and moral limits, both traditions affirm effectively the same things, from specified church freedoms to respect for state authority when kept out of essential church activities. While it is interesting to note that the WCC explicitly references anti-discrimination laws, which are perhaps the most contentious set of laws affecting houses of worship today, such laws also fall within the Catholic Church's broad understanding of the proper spheres of church and state. The *Compendium*'s silence on non-discrimination is a function of its universal exhortation, not a denial of the moral value of anti-discrimination laws. Indeed, the state may require anti-discrimination laws to care for the common good. See related discussion in Section 3.2.

**Figure 2. Catholic and Protestant conceptions of freedom of the church**

| | Roman Catholic Church | WCC / Protestant |
|---|---|---|
| Conceptual bases | Grounded in individual right, while recognizing social nature of man<br><br>Description of Church as voluntary association; and of Church as Body of Christ, as active group agent<br><br>Recognition of positive social contribution of religious associations to wider social and political community<br><br>Distinction between proper functions and ends of church and state | |
| Legal dimension | Negative right or liberty, held by Church and its members against the state with respect to specified activities<br><br>Implicit group right; explicit appeal to individual right to religious liberty<br><br>Extensive list of specified freedoms<br><br>Appeal to related rights, including rights of association, speech, and ownership of property | |
| Moral limits | Respect for the proper spheres or activities of church and state | Respect anti-discrimination laws, except with respect to essential activities |

## 1.3 Organizational exemptions

Having explored freedom of the church, we now turn to the churches' second form of corporate religious liberty – namely, organizational exemptions. This theory covers any activity or function, whether ostensibly or overtly religious, that a non-church entity engages in as part of its religious belief or exercise. A few preliminary remarks are required before outlining the relevant Catholic and Protestant conceptions.

First, it should be made clear that the churches have not explicitly articulated a "theory" (i.e., a set of principles that explain a phenomenon) of religious liberty for non-church entities. To the best of my knowledge, there is no catechism or ecumenical statement that contains sections devoted to the freedom of religious businesses, for example. Lacking an explicit theory, we are left to construct the churches' understandings

based upon various ecclesial and ecumenical statements. Second, the term *organizational exemptions* suggests protections of religious exercise that are viewed as accommodations or concessions to otherwise generally applicable laws. Certainly, freedoms of the church are also accommodations to such laws; but to phrase (i) concessions for for-profit firms as "exemptions" and (ii) concessions to churches as "freedoms" implies that the latter entail robust protections (i.e., protections justified on strong, easily discernible moral grounds) and that the former necessarily require careful deliberation over complex circumstances, consequences, and various moral goods or rights involved.[67] Third, perhaps even more so than the interpretation of freedom of the church given above, the following construction of organizational exemptions is made with the contemporary American context in mind. As the chosen source documents show, Christian and other religious communities within the United States are trying to grapple with the limits of religious freedom and the reach of federal and state governments within non-church contexts. The construction below summarizes parts of their intellectual and legal efforts.

In this section, I highlight the conceptual, legal, and moral aspects of the Catholic and Protestant views on organizational exemptions. I begin with ecumenical statements made against the federal government's contraceptive mandate and then discuss how the Catholic and Protestant perspectives on corporate exemptions might differ in light of each tradition's understanding of religious liberty in general.

[67] I find the distinction between the *prima facie* strength of church freedoms and for-profit exemptions to be ethically appropriate. See Sections 3.2 and 3.3 for further discussion.

### 1.3.1 Ecumenical statements made against the contraceptive mandate

While American churches accepted the federal government's complete exemption of religious organizations from the requirements of the contraceptive mandate, there was general discontent with regard to the narrow organizational-applicability of that exemption scheme, as well as to a related accommodation scheme that allowed religious non-profits to transfer contraceptive costs onto their insurance providers.[68] In the midst of their objections, the American churches made legal-normative arguments that turned upon a broad definition of "religious institution."[69] When deployed against the federal government's refusal to extend the exemption scheme to religious non-profits, this definition helped support arguments that the federal government unjustly favored certain types of religious exercise (e.g., the religious functions of houses of worship traditionally understood) over others (e.g., the religiously motivated care of the elderly poor). The act of

[68] From enactment of the federal government's contraceptive mandate until early October 2017, religious not-for-profit organizations (as defined by the Internal Revenue Service; and excluding churches and houses of worship, which were and still are covered by an exemption scheme) were required by federal law to provide insurance coverage for an array of contraceptives (some of which are believed to cause early term abortions) under an accommodation scheme. In October 2017, the federal government modified this requirement, effectively allowing *any* religious not-for-profit organization to voluntarily opt out of the federal government's accommodation scheme, thereby further removing themselves from participation in providing (certain) contraceptives to their employees. See Accommodations in Connection with Coverage of Preventive Health Services (Temporary), 26 C.F.R. § 54.9815-2713AT (2017). This temporary rule, however, is due to be removed from the *Code of Federal Regulations* on January 14, 2019.

[69] In early iterations of the rules pertaining to the contraceptive mandate, the federal government defined "religious employers" (or "eligible organizations" or "religious institutions") in a narrow manner, following a definition given in the Internal Revenue Code. (See Exemption and Accommodations in Connection with Coverage of Preventive Health Services, 78 Fed. Reg. 39870, 39896 (2013).) This definition includes: "churches, their integrated auxiliaries, and conventions or associations of churches," "any organization . . . the gross receipts of which in each taxable year are normally not more than $5,000," and "the exclusively religious activities of any religious order." Returns by Exempt Organizations, 26 U.S.C. § 6033(a)(3)(A)(i)-(iii). Those who objected to this definition sought a more inclusive iteration, as proposed, for example, in Accommodations in Connection with Coverage of Preventive Health Services (Temporary), 26 C.F.R. § 54.9815-2713AT (2017).

defining a "religious institution," however, poses challenges with regard to reasonable boundary criteria and thus moral limitations. Consider the following ecumenical statement.

In a 2012 open letter, entitled "Free Exercise of Religion: Putting Beliefs into Practice," Catholic, Protestant, and other religious leaders argue that "religious institutions" should not be forced to violate their beliefs through compliance with the contraceptive mandate. At the beginning of their argument, the authors give an expansive definition of "religious institution." They write:

> Such institutions include not only churches, synagogues, mosques, and other places of worship, but also schools and colleges, shelters and community kitchens, adoption agencies and hospitals, organizations that provide care and services during natural disasters, and countless other organizations that exist to put specific religious beliefs into practice.[70]

It is difficult to read this definition as anything other than expansive, incorporating virtually any organization within its purview. After all, organizations that "put specific religious beliefs into practice" could include not only houses of worship traditionally conceived, but also for-profit corporations, whether closely held (e.g., Hobby Lobby) or publically traded (e.g., Apple, Inc.).

The letter's authors, however, conclude their argument with a narrower definition. "If freedom of religion is a constitutional value to be protected," they write, "then institutions *developed by religious groups* to implement their core beliefs in education, in care for the sick or suffering, and in other tasks must also be protected."[71] The term "developed

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[70] "Free Exercise of Religion: Putting Beliefs into Practice - An Open Letter from Religious Leaders in the United States to All Americans," June 2012, para. 1, http://www.usccb.org/issues-and-action/religious-liberty/fortnight-for-freedom/upload/Free-Exercise-of-Religion-Putting-Beliefs-into-Practice.pdf.

[71] "Free Exercise of Religion: Putting Beliefs into Practice," para. 5 (italics mine).

by" effectively narrows the classes of organizations that fall within the letter's definition of "religious institution." It suggests, for example, that the relevant entities are those "founded" or "maintained" by houses of worship.

Nonetheless, the letter's ambiguous use of the term "religious institution" at its inception sets the tone for an organizationally expansive position. Even the narrowing qualification added at the letter's conclusion is still broad, organizationally speaking. For instance, the phrase "developed by religious groups" could imply an ownership role (when a house of worship owns a charitable or business enterprise[72]), a founding role (when a house of worship founds an entity but then subsequently removes itself from ownership and/or control[73]), or even loose affiliation (when a house of worship is said to be part of a healthcare or education network in some extended, legally technical sense[74]). Any number of entities – indeed "countless other organizations that exist to put specific religious beliefs into practice" – can fit within this broad understanding.

It must be conceded that the authors of the 2012 open letter did not deliberately intend to make an argument in defense of *every* type of entity, such as religiously inspired

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[72] Not-for-profit entities, by definition, do not have owners; therefore, to say that a church "owns" a nonprofit is to use the term "ownership" in a colloquial, non-technical sense. By contrast, for-profit entities *can* have shareholders that themselves have not-for-profit status; it is possible, then, for a (not-for-profit) church to own a for-profit firm in the technical or legal sense. See Henry Hansmann, *The Ownership of Enterprise* (London: Belknap Press of Harvard University Press, 1996), 28, 35-39.

[73] For example, the Roman Catholic healthcare system, Dignity Health, began under the auspices of an order of religious sisters. Today it retains a Catholic ethos, without being managed directly by a religious order. See "Our History: Rooted in Kindness," Dignity Health, accessed November 22, 2018, https://www.dignityhealth.org/about-us/our-organization/mission-vision-and-values.

[74] For example, Methodist Health System is contractually bound to the North Texas Conference of the United Methodist Church through a written covenant. See "Covenant Between North Texas Conference of the United Methodist Church and Methodist Hospitals of Dallas," Methodist Health System, accessed November 22, 2018, https://www.methodisthealthsystem.org/documents/CovenantwithUnitedMethodistChurch.pdf.

for-profit firms like Hobby Lobby. Given their institutional roles – which include bishops, presidents of faith networks, religious superiors, and a director of a Catholic healthcare network – it is likely that the authors intended to protect the religious liberty of a limited set of organizations, that is, the religious institutions they directly represent. (This includes houses of worship, religiously affiliated schools, universities, and hospitals – essentially the entities covered by the federal government's exemption scheme and the public-serving, religious organizations accounted for in the related accommodation scheme.) But, while this point concerning the authors' intention may be true, it does not correct or limit the authors' expansive definition of "religious institution." Too easily is this broad term taken out of its original context; and too easily is it then used to justify freedom-of-the-church rights for entities with highly tenuous religious commitments and affiliations. Normative questions follow: Should religiously inspired for-profit firms receive legal protections *as if* they were houses of worship? If not, what are just criteria by which to delimit freedom-of-the-church protections from non-church organizational exemptions?

One way to begin to answer these questions is to adopt a different framework when dealing with the religious liberty disputes of non-church entities, like Conestoga Woods and Hobby Lobby. One other ecumenical statement, again made against the federal government's contraceptive mandate, displays a different, more promising approach to organizational exemptions than the over-extension of the "religious institution" framework.

Immediately after the highly controversial *Hobby Lobby* ruling, a collection of religious leaders urged Congress to keep the Religious Freedom Restoration Act (RFRA)[75]

[75] Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (2017).

– the legislation used to exempt closely held family firms from the contraceptive mandate – in place, that is, without amendment or repeal. The letter sent, entitled "Protecting the Religious Freedom Restoration Act of 1993," eschews the "religious institution" model altogether and focuses upon the relevant flesh-and-blood individuals instead. Its individualist flavor is captured neatly towards the beginning of its argument. The authors write: "Not one of Congress's 535 Members suggested that this landmark new law [i.e., RFRA] would not protect a person's free exercise of religion if she chose to provide for herself, her family, and her employees by starting a business."[76]

An individualist model has several strengths. First, it does not stretch freedom of the church beyond its conceptual capacities through a forced use of the term "religious institution." Consider, for instance, freedom of the church's voluntarist dimension, which justifies certain church rights through appeal to the activities of consenting individuals who, I should add, can easily (that is, voluntarily) leave their religious-institutional affiliation without severe civic or economic consequences. It is not clear that employees of for-profit firms join voluntarily in the same sense, enjoying the same easy right-of-exit (or perhaps easy-right-of-staying[77]).

Second, the individualist model emphasizes the natural persons directly burdened. This has the potential effect of de-mystifying discussions around the moral and legal rights of artificial, corporate persons.

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[76] "Protecting the Religious Freedom Restoration Act of 1993 - Letter to Congress," published June 30, 2014, para. 2, http://www.usccb.org/issues-and-action/religious-liberty/upload/Faith-Communities-RFRA-Letter-to-Congress.pdf.

[77] For example, see Hansmann, *The Ownership of Enterprise*, 26 ("After she [an employee] has taken a job with a particular firm and worked with that firm for a number of years, however, her skills are likely to become specialized to that firm to some degree, and her flexibility to retraining may also diminish."); and *Hobby Lobby*, 134 S.Ct. at 2795-6 (Ginsburg, J., dissenting).

Third, due to the particular legal context in which it was suggested, the individualist model is shaped by a statutory framework (RFRA) that explicitly subjects *individuals'* religious liberty claims to governmental interest-balancing. The concept of interest-balancing is arguably left implicit in a freedom-of-the-church model.[78] But, in the context of for-profit exemption claims, interest-balancing (or a Christian ethical version or transformation of it[79]) should be explicitly adopted for reasons pertaining to the protection of religiously heterogeneous populations employed or served by most commercial enterprises. After all, while it is expected that church members will abide by their organization's religious policies, it is not expected that (all or most) employees or customers of a for-profit firm will abide by their organization's religious policies. Subjected to such policies, it is expected that at least a significant portion of non-adherent employees or customers will or may be negatively affected, for instance, through perceived disparagement or unequal access to the marketplace.

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[78] Garnett, "The Freedom of the Church," 43 (arguing that "freedom of the church" may be "an animating value or principle, even a mood," rather than a strict "rule" or "standard"); and Kent Greenawalt, *Exemptions: Necessary, Justified, or Misguided?* (London: Harvard University Press, 2016), 17-20 (stressing degrees of conditionality of religious exemptions).

[79] I use the term "interest-balancing" with hesitancy – for inasmuch as interest-balancing merely involves a consequentialist weighing of one set of interests against another, it cannot be said to be a Christian form of morality. Undoubtedly, Christian moral thought attends to consequences; but it does not reduce moral deliberation to them. For example, see Germain Grisez's discussion of his eighth mode of responsibility in *The Way of the Lord Jesus*, vol. 1, *Christian Moral Principles* (Chicago: Franciscan Herald Press, 1983), 216-217, ch. 8, q. H, para. 1, n. 2.

Therefore, when the term "interest-balancing" is endorsed in this doctoral thesis, I wish to convey a different, *Christian* meaning – namely, a form of non-reductive moral deliberation that is attentive to basic forms of human flourishing as well as to the theological context that lifts practical reasoning (and mankind) to its intended, theological end. While there is disagreement among theologians over what this moral deliberation (or, more generally, moral theory) actually entails, we can at least say that it is not simply equivalent to the consequentialist interest-balancing familiar to many legal theorists.

For an exposition of consequentialism and a criticism of its use in practical legal contexts, see Francisco Urbina, *A Critique of Proportionality and Balancing* (Cambridge: Cambridge University Press, 2017). Also see Bernard William's criticisms of forms of consequentialism in J. J. C. Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge: Cambridge University Press, 1973) 79-149. Finally, see a related discussion (concerning Schragger and Schwartzman's consequentialism) in Section 2.3.3 below.

Perhaps due to its conceptual and practical strengths, the individualist approach to organizational exemptions is put forward within "Protecting the Religious Freedom Restoration Act of 1993." In my opinion, this ecumenical letter to Congress serves as a definitive individualist statement, one that helps to distinguish between (i) freedom of the church, which stresses protection of both the group itself as a voluntary association and the individuals who compose it, and (ii) organizational exemptions, which, as a legal regime, focuses upon individuals and subjects their exemption claims to interest-balancing in light of various circumstances, including organizational context, generally applicable regulations, and least restrictive means.

Having indicated the individualist, as opposed to the religious-institutionalist, character of an ecumenical approach to organizational exemptions, I turn now to an examination of how the Catholic and Protestant traditions might separately address the moral limits of this legal regime – for it is one thing to admit a requirement of interest-balancing involving individuals' religious exercise, but it is quite another to admit in which direction such balancing weighs and why. On this latter point, I perceive differences between the Catholic and Protestant traditions, based upon their respective ideas of religious liberty in general.

### 1.3.2 A Catholic perspective on organizational exemptions

Recall that human dignity, conscience and truth constitute the moral foundations of a Catholic vision of religious liberty. It is the latter concept, truth, that adds doctrinal substance to the ideas of human dignity and conscience, such that each must be seen in light of God's creative and salvific work in man and in light of the practical moral reasoning with which man is endowed. Without exhaustively detailing the socially transcendent moral truths available to practical moral reasoning, the *Compendium, Gaudium*

*et Spes*, and other magisterial documents affirm their reality and the limits they impose upon all action, including the religious and religiously inspired actions of Catholic and non-Catholic individuals.[80] An important consequence of this affirmation is the adoption of a comprehensive moral standard, at once theological and philosophical, useful for evaluating whether religious or religiously inspired actions should or should not be granted freedom from government coercion.[81]

There are at least two ways in which the Church's morally realist standard can be used. The first pertains to (i) distinctively Catholic actions, such as reception of the Eucharist, and (ii) actions following from the Church's moral vision, such as the restriction of legalized abortion within a nation-state. These are actions that, considered in themselves, should be free from governmental interference to the contrary precisely because they are basic requirements of Catholic (moral) theology.[82] The second use of the Church's morally realist standard pertains to religious actions deemed broadly compatible with a Catholic theological or moral vision. These actions might include Islamic worship, insofar as it expresses the human search for religious truth,[83] or the governmental

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[80] *Compendium of the Social Doctrine of the Church*, para. 130 ("He is open above all to the infinite – God – because with his intellect and will he raises himself above all the created order and above himself, he becomes independent from creatures, is free in relation to created things and tends towards total truth and the absolute good."); *Gaudium et Spes*, para. 16 ("In fidelity to conscience, Christians are joined with the rest of men in the search for truth"); and Catholic Church, *Catechism of the Catholic Church* (London: Geoffrey Chapman, 1994), 425, para. 1951 ("The moral law presupposes the rational order, established among creatures for their good and to serve their final end, by the power, wisdom and goodness of the Creator. All law finds its first and ultimate truth in the eternal law.") (henceforth, cited with title and paragraph only).

[81] Griffin, "Commentary on Dignitatis Humanae," 253; *Dignitatis Humanae*, para. 2 ("Nor is anyone to be restrained from acting in accordance with his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits."); and *Catechism of the Catholic Church*, 1951.

[82] *Dignitatis Humanae*, para. 2 ("[All men] are also bound to adhere to the truth, once it is known, and to order their whole lives in accord with the demands of truth.") and para. 10 ("It is one of the major tenets of Catholic doctrine that man's response to God in faith must be free.").

[83] *Dignitatis Humanae*, para. 4 ("Provided the just requirements of public order are observed, religious bodies rightfully claim freedom in order that they may govern themselves according to their own norms,

restriction of religious terrorists, insofar as this helps preserve the temporal or political common good.[84] Such actions, also considered in themselves, should be free from governmental interference (or, in the case of restricting the movements of religious terrorists, should be *taken up* by government action) precisely because they are compatible with Catholic (moral) theology.

While it may be the case that certain actions are religious or religiously inspired, the Church's morally realist standard may not ultimately support their legal protection. As with religiously inspired terrorism, the Church would insist on legal coercion against it, again, for the sake of the temporal common good. But even with regard to Catholic religious actions or actions aligned with a Catholic moral vision, the Church would not always insist on their government endorsement. For example, while the Church would in general support the establishment of Catholicism as a state religion or a situation in which no individuals committed the sin of fornication, various situations would stop the Church from insisting on the former or endorsing governmental police powers to bring about the latter. These situations can vary widely in nature, from historical circumstances to the sheer impossibility of practical enforcement.

So, recognition of particular circumstances, in addition to respect for socially transcendent moral principles, ultimately inform the Church's ethical position towards

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honor the Supreme Being in public worship . . . and promote institutions . . . in accordance with their religious principles.")

[84] John Finnis, "Religion and Public Life in Pluralist Society," in *Religion & Public Reasons: Collected Essays*, Vol. V (Oxford: Oxford University Press, 2011), 42, 54-55. Finnis writes: "Violation of rights and of the other aspects of public order are indeed the responsibility of law and government to repress with judgment, equity, and an eye to consequences. But our reflections and inquiries should be directed, not so much to speculations about the future, but to fulfilling the duty that is the foundation of religious liberty, of morality itself, and of all decent political existence and coexistence: to seek the truth about God, and to follow it when one has found it as best one can judge."

religious freedom claims in general. This is no less true with respect to non-church, organizational exemptions. In disputes involving group entities, the nuances of particular circumstances must be accounted for in the moral deliberation involved in the prescription of (corporate) legal rights. Hence, in my opinion, the U.S. Supreme Court's ruling in favor of business owner Jack Phillips' religious exercise (*Masterpiece Cakeshop* (2018))[85] was ethically justifiable from a Catholic perspective, as was the Court's insistence that rules concerning religious neutrality should be applied evenly between similar cases. I also think, however, that a Catholic position *could* accept the Court's recognition that state interests "could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed."[86] This balancing[87] in favor of state interests could be morally justified if we recognize (i) that organizational exemptions for public accommodations like bakeries can create unequal access for citizens seeking to do business in a (presumably secular or multi-religious) marketplace and (ii) that situations of unequal access for particular citizens to the marketplace can be incompatible with the temporal common good over which the state has responsibility. Undoubtedly there will be disagreement within Catholic circles over what the temporal common good demands in these kinds of situations, so particular circumstances must be taken into account to encourage prudent moral deliberation (and no mere calculus over incommensurable goods).

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[85] Masterpiece Cakeshop v. Colorado Civil Rights Commission, 138 S.Ct. 1719 (2018) (Ginsburg, J., and Sotomayor, J., dissenting) (holding that the "Commission did not comply with the Free Exercise Clause's requirement of religious neutrality").

[86] *Masterpiece*, 138 S.Ct. at 1722.

[87] I use the term "interest-balancing" in a qualified, Christian ethical sense. See discussion at n. 79 above.

### 1.3.3 A Protestant perspective on organizational exemptions

In contrast to a Catholic approach to organizational exemptions, which focuses upon moral deliberation according to a particular ethical system, a broadly Protestant approach tends to emphasize morally relevant concepts generally acceptable to varieties of Christian traditions – concepts such as individual conscience, the plurality of organizational contexts for conscientious activity and, as a limiting dimension, a conditioned respect for democratic procedures. Having already discussed individual conscience (see Section 1.1), I turn immediately to the latter two concepts.

On an ecumenical Protestant account, the activity of conscience pertains not only to the individual, but also to communities.[88] Moreover, according to the *Statement on Religious Liberty*, the right to religious liberty, being "essential to the expression of [the individual's] inner freedom," is not restricted to a particular type of communal context. For instance, the *Statement* is fairly explicit about the practice of religious conscience, and a corresponding right to this, within economic-associational settings. The *Statement* reads: "[Religious liberty] includes freedom to practice religion or belief, whether by performance of acts of mercy or by the expression in word or deed of the implications of belief in social, economic and political matters, both domestic and international."[89] On this understanding, churches and even for-profit firms are viable and ethically appropriate places to exercise religious beliefs. With regard then to conscientious activity and a

[88] The Third Assembly of the World Council of Churches, "Statement on Religious Liberty, New Delhi 1961," 36, line 34.

[89] The Third Assembly of the World Council of Churches, 36, lines 45-49.

corresponding right to it, there is no fundamental difference between these organizational-types.

A right involving wide organizational-applicability is also affirmed in Protestant responses to the federal government's contraceptive mandate. Consider the amicus brief penned by numerous theologians in support of Hobby Lobby. The brief holds that "requiring a Protestant Christian to choose between violating the Government's regulations or violating his sincerely held religious beliefs substantially burdens his exercise of religion."[90] This argument relies upon several tenants of Christian doctrine, including (i) the requirement that "faith govern every aspect of a Christian's life,"[91] (ii) the vocation to engage in "seemingly secular work *because of* its concomitant spiritual dimension,"[92] and (iii) refraining from aiding or abetting another's wrongdoing, lest one "sin against Christ" (1 Corinthians 8:9-13).[93] Notably, each of these doctrinal points is applicable to believers in *any* organizational context. Supporting this position, the brief states: "Historically, the Protestant Reformation of the 16th and 17th centuries brought about a revitalized view of vocation, wherein *all* work done in faith by God's people was sacred, whether accomplished in the church and monastery or in the fields and courthouse."[94] Hence, we

[90] Brief for 38 Protestant Theologians et al., *supra* note 61, at 4.

[91] Brief for 38 Protestant Theologians et al., at 6.

[92] Brief for 38 Protestant Theologians et al., at 11 (italics in original).

[93] Brief for 38 Protestant Theologians et al., at 24.

[94] Brief for 38 Protestant Theologians et al., at 15. Elsewhere, the brief states, "These holistic demands of Christianity require consistency in familial, business, and social relations and are not limited to sacerdotal, ecclesial, or ritual matters" (p. 8).

are to understand that Christians are called to live "in accordance with the dictates of their faith and conscience," no matter the particular occupation or organizational setting.[95]

An exemption regime of wide organizational-applicability requires practical limits, however, since conscientious activity of one sort may unjustly infringe upon the conscientious activity of another type or even upon legitimate government interests. To address this issue, the World Council of Churches and Protestant critics of the contraceptive mandate point us towards practical limitations provided by liberal democratic procedures.

The 1948 *Declaration on Religious Liberty*, we recall, affirms that the "[political] community has the right to require obedience to non-discriminatory laws passed in the interest of public order and well-being." Without explaining what the "public order" or "well-being" entails, the *Declaration* tacitly supports democratic procedures (implied through the term "passed") that result in governmental activity that may infringe upon religious exercise – whether engaged in by religious organizations, who are encouraged to protect the "corporate and individual rights of the entire [political] community," or by other types of corporate entities, such as for-profit firms.[96]

A deferential position towards government activity is also evident in the contemporary debate. As stated in their letter to Congress, Protestant and other religious

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[95] Brief for 38 Protestant Theologians et al., at 23. Also notice how each of the doctrinal points mentioned above emphasizes the *individual's* response to God, while not explicitly addressing any specific role that communities themselves play in God's salvific work. This omission, it should be stressed, is compatible with the view that groups are indeed theologically indispensable to the individual. For example, see Bonhoeffer's discussion of four mandates (of "labour, marriage, government and the Church," which all entail social units) in *Ethics*, 207-213.

[96] The First Assembly of the World Council of Churches, "Declaration on Religious Liberty, Amsterdam 1948," 7, lines 52-55 ("In the exercise of its rights, a religious organization must respect the rights of other religious organizations and must safeguard the corporate and individual rights of the entire community.").

leaders recognize that the government *can* interfere with someone's free exercise of religion – though, only on condition that "a very high level of proof" is met.[97] This, I take it, is not an opportunistic approval of positive law (i.e., an acceptance of legal regulations only until they inconvenience one's beliefs or lifestyle). It is instead a practical reflection of Christ's command to "[r]ender to Caesar the things that are Caesar's, and to God the things that are God's."[98] Relatedly, the Protestant amicus brief put forward ahead of *Hobby Lobby* references the "accommodation" of religious exercise in light of neutral laws of general applicability.[99] This suggests that Christian theology accepts the legitimacy of democratic procedures, which may result in laws both hostile and friendly towards religious belief – that is, laws that unintentionally burden conscience (e.g., the contraceptive mandate) as well as laws that protect religious exercise (e.g., RFRA). Certainly, then, a Protestant position does not reject outright the legitimacy of laws instituted through secular and democratic means.

That said, it should be stressed that a Protestant approach to organizational exemptions is not characterized by blind obedience to governmental interests or an indiscriminate assertion of the rights of corporate conscientious activity. For one, there is room within theological frameworks to push back against legal regulations. Indeed, believers have the legal prerogatives and theological resources to conscientiously object to certain laws and thus seek relief (e.g., to seek an alternative to conscription in time of war), to judge other laws as entirely unjust and thus seek their repeal (e.g., as with the

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[97] "Protecting the Religious Freedom Restoration Act of 1993 - Letter to Congress," para. 4 (referencing Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(b) (2017).

[98] Mark 12:17 (Revised Standard Version, Second Catholic Edition).

[99] Brief for 38 Protestant Theologians et al., at 20.

contraceptive mandate, as applied to public-serving, religious organizations), and to defend still other laws as necessary for the reasonable living-out of one's faith in society (e.g., the Religious Freedom Restoration Act or the First Amendment).[100] Furthermore, a Protestant perspective on organizational exemptions demands personal and societal virtues in order for diverse and often competing rights-claims to be handled reasonably between litigating parties. In this regard, the virtues of responsibility and respect are paramount. As the World Council of Churches states: "The freedom with which Christ has set us free calls forth responsibility for the rights of others. The civil freedom which we claim in the name of Christ must be freely available for all to exercise responsibly."[101] In other words, a Protestant vision of organizational exemptions entails reasonable application, through respect for others' rights, whether God-given and subsequently recognized in law, or merely promised through democratic deliberation.

### 1.3.4 Summary

Organizational exemptions constitutes what I consider to be the second form of corporate religious liberty that is discernible in ecclesial statements from both the Catholic and Protestant traditions. Figure 3 below provides a summary visualization.

In contrast to freedom of the church, which applies to religious organizations only, organizational exemptions pertains especially to non-church entities that object to generally

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[100] See United States Conference of Catholic Bishops, "Our First, Most Cherished Liberty," 7; and "Free Exercise of Religion," para. 5.

[101] The First Assembly of the World Council of Churches, "Declaration on Religious Liberty, Amsterdam 1948," 7.

applicable laws on religious grounds. In particular, this form of corporate religious liberty covers any organizational activity or function, whether ostensibly or overtly religious, that a non-church entity engages in as part of its religious belief or exercise. With respect to the actual agents or subjects involved, this theory emphasizes the flesh-and-blood individuals whose religious claims are at stake. And, while not denying their existence, it does not stress as a normative matter the group entities involved. The theory of organizational exemptions discerned here therefore shares an individualist framework with the freedom-of-the-church model discussed above (see Section 1.2).

There is an important distinction discerned, however, between the individualism of organizational exemptions and the individualism of freedom of the church. I here address this distinction preliminarily and later flesh out its conceptual bases and legal implications (see Section 3.2, especially).

Perhaps the most distinctive feature of the individualist framework of freedom of the church is its complementary and theologically grounded form of group realism – according to which the Church herself is understood to have a "supernatural personality" or a *sui generis* agency following from various corporatist theological models, such as the Church as the mystical Body of Christ.

By comparison, the individualist framework of organizational exemptions makes no reference to such group realism. Why? For one, non-church entities typically lack visible ecclesial structures, such as clerical roles, rites of worship, and sacraments – hence, their categorization as *non-church*. Within the Catholic tradition at least, visible ecclesial elements are more or less necessary for identifying the presence of the invisible Church of Christ, which Catholics believe acts through a supernatural personality and subsists within

the visible Roman Catholic Church.[102] These doctrinal points are useful for our purposes because, if non-church entities like business firms lack visible ecclesial elements, then it is difficult to attribute the *sui generis* agency of the invisible Church of Christ to those organizations. It follows that non-church entities (presumably) lack a supernatural personality and therefore are poor subjects of a theologically grounded, strongly group-realist defense.

Missing a secure corporatist theological-ground, a theory of organizational exemptions is individualist to a greater extent than a theory of freedom of the church. This point holds for either a Catholic or Protestant construction. A question that follows is whether a heavy emphasis upon flesh-and-blood individuals affects the practical limitations of organizational exemptions in general or, in other words, morally differentiates organizational exemptions from freedom of the church. There is reason to think that it does.

Consider a heavy individualist emphasis *together with* significant changes in organizational context. If the latter entails a change from a voluntary association to a non-voluntary kind, for example, then the change entailed is morally relevant – especially within an individual-rights paradigm. Hence, on this individualist construction, we may say that a legal exemption is morally justified when granted to a voluntary association, but that it is not justified when granted to a state-run entity. This is so because an exemption for the latter is expected to infringe upon the individual rights of religious dissenters served. (Consider the freedom of churches to refuse officiating same-sex wedding ceremonies, in comparison to the lack of freedom for governmental bodies to do the same.)

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[102] See discussion in Sub-section 1.2.1 above and in Chapter 4 below.

Practically speaking, then, a regime of organizational exemptions that takes seriously the diverse moral stakes involved will subject those rights, values, and interests (whether individual or corporate) to some explicit procedure of interest-balancing.[103] A similar procedure could be applied in circumstances involving freedom-of-the-church claims. But the religiously homogenous membership, the general organizational design, and the (theologically) corporatist defense involved would most likely weaken normative justifications for the use of explicit and heavy-handed governmental interest-balancing in the church or religious institutional context. At any rate, if such interest-balancing were to be used on churches, then there would be strong moral grounds to reject the application of organizational exemptions upon churches altogether. It could gloss over fundamental organizational differences of tremendous moral importance.

On a final note, we observe in a theory of organizational exemptions the same conceptual and normative concerns raised in our discussion of religious liberty in general. These concerns dealt with religious liberty's conceptual foundations (being grounded in truth and/or conscience) and just moral limits (relating to free conscience, individual rights and state authority). The reoccurrence of these concerns is unsurprising, given the churches' emphasis upon the individual believer in their discussion of organizational exemptions. An added and ethically salient point in this context involves the protection of individual conscience in certain organizational settings (e.g., non-voluntary associations). How shall an individual right of conscience, translated into a group right of conscience, be handled for purposes of legal prescription?

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[103] I understand "interest-balancing" in a qualified, Christian ethical sense. See n. 79 above.

Having come full circle, we now address the suggestions and queries raised throughout this chapter in order to explore how our subsequent work may progress.

**Figure 3. Catholic and Protestant conceptions of organizational exemptions**

| | Roman Catholic Church | Common | WCC/Protestant |
|---|---|---|---|
| Conceptual bases | Applicable to non-church entities<br><br>Grounded in *objective moral standard,* framed in terms of human dignity, conscience and *truth* | Individualist | *Organizationally expansive*, applicable to churches as well<br><br>Grounded in *individual conscience* and conscientious activity within organizational contexts |
| Legal dimension | Negative right or liberty, held by individual or community against (undue) government interference<br>Varying degree of attention to descriptive features of non-church entities, e.g., lack of voluntary association or heterogeneous religious membership | | |
| Moral limits | Limited by an *objective moral standard*, in light of *particular circumstances*, including organizational context (RC); limited by *democratic procedures*, and by *virtues* of responsibility and respect (WCC) | | |

## 1.4 Conclusion

Recall that the immediate aim of this chapter is twofold. First, it seeks to make plain foundational normative principles or positions of the churches' teaching on (corporate) religious liberty. Second, it seeks to understand how the churches' contributions to the corporate religious liberty debate might be refined by the group ontology of the Christian tradition, particularly with respect to the individual-group divide and related issues. Thus far, the investigatory work of this chapter has achieved the first intention, and critical assessment throughout has tacitly suggested a direction to pursue in regard to the second. In this concluding section, I summarize major normative positions touched upon

throughout this chapter. Then I review and address certain weaknesses in the churches' theorization so as to make explicit the group-ontological direction to be pursued.

To begin, it will be useful to re-iterate that my primary aim in this doctoral thesis is *not* to critique the churches' normative reflection at a foundational level. I largely assume the validity and strength of the relevant moral principles and so readily integrate them into a renewed account of corporate religious liberty. In doing this, I am able to focus upon and refine the *application* of those principles as occurs when answering the thesis's guiding question concerning to whom or to what corporate religious liberty applies. Accordingly, the thesis's proposed account of corporate religious liberty does not build a new normative theory from scratch. Instead, it demonstrates how we can apply the churches' established moral teachings in a novel and focused manner, that is, in a manner informed by the Christian tradition's group-ontological thought. Having thus noted the moral conservatism (so to speak) of this thesis's project, let us review some basic normative positions from the previous chapter-sections. We will take these basic positions forward into the remainder of the thesis's constructive work.

Section 1.1 made evident that the churches' conception of religious liberty is grounded in an ethically salient, theological anthropology. According to this anthropology, the human person is created to respond freely to God's calling in his or her life. Hence, as a normative matter, legal and social arrangements must be such that the person is able to respond freely in actual fact. This response entails following one's conscience, where God is heard calling; and it entails conforming to a universally accessible order of moral and religious truth (especially, though not exclusively, in a Catholic understanding). As for the legal and social arrangements required, the churches view religious liberty as a negative right that is held by an individual or community against government interference. This right is by no means absolute, however. Its exercise requires political prudence and

responsibility, especially with regard to anti-discrimination laws and other prerogatives of the civil state, which has charge over the political common good.

The idea that the state has a particular task in relation to man's well-being was elaborated upon in Section 1.2, where the churches' first form of corporate religious liberty – freedom of the church – was discussed. Freedom of the church, we found, is a normatively complex theory. As articulated by the churches, it is demarcated by an action-based approach, which recognizes specific acts or functions proper to the church that generally merit non-interference from civil authorities. In addition, it is understood to entail a negative right or liberty. Given the theory's corporate application, this right could be understood in two ways: first, as a derivative group right, that is, a right whose normative ground is derived from relevant individual rights, or, second, as a *sui generis* group right that is justified in part by the normative relevance of the invisible Church's group agency and/or the position that groups are morally formative (of individuals and society) and thus merit legal solicitude. I suggest an appropriate choice between the two below.

Finally, Section 1.3 gave an interpretation of the churches' emerging theory of rights applicable to non-church entities such as for-profit enterprises. At its normative core, this (so-called) theory of organizational exemptions emphasizes individual rights, especially the freedom of (individual) conscience as exercised within any organizational setting. It also explicitly subjects the individual rights identified to interest-balancing, which, when understood to entail the full exercise of practical moral reasoning, is meant to facilitate the exercise of organizational exemptions with responsibility and (potentially) with regard to an objective moral standard. Finally, in comparison to the freedom of the church, the churches' theory of organizational exemptions has an acutely individualist character, given its lack of a complementary and theologically corporatist defense.

**Figure 4. Summary of an ecclesial account of corporate religious liberty[104]**

| | Religious liberty | Freedom of the church | Organizational exemptions |
|---|---|---|---|
| Conceptual bases | Part of God's creative and redemptive work; inscribed in human nature | Grounded in individual right, while recognizing social nature of man | Individualist |
| | Free response to God | Description of Church as voluntary association; and of Church as Body of Christ, as active group agent | Applicable to non-church entities (RC); grounded in objective moral standard, framed in terms of human dignity, conscience and truth (RC) |
| | Involving human dignity and inalienable right | Recognition of positive social contribution of religious associations to wider social and political community | Organizationally expansive, applicable to churches as well (WCC) |
| | Based in conscience (RC, WCC) and/or truth (RC) | Distinction between proper functions and ends of church and state | Grounded in individual conscience and conscientious activity within organizational contexts (WCC) |
| Legal dimension | Negative right or liberty, held by individual or community against undue government interference | Negative right or liberty, held by Church and its members against the state with respect to specified activities | Negative right or liberty, held by individual (or community(?)) against undue government interference |
| | | Implicit group right; explicit appeal to individual right to religious liberty | Varying degree of attention to descriptive features of non-church entities, e.g., lack of voluntary association or heterogeneous religious membership |

[104] Figure 4 labels points of divergence between the Catholic (RC) and Protestant (WCC) positions; though not every point should be understood to signify a conceptual issue upon which both traditions deeply disagree. For example, the Catholic Church urges religious freedom to be exercised with political prudence while the World Council of Churches encourages responsibility in this regard. This difference is not substantial in itself; yet I include such differences, firstly, to allow each tradition to speak for itself and, secondly, to see the minor differences in relation to differences that may indeed be substantial. A substantial difference, for instance, involves whether religious liberty is grounded chiefly in an un-coerced conscience or in a free assent to religious and moral truth. Prudence and responsibility, I take it, are markedly different in nature when we consider the different ends to which they could be directed.

| | | | |
|---|---|---|---|
| | | Extensive list of specified freedoms<br>Appeal to related rights, including rights of association, speech, and ownership of property | |
| Moral limits | Exercised within just limits, involving political prudence (RC); exercised with responsibility (WCC)<br>With requirements of the common good, ratification by civil authority, and legal norms consistent with an objective moral order (RC)<br>No moral license to error; no implicit right of error (RC)<br>Involving respect for non-discriminatory laws passed by the state in the interest of public order and well-being (WCC) | Respect for the proper spheres or activities of church and state (RC)<br>Respect anti-discrimination laws, except with respect to essential activities (WCC) | Limited by an objective moral standard, in light of particular circumstances, including organizational context (RC)<br>Limited by democratic procedures, and by virtues of responsibility and respect (WCC) |

As Figure 4 indicates, the churches' understanding of corporate religious liberty has much to offer, especially with regard to conceptual bases, legal dimensions and moral limits. At a general level, the constituent principles or positions are unproblematic. But their application to disputes requires careful consideration of the appropriate legal subjects involved. On this point, the churches' contributions to the corporate religious liberty debate have been inadequate. In this chapter, we addressed recent public statements from church communities that have (i) reduced religious institutions into voluntary associations, (ii) over-emphasized individual rights in the context of church freedoms, and (iii) applied the term "religious institution" too broadly to non-church entities (see Sub-sections 1.2.3 and 1.3.1 especially). Common to these tactics is an inadequate understanding of what particular groups are and why they themselves matter normatively. And, perhaps more fundamentally, these tactics point to a need to account adequately for *all* subjects involved

in corporate religious liberty disputes, including flesh-and-blood individuals as well as the religious activities or functions they engage in. Indeed, the availability of diverse legal subjects presents significant descriptive and moral difficulties for the churches' theorization and, in general, for any theory of corporate religious liberty.

For example, if it is not made clear to whom or to what a corporate religious liberty right applies, then there is a strong possibility that the right can be used irresponsibly or without regard to just limits. For instance, if a relevant right is said to apply only to "religious organizations" and if such organizations are not adequately defined, then it might be the case that *all* organizations will enjoy the right in question. This could have far-reaching, negative effects upon third-party individuals and society at large, depending on the nature of the regulation that the right affects. Alternatively, if a right is said to apply to religious organizations narrowly defined, then other entities that engage in essentially comparable religious actions may be denied the relevant corporate religious liberty right on morally tenuous grounds.

So organizational differentiation and the identification of proper legal subjects (whether groups, individuals or actions) are essential for the moral purposes of corporate rights prescription. From this, we can infer that the *empirical* question concerning to whom or to what corporate religious liberty applies is of fundamental *moral* importance and, thus, that any subsequent development of the churches' theorization will need to prioritize a response to this ethically salient, empirical question.

Immediately it must be conceded that a description-led approach to legal prescription is *not* popular among prominent political liberals engaged in corporate religious liberty discourse. They contend that group descriptions should *follow from* moral commitments and not proceed the other way around. But, as I argue in the next chapter, the morally driven approach is methodologically unsound. It creates an image of what social reality should be and then forces that image upon reality without due regard to

objective descriptive facts and other normative values. Following Finnis, we can say that the morally driven approach creates a "self-'validating' fiction" and ignores "social reality as best we can understand it."[105]

As I see it, then, the central task for a Christian ethical account of corporate religious liberty is to understand social reality as best we can, especially as regards group- or social-life and its relation to the exercise of religion. No less important, a separate and subsequent task involves determining how the churches' moral reflection on religious freedom bears upon the religious aspects of social and group reality and can thus support (and appropriately limit) corporate religious exercise. The question that remains for us now pertains to the manner in which this theory will be developed. How shall we understand social or group reality, such that we can determine the moral propriety of extending or withholding legal rights of religious liberty to organizations of diverse kinds? Further still, how shall we understand social or group reality with a view towards the various legal subjects at stake – i.e., the groups, individuals, and actions involved?

Briefly put, I propose developing the churches' theory of corporate religious liberty through use of a conception of group ontology found in the writings of Saint Thomas Aquinas and developed by contemporary philosophers like John Finnis, Christian List, Seamus Miller and Richard Ekins. This ontology understands groups as verbs (that is, as actions engaged in by flesh-and-blood individuals) and, thus, for our purposes has several advantages. For one, its social-action focus allows us to bridge the divide between possible legal subjects. Furthermore, it avoids a position, heretofore not addressed and rejected by

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[105] Finnis, *Aquinas*, 28.

Miller (along with Finnis, List and Ekins[106]), which holds that collective entities themselves – like natural persons – are moral agents and thereby deserve legal rights.[107] So the framework of group ontology endorsed here avoids a problematic conflation of corporate entities with natural persons. (Of course, as regards the supernatural personality of the Church, which may claim moral group rights of its own, a different approach could be required. But that approach, discussed in Chapter 4, need not be antithetical in the end to a social-action, group ontology.)

Perhaps the most important aspect of the group ontology proposed is its ability to work descriptively *and* normatively. Since it examines the coordinated actions that create groups and group life, a Thomistic group ontology can describe *how* those actions work together to constitute groups, investigating both the ends to which the actions are aimed and the conditions that cause the actions and thus group-life to occur (or to disintegrate). It also can morally evaluate the group-life observed, drawing attention to the freely chosen actions of the flesh-and-blood individuals involved. In turn, it can inform the moral deliberation that constitutes corporate rights prescription and thereby assist in responding to questions such as: Why should we extend religious liberty rights to this type of entity? How will the social relations observed in the group-type be affected? Ought we to accept those effects as morally and theologically valuable?

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[106] John Finnis, *Natural Law & Natural Rights*, 2nd ed. (Oxford: Oxford University Press, 2011), 150–53; Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford: Oxford University Press, 2011), 9–11; and Richard Ekins, *The Nature of Legislative Intent* (Oxford: Oxford University Press, 2012), chap. 3.

[107] Seumas Miller, *The Moral Foundations of Social Institutions: A Philosophical Study* (Cambridge: Cambridge University Press, 2010), 32. Miller notes: "No such justification [for the ascription of legal rights to collective entities] is acceptable if it relies on the ascription of moral properties to collectives as such."

The next chapter provides an extensive engagement with the idea of group ontology in general, focusing upon its skeptics in the corporate religious liberty debate. Having summarized (i) what the churches' understanding of corporate religious liberty is, (ii) how it could be developed in terms of the thesis's guiding question, and (iii) the basic "group-descriptive to legal-prescriptive" position that my developmental work endorses, let us turn immediately to the issue of group-agency skepticism.

## 2 Group ontology and skeptical arguments

In the previous chapter, I concluded that a useful way to develop a Christian ethical account of corporate religious liberty entails identifying the legal subjects involved (which, I noted, is a matter of group-ontology analysis) and subsequently considering relevant normative grounds and practical limits in light of the descriptive facts discerned. This manner of proceeding, however, is either misused in or is precluded from the contemporary corporate religious liberty debate. As we will see below, there are prominent theorists who are content in creating descriptive fictions out of groups in order to justify pre-determined and unreasonable moral or legal conclusions. Alternatively, there are those who eschew group-ontological descriptions altogether, claiming them to be indeterminate with respect to legal conclusions and thus having no (useful) purpose for legal prescription. If we are to execute our program for theological development, we must first address these contentions head-on. This apologetic work is the central aim of the present chapter.

This chapter examines and critiques three questionable accounts of group ontology (or "group agency"), which are either directly or indirectly deployed in a process of legal prescription. Section 2.1 begins with Justice Ruth Bader Ginsburg's corporate theory- and corporate law-based attempt to eliminate the possibility of group agency for profit-making corporations. Section 2.2 engages with James D. Nelson's theory of social conscience, which reduces group agency to explicitly religious group-types through stipulation of a narrow set of group-descriptive criteria or requirements. And Section 2.3 confronts Richard Schragger and Micah Schwartzman's agnostic approach to group agency, which holds the Deweyean-inspired belief that group ontology distracts from the actual moral work required for legal prescription. Common to the three accounts is a general skepticism held towards: (i) extending corporate religious liberty rights to for-profit corporations,

and/or (ii) the possibility of accurately describing groups apart from a clearly normatively biased agenda. Following the distinct character of each, I refer to the three accounts as the "elimination," "reduction," and "agnosticism" approaches respectively.

It should be noted upfront that I ultimately disagree with the elimination and reduction approaches, but find merit in their "group-descriptive to legal-prescriptive" movement. And while the agnosticism of Schragger and Schwartzman should be eschewed, a method of legal prescription attributable to them warrants our further consideration. This latter methodological point will be addressed fully in Chapter 3 where I develop our promised Christian ethical and group-ontological account of corporate religious liberty.

Without further delay, I begin this chapter's sustained criticism, beginning with the elimination approach advanced by Justice Ginsburg.

## 2.1 Justice Ginsburg and group-agency elimination

Justice Ginsburg's elimination approach is articulated in the dissenting opinion she authored in *Burwell v. Hobby Lobby*. Her approach relies in large part upon traditional theories of the corporation (or theories of corporate personality) in order to deny the possibility of for-profit group agency, which in turn, by Ginsburg's lights, would preclude for-profit corporations themselves from making exemption claims under the Religious Freedom Restoration Act (RFRA).[1] Her approach is over-inclusive, however, being

[1] See *Hobby Lobby*, 134 S.Ct. at 2794 (Ginsburg, J., dissenting) ("the exercise of religion is characteristic of natural persons, not artificial legal entities").

applicable not only to for-profit corporations, but also to churches and religious organizations. It also evinces an unfamiliarity with state corporation law, which helps make group agency possible. As demonstrated below, it is apparent that an elimination approach based upon Ginsburg's construal is misguided. Nevertheless, the moral rationale behind Ginsburg's skepticism – a rationale concerned with third-party harms and respect for individual consent (or, perhaps, the political common good and individual conscience) – is worth our attention.

### 2.1.1 Appropriation of corporate theory

To assess Ginsburg's approach, we first summarize it as presented in her dissenting opinion in *Hobby Lobby*.

A central question before the *Hobby Lobby* Court was whether for-profit corporations rank among "person[s]" who "exercise religion."[2] As a threshold question, an adequate response to it would help determine in which direction the Court would rule regarding the religious liberty claims of a collection of closely held for-profit corporations. If the Court answered positively, then it could apply RFRA regulations to the disputed contraceptive mandate. If it ruled negatively, the RFRA regulations would not have applied and the for-profit firms involved would require different legal grounds for standing. As it turned out, the Court majority answered this question positively and so a RFRA analysis was applied to the contraceptive mandate. But Justice Ginsburg in her dissent reached a negative answer to this threshold question.

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[2] *Hobby Lobby*, 134 S.Ct. at 2793 (Ginsburg, J., dissenting).

Reviewing her reasoning, we see that Ginsburg used a corporate-theory-based argument to reach her conclusion. Ginsburg's argument is as follows. She writes:

> Until this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA. The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities. As Chief Justice Marshall observed nearly two centuries ago, a corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law." . . . Corporations, Justice Stevens more recently reminded, "have no consciences, no beliefs, no feelings, no thoughts, no desires."[3]

Within this argument is reference to two types of corporate theory – namely, artificial entity theory (whereby a corporation is understood to be an artificial creation of the state) and corporate realism (which, on some accounts, views the corporation as a being that is metaphysically distinct from its members, having a mind and agency of its own).[4] Corporate theory as a discipline within law and the social sciences in general is constituted by more perspectives of the firm than these two approaches and, indeed, her characterizations of each theory are by no means the only ones available. Leaving aside the implications that alternative theories might have upon her argument, let us consider why Ginsburg chooses to reference these two theories in particular.

First, we note that Ginsburg's corporate-theory argument is framed by her general dissent against the Court's decision to extend RFRA protections to closely held, for-profit corporations. She thinks that this decision will apply to all "commercial enterprises,

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[3] *Hobby Lobby*, 134 S.Ct. at 2794 (Ginsburg, J., dissenting) (citations ommitted).

[4] For an overview of types of corporate theory see Eric W. Orts, *Business Persons: A Legal Theory of the Firm* (Oxford: Oxford University Press, 2015), 13 (describing the concession, participant, and institutional theories), 15 (describing real-entity theory, which is attributed to Otto von Gierke: "intermediary institutions . . . should be considered to have a metaphysically 'real' existence and an 'organic' institutional permanence separate from their individual participants."). Note that, within the general study of corporate theory, there is no uniform nomenclature with regard to different kinds of theories.

including corporations, along with partnerships and sole proprietorships," allowing them the opportunity to "opt out of any law . . . they judge incompatible with their sincerely held religious beliefs."[5] Her dissent shares in the spirit of Justice Scalia's law-unto-himself-argument in *Employment Division v. Smith*, but focuses upon the potential harms that an exemption (or accommodation) for for-profit firms would cause to third parties.[6] She writes that the Court's opinion would demand accommodation,

> no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith – in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ.[7]

In short, Ginsburg believes that recognition of for-profit claims to religious liberty – whether by the Free Exercise Clause or RFRA – would have deleterious social consequences. She utilizes artificial entity theory and corporate realism, therefore, in order to convey the absurdity of extending religious liberty rights to commercial firms.

Why, Ginsburg asks, should the law protect the religious exercise rights of an artificial being (e.g., a corporation) when the exercise of religion is characteristic only of natural persons (i.e., flesh-and-blood individuals)? Ginsburg's reference to artificial entity theory creates for the reader a clear dichotomy regarding the possible (and proper) agent of religious exercise: a corporation *or* an individual. To support this dichotomy, Ginsburg immediately turns to Justice Steven's position in *Citizens United v. FEC* whereby he references a strong form of corporate realism. "Corporations, Justice Stevens more

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[5] *Hobby Lobby*, 134 S.Ct. at 2787 (Ginsburg, J., dissenting).

[6] Employment Division v. Smith, 494 U.S. 872, 879 (1990).

[7] *Hobby Lobby*, 134 S.Ct. at 2787 (Ginsburg, J., dissenting).

recently reminded, 'have no consciences, no beliefs, no feelings, no thoughts, no desires.'"[8] Justice Steven's reference, of course, is a repudiation of the view that corporations can hold their own (religious) beliefs. By stressing this repudiation within the artificial-entity dichotomy, Ginsburg drives home the point that only flesh-and-blood individuals are "person[s]" who "exercise religion."[9]

As confident as Ginsburg's corporate-theory argument sounds, its strength relies upon that confidence as opposed to its logic. There are two reasons why we should reject its eliminative vision of group (religious) agency and its conclusions against for-profit exemption claims.

### 2.1.2 If corporations cannot exercise religion, then neither can churches

In her corporate-theory argument, Ginsburg writes that "the exercise of religion is characteristic of natural persons, not artificial legal entities."[10] While Ginsburg asserts this claim to argue against the extension of religious liberty rights to for-profit corporations, she fails to acknowledge that churches and religious organizations are (often) incorporated under law and therefore count as artificial legal entities, which, on her understanding, are incapable of exercising religion. Following Ginsburg's logic, should we conclude that *both* for-profit firms *and* churches do not exercise religion? Let us take Ginsburg's argument to

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[8] *Hobby Lobby*, 134 S.Ct. at 2794 (Ginsburg, J., dissenting) (quoting Citizens United v. Federal Election Commission, 558 U.S. 310, 466 (2010) (opinion concurring in part and dissenting in part)).

[9] *Hobby Lobby*, 134 S.Ct. at 2793 (Ginsburg, J., dissenting).

[10] *Hobby Lobby*, 134 S.Ct. at 2794 (Ginsburg, J., dissenting).

its logical conclusion – first by outlining it in syllogistic form, then by filling in the details with reference to actual corporate law.

Setting aside Ginsburg's reference to corporate realism, which ultimately is used to support her use of artificial entity theory, we can outline Ginsburg's argument as follows:

| Syllogism B | |
|---|---|
| Premise 1 | Corporations are artificial legal entities. |
| Premise 2 | Artificial legal entities cannot exercise religion. |
| Conclusion | Corporations cannot exercise religion. |

This syllogism, of course, fails to consider a preliminary syllogism that Ginsburg is forced to omit in her corporate-theory argument. This suppressed syllogism can be read as:

| Syllogism A | |
|---|---|
| Premise 1 | Churches and religious organizations are corporations. |
| Premise 2 | Corporations are artificial legal entities. |
| Conclusion | Churches and religious organizations are artificial legal entities. |

Combined with Ginsburg's original syllogism, the suppressed syllogism derails Ginsburg's corporate-theory argument altogether. Considered together, they read:

| Syllogism A | Syllogism B | |
|---|---|---|
| Premise 1 | | Churches and religious organizations are corporations. |
| Premise 2 | | Corporations are artificial legal entities. |
| Conclusion | Premise 1 | Churches and religious organizations are artificial legal entities. |
| | Premise 2 | Artificial legal entities cannot exercise religion. |
| | Conclusion | Churches and religious organizations cannot exercise religion. |

Ginsburg, of course, does not want to arrive at the conclusion that churches cannot exercise religion. Therefore, in order to avoid addressing her suppressed syllogism and thereby taking her corporate-theory argument to an unpalatable conclusion, Ginsburg immediately changes course to emphasize the Court's well-recognized "autonomy of

religious organizations" (or freedom-of-the-church) doctrine.[11] I discuss the distinct, normative strength of this doctrine below (see Sub-section 2.1.4).

I turn now to the actual law. A central weakness of Ginsburg's corporate-theory argument is its failure to recognize how organizations, like churches, that we do not normally think of as corporations are indeed established by law under corporate forms and therefore are artificial entities.

For instance, consider Ginsburg's reference to *Trustees of Dartmouth College v. Woodward*. This was a landmark case that both identified corporate persons as artificial entities and held that they have the same rights as natural persons under the Constitution's contract clause.[12] However, in this particular dispute, it is important to note that Chief Justice Marshall was not referring to any for-profit corporations. Indeed, *Dartmouth* involved two parties (Dartmouth College and the state legislature of New Hampshire), neither of which were or are for-profit corporations. If Ginsburg's argument was meant to categorize for-profit firms alone as artificial entities, then inclusion of *Dartmouth* works against this intention by extending the artificial-entity category to other organizational types, including a not-for-profit organization (Dartmouth) and a public body (the New Hampshire state legislature).

In addition to passing over *Dartmouth* as a support, perhaps Ginsburg should have referred to state corporation law to recognize that all the relevant organizational types at issue in the contraceptive mandate – from for-profit firms to not-for-profit religious

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[11] *Hobby Lobby*, 134 S.Ct. at 2794-7 (Ginsburg, J., dissenting).

[12] Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 636 (1819) ("[a] corporation is an artificial being, invisible, intangible, and existing only in the contemplation of the 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.").

organizations – are or can be corporations and thus, on her logic, are artificial entities incapable of exercising religion. The Oklahoma General Corporation Act, under which Hobby Lobby Stores is incorporated, is a basic example of state corporation law. The Act requires that individuals complete a certificate of incorporation in order to create a functioning corporate body recognized by the state.[13]

Of its seven basic requirements the seventh, which categorizes churches as not-for-profit entities, stands out as the most pertinent for our discussion.[14] There, we see that the Oklahoma General Corporation Act recognizes churches as incorporated entities, differing from for-profit corporations only by the former's inability to "afford pecuniary gain" to its members. Oklahoma's corporate law recognizes no further substantial differences between churches and for-profit firms. It follows that, if Ginsburg is to hold that for-profit firms alone are artificial, then she must show that it is the profit-making motive that makes corporations artificial (i.e., mere creations of the state). This, however, is not part of Ginsburg's corporate-theory argument, and I know of no scholar who would attempt to defend such a position.

### 2.1.3 Corporations, as artificial, can exercise religion

[13] 18 OK Stat § 18-1006(A) (2014).

[14] 18 OK Stat § 18-1006(A)(7)(a)-(d) (2014). This section reads: "[7.] If the corporation is not for profit: [a.] that the corporation does not afford pecuniary gain, incidentally or otherwise, to its members as such, [b.] the name and mailing address of each trustee or director, [c.] the number of trustees or directors to be elected at the first meeting, and [d.] in the event the corporation is a church, the street address of the location of the church."

Just as the foregoing argument turns on a technical though uncontroversial reading of state corporation law, so does the next. I now argue that, despite their artificial nature, corporations can rightfully be said to exercise religion. Whereas the previous argument entailed an attack on Ginsburg's weaknesses, the present argument is a positive defense of corporate religious exercise and thus of group agency. I offer it here to further show how Ginsburg's elimination approach fails to support its restrictive legal conclusion by simply failing to engage with the mechanisms of state corporation law that help make group agency (specifically, corporate religious exercise) possible.

To begin, consider the fact that state corporation law often speaks of group religious exercise as occurring only within the not-for-profit context. The Oklahoma code, for instance, generally confines its treatment of religious purpose or activity to sections dealing with not-for-profit and specifically charitable corporations. The Oklahoma certificate of incorporation explicitly describes churches as a sub-set of not-for-profit corporations.[15] And a related part of the code, the Oklahoma Solicitation of Charitable Contributions Act, defines a "charitable organization" as:

> any person . . . described in Section 501(c) of Title 26 of the United States Code, . . . that is organized and operated primarily for religious, charitable, scientific, literary, educational, artistic, cultural, economic development, civic improvement, testing for public safety, research, humanitarian, animal welfare, recreational, or environmental protection purposes[.][16]

Viewed with the certificate of incorporation, the Charitable Contributions Act displays a legal schematization in which religious organizations fall beneath a broad, not-for-profit

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[15] 18 OK Stat § 18-1006(A) (2014).

[16] Oklahoma Solicitation of Charitable Contributions Act, 18 OK Stat § 18-552.2 (2014).

category. Coupled with the fact that the Oklahoma code does not, as a default matter, consider for-profit organizations to be religious, these regulations suggest that there is no legal basis for for-profit, corporate religious exercise. Lacking this legal basis, the sheer possibility of group agency for for-profit corporations on religious matters is called into question. After all, if the law itself does not permit group religious exercise within profit-making ventures, then such agency (in the eyes of the law) is eliminated, and for-profit firms lose standing before the courts. This seems to be a situation that Ginsburg herself seems eager to bring about.

There are at least two arguments against this eliminative legal conclusion. First, businesses themselves can exercise religion through the control of distinctly religious organizations. For instance, the Oklahoma code allows charitable organizations to directly maintain and own business entities. Section 18-549 reads:

> Any corporation heretofore or hereafter organized under the laws of the State of Oklahoma for charitable or educational purposes may *maintain* and carry on any and all kinds of business enterprises that an individual or corporation may lawfully carry on under the laws of the State of Oklahoma as auxiliary enterprises . . .

The section continues by affirming the right of charitable corporations to *own* those same business entities:

> and may do so either directly or through any other corporation or corporations, *a majority of whose stock it lawfully owns*, in order that additional funds may be obtained with which to carry out only the charitable or educational purposes of such corporation.[17]

[17] 18 OK Stat § 18-549 (2014) (italics mine).

If a charitable organization can own and control a for-profit corporation, then the business in question is ultimately set up or maintained in order to contribute to the charitable purpose of the parent company. It is difficult if not impossible, therefore, to divorce the purpose of said business from the purpose of the overarching charitable organization. And if the charitable organization has a religious purpose, then the business that is owned and controlled also has a religious purpose. In effect, the business itself exercises religion.

A simpler reason behind the possibility of for-profit corporate religious exercise turns upon what state corporation law does *not* say. While it is true that state codes like Oklahoma's do not generally discuss religious purposes within for-profit contexts, they do not explicitly bar religious exercise within or through for-profit forms. Consider the Oklahoma code's regulations on organizational purpose. The certificate of incorporation requires an entity's incorporators to declare the "nature of the business or purposes to be conducted," which is presumed to entail "any lawful act or activity for which corporations may be organized under the general corporation law of Oklahoma."[18] Seeing how the Oklahoma General Corporation Act does not list religion as an unlawful act or activity, the state allows corporations – both not-for-profit and for-profit – to have a religious nature or purposes. *Pace* Ginsburg, it seems clear that corporations, as artificial and of any profit-making status, can indeed exercise religion. So much for her skeptical, eliminative claim otherwise.

### 2.1.4 Third-party harms and moral deliberation

[18] 18 OK Stat § 18-1006(A) (2014).

The critical analysis above emphasized how Ginsburg's elimination account of group agency suffers from a poor use of corporate theory and state corporation law. In the final analysis, we must admit that Ginsburg's account fails to eliminate group agency or corporate religious exercise for profit-making corporations. It therefore fails to preclude such entities from having standing under religious liberty laws like the Religious Freedom Restoration Act. Nevertheless, we must also admit that the underlying normative rationale of Ginsburg's elimination approach has a certain ethical merit. What exactly is this rationale, and why does it warrant Christian ethical reflection?

Recall that Ginsburg, in failing to pare back the untoward conclusions of a corporate theory-based argument (see Sub-section 2.1.2), immediately pivots to a discussion of the Court's long-standing "autonomy of religious organizations" (or freedom-of-the-church) doctrine.[19] According to Ginsburg, the autonomy of religious organizations is meant to "further[ ] individual religious freedom" for those who voluntarily associate in a religious community.[20] And, in being restricted to voluntary associations alone, it is intended to protect non-adherents from suffering significant third-party harms that may follow from exemptions granted to the religious owners and/or controllers of a (presumably secular) entity.[21]

From a Christian ethical perspective, both moral rationales are of legitimate concern. The Roman Catholic Church and the World Council of Churches recognize the need for men and women to respond freely to God and, therefore, affirm the necessity of

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[19] *Hobby Lobby*, 134 S.Ct. at 2794-7 (Ginsburg, J., dissenting).

[20] *Hobby Lobby*, 134 S.Ct. at 2794 (Ginsburg, J., dissenting).

[21] *Hobby Lobby*, 134 S.Ct. at 2805-6 (Ginsburg, J., dissenting).

legal freedoms to religious belief and exercise. Moreover, both ecclesial bodies and the traditions they represent acknowledge that religious freedom entails no license to irresponsible behavior. As understood within the Roman Catholic tradition, the exercise of religious freedom involves political prudence, discernment of the common good, and respect for legal regulations that are ratified by legitimate civil authorities and consistent with an objective moral order. Relatedly, the World Council of Churches claims that the exercise of religious freedom – especially for, but not limited to, religious organizations – must respect laws passed in the interest of public order and well-being. And, although the WCC's statement pertains specifically to anti-discrimination laws and not to exemptions *per se*, its call to respect the public order and well-being is applicable more generally (see Section 1.1).

There are at least two implications to draw from this overlap between Ginsburg's moral rationale and the Christian tradition's perspective on (individual and associational) religious liberty. First, we can infer – and should make plain – that a political liberal emphasis upon individual rights and public order is not alien to Christian morality. In fact, the Christian ethical tradition places a strong emphasis upon individual rights and the "public order," which can be referred to as the "common good" or "temporal common good." Christian ethical thought on the matter differs from certain political liberal conceptions in terms of ultimate grounds, of course; but the practical overlap between both approaches is relatively apparent. Moreover, given the metaphysical bases of a Christian approach to rights and public order, the Christian tradition (as compared to secular political liberalisms) may be said to more securely ground the normative justifications for any relevant legal regime. I examine this set of claims in more detail below (see Section 2.3 and Chapter 3).

A second implication pertains to distinct types or forms of corporate religious liberty. Along with other group-agency skeptics, Ginsburg argues that free exercise rights

should be restricted to religious organizations – specifically, "churches and other nonprofit religion-based organizations."[22] This implies a single form of corporate religious liberty, applicable to a narrow organizational-type. But the Christian ethical tradition (and a majority of the *Hobby Lobby* Court) does not restrict the exercise of religious freedom to one group-type. In proposing that religious freedom be exercised with responsibility and political prudence, the Christian churches never suggest that religious exercise should be restricted to "churches and other nonprofit religion-based organizations." In fact, the churches break with Ginsburg's restrictive position and explicitly endorse organizational freedoms whenever deemed prudent and in accord with various ethical requirements (see Section 1.3 especially). In the final analysis, therefore, we can infer that Ginsburg's ethical concerns over individual rights and public order need not – and should not – culminate in narrow, organization-specific restrictions. A Christian ethical approach to these concerns grants more room for prudence in the moral evaluation of any given legal dispute; accordingly, it suggests that a regime of corporate religious liberty ought to embrace a form of group protections that is both applicable to non-church entities and capable of thoroughly deliberating[23] upon the competing interests, circumstances, consequences, etc., that are inevitably present within non-church contexts. In other words, the Christian ethical tradition would endorse a doctrine of organizational exemptions (see Section 1.3 and development in Section 3.2).

To conclude: Ginsburg's elimination account of group agency has taught us that *ad hoc* usage of corporate theory and state corporation law can undermine reasonable moral

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[22] *Hobby Lobby*, 134 S.Ct. at 2794 (Ginsburg, J., dissenting).

[23] See discussion on interest-balancing above: Chapter 1, n. 79.

motivations. It also taught us that the intention to protect individual rights and third parties can be further undermined through an unjustifiable restriction to a particular form of organizational freedom. A Christian approach would resist both mistakes, learning from Ginsburg's failures in the first regard and, in the second regard, drawing upon its own ethical resources to construct a positive account of organizational exemptions.

## 2.2 James Nelson and group-agency reduction

The next skeptical approach to address is a reductive form proposed by legal scholar James D. Nelson. A now-rising scholar in corporate and constitutional law, Nelson merits our sustained engagement in large part because of the emphasis he gives to the idea of group or corporate conscience. In the contemporary religious liberty debate, this focus distinguishes Nelson's work from others' scholarship, which generally focuses upon two traditional areas: interpretations of the Religion Clauses,[24] or standard theories of corporate personality.[25] While each subject area adds value to the ongoing corporate religious liberty debate, most scholarship on these topics fails to sufficiently address how conscience grounds a right to religious liberty and how conscience transfers from individuals to corporate entities. Nelson's 2013 article, entitled "Conscience, Incorporated," fills this void by offering a "social theory of conscience," developed with the purpose of assisting courts

[24] For example, see Paul Horwitz, "Defending (Religious) Institutionalism," *Virginia Law Review* 99, no. 5 (2013): 1049-1063; and Richard Schragger and Micah Schwartzman, "Against Religious Institutionalism," 917-985.

[25] For a sampling of this line of argument, see Mark Rienzi, "God and the Profits: Is There Religious Liberty for Money-Makers?" *George Mason Law Review* 21, No. 1 (2013): 59-116; and *Hobby Lobby*, 134 S.Ct. at 2787 (Ginsburg, J., dissenting).

in their identification of viable claims of corporate conscience or, differently put, group agency.[26]

Using Nelson's own summary, I identify (and enumerate within) three parts to this theory:

> [The] social theory of conscience . . . seeks to connect individual interests to organizational structure. First, the theory identifies conscience as the normative core of religious free exercise. It then links the freedom of conscience to the concept of personal identity [Part 1]. Drawing on the various strands of the collective rights literature, and in particular the work of Meir Dan-Cohen, [it explains] how personal identity is in significant ways constructed through the internalization of various collective roles. At the core of the social theory of conscience is a distinction between *identification* with a collective, where one's membership in a group is intimately tied to personal identity, and *detachment*, where one's role in a group is external to the self [Part 2]. These individual modes of affiliation provide the building blocks for a conceptual scheme to classify what kinds of collectives can make intelligible claims of institutional conscience [Part 3].[27]

Reviewing its three parts, we note that Nelson's social theory of conscience is both descriptive and prescriptive. It is descriptive insofar as it identifies how conscience functions (Part 1) and how individuals relate to various types of collectives (Part 2). It is prescriptive insofar it recommends which types of collectives deserve free exercise rights based on the shared conscience commitments of their members (Part 3). Nelson's theory therefore responds to questions around: (i) the possibility and design of group agency, through the restriction or reduction of conditions by which a certain type of group agency is considered viable (hence, the approach's "reductive" nature), and (ii) whether various group-types, including for-profit firms, should enjoy corporate religious liberty rights. (In

[26] James D. Nelson, "Conscience, Incorporated," *Michigan State Law Review* (2013): 1565-1620.

[27] Nelson, 1568.

other words, Nelson's theory tracks our two proposed areas for theological development of the churches' understanding of corporate religious liberty: see Section 1.4 above.)

Judged valuable either in whole or in part, Nelson's theory has been endorsed by prominent scholars including Richard Schragger, Micah Schwartzman and, more recently, Cécile Laborde.[28] Despite these endorsements, however, the question remains as to whether we should accept the strict conclusion that Nelson considers to follow from his theorization – namely, that, due to tenuous claims of corporate conscience, religious liberty rights should generally be withheld from for-profit corporations. To this strict reductive conclusion, I offer three reasons for disagreement, aligning each reason with a distinct part of Nelson's theory and drawing upon Christian ethical and socio-legal resources to make my case.

### 2.2.1 Conscience entails the capacity to distinguish right from wrong

My first objection to Nelson's theory concerns its portrayal of conscience itself. According to Nelson, the definition of conscience must be construed with regard to free exercise law. As such, it is understood not as the innate ability to distinguish right from wrong, but rather as the conceptual vehicle by which we understand individuals to make commitments and thus author their personal identities.[29] Nelson writes, "[It is the] process of selecting our commitments, integrating them with other aspects of our identity, and then applying those commitments to future projects . . . [that entails] the autonomous process of self-

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[28] Schragger and Schwartzman, "Some Realism," 368; and Laborde, *Liberalism's Religion*, 184.

[29] Nelson, "Conscience, Incorporated," 1575-1578.

authorship."[30] This autonomous process alone justifies respect for the freedom of conscience; and freedom of conscience, in turn, serves as the singular justification for protecting religious exercise.[31]

Granting this understanding of conscience as useful for free exercise (or, more generally, corporate religious liberty) purposes,[32] we need not accept it as complete. In fact, Nelson's neglect of the properly normative capacity of conscience makes his theory blind to the motivating factors that undergird the moral commitments individuals make. Without this knowledge, we cannot properly understand *why* individuals choose one action or state of being over another; and, in particular, we will fail to understand *why* individuals choose to commit themselves to moral purposes within for-profit corporations. If I am correct in this assessment, then it will be no surprise that Nelson comes to such a strict conclusion against for-profit claims for legal exemptions. But as I will argue, we must understand conscience as also having a strong normative capacity and, as such, useful in the identification of conscientious group agency and the defense of for-profit claims of corporate conscience.

#### *2.2.1.1 The dilemma of motivation*

[30] Nelson, 1578.

[31] Nelson, 1576.

[32] For arguments against the claim that freedom of religion is based solely on the freedom of conscience, see Germain Grisez, *The Way of the Lord Jesus*, vol. 1, *Christian Moral Principles* (Chicago: Franciscan Herald Press, 1983), 76-77, ch. 3, q. B, para. 9 (henceforth this volume of Grisez's work is cited with the abbreviated title CMP and page number, as well as chapter, question and paragraph number: e.g., 3, B-9).

To begin my argument, I would like to highlight the dilemma of motivation caused by Nelson's understanding of conscience. We already know that Nelson limits conscience to the relationship between commitment and identity; but let us further explore his understanding of this matter. Using the work of legal scholar Timothy Macklem on the subject, Nelson writes:

> Most persuasively, Timothy Macklem has argued that the notion of commitment distinguishes conscience from other related concepts . . . . [W]hen we commit to certain beliefs and projects, we make them part of our identity and therefore shape the way we picture ourselves. These commitments, in turn, form the basis for evaluating future action and judging it against our own self-image.[33]

Other than a further qualification that commitments are influenced by social factors,[34] Nelson's understanding of conscience stops here. But this is insufficient; for the result of such a truncated understanding of conscience is a dilemma of motivation, that is, the lingering questions of *why* we should commit ourselves to certain beliefs and practices and *why* we should incorporate them into our identities. Nelson neither addresses this issue nor is able to, given the fact that he passes over conscience's normative capacity to judge right from wrong. This capacity helps provide the answer to the question of motivation: We do X because it is right; we avoid Y because it is wrong. Or, to use Nelson's terms: We commit to X because it is right; we do not commit to Y because it is wrong.

Of course, the solution to motivation goes much deeper than a mere assertion of right and wrong. If we are told that something is right to do, we might then ask why we should do the right thing. Why not do the wrong thing? Nelson offers no response to such

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[33] Nelson, "Conscience, Incorporated," 1577-1578.

[34] Nelson, 1578.

questions. But a satisfactory response to the question of motivation is necessary, especially as regards the exercise of conscience within the for-profit context. Consider the case of Ameris Capital.

Ameris Capital, a consulting and private equity firm in Chile, manages a social impact fund called the Fondo Inversión Social (FIS). The fund allows agents in the private sector to invest in social entrepreneurship projects, thus generating social benefits in addition to financial returns. In 2010, FIS raised $4.5 million between 21 investors and expects a financial return on its social investments at a rate of 2% plus inflation over a period of 10 years. As of June 2018, FIS has directly benefited 11,362 individuals throughout Chile.[35]

Ameris Capital, as well as its investment partners, are for-profit firms that clearly have an interest in solving social problems. But what motivates their commitment to this cause? It certainly cannot be the mere desire to partake in the "autonomous process of self-authorship."[36] (Why is that a good thing to do?) And it cannot be the mere assertion that this would be the "right thing" to do. (Why not do the wrong thing?) Neither reason fully explains why individuals or groups partake in moral, or conscience-based, activity. Thus we must turn to a richer theory of conscience in order to understand why individuals take on commitments of the kind that Ameris Capital does.

The late Roman Catholic theologian and natural lawyer Germain Grisez offers a good starting place to understand conscience. In his work, *Christian Moral Principles*, Grisez defines conscience as "an awareness of moral truth." He elaborates:

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[35] "About Us," Ameris Capital, accessed November 25, 2018, https://en.fisameris.cl/fis-ameris/.

[36] Nelson, "Conscience, Incorporated," 1578.

> Only at this level are moral good and evil fully understood and rightly located in the freely choosing person who confronts *the reality of the world and human possibilities*. Wrongdoing is seen to lie . . . in refusing to make the commitments and enter into the communities in which one might hope to be *fulfilled* [i.e., to find *fulfillment*].[37]

Two items are worth pulling out of this definition of conscience. First, we consider the phrase, "The reality of . . . human possibilities." According to Grisez, the process of exercising conscience entails a movement from principles to moral conclusions.[38] The starting place of this movement consists of self-evident[39] possible choices, that is, those things understood as intelligibly worthwhile.[40] Among these choices are what Grisez refers to as forms of "basic human goods"; they include whatever ought "to be done and/or pursued, protected, and promoted."[41] Life, justice and friendship are said to be basic human goods.[42]

The array of human goods, however, does not tell us what is *morally* good. "Rather," as Grisez puts it, "they generate the field of possibilities in which choices are necessary."[43] To move toward moral conclusions, we require norms to guide our choices among possible human goods.[44] For Grisez, these norms do not direct our choices towards a promise of the most good or least evil, as in a proportionalist theory;[45] instead, authentic

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[37] CMP, 74, 3, A-5 (italics mine).

[38] CMP, 76, 3, B-6.

[39] CMP, 195-196, app. 1.

[40] CMP, 178-180, 7, C-3.

[41] CMP, 180, 7, D-2.

[42] CMP, 180-182, 7, D-2 through 4.

[43] CMP, 183, 7, E-1.

[44] See CMP, 183-189, 7, E-F (the first principle of morality); and CMP, 205-228, 8 (the specifications of the first principle of morality, i.e., the modes of responsibility).

[45] CMP, 183, 7, E-2.

moral norms direct our choices toward "integral human fulfillment." This is an ideal state in which our choices avoid "unnecessary limitation" and maintain an "openness" to further instantiations of goods,[46] and in which "all goods of human persons . . . contribute to the fulfillment of the whole community of persons."[47] Hence fulfillment, in a specifically personal and social understanding, constituted by the promotion of human goods, becomes the guiding norm of our choices and commitments. In fact, it becomes the motivating force behind those commitments.

Whether Grisez's "integral human fulfillment" sufficiently accounts for our motivation to act is a question we can address only in a limited way in this present chapter.[48] But I here offer Grisez's theory of conscience as an example of a system capable of explaining human moral behavior in a more philosophically sophisticated manner than Nelson's theory. Let us therefore return to our example of Ameris Capital to see how Nelson and Grisez's theories might account for the conscience-based activity of a for-profit corporate entity.

According to an FIS report, Ameris Capital, in cooperation with their partners, has invested in five social ventures. Three of them are: Lumni, a fund for disadvantaged students studying in technical training centers; Promoeduc, a foundation that provides learning resources and counseling to needy Chilean students; and Techo, an NGO constructing approximately 1,520 social housing units across Chile.[49]

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[46] CMP, 186, 7, F-4.

[47] CMP, 185-186, 7, F-2.

[48] On the limitations of Grisez's natural law theory, see Nigel Biggar and Rufus Black, *The Revival of Natural Law: Philosophical, Theological and Ethical Responses to the Finnis-Grisez School* (Aldershot: Ashgate, 2000).

[49] "Lecciones Aprendidas," Ameris Capital, accessed November 25, 2018, http://en.fisameris.cl/wp-content/uploads/2018/07/lecciones-aprendidas-FIS-Diciembre-2016.pdf.

If we apply Nelson's theory of conscience to their efforts we might at best describe their actions as an autonomous process of self-authorship.[50] They have chosen to commit themselves to these ventures as a means to identify themselves as agents who would make such commitments. This description, of course, does not help us understand why the commitments were made in the first place. Why is it that self-authorship is something we ought to do? And why would investing in social ventures be a worthwhile project to incorporate as part of our identities? Nelson's theory has no answers to these why-questions other than a mere assertion of autonomous choice.

When we view the projects of Ameris Capital through the lens of Grisez's theory of conscience a more sophisticated picture appears. First, we understand each of their social projects as promoting categories of basic human goods: Lumini promotes the substantive goods of knowledge of truth and skilled performance in work;[51] Promoeduc may be said to promote the same goods, as well as the reflexive goods of living at peace with others and inner consistency;[52] and, Techo's work promotes the substantive goods of bodily integrity and health.[53] Next, we understand that the range of self-evident human goods must be chosen with a view towards integral human fulfillment. The investors must therefore ask themselves whether committing to any of these projects will limit the integral human fulfillment of themselves or those whom they will serve.[54] Thus in actively seeking to promote instantiations of human goods, they bring fulfillment to their own lives (via

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[50] Nelson, "Conscience, Incorporated," 1578.

[51] Germain Grisez, "Natural Law, God, Religion, and Human Fulfillment," *The American Journal of Jurisprudence* 46 (2001): 7.

[52] Ibid.

[53] Ibid.

[54] This question derives from Grisez's modes of responsibility. See CMP, 191, 7, G-6.

profits and social capital) and the lives of others (via the promotion of various human goods).

It should now be clear that a Grisezian theory of conscience provides a sophisticated analysis of the motivation behind commitment-making. For in understanding the exercise of conscience as the process of making moral commitments to a field of possible choices (i.e., basic human goods), we discover that human choice is not a mere assertion of autonomy or the creation of identity, but rather is an opportunity to bring about integral human fulfillment in one's self and in others. When we look at Nelson's theory, then, we note that its lack of reference to a socially transcendent moral order, such as Grisez's basic human goods, leaves Nelson with no philosophical resources to describe conscience as anything other than a faculty of self-authorship. This collapses Nelson's theory into a degenerate form of Kantianism, in which the emphasis upon autonomy completely obscures the affirmation of a universal moral law of reason. Nelson's understanding of conscience thus suffers from the dilemma of motivation to an even greater degree than Kantian ethics; at least Kant can point to a universal law that moves the will.[55] To what can Nelson point?

#### *2.2.1.2 Application to free exercise analysis*

Having granted the greater philosophical sophistication of a Grisezian understanding of conscience, we must now ask how this understanding can affect free exercise analysis,

[55]Immanuel Kant, *Grounding for the Metaphysics of Morals*, 3rd ed. (Indianapolis: Hackett Pub. Co., 1993), 14 (Section 402). Here, Kant's categorical imperative reads, "I should never act except in such a way that I can also will that my maxim should become a universal law."

particularly when considering the conscience claims made by for-profit corporate entities. To this end, I would like to pose two points for consideration: first, that a Grisezian understanding of conscience helps illuminate why individuals come together in corporate bodies; and, second, that it is thus able to explain how individuals are said to create and exercise corporate conscience.

As regards the first point, if we grant that individuals exercise conscience as a means to promote various forms of good in the world,[56] it is easy to see why individuals would choose to act in joint ventures: A corporate effort would promote their shared vision of good, helping it reach new levels through greater quantifiable impact and/or new innovations. We saw that Ameris Capital is one firm that brings together a variety of individuals within the private sector to collaborate on projects of social good. As a result of this collaboration, their social impact is far greater than what would have been achieved by a single person.

Next, if we consider the larger corporate entity of FIS, under which Ameris Capital and its partners operate, we see that these agents can create what is unmistakably a corporate conscience. In other words, through the recognized entity of FIS, and through the authority of those who can establish this entity's ethos and aims, the agents involved can exercise the capacity to identify goods and to morally commit themselves to the realization of those goods, not as mere individuals but as a corporate body.

Free exercise analysis therefore should be sensitive to individuals who share the same moral commitments and who choose to advance those commitments through the formation of corporate entities. Nelson's theory, however, precludes the normative

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[56] CMP, 185-186, 7, F-2.

capacity of conscience and thus is blinded to the moral impetus behind corporate formation. If courts or legislative bodies were to adopt this theory in their analyses, they too would overlook the moral vision, or conscience, of potentially countless corporate entities. Nelson's understanding of conscience as "self-authorship" may appeal to the liberal value of autonomy[57] and thus help justify freedom of conscience,[58] but it does not do enough to explain *why* individuals make commitments in the first place and *why* they would choose to share those commitments with others in corporate entities of any type, profit-making or otherwise. Thus the social theory of conscience is more likely to overlook genuine instantiations of corporate conscience than Nelson would like to admit.

### 2.2.2 Individuals actively identify themselves with businesses

As argued in the objection above, Nelson's social theory of conscience fails to identify the range of human goods that agents seek to promote as individuals and as collective entities. I now show how the above-mentioned oversight gives further reason to doubt the usefulness of Nelson's theory for corporate religious liberty purposes. Of particular concern will be the theory's "core," as found in its second part – namely, its distinction between "identification" and "detachment."[59] Through this distinction, Nelson claims that modern corporate life encourages individuals to detach themselves from businesses,[60] and

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[57] Nelson makes no explicit distinction between political autonomy and moral autonomy as does Rawls; see John Rawls, "The Idea of Public Reason Revisited," in *The Law of Peoples with 'The Idea of Public Reason Revisited'* (Cambridge, Mass.: Harvard University Press, 1999), 146.

[58] Nelson, "Conscience, Incorporated," 1576-1578.

[59] Nelson, 1568.

[60] Nelson, 1586.

concludes that corporations and other business entities can hardly be said to form corporate consciences.[61] However, our discussion above shows that individuals can and do invest themselves deeply within (for-profit) corporate contexts to promote human good. Hence, those entities can be said to exercise corporate conscience. Here I elaborate upon that discussion in order to reveal the limitations of this core part of Nelson's theory.

#### *2.2.2.1 Identification and detachment*

Let us begin with a more detailed exposition of Nelson's core distinction. According to Nelson, conscience is shaped in large part by the various roles one assumes within collectives (thus the "social" aspect of his theory). These roles lend themselves to two types of relational patterns: identification and detachment. The first kind of relationship describes the circumstance in which an individual considers his membership in a group as a "significant aspect of his personhood."[62] Nelson writes:

> When an individual identifies with a collective entity, his participation in forming and enacting that group's agenda becomes intertwined with his other core commitments and projects. That intimate connection prompts an individual to integrate his particular affiliation with other roles to which he is attached and attempts to order those roles in a way that achieves a coherent picture of the self . . . . On this model, an identification relationship tends to break down distinctions between self-interest and group goals. Participation in the life of the group takes on intrinsic meaning or value – it becomes a good in itself.[63]

[61] Nelson, 1610.

[62] Ibid.

[63] Nelson, 1578-1580.

As an example of this relational pattern, Nelson offers what he considers to be the "clearest case" of identification: the role of parent within the collective entity of the family. "That role," he writes, "typically involves a close connection between the parent's duties and that parent's identity as a person." Furthermore, the family group itself becomes part of the parent's identity, so much so that "other aspects of [his or her] identity must be arranged or re-arranged to be consistent with that association."[64]

But one's duties and associational group are not closely connected to identity in the second relational pattern known as detachment. According to the detached mode of affiliation, "individuals regard the collective's goals and values as distant from their own personal identity." Nelson elaborates:

> A detached affiliation sprouts few if any connections with core aspects of the self, and is experienced without any significant emotional involvement or investment. Detached affiliation calls for impersonal modes of interaction and is characterized by interlocking instrumental motivations and goals.[65]

Using an example given by professor Meir Dan-Cohen, Nelson offers the telephone operator at AT&T as the quintessentially detached agent:[66]

> The operator does not regard his membership in the company as a significant part of his personhood, and expends little or no effort to integrate his duties in that role with his life's narrative. Instead, his actions on behalf of the company are tightly controlled by his role description, and those actions are secured through a mixture of financial incentives and implicit threats of negative treatment if his performance does not meet externally imposed standards.[67]

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[64] Nelson, 1579.

[65] Ibid.

[66] Nelson, 1580.

[67] Ibid.

Compelled externally, the detached agent considers neither his duties nor his associational group as part of his personal identity. His response to the collective is instrumental insofar as he expects financial reward from his labor, and impersonal inasmuch as he keeps distant from the corporate body.

Having identified Nelson's two relational patterns, we must now consider why particular roles (e.g., parent and telephone operator) tend to elicit one pattern over the other. For Nelson, this phenomenon is explained by the social expectations that accompany each role. He writes:

> The difference between identification and detachment lies entirely in the subjective attitudes of individuals who enact collective roles . . . . But although the distinction is based on subjective attitudes, those attitudes are not entirely idiosyncratic. Different roles within collective entities come with more or less defined patterns of expectations for behavior. The roles of father . . . or telephone operator are saddled with social expectations of appropriate behavior that those roles entail.[68]

In turn, the expected behavior pushes individuals toward one relational pattern. "In other words," explains Nelson, "the norms that accompany collective roles, in significant respects, write the 'script' for social behavior and heavily influence the way that individuals relate to collectives."[69]

Given this understanding, it is not difficult to see why Nelson considers the role of parent to elicit identification and the role of telephone operator, detachment. But if this dichotomy seems too stark, Nelson makes clear that the "pure affiliations of identification and detachment" are only "ideal types."[70] He concedes that people who espouse a mode of

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[68] Ibid.

[69] Ibid.

[70] Nelson, 1581.

identification with a collective can act in instrumental ways toward that entity, "and the reverse is true for detached roles as well."[71]

Despite this caveat, however, Nelson carries forward his argumentation without serious regard to the blurring between behavioral lines. This is seen especially in his lengthy analysis of business corporations, in which Nelson argues that the "environmental conditions" of modern corporations – *no matter their size or legal status*[72] – encourage shareholders, directors, officers, employees, and customers "to detach from their organizational roles,"[73] thus undermining the formation of a corporate conscience. Here, Nelson states that each role contains a "script" that dictates a relational pattern of detachment, and implicitly claims that each script is unchanging and actively forces its agent to adopt certain behaviors.[74] The individual agent is therefore assumed to be passive in his or her behavior, doing only what the role's script requires. Some points from Nelson's analysis of detachment in corporate roles will be useful.

Nelson begins by describing shareholders as "mere passive investors," with "very little incentive to become involved in corporate governance."[75] This, he claims, is due to several factors: First, many shareholders do not own enough stock to be able to exercise significant voting power; second, the cost of active involvement in corporate affairs is too

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[71] Ibid.

[72] Nelson does not seriously take into account the behavioral differences that may be attendant to the various forms of business enterprise, such as privately owned entities, closely held entities, and large public corporations. Instead he minimizes the discussion to the "basic elements of the ordinary corporate landscape" broadly understood (see Nelson, 1586). This is a mistake, and the reasons for this will become clear below.

[73] Nelson, 1586.

[74] Nelson, 1580.

[75] Nelson, 1587-1588.

high for most, who have neither the time nor knowledge to participate in corporate governance; and third, portfolio diversification distributes shareholders' investments across too many businesses, thus discouraging involvement in the administration of any particular firm.[76] Their main interest in the corporation, says Nelson, is to receive maximum return on their investment.[77]

While the above account easily applies to shareholders of large, public corporations, similar pressures affect shareholders of close corporations.[78] These corporations are owned by a majority group of shareholders, who normally serve as directors or officers in the firm. They therefore have the capacity and incentive to become directly involved in corporate affairs.[79] But, as is the case in most close corporations, there exist pockets of shareholders who own only a minority of shares. These shareholders generally hold the same detached patterns of behavior as those in large public corporations; and, as Nelson points out, they are entitled to the same wealth-maximization.[80]

Directors are also subject to the requirements of law. In the ruling of *Dodge v. Ford Motor Company*,[81] the requirement for directors to act for the "financial benefit of shareholders," regardless of their moral commitments, was made explicit in court. As a result, Henry Ford was required to issue dividends to Ford shareholders instead of acting

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[76] Ibid.

[77] Nelson, 1590.

[78] Close corporations are "typically understood to involve a small number of shareholders who substantially participate in the corporation's management and whose shares are not readily transferable on the market." See Nelson, 1591, n. 105.

[79] Nelson, 1591-1592.

[80] Ibid.

[81] Dodge v. Ford Motor Company, 204 Mich. 459 (1919).

upon his intention to increase employee wages. As Nelson writes, the *Dodge* court clearly ruled that "the corporation is a tool to produce financial gain for investors, and not a vehicle for realizing moral goals."[82] Corporate officers also share in the responsibility of shareholder wealth-maximization.[83] And as owners of large amounts of corporate shares (via stock options in executive pay), they have a vested interest in this corporate duty.[84]

The final set of corporate constituents that Nelson describes as detached include employees and customers. Referencing a 1997 study on employee motivation, Nelson writes:

> [C]orporate employees are heavily motivated by the financial rewards that their positions promise. In response to surveys, employees in for-profit businesses routinely list wages or other forms of compensation as the primary motivator of their work-related conduct, and there is evidence that the power of extrinsic motivation has only increased over time.[85]

In addition to their concern for financial gain, Nelson asserts that employees invest not in organizations but rather in themselves, developing transferable skill and knowledge sets that can be taken to any number of firms. Nelson cites a report made by the United States Department of Labor that claims that the average employee stays in one job for 4.6 years, and highlights the fact that this number is significantly lower for workers under 35 years of age.[86]

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[82] Nelson, 1596.

[83] Nelson, 1600.

[84] Ibid.

[85] Nelson, 1602.

[86] Nelson, 1605.

Employees, however, are not the only constituents that transfer easily between corporations. Nelson references economist Albert Hirschman's famous observation that customers influence corporate strategy primarily through "exit," that is, the ability to transfer one's purchasing power to a different firm when dissatisfied.[87] Furthermore Nelson points out that even the Corporate Social Responsibility movement, through which value-based decisions appeal to customer loyalties, is limited inasmuch as low prices and quality products – not social good –remain the primary concern for consumers.[88]

Detachment then appears to be the dominant behavioral pattern in the for-profit context, specifically as seen in large corporate organizations. From shareholders to customers, the script embedded in each role cultivates in individuals an overwhelming concern for financial gain or advantage: shareholders demand strong returns; to this end, directors and officers focus solely on profit-maximization; employees carry out the business of the firm, exerting effort only for a paycheck; and customers, in their search of quality bargains, quickly withdraw their loyalties from businesses which, in their view, cannot deliver. This myopia of financial gain discourages individuals from identifying in any meaningful way with their associated business organizations; and without this sense of identification among constituent members, the formation of corporate conscience is impossible.[89]

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[87] Nelson, 1606.

[88] Nelson, 1608.

[89] Nelson, 1610.

*2.2.2.2 Personal vocation*

But that is Nelson's view. What I propose to do here is to push back against Nelson's portrayal of passive individuals within a cold, conscience-less world of business. Grisez's natural law theory offers strong theoretical insights that tell against this portrayal, and emerging empirical data speak against a narrow view of human motivation within the corporate landscape. Let us turn first to the insights of natural law theory.

Under Nelson's social theory of conscience, individuals are said to identify with a collective insofar as they consider their membership or role within the group to form a significant part of their personhood. But, as Nelson has argued, this relational pattern is cultivated with difficulty – or not at all – within the for-profit context.[90] Turning again to Grisez's natural law theory, we find an alternative view of identification under the concept of personal vocation.

In *Living a Christian Life*, Grisez defines personal vocation as an individual's unique share in the Church's mission to live for, and build up, the kingdom of Christ.[91] Concretely put, it is a major – if not life-long – commitment[92] to use of one's gifts and opportunities for the bringing about of that kingdom,[93] which we also understand as the ideal state of integral human fulfilment intended for all by God.[94] Understood as such, personal vocation

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[90] Ibid.

[91] Germain Grisez, *The Way of the Lord Jesus*, vol. 2, *Living a Christian Life* (Quincy, Ill.: Franciscan Press, 1993), 113, ch. 2, q. E, para. 1 (henceforth this volume of Grisez's work is cited with the abbreviated title LCL and page number, as well as chapter, question and paragraph number: e.g., 2, E-1).

[92] CMP, 557, 23, C-11.

[93] LCL, 113-115, 2, E-1.

[94] CMP, 184, 7, F-1. See also Grisez, "Natural Law, God, Religion," 22 (on the notion that the kingdom or integral human fulfillment is an ideal: "[t]hat kingdom is not of this world. It will come when

is inextricably tied to the exercise of conscience. In other words, personal vocation describes the specific manner in which a unique individual identifies various forms of good and promotes them with a view towards integral human fulfilment.[95] This may be achieved through adopting any number of vocational choices, from accounting to pharmacy, from teaching to ministry.

Personal vocation therefore provides us with a powerful insight as to why individuals closely identify with for-profit institutions: They see it as an opportunity to promote specific instantiations of human good. True, an investment banker may not say that she chose her career as a means to "promote the range of basic human goods," but other responses reflect these motivating sentiments. For example, one could say, "I chose to become a banker to provide for my growing family," or "I chose to become a banker to invest in projects of social good." These answers tell of an implicit desire to promote various forms of human good and, at best, may be attributable to a desire to promote integral human fulfilment.

This insight, however, is not mere inference from Grisez's definition of personal vocation. Grisez offers three aspects of personal vocation that are directly applicable to our discussion. First, personal vocation is understood as embracing every aspect of one's life, from the decision to be married to the choice of one's occupation.[96] Grisez writes:

> Certainly, the great commitments which settle one's state in life – as cleric, religious or married or single lay person – are important elements of personal vocation. But one's work – whether it be in homemaking, day labor, farm, factory, office, trade, profession,

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God renews creation as a whole"), 27 (for its motivating force for believers: "[t]he kingdom can be one's overarching reason for choices because, as Jesus described it, the kingdom clearly includes human fulfillment: harmony with God[,] . . . intimate friendship with Jesus, and the joy of living together in a perfect human community.").

[95] LCL, 116, 2, E-2a.

[96] LCL, 116, 2, E-2a.

> government, education, or whatever – also is a large part of life and offers its own opportunities for giving Christian witness, serving one's neighbor, and recapturing some part of the fallen world for Jesus' kingdom.[97]

The potential to "recapture" the good in the world is thus not precluded from Grisez's understanding of work and personal vocation. How could it? His rich theory of conscience – as the capacity to identify and pursue goods – allows Grisez to recognize the wider motivations behind human commitments. This, in turn, informs his understanding of personal vocation so that the pursuit of goods is included within the sphere of human labor.

This understanding also does not preclude the joint effort of individuals to pursue goods within a business entity. Even the activity of forming a corporate body itself could be referred to as an instantiation of a basic human good, insofar as the association is not purely instrumental,[98] that is, apart from its more obvious purpose of creating the structures to produce services or products with greater efficiency or effectiveness.[99] If the pursuit of goods can occur jointly and within businesses, then certainly it can be said that corporate conscience exists within the for-profit context. But perhaps this is mere wishful thinking; perhaps Nelson is correct to state that the environmental conditions of modern corporations detach individuals from their organizational roles,[100] resulting in a seriously undermined effort to promote human goods via business entities.

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[97] Ibid.

[98] The discussion on friendship in CMP, 182, 7, D-6.

[99] See Ronald F. Duska, "The Why's of Business Revisited," *Journal of Business Ethics* 16 (1997): 1401-1409.

[100] Nelson, "Conscience, Incorporated," 1586.

To this difficulty, a second aspect of personal vocation offers a response. According to Grisez, the pursuit of one's personal vocation should never be focused upon difficulties met. Grisez explains that we ought to be "concerned primarily with the work to be done and only secondarily [concerned] with the difficulties and obstacles, such as [our] deficiencies, the lack of necessary means, and the effort required."[101] If we concede that strictly defined economic, legal and social scripts do in fact provide obstacles to individuals, specifically deterring them from morally investing themselves within for-profit institutions, Grisez's point hints at the positive actions individuals can (and do) take to actively push back against the difficulties they meet.

We can also take Grisez's words about the Church's preferential love for the poor to apply equally to the moral difficulties experienced by those within businesses. Grisez writes:

> [T]hose who can do so should consider devoting at least part of their lives to helping [the materially poor and oppressed]. Action to overcome structural injustices by morally acceptable means surely deserves special consideration, because of its potential for widespread benefits.[102]

Is it not an injustice – a structural injustice – that a public corporation can be at the mercy of majority shareholders who have owned the firm's equity for a mere 22 seconds?[103] Is it not an injustice that directors have to choose – under force of law – between paying their employees a fair wage and issuing dividends to shareholders?[104] Without downplaying the

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[101] LCL, 121, 2, E-3d.

[102] LCL, 120, 2, E-3b.

[103] Jonathan Charkham and Anne Simpson, *Fair Shares: The Future of Shareholder Power and Responsibility* (Oxford: Oxford University Press, 1999), 1-9.

[104] *Dodge*, 204 Mich. 459 (1919).

needs of the materially poor and oppressed, I wish to note that people within the corporate world suffer their own share of structural injustices. Grisez's theory of personal vocation, however, reminds us that human beings are not so passive as to let structural difficulties define who they are and what they do. If anything, these obstacles serve as encouragement for individuals to discover new and creative ways to pursue their ends.

Thus we arrive at our third point: that the pursuit of one's personal vocation does not preclude change and creativity.[105] The following passage from Grisez is illuminating:

> Wishing to give better service, the faithful person does not always follow standard practices, but innovates, while respecting the requirements of morality and the just law, as did the saints who founded new religious institutes to satisfy unmet needs.
>
> Then too, in carrying out responsibilities it often is necessary to undertake projects directed toward certain definite goals; but because projects are only means to the goods to be served, they often can be modified or abandoned without unfaithfulness, if they fail to serve the purposes they were meant to serve or if the purposes can be better served in other ways.[106]

Here, too, Grisez points to the human ability to react against the status quo. The need to innovate, modify and even abandon constitutes what it means to live out one's personal vocation. Is this capacity of human beings somehow left at home when entering the office? There is no reason to think so.

Grisez's theory of personal vocation is therefore clear: Individuals can closely identify with businesses despite the structural obstacles of the for-profit world. But is there empirical proof to support this claim? Do individuals actually identify with businesses? While Nelson may disagree, I find strong empirical evidence in favor of the natural law

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[105] LCL, 126, 2, E-5b.

[106] LCL, 126, 2, E-5b.

theory articulated above. Three items concerning the positive behaviors of corporate constituents are worth our attention.

First, recent studies indicate that financial reward is not the greatest motivating factor for employees.[107] A 2013 study conducted by the Harvard Business Review and the Energy Project, reveals that employees are deeply motivated when four core needs are met in the workplace:

> [P]hysical, through opportunities to regularly renew and recharge at work; emotional, by feeling valued and appreciated for their contributions; mental, when they have the opportunity to focus in an absorbed way on their most important tasks and define when and where they get their work done; and spiritual, by doing more of what they do best and enjoy most, and by feeling connected to a higher purpose at work.[108]

This conspicuous lack of emphasis upon financial motivation is complemented by the findings of a 2013 Gallup report. Regarding the motivational force of corporate policies and perks, the report found that "although certain policies such as hours worked, flex-time and vacation time do relate to employee wellbeing, engagement levels in the work environment eclipse corporate policies."[109]

Compared to Nelson's summary, these two studies present a far different portrayal of employee motivation. Nelson claims that employees are "heavily motivated" by financial

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[107] Tony Schwartz and Christine Porath, "Why You Hate Work," The New York Times, accessed November 25, 2018, https://www.nytimes.com/2014/06/01/opinion/sunday/why-you-hate-work.html. See also "Our Approach," The Energy Project, accessed November 25, 2018, https://theenergyproject.com/approach/; and "State of the American Workplace Report 2013," Gallup, accessed November 25, 2018, http://www.gallup.com/strategicconsulting/163007/state-american-workplace.aspx.

[108] Schwartz and Porath, "Why You Hate Work."

[109] Gallup, "State of the American Workplace Report 2013," 10. According to this study, engaged employees are defined as those who "work with passion and feel a profound connection to their company. They drive innovation and move the organization forward" (p. 21).

reward, and cites a 1997 study to support this claim.[110] But what may have been true in the past – assuming the validity of the study cited – may not be true of today.[111] Today's research reveals a full range of non-financial incentives that motivates employees: from the desire for a higher purpose in their work[112] to a feeling of profound connection with their company.[113] These findings reflect the conscience-based motivations described in natural law theory more than the financial gain and passivity described in Nelson's social theory of conscience.

Second, the passivity of corporate shareholders and the low retention rate of employees are being overcome significantly as more businesses adopt Employee Stock Ownership Plans (ESOPs).[114] First implemented in 1956 by attorney Louis Kelso, ESOPs are designed on the theory that "facilitating broader-based ownership would not only increase corporate performance, but also ease workplace tensions, reduce disparities of wealth, and help build a better society."[115] Their growing popularity is clear: In 1975, ESOPs numbered 1,600 and covered 250,000 participants. As of 2005, a total of 9,225

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[110] Nelson, "Conscience, Incorporated," 1602 ("employees in for-profit businesses routinely list wages or other forms of compensation as the primary motivator of their work-related conduct, and there is evidence that the power of extrinsic motivation has only increased over time.").

[111] On why investing in other aspects of employee wellbeing is important today, see Schwartz and Porath, "Why You Hate Work." They write: "Systematically investing in employees, beyond paying them a salary, didn't seem necessary until recently. So long as employees were able to meet work demands, employers were under no pressure to address their more complex needs. Increasingly, however, employers are recognizing that the relentless stress of increased demand — caused in large part by digital technology — simply must be addressed."

[112] Ibid.

[113] Gallup, "State of the American Workplace Report 2013," 21.

[114] ESOPs are retirement plans for employees and qualified owners. They are not forms of compensation that replace salaries and other benefits. It is also important to note that ESOPs are not restricted to corporate officers (as perks of executive pay); instead they are extended to all corporate constituents. See Steven F. Freeman, "Effects of ESOP Adoption and Employee Ownership: Thirty Years of Research and Experience," *University of Pennsylvania Scholarly Commons* (2007): 3, http://repository.upenn.edu/od_working_papers/2/.

[115] Freeman, 3.

ESOPs covered more than 10 million participants, with a net value exceeding $600 billion.[116]

Research shows moderate to significant behavioral change in employees who own company stock. Professor Steven F. Freeman writes:

> Employee ownership is . . . associated with considerably greater employment stability and, in firms that simultaneously increase worker participation in decision making, the result is increased job satisfaction, organizational commitment, identification, motivation, and workplace participation.[117]

The ability to contribute to company decision-making, while not unique to ESOPs, certainly contributes to their success when implemented. But the notion of increased employee well-being seems to be at the heart of ESOPs' benefits. Surveying literature on the relationship between employee ownership and satisfaction, Freeman concludes:

> [Researchers] in positive psychology and positive organizational scholarship attribute extensive well-being to people who feel a sense of commitment, identification, motivation and participation in their work. Prominent scholars . . . claim that these are precisely the most important elements of work life, and that it is this attachment to and identification with work that makes for a life of meaning and satisfaction.[118]

If modern corporate life actively pushes against the human desire to identify with work, ESOPs undoubtedly go against the grain. And I would argue that Grisez's theory of personal vocation allows us to view them as genuine innovations, ones by which ordinary corporate obstacles are overcome to promote forms of human good.

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[116] Freeman, 3-4.

[117] Freeman, 1.

[118] Freeman, 8-9.

The creativity prescribed by Grisez's natural law theory, of course, can be seen in countless business innovations; but one particular pair that I would like to dwell on for final consideration are benefit corporations (B-corps) and low-profit limited liability corporations (L3Cs). Both corporate forms are the result of new hybrid corporate statutes that mandate the pursuit of social benefit in addition to shareholder wealth.[119] Nelson purposefully omits these socially conscience ventures from his discussion of corporate detachment. He explains:

> [I]t is too early to tell whether these new corporate forms will allow various constituents to transcend the commercial norms of ordinary business practice. If the statutes do manage to carve out a niche for non-maximizing businesses, however, the structural differences in those businesses may justify a different result under the social theory analysis.[120]

But what are the "commercial norms of ordinary business practice" to which Nelson refers? If they are the behaviors associated with shareholder wealth-maximization, these are immediately mitigated by the corporate statutes of these new business entities – thus shareholders, directors and officers of B-corps and L3Cs can concentrate on other concerns. And if they are the passive and detached behaviors of corporate employees, we know that such attitudes are changed by structural innovations and concern for employee well-being.

It seems to me therefore that if corporate constituents can closely identify with traditional corporations, they have even more grounds to do so with B-corps and L3Cs, given the latter's emphasis on social values. The fact that they remain businesses, in itself,

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[119] Nelson, "Conscience, Incorporated," 22, n. 73.

[120] Ibid.

does not change their conscience-driven mission; it therefore does not change the joint exercise of conscience among their members; and, thus, it does not dilute their corporate conscience.

The above examples were not comprehensive, but only indicative of active engagement and identification within the for-profit space. But their current existence is telling, for it should now be evident that individuals can and do closely identify themselves with business corporations – despite the structural challenges met. Therefore, based on the empirical data and insights from Grisez's natural law theory, we see that Nelson's argumentation omits an important component of human behavior: *active* identification within for-profit contexts.

### 2.2.3 Corporate conscience is not dependent upon all constituent members

In my first two objections to Nelson, I used Grisez to critique aspects of Nelson's social theory of conscience. Of particular concern were Nelson's thin view of conscience and overemphasis upon detachment within business corporations. In this final objection I offer an internal critique of Nelson's theory, as my focus will be upon the difficulties inherent to its culminating normative framework, the continuum of collectives.

#### *2.2.3.1 Ideal types of collectives*

Let us turn first to the structure of Nelson's proposed normative framework. In the final part of his theory's exposition, Nelson claims to have found a way to identify collectives

that are best able to claim corporate rights of conscience. He arrives at this conclusion via the construction of what he calls the "continuum of collectives."[121]

At its opposite ends, the continuum consists of two ideal types of collectives: "organizations" and "constitutive communities." On the left end of the spectrum are "organizations." Nelson describes organizations as collectives towards which constituent members adopt a dominant pattern of detachment.[122] As mentioned above detachment is one of two modes of affiliation, and describes those who are "distant" or even "alienated" from their associated group. Those who adopt this relational pattern do not integrate their organization's goals and values within their own personal identity. Furthermore, organizations are composed primarily of individuals who remain within the collective due to external coercion or offers of inducement (e.g., a salary or some form of instrumental incentive).[123] For Nelson, clear examples of organizations include large multinationals like AT&T and IBM.

Sitting at the opposite end of the spectrum are "constitutive communities." These collectives are formed by a dominant pattern of identification.[124] In constitutive communities, members closely identify with the group's goals and integrate those goals with their core commitments and projects. The community is thus said to become intertwined with a member's personal identity. As Nelson notes, "[I]ndividual members are intrinsically motivated, because in a significant sense the group's goals are their own goals, and they therefore enact [the group's] roles transparently and authentically." Families fall

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[121] Nelson, "Conscience, Incorporated," 1582.

[122] Nelson, 1581-1582.

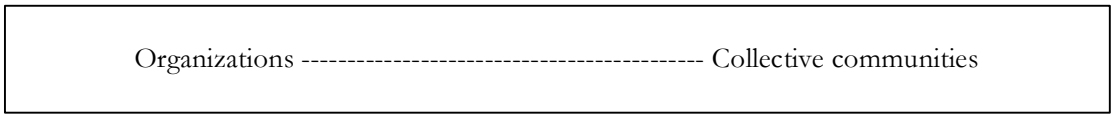
[123] Ibid.

[124] Nelson, 1582.

within this category since "[f]amily members tend to identify with the collective unit and to consider their roles to be intertwined with personal identity." And religious cults fit the description "because both the leaders and the ordinary members regard the group as an important aspect of their personhood."[125]

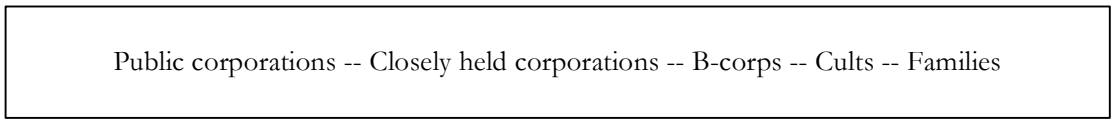
The spectrum of collectives can therefore be portrayed as follows:

**Figure 5. Nelson's spectrum of collectives (Version A)**




Organizations, such as large public corporations, fall on the left side of the continuum; and collective communities, such as families and cults, fall on the right. Within the spectrum one could place other forms of collectives, but Nelson does not indicate specific types in this discussion. However, we can identify some candidates from elsewhere in his article. For example, closely held corporations might fall to the right of large public corporations, and B-corps may be positioned further along towards the ideal collective communities.

**Figure 6. Nelson's spectrum of collectives (Version B)**




[125] Ibid.

Having this conceptual tool in hand, Nelson then writes:

> The idea of a constitutive community, I suggest, is the most plausible way that we can make sense of collective claims of conscience. On the conception of conscience as commitment, individuals have an interest in selecting among available beliefs and projects and making those beliefs and projects part of and coherent with their personal identity. To make a strong claim of collective conscience, though, that interest must be in some significant respect *shared* among the members of a group or institution. That is, for the individual interest in commitment to become a group claim, that interest must be held in common by the group's members. My claim, then, is that the pattern of shared interests in self-definition through an association should be the normative touchstone for evaluating collective claims of conscience.[126]

At first sight, this conclusion is appealing. Not only does Nelson's conclusion follow logically from his distinction between identification and detachment, but it also seems to appeal to certain biases cultivated in contemporary American culture. For example, by positioning institutions such as families and (religious) cults on the right side of the spectrum, Nelson appeals to the American tradition of providing special protections to families and religious groups.[127] The positioning of large multinationals such as AT&T on the left side of the spectrum also sits well with the image of an organization too large, impersonal and corrupt to have a corporate conscience of any sort.[128]

But, pushing these biases aside, I would like to take a closer look at the formation of the spectrum of collectives itself. It is there that I see at least two items that will give us pause when considering the merits of Nelson's conclusion.

Nelson explains the formation of his spectrum by identifying the two types of entities that are placed at its opposite ends. But let us take a closer look at this process. It

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[126] Nelson, 1582-1583 (italics in original).

[127] See discussion of Patrick Henry and James Madison in John Rawls, "The Idea of Public Reason Revisited," 164-168.

[128] See Robert J. Shiller, *Finance and the Good Society* (Oxford: Princeton University Press, 2012), i-xiii.

seems to me that, in order for Nelson to place collectives at the ends of this spectrum, specific criteria, which he may or may not have made explicit, are actually adopted. Consider his following statement:

> To make a strong claim of collective conscience, though, that interest must be in some significant respect *shared* among the members of a group or institution.[129]

Referring to constitutive communities in particular, this statement helps us understand what Nelson's criteria actually are.

First, Nelson must be able to identify a dominant pattern of affiliation for any given collective. After all, he would not be able to identify a constitutive community unless a *predominant* pattern of identification were present among that collective's membership. Likewise, an organization would not be identified as such unless a markedly clear pattern of detachment were dominant among constituent members. It is therefore a requirement that one be able to identify the dominant[130] relational pattern within a group in order to place that group on the spectrum of collectives. I will refer to this criterion as the "requirement of dominance."

Second, Nelson requires that *all* of the members of a given collective be accounted for in the identification of a dominant relational pattern. This requirement seems so obvious to Nelson that he never explicitly states it. But its importance is implied throughout his article, from statements such as "interest must be in some significant

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[129] Nelson, "Conscience, Incorporated," 1582-1583 (italics in original).

[130] Nelson uses the term "dominant" in other parts of his article. See Nelson, "Conscience, Incorporated," 17 ("look at the *dominant* modes of affiliation at the level of the collective"), 52 ("The *dominant* mode of affiliation within these organizations is . . ."), and 22 ("That *general* pattern of detachment . . .", with "general" used as a synonym to "dominant.") (italics mine).

respect *shared* among the members [i.e., *all* members],"[131] to his exhaustive analysis of all the major constituents of a business corporation. For Nelson, therefore, the subjective attitudes of every member within a corporate body contribute to that entity's corporate conscience. I will refer to this criterion as the "requirement of entirety."

With these two criteria made plain, we can now articulate the guiding principle that Nelson would have to adopt to create the ends of his continuum of collectives: One must be able to determine a markedly *dominant* pattern of affiliation (requirement of dominance) among *all* constituent members of a given group (requirement of entirety). If this is a fair articulation of the rationale behind Nelson's continuum, I find that there are significant problems with this conceptual tool when we consider the logical consequences or validity of each requirement.

#### *2.2.3.2 Rejecting the requirements of dominance and entirety*

First, consider the requirement of dominance. What does "dominant" mean in concrete terms? For example, when Nelson states that a dominant pattern of detachment exists in entities such as business corporations, does he mean that 51% of the constituent members are detached? Does that particular value account for dominance? Or should we give this qualifier a higher threshold, say, 99% agreement among members? Far from mere speculation, these questions have strong practical relevance.

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[131] Nelson, 1582-1583.

Take, as an example, the Roman Catholic Church. According to Nelson's theory the Roman Catholic Church is a constitutive community,[132] that is, it is characterized by a dominant pattern of identification among its members. These members therefore closely identify with the group's beliefs and goals. As regards moral beliefs, the Roman Catholic Church has a well-defined moral teaching on the issue of contraception.[133] But if we were to rely on a prevailing pattern of identification with the Church's teaching on contraception, we would not be able to call the Roman Catholic Church a constitutive community – at least, not in the United States.[134]

One might object to this logic, however, by claiming that the Roman Catholic Church still remains a constitutive community based on its members' adherence to other teachings; but this does not resolve the lack of a shared moral vision regarding contraception. On this issue there is more detachment than identification among the constituent members; and thus by the logic of Nelson's theory, the Roman Catholic Church can make no valid claim of corporate conscience on the issue of contraception.

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[132] Nelson, 1618.

[133] The *Catechism of the Catholic Church* reads, "The regulation of births represents one of the aspects of responsible fatherhood and motherhood. Legitimate intentions on the part of the spouses do not justify recourse to morally unacceptable means (for example, direct sterilization or contraception)," para. 2399.

[134] According to a 2005 Harris Interactive Poll, which surveyed 2,242 U.S. adults between September 6 and 12, 2005, 90% of Catholic polled favor contraception. On other issues, the poll shows a majority who disagree with official Church teachings: 93% approve of condom use to prevent HIV/STD infections, 70%, embryonic stem cell research, and 56% abortion rights. See "New Harris Poll Finds Different Religious Groups Have Very Different Attitudes to Some Health Policies and Programs," HarrisInteractive, accessed November 26, 2018, https://theharrispoll.com/wp-content/uploads/2017/12/Harris-Interactive-Poll-Research-New-Finds-Different-Religious-Groups-H-2005-10.pdf. For similar results from a more recent poll, conducted in 2011, see "Countering Conventional Wisdom: New Evidence on Religion and Contraceptive Use," Guttmacher Institute, accessed November 26, 2018, http://www.guttmacher.org/pubs/Religion-and-Contraceptive-Use.pdf.

Therefore, whether Nelson intends this or not, his requirement of dominance forces courts to retract the current legal exemptions given to the Roman Catholic Church in America. [135]

As we can see, significant difficulties are attendant to the requirement of dominance. Its corollary, the requirement of entirety, fares no better. According to this requirement, *all* constituent members must be accounted for in the determination of corporate conscience. In real life, however, this requirement does not pan out as Nelson expects.

Returning to the Roman Catholic Church, there is strong evidence to suggest that the corporate conscience of this community is determined not by the sum of its members, but rather by select individuals within the collective. Looking particularly at the Church's hierarchy, we find a specific teaching office known as the magisterium.[136] This office, comprised of a select body of individuals, is responsible for defining and codifying the official (moral) teachings of the Roman Catholic Church. The individuals who constitute the magisterium are thus said to create and define the "corporate conscience" for the entire Church.[137] And in no significant way, does the entire collective membership of the Church contribute to that process.

This example is telling. If the formation of conscience can occur in this way for the Roman Catholic Church, what is to prohibit the same process from happening within a

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[135] See Nelson, 52 ("The social theory of conscience, however, provides the resources both to justify the skeptical intuition about for-profit institutions, and to explain why they should be treated differently than churches and other religious organizations.").

[136] *Catechism of the Catholic Church*, para. 2032-2034.

[137] "To the Church belongs the right always and everywhere to announce moral principles, including those pertaining to the social order, and to make judgments on any human affairs to the extent that they are required by the fundamental rights of the human person or the salvation of souls." *Catechism of the Catholic Church*, para. 2032.

for-profit setting? To explore this possibility, let us turn to the arts-and-crafts retail chain involved in *Burwell v. Hobby Lobby*.

Hobby Lobby, Inc. approached the U.S. Supreme Court to ask for a religious-based exemption from the federal government's contraceptive mandate. It did so on grounds of Free Exercise rights and protections afforded by the Religious Freedom Restoration Act. A central question in this case was whether a business entity can exercise religion; or, as Nelson would phrase it, whether a business entity has a valid claim of corporate conscience. To answer this question, I propose that we look not to the business's entire corporate membership, but rather to its owners and executive managers, the Green Family. Consider the following.

Hobby Lobby is a private entity, owned entirely by the Green Family. Members of the Green Family function within the business not only as owners, but also as managing executives and regular employees.[138] Following the family's collective decision,[139] Hobby Lobby is run according to Biblical principles, which are documented in the company's mission statement and exhibited through the company's long-standing practices.[140]

Given these facts, it is difficult to distinguish the corporate entity of Hobby Lobby from the personal beliefs of its owners and managing directors. As Nelson might put it, the entity of Hobby Lobby is intimately "intertwined" with the goals and beliefs of the Green Family.[141] Not only do the Greens identify with Hobby Lobby, but Hobby Lobby identifies

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[138] "Burwell v. Hobby Lobby," Becket Law, accessed November 26, 2018, https://www.becketlaw.org/case/burwell-v-hobby-lobby/.

[139] As far as I am aware, Hobby Lobby's religious bent was not voted into being by the entirety of its current members, which, as of November 2018, total more than 32,000 in number. See "About Us," Hobby Lobby, accessed November 26, 2018, https://www.hobbylobby.com/about-us/our-story.

[140] Ibid.

[141] Nelson, "Conscience, Incorporated," 1579.

with the Greens, insofar as it is an extension of their own exercise of conscience. Furthermore, as the individuals responsible for the ownership and control of this corporate entity, the Green Family wields the authority to determine the shape and direction of the firm's conscience-based activity. In other words, the Greens create and define the corporate conscience of their business; and they do this in a way not dissimilar to a church's leadership defining a collective moral vision on behalf of others.

In light of these examples, it is clear that the requirement of entirety does not reflect the way in which corporate conscience is formed in both the Roman Catholic Church and in a business corporation broadly understood.

Let us now consider where our analysis of Nelson's two requirements has led. First, the requirement of dominance states that no collective can be considered as a constitutive community unless a majority of its members closely identify with that collective's moral beliefs. Following this logic, we conclude that on the issue of contraception the Roman Catholic Church is not a collective community, and therefore cannot make a plausible claim for collective rights for legal exemption. Second, the requirement of entirety states that all members of a collective body must be accounted for when determining the existence of a corporate conscience. But two prominent examples – again from the Roman Catholic Church, and the other from Hobby Lobby – show that the formation of corporate conscience can and does occur without regard to this requirement.

In sum, the first argument reveals where the logical consequences of the requirement of dominance would go; and the second argument shows that the requirement of entirety is mistaken altogether. Since together these requirements are necessary for the construction of the polar ends of Nelson's spectrum, it is clear that their difficulties render the continuum of collectives ill-suited for free exercise, or corporate religious liberty, analysis. After all, if the Roman Catholic Church cannot fall neatly on the continuum's right end and if Hobby Lobby cannot not sit comfortably on the left, then the continuum

already fails to accurately categorize two ideal corporate types. What confidence should we have in its ability to identify the corporate consciences of group entities with even more idiosyncratic relational patterns?

### 2.2.4 Summary of Ginsburg and Nelson

Thus far in this assessment of skeptical accounts of group agency, I have shown why Ginsburg's elimination and Nelson's reduction approaches fail to convince. To eliminate group agency and thereby the legal standing of certain (though, in reality, *all*) corporate-types, Ginsburg betrays an arbitrary use of corporate theory and an unfamiliarity with typical state corporation law. Nelson, by contrast, correctly recognizes the possibility and existence of group agency, particularly with respect to conscientious group activity (what he calls "corporate conscience"). But Nelson's criteria for assessing the existence of corporate conscience are either conceptually weak[142] or empirically inaccurate.[143] As a result, his apparent openness to religiously motivated group agency within for-profit contexts is merely ostensible, and his strict conclusion against for-profit exemptions is demonstrably weak.

To their credit however we should note that Ginsburg and Nelson's respective approaches do move, generally speaking, in a "group-descriptive to legal-prescriptive" manner. This general means of proceeding is endorsed in our theological development of a

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[142] See Nelson's ideas about conscience, against a natural law conception in Sub-section 2.2.1 above.

[143] See Nelson's notions of identification and detachment, against a Christian vision of personal vocation, and dominance and entirety, against basic ideas in organizational design, in Sub-sections 2.2.2 and 2.2.3 above.

theory of corporate religious liberty. What causes their particular approaches to fail, however, is attributable to their poor or incomplete group-descriptive theories. Traditional theories of the corporation are insufficient for the moral work of legal prescription. And Nelson's social theory of conscience, while laudable for its attention to ethically salient relations within diverse group-types, is unjustifiably reductive of (religiously motivated) group agency.

As for their underlying normative motivations, it might be the case that Ginsburg and Nelson's moral concerns do, in fact, hold weight. For example, the issue of third-party harms might be of tremendous even overwhelming consideration in a given dispute. But recognition of this fact does not justify poor descriptions of social and group realities. We therefore recognize the potential weight of their (implied) normative concerns and reject their approaches to legal prescription based upon their poor group-agency accounts (i.e., their self-validating fictions).[144]

Given the descriptive weaknesses of the elimination and reduction positions, it is unsurprising that Richard Schragger and Micah Schwartzman opt for a different approach. Writing after Nelson and Ginsburg, Schragger and Schwartzman articulate an approach to legal prescription that is agnostic towards the nature of group agency. Their agnosticism is ultimately based upon a conviction that *any* account of group agency – no matter how empirically accurate or theoretically compelling – is always indeterminate with respect to the prescription of corporate religious liberty rights. For them, political morality is always prior and fundamental in relation to the description of groups or group agency.

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[144] Finnis, *Aquinas*, 28.

In the next section, I show why this agnostic intuition has some methodological merit for purposes of developing a Christian theory of corporate religious liberty. But I also show why it is descriptively inadequate and ethically shortsighted. In the final analysis, after pointing to an appropriate method of legal prescription attributable to them, I reject Schragger and Schwartzman's specific suggestion to eschew group-ontological considerations from corporate religious liberty theorization.

## 2.3 The Dewey-Schwartzman narrative and group-agency agnosticism

In an anthology chapter, entitled "Some Realism about Corporate Rights," legal scholars Richard Schragger and Micah Schwartzman argue against the use of group ontology for legal-prescriptive purposes. They write:

> The indeterminacy of group ontology [i.e., accounts of group agency] means that even if we grant that groups are real entities – and, further, that they are moral agents – it does not follow that they have moral or legal rights. The strong version of this claim is that group agency is entirely irrelevant to the ascription of rights. Here we make a more limited argument, namely, that the moral implications of group agency, if indeed there are any, are overwhelmed by other moral considerations.[145]

Schragger and Schwartzman are here careful to distinguish between strong and limited versions of their group-agency agnosticism. But, since Schragger and Schwartzman never indicate circumstances in which the moral implications of group agency are *not* overwhelmed by "other moral considerations," it is safe to assume that their strong and limited arguments reach the same practical conclusion – namely, "that the moral

[145] Schragger and Schwartzman, "Some Realism," 366.

implications of group agency . . . are [entirely] overwhelmed by other moral considerations."[146]

In this section, I critique Schragger and Schwartzman's agnostic account of group agency, primarily in terms of its methodological corollary, an empirical method of corporate rights prescription. Following Schragger and Schwartzman's group-agency agnosticism, this method of legal prescription holds that (i) accounts of group agency are always indeterminate with respect to legal conclusions and, more positively put, that (ii) legal conclusions *and* any relevant group descriptions are fundamentally shaped by politico-normative commitments. I argue that this method improves upon an earlier version advanced by the twentieth-century philosopher John Dewey. But, in the final analysis, I show that Schragger and Schwartzman's improved version is descriptively inadequate and ethically insufficient, in large part due to an inadequate practical distinction between the subject-matters and methods of descriptive group ontology and moral theory. To make this case, I begin with an account and critique of Dewey's preferred method of corporate rights prescription. I then situate Schragger and Schwartzman's version within this methodological heritage and assess their various innovations.

### 2.3.1 Dewey's empirical method of legal prescription

The twentieth-century origins of the Schragger-Schwartzman method of legal prescription can be found in a 1926 article by John Dewey, entitled "The Historic Background of Corporate Legal Personality." There it is argued that the ascription of rights and duties to

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[146] Ibid.

corporate persons should (i) operate independently of political, moral, and theological ideas about legal personality, since such "extraneous dogmas and ideas" can obstruct rules of law;[147] and that such ascription should (ii) have recourse only to the social consequences that legal experts find corporate persons to have when granted or denied whichever rights and duties,[148] since this is the only way that the concrete facts and relations necessary for legal prescription can be laid bare. Implied in this argument is an understanding of two opposing methods of legal prescription, what I refer to as the "metaphysical" and "empirical" methods. I here identify how Dewey regards each method to operate, and I point to a certain ambiguity in Dewey's articulation of his preferred option, the empirical method.

According to Dewey, the metaphysical method of corporate rights prescription follows from an ancient Greek logic, which involves first understanding what a thing *is* and then determining which rights and duties that thing should enjoy based upon its inherent nature. Dewey sees evidence of this method in classical metaphysics (through its preoccupation with defining substances[149]), in the work of the German legal historian Otto von Gierke (who argues that corporate bodies are living organisms and therefore deserving of strong legal protections) and in the writings of von Gierke's British counterpart, Frederic W. Maitland (who, according to Dewey, never quite understood the rights and duties of legal persons to be separate from and unconditioned by the perceived inherent

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[147] John Dewey, "The Historic Background of Corporate Legal Personality," *Yale Law Journal* 35, No. 6 (1926): 657. See also p. 660 where Dewey writes that "false theories have done practical harm." Dewey does not explain the criteria by which a theory is judged false or true.

[148] Dewey, 661.

[149] Dewey, 660.

properties of those persons[150]). Common to all these proponents is the view that the metaphysical method operates upon a "common sense" assumption that "whatever is a right-and-duty-bearing unit should have a *character of its own* in virtue of which it may possess rights . . . [and] obligations."[151] This inherent character, being so important to the metaphysical method, must be something of practical (moral) importance. Otherwise, "why are not molecules, or trees or tables just as fit candidates for legal attributes as singular men and corporate bodies?"[152]

While Dewey recognizes the moral import of assigning rights and duties to legal persons, he thinks that the basic intuition underlying the metaphysical method (i.e., the notion that legal rights follow from a thing's essence) is misplaced. After all, judges and lawmakers issue holdings and pass legislation without reaching consensus on the metaphysical nature of juridical subjects. They need only rely upon the relevant effects of recognising rights and duties, effects known empirically by those "competent in law."[153] Brute facts of actual legal consequences, therefore, weaken the currency of the metaphysical method and its basic assumption.

Apart from the seeming practical impotence of the metaphysical method, Dewey attributes a certain normative failure to it as well. By virtue of this method, "psychology[,] . . . philosophy or what not extraneous dogmas and ideas" can obstruct rules of law. This implies that such theoretical notions about *what is* are obsolete or inaccurate and therefore

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[150] Dewey, 658. Also see Frederic W. Maitland, Introduction to *Political Theories of the Middle Ages*, by Otto Gierke, trans. Frederic W. Maitland (London: Cambridge University Press, 1938).

[151] Dewey, "Corporate Legal Personality," 660 (italics mine).

[152] Dewey, 660.

[153] Dewey, 660–61. Dewey does not provide a systematic theory of judicial interpretation or activism.

are unsuitable for solving contemporary legal problems. Dewey writes, "We often go on discussing problems in terms of old ideas, when the solution of the problem depends upon getting rid of the old ideas, and putting in their places concepts more in accord with the present state of ideas and knowledge."[154] Thus, through its penchant for drawing legal conclusions from non-legal ideas, the metaphysical method – by Dewey's lights – falls flat.

Dewey's proposed empirical method, by contrast, proceeds in an almost opposite manner from the metaphysical approach. Rights and duties do not follow from conclusions about an inherent essence. Instead, rights and duties are first given to a legal person and then the consequences that follow from this assignment are analysed. This method (i) focuses upon what a thing *does* in light of the rights and duties it is given, (ii) remains agnostic with respect to the inherent nature of the thing in question[155] and (iii) presumably involves a normative assessment of the observed consequences, which culminates in an adjustment of laws and policies. On this third point, Dewey is regrettably ambiguous.

Ambiguity concerning the empirical method's normative or prescriptive function can be attributed in part to the method's two sources of inspiration: C. S. Pierce's pragmatist rule (which states that "our conception of . . . effects is the whole of our conception of the object"[156]) and a scientific principle known as extensive abstraction (according to which "what really matters to science is not the inner nature of objects but their mutual relations"[157]). Dewey claims that a method built upon these foundations is

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[154] Dewey, 657.

[155] Dewey, 660.

[156] Dewey, 661.

[157] Dewey, 661.

"logical" or mathematical.[158] Yet somehow, on Dewey's understanding, a mathematical method can recognise the normative importance of rights and duties, as if "two plus two" could result in a moral appraisal.

To support this curious position, Dewey seems to supplement his discussion of the empirical method with something of a normative theory. But since he does not concede that legal concepts like personality should be informed by non-legal factors, Dewey treads lightly when discussing the particular moral character of the "analysis of facts" required for defining the rights and duties of legal personality. Indeed, he never explicitly refers to this analysis as moral. Instead, Dewey considers it sufficient to stress the "practically important matter" of defining rights and duties, which he claims can be understood in terms of observing "social consequences." On this construction, the lawyer or even the informed layman can identify how bodies "singular and corporate . . . act differently, or have different consequences, depending upon whether or not they possess rights and duties . . . [or depending upon] what specific rights they possess and what obligations are [in fact] placed upon them."[159] Dewey, however, offers no guidance in his article on how to discriminate between morally good and bad actions or consequences. It appears then that, despite his appeal to normative concerns, Dewey's analysis of facts is more so an extension of a positive scientific principle than a procedure of normative legal theory.

Further evidence of Dewey's intentional distancing from a (methodologically sound) moral approach is seen in his empiricization of the terms "interest" and "will," terms commonly associated with moral philosophy. Following the French jurist Michoud,

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[158] Dewey, 661–63.

[159] Dewey, 661.

Dewey claims that both terms can be defined according to their consequences and not with reference to their metaphysical status. He writes, "we determine the absence or presence of 'intent,' and the kind of 'intent,' by discrimination among concrete consequences, precisely as we determine 'neglect,' which by definition is not a peculiar kind of inhering agency." Continuing, Dewey concedes that intent or neglect could be subject to hypostatization and therefore made into a "positive and intrinsic force or agency." But this process, he notes, defies the logic of extensive abstraction, according to which "'will,' like 'interests,' denotes a *function*, not an intrinsic force or structure."[160] In other words, interest and will are empirical concepts. They – like Dewey's analysis of facts – are scientific, not metaphysical.

### 2.3.2 Conflating science and morality

Given its normative purpose coupled with a scientific or "logical" character, Dewey's empirical method seems to be an impossibly *a*moral form of legal prescription. A conflation of proper subject-matters, between moral theory and a descriptive science, accounts for this normative confusion.

To see why this is the case, we begin by considering the passage in which Dewey explicitly acknowledges the practical and social importance of defining rights and duties:

> From this point of view [i.e., the empirical method], the right-and-duty-bearing unit, or subject, signifies whatever has consequences of a specified kind. The reason that molecules or trees are not juridical "subjects" is then clear; they do not display the specified consequences. *The definition of a legal subject is thus a legitimate, and quite conceivably a practically important matter.* But it is a matter of analysis of facts, not of search for an inhering essence. The facts in question are whatever specific consequences flow from

[160] Dewey, 663 (italics in original).

> being right-and-duty-bearing units . . . The consequences must be social in character, and they must be such *social consequences* as are controlled and modified by being the bearer of rights and obligations, privileges and immunities. Molecules and trees certainly have social consequences; but these consequences are what they are irrespective of having rights and duties . . . But there are some things, bodies singular and corporate, which *clearly act differently, or have different consequences,* depending upon whether or not they possess rights and duties, and according to what specific rights they possess and what obligations are placed upon them . . .[161]

Here, Dewey appeals to "social consequences" and claims that defining a legal subject is a "practically important matter." While these references strike one as normatively relevant, they admittedly can be interpreted in various ways. One could read Dewey as simply stating that empirically observable consequences follow from the act of defining rights and duties. This empiricist interpretation is corroborated by Dewey's conclusion to the excerpt copied above, where he writes: "If the logical principle [i.e., the principle of extensive abstraction] be granted, it is a *factual matter* what bodies have the specifiable consequences and what these consequences are."[162] By this reading, the empirical method is nothing more than an observation that Z happens when Y is affected by X. It is, as Dewey claims, a scientific analysis of facts.

But this reading loses its force when one takes seriously (i) the normative implications of the claim that certain things "act differently, or have different consequences," when granted rights and duties and (ii) Dewey's earlier argument that legal problems can be resolved only when "extraneous dogmas and ideas" are replaced by concepts more in accord with current knowledge.[163] Both points betray a normative

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[161] Dewey, 661 (italics mine).

[162] Dewey, 662 (italics mine).

[163] Dewey, 657.

agenda, which naturally presupposes a normative position that, at the very least, is able to differentiate morally good "dogmas and ideas" from bad ones. It is this normative agenda – be it a solitary principle, an *ad hoc* collection of principles, or a comprehensive moral theory – that Dewey fails to make plain. We are therefore forced to ask, "Why permit Z to happen when Y is affected by X?" This is a normative question that requires a normatively grounded answer, something that Dewey's empirical method cannot intelligibly provide.

The classical distinction between four sciences, or fields of rational inquiry, helps illuminate this limitation in Dewey's method. First proposed by Aristotle, adopted by Aquinas, and re-appropriated by Finnis, the classical distinction holds that:

> [The] sciences {scientiae} are of four irreducibly distinct {diversae} kinds: (1) sciences of matters and relationships {ordo} unaffected by our thinking, i.e. of the 'order of nature {rerum naturalium}' studied by the 'natural philosophy' which includes 'natural science' {[scientia] naturalis}, mathematics, and metaphysics; (2) the sciences of the order we can bring into our own thinking, i.e. logic in its widest sense; (3) the sciences of the order we can bring into our deliberating, choosing, and voluntary actions, i.e. the moral, economic, and political sciences compendiously called *philosophia moralis*; (4) the sciences of the multitude of practical arts, the technologies or techniques which, by bringing order into matter of any kind external to our thinking and willing, yield 'things constituted by human reason.'[164]

According to Finnis, of the four orders, it is only the third that deals with self-determining, freely chosen conduct and therefore with morality itself.[165] This distinctiveness concerns

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[164] Finnis, *Aquinas*, 21 (italics in original).

[165] Finnis, 23, 62. See also the first endnote in Finnis, *Natural Law & Natural Rights*, 127, which reads: "The notion of freedom of choice, as the matrix in which human responsibility for good is set, first becomes an explicit theme in Christian writings. it is given great prominence by Thomas Aquinas, who opens the part of his *Summa Theologiae* which deals with human action and morality by stating: 'Human beings are made in the image of God, and this implies, as St. John of Damascus said, that they are intelligent and free in judgment and self-mastery. So, having considered both the exemplar of that image, namely God, and the things that proceed by divine power and the will of God, it remains for us now to consider the image itself, i.e. human beings, precisely insofar as each is the source of his or her own actions and has freedom of judgment and power over his or her own words and deeds': S.T. I-II, Prologue."

the interplay between moral responsibility (i.e., choosing one's actions) and the self-constitutive nature of those freely chosen acts. Such actions are what Finnis calls "*actio* rather than *factio,*" that is, "*doing* (considered precisely as self-determining) rather than *making* (considered precisely as shaping something outside the acting person's mind and will)."[166] It is the subject-matter of *doing*, which, in regards to the other sciences, makes the third order uniquely moral and thus irreducible to nature (1), logic (2) and technique (4).

By my understanding, legal prescription entails a normative procedure and hence involves, or has bearing upon, freely chosen actions.[167] On this construction, lawyers and judges morally deliberate in their prescription of legal regimes; and those subject to regulations deliberate over how to act within the legal space created and, at times, deliberate over how to change that space to align with moral requirements. While dealing with the social technology known as law[168] and thus rightly being part of the fourth order

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For related discussion on free-choice, see Germain Grisez and Russell Shaw, *Fulfillment in Christ: A Summary of Christian Moral Principles* (Notre Dame: University of Notre Dame Press, 1991), 16–17. Grisez notes that free choice has a threefold importance to Christian morality, being (1) a "source of moral responsibility," (2) pertaining to the act of faith, and (3) "the basis of human personal dignity." For a defense of the reality of freedom of choice, see Grisez, Germain, Joseph M. Boyle, and Olaf Tollefsen, *Free Choice: A Self-Referential Argument* (Notre Dame: University of Notre Dame Press, 1976).

166 Finnis, *Aquinas*, 24 (italics mine).

167 I follow Finnis on this point. See John Finnis, "A Grand Tour of Legal Theory," in *Philosophy of Law: Collected Essays*, Vol. IV (Oxford: Oxford University Press, 2011), 109-111 (arguing that ethics extends to politics and that, in turn, politics requires a theory of law).

168 For example, see Orts, *Business Persons*, 1. Orts here defines law as a social technology: "Law supplies the social technology by which business enterprises are constructed and maintained. One may usefully contrast 'physical technologies' (such as improvements in energy production or the invention of new modes of communication and transportation) with 'social technologies' such as law. Without the social technology and 'forms' provided by law, business firms would be indistinguishable from informally organized social groups, clubs, or gatherings of people pursuing similar interests. Law also distinguishes business firms from other formally organized social entities, such as nation-states and non-profit charities."

of technique, legal prescription has roots deeply within the classical distinction's third order, the order of moral philosophy.[169]

In light of the above, it becomes apparent that Dewey's empirical method downplays, to the point of obscurity, the reality of freely chosen and self-constitutive acts in the procedure of legal prescription. On Dewey's account, lawyers and judges are not said to morally deliberate over rights and duties; rather, they "find" them through a scientific analysis of facts.[170] And legal experts responsible for observing relevant social consequences are not explicitly said to engage in ethical evaluation. Instead, Dewey portrays them as scientists or technicians, recording the various permutations of effects that follow from a string of legal experiments.[171]

Returning to the question, "Why permit Z to happen when Y is affected by X?," a method of legal prescription that is an order of science ultimately lacks the resources to normatively justify Z. This is because the first order pertains only to what *is* (i.e., those things outside of the acting person's mind and will). Legal prescription, however, requires an *ought*, which is available through moral philosophy's recognition of self-constitutive acts, including the normative reasons behind their being freely chosen.[172] Therefore, what

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[169] See Finnis, "A Grand Tour of Legal Theory," 111. Finnis writes: "Ethical philosophy, without any essential shift in its normative, good-reason-seeking purpose and method, extends into political philosophy. And since the problems of administering justice, and of coordination for defence and economic welfare, cannot reasonably be resolved without new norms of conduct, new procedures for enforcing morality's perennial requirements, and new procedures for introducing and maintaining those new norms and procedures appropriately, political philosophy must include a theory of law." But here Finnis also notes that legal theory and law are not reducible to ethics.

[170] Dewey, "Corporate Legal Personality," 656.

[171] Dewey, 661.

[172] Behind this statement, I roughly follow Finnis's interpretation of Aquinas's moral *philosophy* (versus Aquinas's moral theology), as found in the *Summa Theologiae*, q. 94, a. 2 of the *Prima Secundae*. See Finnis, *Natural Law & Natural Rights*, 33-36 (arguing that Aquinas's natural law theory does not make an illicit jump from "is," i.e., human *nature,* to "ought;" but rather references "what is reasonable" or, more specifically put, "the *underived* first principles of practical reasonableness").

Dewey tenuously holds out to be a method of legal prescription – which, specifically for him entails a method that is (i) concerned with social consequences and (ii) corrective of dogmas and ideas obstructive to law – is, in the final analysis, no such thing. Logically speaking, by collapsing the *ought* of freely chosen actions into the *is* of scientific study, the empirical method offers no moral reasons to follow its conclusions. Why permit Z to happen when Y is affected by X? On Dewey's account, we will never know.[173]

### 2.3.3 Schragger and Schwartzman as corrective of Dewey

For group-agency skeptics, Dewey's empirical method can potentially justify the eschewal of group ontology and any untoward moral implications that may follow from it. But, as shown above, Dewey supporters should be skeptical of his method, principally due to its conflation between the subject-matters of science and morality. This methodological failure undermines the ability of the empirical method to justify its legal conclusions adequately. Since Dewey's method is held out to be a form of legal prescription – which by definition entails moral deliberation or, as Dewey implies, a moral evaluation of social consequences – its inadequate normative capability is particularly lamentable.

Perhaps due to Dewey's methodological weaknesses, Richard Schragger and Micah Schwartzman offer a version of the empirical method that does not collapse legal prescription into a scientific investigation. Their approach recognizes that a political morality (of whichever type) undergirds corporate rights ascription. Unquestionably, this is

[173] At minimum, following Dewey, we will not have any good (i.e., non-arbitrary) reasons for permitting or disallowing Z.

an improvement upon Dewey. In this sub-section, I interpret Schragger and Schwartzman's approach to legal prescription as found in their chapter, "Some Realism about Corporate Rights." I show how it *can* be seen to follow the Aristotelian or Thomistic distinction between four fields of rational inquiry and so offer an appropriately empirical *and* normative method of legal prescription. In the following sub-section, however, I point out the limits of my interpretation; and, in the end, I argue against the adoption of Schragger and Schwartzman's method, not as I interpret it, but as they actually propose it. I turn now to a possible interpretation of Schragger and Schwartzman.

Following Dewey's lead, Schragger and Schwartzman reject the position that metaphysical ideas about legal personality should determine the status of corporate persons as rights-holders. Among these ideas, Schragger and Schwartzman identify three main doctrines of personality:[174] real entity theory, according to which corporate bodies have moral agency and thus ought to be protected by law;[175] concession theory, which holds that corporations are creations of law and therefore cannot exist independently of law or hold grievances against it; and fiction theory, the view that corporate personality is a legal fiction designed to advance the interests of groups' individual members, not corporate entities themselves.[176] Like Dewey, Schragger and Schwartzman single out real entity theory as especially problematic, implying strongly that it is deliberately used to impose group

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[174] Schragger and Schwartzman, "Some Realism," 347; and Dewey, "Corporate Legal Personality," 665, n. 1.

[175] Schragger and Schwartzman, "Some Realism," 353; and Dewey, "Corporate Legal Personality," 658.

[176] Schragger and Schwartzman, "Some Realism," 353–54; and Dewey, "Corporate Legal Personality," 666.

interests upon vulnerable individuals.[177] And with respect to all three doctrines, Schragger and Schwartzman find them to be a hindrance to legal prescription, insofar as they distract from the social consequences of rights-extension[178] and are indeterminate with respect to legal outcomes, thus being fundamentally useless for the normative work of legal prescription.[179]

Their proposed solution is an empirical method that both draws upon and departs from Dewey's in important ways. Common to both is an emphasis upon what social effects might follow from the extension of rights and duties to corporate persons. In this way, Schragger and Schwartzman's empirical method follows the facts-based approach of the legal realist movement, which Schragger and Schwartzman loosely associate with Dewey himself.[180] However, unlike Dewey's scientific and notably *a*moral approach, Schragger and Schwartzman's method explicitly acknowledges the normative interpretation of social effects. (Hence, their method could be called empirical *and* consequentialist.) Concluding a discussion on the moral indeterminacy of corporate theories, Schragger and Schwartzman write:

> Whether a group is a real entity, an aggregate of individuals, or a legal fiction tells us very little about the group, or about groups in general. We can know everything about a group's metaphysics, and yet know almost nothing about its relationship to its own members and to the political society (or societies) in which it finds itself, or perhaps to

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[177] See discussion on normative individualism in Schragger and Schwartzman, "Some Realism," 366. In the same article, see also their analysis of the Tenth Circuit court's decision in *Hobby Lobby* (pp. 363-364), where Schragger and Schwartzman attribute real entity theory to the Tenth Circuit and imply that the court is held morally responsible for its (in their opinion) misguided and normatively problematic decision.

[178] Schragger and Schwartzman, 360 (italics mine).

[179] Schragger and Schwartzman, 357. They summarize Dewey's approach as follows: "Let us say that a metaphysical view, $V$, is indeterminate if it does not provide a sufficient reason to select between two mutually exclusive legal options, $L_1$ and $L_2$. If a proponent of $V$ has equally good reason to support either $L_1$ or $L_2$, or no reason to prefer one to the other, then $V$ is indeterminate at least with respect to those options."

[180] Schragger and Schwartzman, 346, 358. They do not claim that Dewey himself was a legal realist, but they associate his conclusions about corporate personality with legal realism.

> which it belongs. But without information about those relationships, and without some conception of what makes rights valuable, it is impossible to draw any conclusions about whether it makes sense to recognize the moral and legal rights of groups.[181]

Being normatively inclusive, Schragger and Schwartzman's empirical method is able – in theory – to offer moral reasons for its legal outcomes. It therefore overcomes not only the metaphysical method's perceived indeterminacy with respect to legal conclusions, but also Dewey's normative ambiguity. Indeed, unlike Dewey's scientific approach, Schragger and Schwartzman's empirical method offers reasons why we should permit Z to happen when Y is affected by X.

One way to appreciate the normative capacity of this reformulated method is to identify the proper relationship between corporate theory and moral philosophy. Schragger and Schwartzman's evolving understanding of corporate theory in "Some Realism" is here useful. To begin their critique of the metaphysical method, Schragger and Schwartzman adopt what they think religious institutionalists (i.e., those who endorse strong jurisdictional or rights-based protections for religious organizations) seem to propose – namely, that corporate theory can explain the metaphysics of group personality, which ineluctably results in (pro-corporate) legal conclusions.[182] On this construction, corporate theory almost serves as a subset of moral philosophy, one that specifically pertains to the moral and legal rights of corporate persons.

But later in "Some Realism," Schragger and Schwartzman come to describe corporate theory as a positive science, that is, purely descriptive and distinct from moral

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[181] Schragger and Schwartzman, 367–68.

[182] Schragger and Schwartzman, 348, n. 13 (identifying Víctor Muñiz-Fraticelli, Paul Horwitz, Patrick McKinley Brennan, Steven D. Smith, and Richard W. Garnett as religious institutionalists).

philosophy. For example, towards the end of their chapter, they recognise that legal prescription requires descriptions of groups and that corporate theories can provide these descriptions.[183] Elsewhere, they acknowledge that descriptions about group agency have "normative implications";[184] yet Schragger and Schwartzman do not go so far as to refer to corporate theory as a type of political morality.[185] These points suggest an understanding that corporate and moral theories operate upon separate planes.

This final understanding moves in the right direction, methodologically speaking, as seen against the classical distinction between fields of rational inquiry. If corporate theories are understood to *describe* group agency, especially in terms of what agency arrangements organizational structures permit,[186] then it is possible to categorize these theories within Aristotle and Aquinas's descriptive fourth order, that is, the science of "techniques which . . . yield 'things constituted by human reason.'"[187]

Legal scholar Eric W. Orts does this much when he articulates a descriptive theory of corporations, which focuses upon the legal institutions that shape formally organized business firms.[188] These include three institutions pertaining to corporate law (legal fiction, legal entity, and legal personality),[189] as well as three institutions normally associated with other substantive legal fields but that have relevance for an understanding of the

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[183] Schragger and Schwartzman, "Some Realism," 369.

[184] Schragger and Schwartzman, 366.

[185] Schragger and Schwartzman, 368.

[186] One example is the idea of corporate internal decision (CID) structures held by philosopher Peter French, as mentioned in Schragger and Schwartzman, 350.

[187] Finnis, *Aquinas*, 21.

[188] Orts, *Business Persons*, 1. Orts focuses on business firms, but acknowledges that his theory has applications for other types of organizations.

[189] Orts, chap. 1.

composition of corporate entities (agency, contracts, and property).[190] Orts emphasizes that his legal, or institutional, theory is "minimalist with respect to substantive political content."[191] Thus, along Deweyean lines, an institutional corporate theory deliberately eschews the moral biases that have historically accrued to corporate theories when used in legal argumentation.[192] As Orts puts it, "it makes better sense to decide specific policy questions with respect to the law applicable to business firms in particular contexts and situations rather than in general."[193] In other words, abstract theories of corporate personality (constituting a "general" approach) should not determine corporate-related policies.

That said, Orts recognizes that an institutional corporate theory leaves open for moral deliberation issues surrounding government regulation and the rights of businesses and their owners. Business people and policy makers are assumed to hold practical, moral positions that inform their legal conclusions;[194] thus, Orts's institutional theory here follows Schragger and Schwartzman in its normative inclusion. At the same time and with reference to the classical distinction, an institutional corporate theory maintains a distinction between a descriptive theory of corporations (which pertains to the *factio* of technique) and moral theory (that is, the third order of rational inquiry, which, we should

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[190] Orts, chap. 2.

[191] Orts, 18.

[192] Orts, 17–18. Orts writes: "In addition, Dewey observes that legal results related to corporate personality have been driven by many different 'non-legal considerations,' including 'considerations popular, historical, political, moral, philosophical, metaphysical and, in connection with the latter, theological.' These policy considerations should be made explicit."

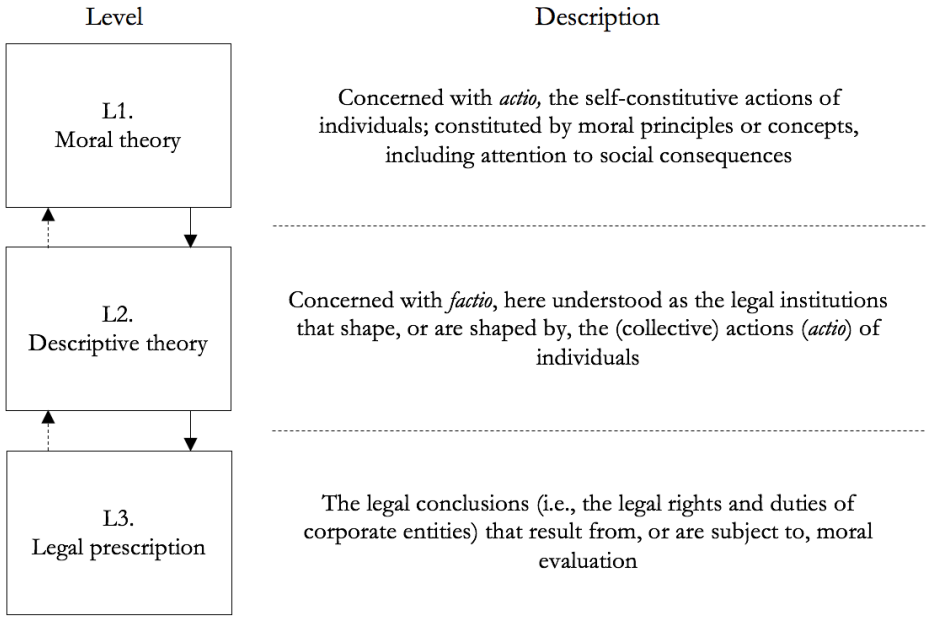
[193] Orts, 19.

[194] Orts, xxii.

add, requires descriptive facts to arrive at concrete moral conclusions pertaining to the *actio* of self-determining human persons).[195]

With reference to corporate rights prescription, Figure 7 visualizes this methodologically appropriate relationship.

**Figure 7. An interpretation of Schragger and Schwartzman's empirical method**




The schematic presented is divided into three levels. The first level indicates a moral theory that undergirds the process of legal prescription. This level is concerned with *actio,* the self-constitutive actions of individuals, executed on one's own or in coordination with others. The exact moral theory used is variable and could be conceived in terms of an *ad hoc* collection of moral principles and concepts or a comprehensive moral doctrine, whether

[195] See Finnis, *Natural Law & Natural Rights*, 18-19 ("[A theory of natural law] cannot proceed securely without a knowledge of the whole range of human possibilities and opportunities, inclinations and capacities – a knowledge that requires the assistance of descriptive and analytical social science.").

secular or religious in nature. Whatever the moral theory chosen, and following the Dewey-Schwartzman narrative, the schematic's normative foundations will pay attention to social consequences. The second level, descriptive theory, pertains to theories of group agency or, in the context of incorporated entities, specifically to corporate theory. This level is thereby concerned with *factio*, understood here as the legal institutions (e.g., legal fiction, entity, personality; agency, contracts, property) that shape, or are shaped by, the collective actions of individuals executed within or through formally organized groups. The third level, legal prescription, entails the legal conclusions that result from, or are subject to, moral evaluation. In the corporate religious liberty context, the third level pertains to the legal rights and duties of, or associated with, corporate entities.

Although moral commitments inform one's description of groups and then culminate in legal conclusions, the progression through levels is not unidirectional. Thus, the schematic supplements the expected downward arrows with an upward-facing set. The latter set indicates that a feedback mechanism exists between levels, meaning that conclusions from one (lower-positioned) level can be used by another (higher-positioned) level in such a way that the (higher) level changes one or more of its own conclusions. For instance, a hypothetical law restricting religious exercise to not-for-profit organizations (Level 3) can influence how we describe groups and religious group agency (Level 2), which invites moral reflection upon whether the hypothetical law is normatively worthwhile (Level 1). Following this example, it may be the case that a given exercise of moral deliberation (i) takes for granted the high moral value of the hypothetical law, (ii) describes religious organizations as not-for-profit, and (iii) solidifies the moral assumption or argument that collective religious action should occur only within not-for-profit contexts. Further to this, it should be added that the feedback mechanism can occur between two neighboring levels, as when a group description (say, one involving the

control and monetary privileges of property rights) informs or evokes reflection upon moral principles (in this case, a natural moral right to ownership).

In light of the interaction between levels, it is important to stress that levels one and two operate according to their own methodologies, given their distinct subject-matters. Moral theory's emphasis upon self-constitutive (moral) acts cannot be reduced to a descriptive theory's understanding of "what is the case"; and the reverse is true. At the same time, we must note that a descriptive theory is never entirely uninformed by moral commitments. (Otherwise, what explains the *moral* choice behind a social-scientific emphasis upon whichever phenomenon? In other words, why is *that* phenomenon worth studying?) Likewise, moral theory can never culminate in concrete moral and legal conclusions without some awareness of what "is," that is, what is known through "the assistance of descriptive and analytical social science."[196]

To reiterate, Figure 7 outlines only an interpretation of Schragger and Schwartzman's empirical method. It does not precisely reflect Schragger and Schwartzman's empirical method, since they neither have recourse to an institutional corporate theory nor explicitly claim that descriptions of groups should include accounts of institutions beyond legal personality (Level 2). Nevertheless, the schematic's three-tiered structure reflects a basic logic and methodological soundness that could be attributed to their approach. Indeed, unlike Dewey's method, which would confusedly attempt to legally prescribe without a conception of morality (Level 1), the empirical method outlined above maintains the distinction between the mutually supportive subject-matters and

[196] Finnis, 18-19.

methodologies of moral theory and technique; accordingly, it is able to offer moral reasons for its coercive legal prescriptions (Level 3).

Given its methodological strengths, I adopt the empirical method of legal prescription as described above for our developmental work in Chapter 3. But, to round off our discussion and criticism of Schragger and Schwartzman's agnostic approach, we must admit that the above interpretation is not the only one available. Indeed, it may not be the most accurate interpretation of Schragger and Schwartzman. In the next sub-section, I show how Schragger and Schwartzman depart from the methodological strengths addressed above and thus further remove themselves from a Christian approach to corporate religious liberty.

### 2.3.4 Remaining methodological and Christian ethical contentions

The previous sub-section portrayed Schragger and Schwartzman's empirical method in the best possible light, methodologically speaking. I now provide an alternative interpretation, one that I consider to be more closely aligned with Schragger and Schwarzman's chapter "Some Realism" and their wider scholarship. In the interpretation that follows, I conclude that Schragger and Schwartzman ultimately endorse a unidirectional understanding of legal prescription and, along the way, unjustifiably discredit Christian ethical thought from grounding that process. By highlighting this methodological mistake and ethical bias, I hope not only to show why we should reject their method of legal prescription but also to provide a foil against which to appreciate better the strengths of the empirical method constructed above. That method, as visualized in Figure 7, will inform our constructive work in the next chapter.

The first point to address concerns the unidirectional nature of Schragger and Schwartzman's empirical method. Recall that a multidirectional method of legal

prescription admits the methodological independence of morality and descriptive theory; it also recognizes that both types of rational inquiry can and do inform each other at appropriate points. But Schragger and Schwartzman's method of legal prescription neither admits nor recognizes either. Indeed, it seems to operate in a unidirectional manner, such that moral theory "drives" – or entirely determines – a description of groups.

Consider this extended passage:

> But the salience of particular group attributes will be driven by considerations well beyond the ontological nature of the organization. Whether the size of a given organization is salient, for example, may turn on the relative size of all organizations in society, whether the organization serves as a countervailing power, what the organization actually does, and whether that activity is itself worth doing. This will be the case with any given generalization. For example, whether the for-profit or nonprofit status of a given organization is relevant to the recognition of its rights will depend on some account of market relations in a democratic society. Descriptive generalizations about a category of organizations – churches, corporations, nonprofits – only become relevant to the assignment of rights and responsibilities when they are evaluated under some conception of political morality.
>
> Without specifying such a conception, it is pointless to go on about the nature of churches, corporations, and other groups. But we can, at least, address the objection raised earlier to the realist claim that we should replace the question, "What is a corporation?" with the question, "How does granting rights to a corporation affect our social relations?" To claim that we cannot know what the effects will be without an accurate description of the group, our response is that *the kind of description needed is not an ontological one, but rather one driven by our moral concerns*. If our purpose is to assign moral rights and responsibilities, then we need conceptual and empirical descriptions informed by that purpose.[197]

Schragger and Schwartzman here argue that abstract theories of group ontology (which determine whether groups are real entities or mere aggregates, for example) provide insufficient ethical information for the process of legal prescription. Other moral considerations, such as the normative purpose or value of various groups in society, are required. It is these considerations, driven by an underlying conception of political

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[197] Schragger and Schwartzman, "Some Realism," 368–69 (italics mine).

morality, that bring to light the descriptive attributes of groups that are ethically relevant for the assignment of corporate rights. In other words, by Schragger and Schwartzman's understanding, it may be empirically true that a for-profit firm has owner-controllers who hold certain legal rights of ownership; but, if our conception of political morality eschews the importance of property rights (whether morally or legally, i.e., positively, construed), then we can (i) choose to ignore the empirical fact concerning ownership from our group description and (ii) recognize or prescribe moral and legal rights that would disregard or overrule the relevant prerogatives of the owner-controllers in question.

Several inferences can be drawn from Schragger and Schwartzman's argument. To start, even though Schragger and Schwartzman evoke the ethical "salience" of group descriptions, which implies that descriptive theories do inform level-one moral reasoning, it is still not clear that their implied method of legal prescription operates in a multidirectional manner. Insofar as "the kind of [group] description needed" is "*driven* by our moral concerns,"[198] the interaction proposed between morality and descriptive theory runs in one direction: first, certain moral principles are chosen as most important; then, group attributes deemed relevant to those principles are described.

The problem with this procedural sequence can be construed in several ways: First, it risks overlooking ethical concerns made apparent through an attention towards organizational design, as in the example above regarding the property rights of owner-controllers; second, it endorses a moral shortsightedness, in which the brute facts of social reality – including organizational design and (dare I say) objective moral facts – are passed over in favor of a narrow set of normative concerns; and, third, it encourages a certain

[198] Schragger and Schwartzman, 369.

arbitrariness, whereby individuals are never quite sure whose conception of political morality will ultimately drive the description of groups and the related legal conclusions. An explicitly multidirectional method of legal prescription could avoid these faults by (a) taking into account the full range of group-descriptive attributes, (b) adopting a non-reductive or pluralist moral theory,[199] and (c) providing more assurance – by virtue of (a) and (b) considered together – that more or all group-descriptive attributes will have the opportunity to be ethically relevant for purposes of legal prescription. These correctives do not guarantee that a given ethical concern, tied to particular group-descriptive attributes, will outweigh all other interests; but they do put more empirical and normative considerations on the table than Schragger and Schwartzman's method seems to allow.

It might be argued that I have caricatured Schragger and Schwartzman's method. It is not unidirectional, some might say, because it does not involve a subject-matter conflation between a foundational moral theory and group-descriptive theory, such that the former effectively takes over the subject-matter and methodology of the later. I concede that a subject-matter conflation is not explicitly present in Schragger and Schwartzman's thought (though, in a different way, it is in Dewey's[200]). But even an over-emphasis upon the fundamental importance of a conception of political morality suggests a

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[199] Pluralist theories come in many forms. I specifically have in mind Aquinas's natural law theory, which, philosophically speaking, has reference to a range of human goods or requirements of practical reason and, theologically speaking, is tied to a rich theological anthropology, one that is not reducible to, say, voluntary consent alone. See Finnis, *Aquinas*, 79-86; and Ratzinger, *Truth and Tolerance*, 245-249 ("freedom is linked to a yardstick, the yardstick of reality – to truth"). See also Kent Greenawalt's discussion of the benefit of "multiple value theories" for the fair and practical adjudication of religious liberty disputes. Greenawalt, *Religion and the Constitution*, Vol. 1, 5-9.

[200] Dewey collapses morality into a descriptive theory or science. See Sub-section 2.3.2 above. Whereas Schragger and Schwartzman could possibly be said to collapse descriptive theory into morality. See, especially, "Some Realism," 369 ("the kind of description needed is not an ontological one, but rather one driven by our moral concerns").

method of legal prescription that suffers from the three problems described in the preceding paragraph. Thereby, it can be seen to operate in a unidirectional manner.

I turn now to a second and related interpretive point – namely, the type of political morality that implicitly drives Schragger and Schwartzman's empirical method. Schragger and Schwartzman are seemingly ambivalent on this front. They pepper "Some Realism" with phrases that refrain from adopting a particular political morality. Their only goal, it seems, is to draw attention to the importance of *a* conception of political morality – and no one conception in particular – for the exercise of legal prescription.[201] This is not their aim, however. Despite the lawyerly objectivity projected, Schragger and Schwartzman tacitly endorse a form of political liberalism and reconstruct Dewey's empirical method within this individualist (i.e., individual rights-based) normative framework. Such endorsement and use are evident in their critique of the "standard argument" (which defends corporate rights based upon the idea of corporate moral personality),[202] their favorable treatment of List and Pettit's "normative individualism" (which provides a normative check against the domination of real group entities),[203] and their eschewal of group metaphysics or metaphysics in general (which, by political liberal standards, are too controversial for developing a public or political morality).[204]

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[201] Schragger and Schwartzman, "Some Realism," 348 ("[W]e give some reasons for moving beyond what was, and what will almost certainly continue to be, endless metaphysical disagreements about the nature of groups. It makes sense to focus instead on reasoning about the moral and political values that might be served by attributing rights to churches, corporations, and other organizations"), 360 ("Instead of asking 'What is a group?,' we should be asking 'How would giving this group legal rights and duties affect our social relations?'"), 368 ("Descriptive generalizations about a category of organizations – churches, corporations, nonprofits – only become relevant to the assignment of rights and responsibilities when they are evaluated under some conception of political morality.").

[202] Schragger and Schwartzman, 348–53.

[203] Schragger and Schwartzman, 366–67.

[204] Schragger and Schwartzman, 370–71.

In addition, Schragger and Schwartzman's political liberal commitments can be seen in an earlier article, "Against Religious Institutionalism," where it is argued that the doctrine of church autonomy (or freedom of the church) should be conceived of in terms of a Lockean voluntarism. According to the "voluntarist principle," churches enjoy legal protections not because they promote a unique moral good (i.e., religion), but because they advance individual consent through voluntary association.[205] "Against Religious Institutionalism" does not restrict Schragger and Schwartzman's individualist commitments to religious organizations traditionally understood. The "general account of conscientious objection"[206] advanced therein applies to all group-types, from "an ideologically committed business that hires hundreds of employees, to a religious hospital, or to a non-religious non-profit."[207]

Why does this political liberalism matter? One area upon which it has direct bearing is the methodological relationship between morality and group description. For Schragger and Schwartzman, the formal relationship here entails political morality "driving" group description. In light of their expressed moral commitments, we now see that their understanding of legal prescription entails a form of political liberalism taking the group-descriptive wheel. The result is a description of groups as voluntary associations and a legal conclusion, or regime, according to which voluntary associations alone are deserving of corporate religious liberty rights. Precluded from their conception of political liberalism is the idea that corporate entities, or groups in general, have *sui generis* moral rights based

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[205] Schragger and Schwartzman, "Against Religious Institutionalism," 957–62.

[206] Schragger and Schwartzman, 969.

[207] Schragger and Schwartzman, 981.

upon normative implications of whichever ontological description – but, especially, of any real entity theory. Allowing this idea to have practical effect, it is feared, would most likely result in morally unacceptable consequences, with respect to individual rights and societal well-being.[208]

All things considered, it should now be apparent that Schragger and Schwartzman's empirical method, which holds itself out as (i) agnostic towards group ontology and as (ii) offering a methodologically sound approach to legal prescription, fails on both counts. In reality, the proposed method is dismissive of certain group ontologies, due to its political liberal and individualist commitments. And while it may not actually conflate the proper subject-matters and methodologies of morality and descriptive theory, its zealous emphasis upon *a* political morality (here, a form of political liberalism) obscures the methodologically appropriate relationship between both fields of rational inquiry. Indeed, group descriptions can, through normative implication, bring vital ethical intelligence to moral reasoning at its most foundational level; this ought not to be overlooked by a brash application of political liberalism.

To close the present discussion, I raise a third and final interpretive point: it should be noted that Schragger and Schwartzman proffer their Deweyean-inspired method of legal prescription while mischaracterizing – albeit briefly – medieval Christian theology as exclusively or primarily strongly group-realist. I suspect that this mischaracterization does nothing to dispel the idea that medieval theology and law were crudely corporatist, a

[208] Schragger and Schwartzman, "Some Realism," 366. See their discussion of List and Pettit's idea of normative individualism.

position that seems to be held by prominent figures in the contemporary corporate religious liberty debate.[209] Allow me to elaborate upon this suspicion.

Beginning their critique of the "standard argument," Schragger and Schwartzman describe medieval group ontology as follows. They write:

> In earlier accounts of group ontology, groups were described in organic terms and by analogy to living creatures, which grow and develop and have lives of their own. The claim that associations are pre-legal, natural features of the social landscape is indebted to medieval theological concepts, especially the unified personality of the Church.[210]

To be fair, the above excerpt is not entirely a mischaracterization. It puts forward a summary of medieval thought that is somewhat supported in the primary and secondary literature. For example, Aquinas held that groups can be understood to have their own agency,[211] a position which need not demand that groups cannot exist prior to the recognition of laws.[212] And, according to the historian Janet Coleman, medieval associations like churches were indeed treated as having unified wills and intentions of their own.[213]

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[209] In addition to Schragger and Schwartzman, see Laborde, *Liberalism's Religion*, 164-165 (arguing against the theocratic rule of the church, in favor of the political state's ultimate authority to define jurisdictions).

[210] Schragger and Schwartzman, "Some Realism," 349.

[211] *Summa Theologiae* I-II, q. 23, aa. 3-4. Henceforth, I reference and cite the English Dominicans' translation of the *Summa Theologiae*, using book, question, and article enumeration. See Thomas Aquinas, *Summa Theologiae*, ed. Fathers of the English Dominican Province (London: Blackfriars, 1964-80), esp. vols. 11, 17, 18, 28, 39, and 56.

[212] See Janet Coleman, *A History of Political Thought: From the Middle Ages to the Renaissance* (Oxford: Blackwell Publishers, 2000), 41. Coleman writes: "The word *universitas* like the word *commne* was often used in documents without implying some new and special kind of unity in the sense of a newly created legal power or corporate personality of the group which, upon such formal legal recognition, suddenly was empowered to act in ways its members had not been free to act before."

[213] Coleman, 43.

Upon closer look of the historical sources, however, one sees that Schragger and Schwartzman's summary is impressionistic. While Aquinas *did* think that groups could have intentions separate and distinct in some way from those of their members, he nevertheless did *not* hold that groups in general actually had "lives of their own," as if possessing separate minds, wills or souls.[214] Moreover, Coleman stresses that corporate wills and intentions were merely legal fictions endorsed by church canonists,[215] not concepts proposed within the ethical personalism of twelfth-century theology. According to the latter, individuals were thought to have natural, God-given capacities that enabled them to make claims to certain natural rights.[216] In turn, corporate bodies were understood to enjoy rights and duties by extension, that is, through derivation from the rights and duties enjoyed by groups' individual members.[217]

Schragger and Schwartzman therefore mischaracterize medieval group ontology itself (*vis-à-vis* Aquinas) and fail to appreciate that conclusions about medieval group ontology are separate and distinct from accounts of how medieval societies determined the legal rights and duties of corporate bodies (*vis-à-vis* medieval canon law and ethical personalism). Thus we can acknowledge a medieval group realism, especially Aquinas's modest version, without considering it to be the default normative ground of a medieval approach to corporate rights. If what historians like Coleman say is true, then that ethical

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[214] For example, see ST I-II, 23, aa. 3 and 4.

[215] Coleman, *From the Middle Ages to the Renaissance*, 43.

[216] Coleman, 46–49 (discussing Cicero, Gratian, Abelard, and Aquinas's contributions to natural law thought).

[217] Coleman, 47 (discussing the derivation of corporate rights from individuals).

foundation is primarily individualist,[218] not strongly group-realist (see Chapter 3; though, cf. Sub-section 4.2.1 below).

Of course, we must acknowledge disagreement over medieval justifications of corporate rights. Legal scholar, Patrick Brennan, for example, has recently argued that any contemporary idea of "freedom of the church"[219] must account for the (Catholic) Church's medieval self-understanding as founded by Christ, not by individual members, and thereby deserving of institutional autonomies.[220] Coleman also points to thirteenth-century references of the Church as the *corpus mysticum republicae* as evidence of its special privileges, authority, and responsibilities.[221]

But even these points do not contradict the claim that medieval theological concepts are primarily ethically individualist and not strongly group-realist. Note the standard argument's logic, which moves from ideas of real-entity group agency to a conclusion about legal rights. Seen schematically and as put by Schragger and Schwartzman, it holds:

> (1) Some groups are agents.
> (2) Some group agents are rational.
> (3) Rational agents are moral persons.
> (4) Moral persons have moral rights.
> (5) Legal rights protect moral rights.
> (6) Therefore, some groups are moral persons (by 2 and 3).
> (7) Therefore, some groups have moral rights (by 4 and 6).
> (8) Therefore, legal rights protect some groups' moral rights (5 and 7).[222]

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[218] See treatment of individualism within a Christian ethical context in Sub-section 1.2.3 above.

[219] Within legal academic circles, contemporary usage of the term "freedom of the church" is commonly attributed to Richard Garnett and Steven D. Smith. See especially Garnett, "The Freedom of the Church" and Smith, "The Jurisdictional Conception of Church Autonomy."

[220] Patrick McKinley Brennan, "The Liberty of the Church: Source, Scope and Scandal," *Journal of Contemporary Legal Issues* 21 (2013): 169.

[221] Coleman, *From the Middle Ages to the Renaissance*, 42.

[222] Schragger and Schwartzman, "Some Realism," 352, n. 32.

Neither Brennan's nor Coleman's historical points follows this logic. Even if the medieval Church views itself as founded by Christ or as responsible for the salvation of the Christian body public, these perspectives need not translate into the standard argument that the Church is a rational person (2), has moral rights (7) and therefore has or should have legal rights (8). Brennan's point can be seen to simply move the final justification of corporate rights from individual consent to an unspecified claim about Christ's pre-eminence. Coleman's point is more suggestive than Brenan's of a strongly group-realist justification for legal rights. Nonetheless, she herself attributes the observed group-agential language to a medieval penchant for metaphors, which served to "fill in the details" of what groups' officials were responsible for, given the natural purpose of their respective collective entities.[223] At bottom her reference to the *corpus mysticum republicae* notes an idiosyncratic use of language, which need not be seen to displace the ethically individualist character of a medieval approach to corporate rights and duties.[224]

More will be said on the topics of medieval group ontology in the Chapter 4 below. For now, we can say that Christian ethical thought on corporate rights ascription need not be tied to a crude medieval corporatism. Moreover, given this fact, perhaps Schragger and Schwartzman would consider incorporating Christian ethical insights, especially those that emphasize individual dignity and rights, into their metaphysically bereft political liberalism. And perhaps, too, they might consider the methodological points raised within this section

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[223] Coleman, *From the Middle Ages to the Renaissance*, 42. Coleman writes: "Some spoke of the *respublica* as having a head, the king, but that its soul was the clergy. The king's counsellors could then be imagined as the body's heart, judges as the eyes and ears, soldiers the hands, farmers the feet. No part could be removed without the whole deteriorating."

[224] Coleman, 43–45 (discussing consent, sovereignty and natural rights in medieval thought).

to become more attuned to the diverse normative implications that descriptive theories in general and group agency in particular have for legal prescription. Were Schragger and Schwartzman to follow these suggestions, their group-agency agnosticism would lose relevance and a method of legal prescription useful for Christian ethical development could follow.

## 2.4 Conclusion

This chapter featured an extensive criticism of three skeptical accounts of group agency. To best appreciate its most important conclusions, and so as to avoid a situation in which we cannot see the wood for the trees, allow me to provide a general review of our entire discussion thus far.

Recall that the overarching aim of this doctoral thesis is to develop a Christian ethical and group-ontological account of corporate religious liberty, responding to the question: To whom or to what does corporate religious liberty apply? Development began in Chapter 1 with an interpretation of the Christian churches' understanding of religious liberty in general and of two forms of corporate religious liberty: freedom of the church and organizational exemptions. By the chapter's end, we identified two areas in the churches' understanding that would benefit from further theological development: first, the identification of appropriate legal subjects and, second, the normative justifications and practical limits of corporate religious liberty rights.

To make progress with the second area, we determined that development of the first area – specifically in terms of group ontology – would be necessary. Noting however that the "group-descriptive to legal-prescriptive" approach is unpopular in certain political liberal circles, we decided to address a family of related contentions head-on. Therefore in the present chapter, Chapter 2, we engaged with those skeptical of extending rights to for-

profit entities due in part to inadequate group-ontological accounts (Ginsburg and Nelson) and those skeptical of group ontology's use in the prescription of corporate religious liberty rights altogether (Schragger and Schwartzman). We determined that their various forms of skepticism and their restrictive legal prescriptions are, in the end, unconvincing: Ginsburg and Nelson utilize poor group-descriptive theories to justify an unreasonable and pre-determined normative position against for-profit protections; and Schragger and Schwartzman seem to make the opposite error of overriding group descriptions entirely through over-emphasis upon moral theory.

In light of the descriptive and normative weaknesses of the accounts explored, we concluded that a method of legal prescription that takes seriously group-ontological descriptions *and* Christian normative commitments is required. As I discuss in the next chapter, this method will follow the idealized interpretation of Schragger and Schwartzman's empirical method, visualized in Figure 7 above. Of equal importance, it will embrace a Thomistic account of group ontology, which views groups as the coordinated actions of individuals, and it will build upon the churches' normative reflections concerning religious freedom. With these various components assembled, a distinctively Christian ethical and group-ontological account of corporate religious liberty will emerge.

## 3 A modest account of corporate religious liberty

In this chapter, I construct an account of corporate religious liberty that identifies the appropriate legal subjects at stake and addresses the practical moral limits of the freedoms prescribed. Drawing upon Aquinas's group-ontological thought, the theory offered considers group agents – understood as the coordinated actions of individuals – to be the most appropriate subject of legal rights. And through use of Thomist, Augustinian, and Neo-Calvinist traditions of moral and political thought (i.e., moral reflections drawn from or that inform the churches' teachings on religious freedom: see Chapter 1), the proposed theory demarcates just limits between religious coordination and governmental activity.

Before detailing the structure of this chapter's developmental work, allow me to provide a concise (though, technical) overview of my theory and to comment on some of its distinctive aspects. Summarily put, my account of corporate religious liberty entails identifying (i) the legal conditions the civil government should provide in order to (ii) permit or restrict an occurrence of corporate *religious* exercise (or corporate *religiously motivated* exercise), on condition of (iii) the moral quality of the group-agential act in question. Assuming that corporate *religious* exercise is executed in religiously homogeneous associations and thereby causes little to no direct third-party burdens upon members, the moral quality of this type of group-agential act does not generally invite heavy government interference. This set of assumptions and the appropriate governmental response entails (iv)(a) a doctrine of freedom of the church. By contrast, assuming that corporate *religiously motivated* action is executed in religiously heterogeneous associations and thereby could cause significant third-party burdens, the moral quality of this type of group-agential act generally invites heavy government interference. This set of assumptions and the appropriate governmental response entails (iv)(b) a doctrine of organizational exemptions.

There are three ways in which my theory is differentiated from prominent accounts of corporate religious liberty. Firstly, insofar as my theory differentiates between religious and religiously motivated activities and insofar as it permits the engagement of both in diverse organizational settings, it is differentiated immediately from certain political liberal accounts, like Cécile Laborde's or Schragger and Schwartzman's, that ultimately reduce religion to voluntary consent and consequently restrict corporate religious liberty rights to voluntary associations alone. Secondly, insofar as my theory recognizes the responsibility of the state to adopt a substantive moral vision and to involve itself in the regulation of corporate religious (or religiously motivated) activity, it is distinguished from contemporary religious institutionalisms like Richard Garnett's that seem to erect an impenetrable wall around church or religious activities.

Finally, given its particular group-ontological core, my theory prescribes general legal conditions in direct response to the factors internal to a group that make corporate action or group agency possible in the first place. This action-focused perspective has at least two practical benefits: First, it recognizes the anatomy of group agency in general and so it helps my theory to avoid unreasonably restricting (religious) group agency to a narrow set of group-type as Ginsburg and Nelson's theories do. Second, as its name suggests, the action-focused perspective takes human acts to be its primary subject. This allows my theory to *describe* the corporate or individual actions involved (inasmuch as they are the subject of technique, i.e., *factio*) and to morally evaluate them (inasmuch as they are freely chosen and self-constituting, i.e., *actio*). The second capacity is necessary for the determination of just limits in protecting or restricting corporate activities by law; and the first capacity is fundamental if we are to recognize the existence of corporate religious activity in organizational contexts beyond (religious) voluntary association, thus

acknowledging a basic condition for the viability (or, at minimum, the intelligibility) of corporate claims for religious exemptions.[1]

I elaborate upon these points of differentiation in the present chapter. But with them having been made plain upfront, we see that the normative significance of my proposed theory comes into bold relief. Summarily put: If we are to protect individuals in their corporate religious activities, we must both acknowledge corporate religious exercise in *all* of its associational contexts and propose reasonable practical limits.

Now to the task at hand. This chapter develops a theory of corporate religious liberty in three sections. Section 3.1 offers the Thomistic account of group agency on which my theory descriptively depends. Section 3.2 then outlines how Christian ethical reflection bears upon the "anatomy" of Aquinas's modest group agent to suggest a theory of corporate religious liberty that has two forms: a freedom of the church and an account of organizational exemptions. Finally, Section 3.3 examines how the proposed theory responds to certain political liberal and theological contentions through its identification of modest group agents as the most appropriate (but not the only) legal subjects of corporate rights prescription.

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[1] It is important to note that it is neither sufficient nor necessary to determine the existence of group agency as I define it within this chapter in order to prescribe legal rights to a corporate entity. However, my point here is that legal prescription is made more intelligible if we recognize that the prescription of corporate rights is not the mere act of bestowing a right upon something the law recognizes as a legal person, but rather that such prescription has a subject that exists in reality beyond the mere fiat of law. Besides, as the previous chapter noted, there are too many theorists (and jurists) that are content in creating self-validating fictions of group- and associational-life in order to justify their pre-determined legal and moral positions. The group ontology posed within this chapter is meant to help see social reality as best as possible (i.e., as it is), and not as we might like it to be.

## 3.1 Aquinas's modest group realism

A methodologically appropriate theory of corporate religious liberty operates from normative bases in collaboration with group-ontological insights and culminates in legal prescription (see the three-tiered schematic in Figure 7). In this section, I take it for granted that Aquinas's group ontology portrays social reality as best as possible.[2] And by placing it at the center of our preferred method of legal prescription, I show, first, that Aquinas's group-ontological thought is indeed of the social-action type described above and, second, that Aquinas's group agent has a particular anatomy useful for our legal-prescriptive purposes. Prior to making these substantive points, however, I frame our discussion of Aquinas's group ontology in terms of the contemporary study of social ontology or group realism.

### 3.1.1 Group realism and the Christian tradition

To frame our discussion of Aquinas's social-action group ontology, I propose using the alternative nomenclature of "group realism." This latter style of categorization not only relieves us of the cumbersome length of terms like "social-action group-ontological thought" but also helps emphasize the point that groups (on Aquinas's account) have a *sui generis* reality. Recognizing that Aquinas himself never explicitly described his social thought in terms of group realism (or in terms of group ontology, for that matter), we can usefully

[2] At minimum, I think that Aquinas's group ontology outperforms those critiqued in Chapter 2 above.

apply the nomenclature to him as a means of engaging with the contemporary study of social ontology and considering the extent to which the Christian tradition itself adopts two forms of group realism – a modest form (via Aristotle and Aquinas) and a strong form (via Scripture and theological tradition).

Let us begin with the contemporary study of groups. A foundational question in the philosophy of social ontology concerns the nature of group agency. The question is this: How does a group act? Put differently: What distinguishes group action from the action of a group's members? Put differently still: Is a group agent an ontologically distinct being or a mere aggregation of individual inputs? Contemporary philosophers who pose answers to these and related questions include John Searle, Margaret Gilbert, Michael Bratman, Christian List, and Philip Pettit.[3] Historical figures include political philosophers Thomas Hobbes and John Locke, as well as sociologist Max Weber and economist Kenneth Arrow.[4] As expected, their answers are varied and often incompatible. Nevertheless, we can identify two general approaches to group agency within the field.

First, there is an approach known as elimination theory, which holds that group-agency talk is always reducible to or described by individual-agency talk.[5] In other words,

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[3] John Searle, *The Construction of Social Reality* (London: Penguin Books, 1995); Searle, *Making the Social World: The Structure of Human Civilization* (Oxford: Oxford University Press, 2010); Margaret Gilbert, *On Social Facts* (Princeton: Princeton University Press, 1989); Gilbert, *Joint Commitment: How We Make the Social World* (Oxford: Oxford University Press, 2014); Michael E. Bratman, *Shared Agency: A Planning Theory of Acting Together* (Oxford: Oxford University Press, 2014); and List and Pettit, *Group Agency*.

[4] Thomas Hobbes, *Leviathan*, ed. Ian Shapiro (London: Yale University Press, 2010); John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1960); Max Weber, Edward Shils, and Henry Finch, *The Methodology of the Social Sciences* (New York: Free Press, 1949); Kenneth J. Arrow, *Social Choice and Individual Values*, 3rd ed. (London: Yale University Press, 2012).

[5] List and Pettit, *Group Agency*, 3-6 (referencing eliminativism, which holds that "there are only individual agents like Christian, Philip, and other people; when such individuals cooperate in groups, they do not bring novel agents into existence. Anything ascribed to a group . . . can be re-expressed by reference to its members"); and Bratman, *Shared Agency*, 4 (proposing a vision of social reality that approximates elimination theory: "my guiding conjecture is that such individual planning agency brings with it sufficiently

speaking of a group agent and its actions is a shorthand way of speaking of individual agents. It is important to note that elimination theory does not necessarily deny the existence or normative importance of social groups for human beings. It need not adopt a position, whether as a premise or conclusion, that a group such as the political state is an illusion or that the state's legal recognition as a person is normatively erroneous. It also need not adopt an anti-Aristotelian position that individuals are asocial by nature or that individuals look after their self-interest first before that of others.[6] Its basic claim, as I understand it, is more modest: It is simply that when we speak of group agents and their actions, we really speak about the actions of the individual agents involved.

The second approach to group agency is group realism, which holds that group-agency talk is not always and entirely reducible to or described by individual-agency talk.[7] Within group realism there are what I consider to be two broad variations: modest group realism and strong group realism. Beginning with the second, strong group realism holds that group agents are beings with minds and intentions that are substantially (if not completely) divorced from the minds and intentions of the group's individual members.[8]

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rich structures . . . that the further step to basic forms of sociality, while significant and demanding, need not involve fundamentally new elements. There is here a deep continuity between individual and social agency planning").

[6] Schragger and Schwartzman, "Against Religious Institutionalism," 957 (constructing a theory of church autonomy that recognizes the moral importance of associational life for individuals); Miller, *The Moral Foundations of Social Institutions*, 18-22 (defending a conception of "relational individualism," which "does not adhere to the implausible doctrine that social entities can be reduced to the individual human beings who constitute them; Australia, for example, is more than the sum of Australians"); and Miller, 37, 57-58 (assuming a theory of universal human rights).

[7] List and Pettit, *Group Agency*, 10 (describing "a realism under which group-agency talk is non-redundant", that is, reducible to talk concerning individual members).

[8] List and Pettit, 9 (claiming that strong group realism or "animation theory" treats talk of group agents literally, not metaphorically, and that it is possible "to replicate all the properties and relations we find among the individual members of a group agent without replicating the group agent itself," since the group agent exists because of "something extra present: a force . . . surging from above"); and Nelson, "Conscience, Incorporated," 1571-1572 (describing a version of strong group realism, or "real entity theory," according to which "the corporation is a naturally occurring phenomenon that has an independent life and

This position is strongly metaphysical (i.e., proposing of corporate-beings, ontologically distinct from their members), and it is often met with astonishment and disbelief. The U.S. Supreme Court has wrestled with this proposed form of realism when confronting lawsuits brought before it on behalf of corporate persons.[9]

By contrast, modest group realism does not purport the existence of beings with independent and metaphysically substantiated minds. Instead, it holds that group agents have a certain agency proper to themselves, one that results from the complex coordinating of individual group members.[10] Hence, when we say that the army surrounds the enemy, the group agent (the army) engages in an action (surrounding the enemy) that no individual member herself could be said to do. This is a basic example of modest group realism.[11]

These preliminary definitions of group realism are given within an entirely philosophical paradigm. But the question remains: Does the Christian tradition offer a theologically distinct conceptualization? Yes and no. With regard to strong group realism, the Christian tradition evinces a nuanced understanding of group agency. By my reading, it holds that strong group agents are not metaphysically ubiquitous, that is, not emerging whenever individuals choose to coordinate and not existing for any secular purpose. Instead, strong group agency pertains to the Church alone, she being animated directly by

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personality of its own. The corporation['s] . . . functional existence is neither dependent upon nor reducible to the individual acts of its members").

[9] For example, see Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 636 (1819); and Burwell v. Hobby Lobby Stores, 134 S.Ct. 2751 (2014).

[10] For varieties of modest group realism, see List and Pettit, *Group Agency*, 10 (putting forward a theory of group realism, according to which "various forms of coordination can give rise to [group] agents") and 32 (summarizing "features of agency" that a group must meet in order to be a group agent); and Finnis, *Aquinas*, 26 (analyzing groups as coordinated, voluntary actions).

[11] Finnis, 24-25.

God (via Christ or the Holy Spirit) and able to exist apart from any earthly members (see Chapter 4). Again, this is a type of strong group agency that applies to an extremely narrow set of group-types: the Church alone.

As for modest group realism, the Christian tradition does not offer an account that is substantially different from the philosophical. Indeed, the tradition has adopted modest group realism from Aristotle and has maintained this general concept through the millennia. Those aligned with the classical natural law theory, including John Finnis and Richard Ekins, demonstrate contemporary developments of this ancient concept – particularly in the legal and political disciplines (see Sub-section 3.1.3). But even these developments do not depart radically from the ancient and Christian sources. Indeed it should be noted that, in the contemporary field of social ontology, modest group realists such as Christian List and Philip Petit confidently associate the idea with medieval (Christian) jurists, if not to Aquinas himself.[12]

### 3.1.2 Modest group agency and Aquinas's Treatise of Human Acts

Let us now turn to Aquinas's modest group realism, by first leaving aside the impression that medieval jurisprudence and theology are crudely corporatist.[13] This impression is simply not true. It is a well-established position that Saint Thomas Aquinas (1225-1274) understood group agency in terms of coordination (i.e., the ordering of individuals' actions around shared purposes) and not in terms of organic substantial wholes. Aquinas's vision

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[12] List and Pettit, *Group Agency*, 10-11.

[13] Schragger and Schwartzman, "Some Realism," 349. See discussion at Sub-section 2.3.4 above.

of group agency, which I categorize as a form of modest group realism, is worth presenting in full. But, first, it will be useful to demonstrate (i) why we cannot easily attribute strong group realism or elimination theory to Aquinas and (ii) how Aquinas's group-agential thought fits within his historical milieu. We can achieve both aims by analyzing Question 21, Articles 3 and 4 of the *Prima Secundae*, while keeping an eye towards relevant historical contexts.

The third article of Question 21 in the *Prima Secundae* answers whether a human act is well- or ill-deserving due to its moral quality. For our purposes, Aquinas's specific answer to this question is not so important. (Indeed, perhaps unsurprisingly, he *does* consider the moral goodness or badness of an act to elicit praise or blame.) Instead, the group-agential language within his answer draws our attention. Let us consider the article's *responsio* in full:

> We speak of merit and demerit in relation to the requital which is rendered according to justice to a person by reason of his having done something for another's benefit or hurt.
>
> Consider how each person living in a community is in a way a part or member of the whole group. The helping or harming of anybody in the community therefore extends to the whole; it is like hurting a hand and consequently hurting a man. Now when you act for the good or bad of another individual person merit or demerit comes into the case on two counts. First, a return is owing from the individual person (*a singulari persona*) who has been helped or harmed. Second, from the whole community (*a toto collegio*).
>
> So that when somebody's deed is directly ordered to the benefit or otherwise of the entire community, then requital is due to him from that in the first place (*primo quidem et principaliter a toto collegio*), and then afterwards from all its members (*secundario vero ab omnibus collegii partibus*).
>
> Even when what he does is for his own good or evil, he still deserves requital, since his deeds involve the common interest in so far as he is part of the community (*pars collegii*) – although if you consider the individual in isolation no return of justice is due for what he does to himself, except perhaps by a figure of speech, as when we talk of a man being fair to himself.
>
> So then a good or bad act clearly carries the quality of being praiseworthy or blameworthy according as it lies within the will's responsibility; of right or wrong

> according to its direction to our end; and of deserving reward or punishment according to the recompense of justice due from one to another.[14]

In this excerpt, Aquinas mentions three distinct types of agents: the individual person affected (*a singulari persona*), the whole community (*a toto collegio*), and all the members of the community (*ab omnibus collegii partibus*). If there is any wonder whether the community in this passage is a strong group agent, Aquinas's three-part distinction among agent-types – especially his emphasis upon all the members or parts of the community – strongly precludes that possibility. Indeed, when first addressing the return owed by the whole community, Aquinas immediately phrases this return in terms of the action owed by all its parts (see the second and third paragraphs of the excerpt above). And, to further diminish the possibility of strong group agency, Aquinas precedes that discussion with a simile: "The helping or harming of anybody in the community therefore extends to the whole; it is *like* hurting a hand and consequently hurting a man."[15] That Aquinas eschews strong group realism – in this passage at the very least – is seen clearly in the text.

But why this eschewal? What motivates Aquinas's rejection (whether intentional or not) of a strong group-realist position? One reason pertains to the placement of Question 21, Article 3 in the *Summa Theologiae*. It and the article that immediately follows are situated at the end of a section sometimes referred to as the "Treatise of Human Acts" (ST I-II, Questions 6 through 21). This treatise details the metaphysical structure of human action, emphasizing the interaction between reason and will. The treatise also covers the general nature of these faculties and invites consideration of "in whom" these faculties subsist. Do

[14] ST I-II, 21, 3, resp.

[15] Ibid. (italics mine).

they subsist in a group agent, for example? And, if so, does this justify analysis of (organicist) *group* acts in addition to (individual) *human* ones?

Aquinas never gets around to entertaining this idea in the treatise in question. He simply does not have to; in the *Prima Pars*, Aquinas already eliminates a related metaphysical prospect – namely, the Averroist notion that one intellectual soul can be shared among all members of the human species. Aquinas thinks that this is an impossibility: "We are left with the fact that it is absolutely impossible and incongruous to posit one single power of understanding among all men."[16] Plainly, empirical observation itself discredits the Averroist idea, which could be used to construct (out of many individuals) a strong group agent having a single intellectual soul, with a single set of reason and will. More importantly, though, the normative idea of moral responsibility resting in the human agent his or herself undercuts the possibility of strong group realism. Aquinas's moral vision and his corresponding metaphysics of human action simply disallow it.[17]

Another reason Aquinas rejects strong group realism could be tied to the law and politics of his historic milieu. The thirteenth century witnessed a gradual shift in political power from localized feudal lordships to national monarchies and city-republics. It therefore might be tempting to assume that the predominant politico-legal paradigm of this era entailed recognition of strong group rights for the emerging states and centralized powers. But centralization did not "create" antagonistic moral and legal agents out of groups. Legal rights pertained still to individuals, as well as to their diverse communities

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[16] ST I, 76, 2, resp.

[17] See especially ST I-II, qq. 6-21 (the Treatise of Human Acts).

and associations. Historian Janet Coleman notes: "[R]ules about group responsibilities . . . did not consist in newly representing groups or corporations as legal persons so much as turning already known and exercised moral norms into legal rules. In an overwhelming number of cases the *law followed practice*. The strong assumption of the medieval community meant that it was taken for granted that everyone had a right to associate with fellows provided that the actions of their association were lawful and did not exceed the customary restriction on their freedom of action as individuals with whatever status they had."[18] Thus, unlike lawyers in nineteenth-century Germany, thirteenth-century medievals did not generally fear whether their associational life was illegitimate in the eyes of a public authority. That "law followed practice" meant their associations were protected legally through a regime of individual rights, cognizant of an individual's natural and theologically grounded freedom.[19] Indeed, that legal rights could adhere to a group (agent), entirely apart from individuals, was not an intelligible proposition for those in Aquinas's day. It did not follow practice.[20]

It seems then that strong group realism is an improbable position to attribute to Aquinas. But our discussion thus far has neither firmly established modest group realism in, nor dismissed elimination theory from Aquinas's thought. To approach more solid

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[18] Coleman, *From the Middle Ages to the Renaissance*, 41 (italics in original).

[19] Coleman, 46. This conceptualization was, by no means, the same substance or nature of modern rights talk concerning the individual. For example, see Francis Fukuyama's discussion of individual rights in medieval Europe, in Fukuyama, *The Origins of Political Order: From Prehuman Times to the French Revolution* (London: Profile Books, 2011), 262–75.

[20] In his introduction to Gierke's *Political Theories of the Middle Ages*, Frederic Maitland, notes that both the medieval *universitas* and the *societas* were viewed as "moral persons," but only as a legal, labor-saving device. See Maitland, xxiv–xxv. Relatedly, see Fukuyama, 262–75 (demonstrating that the medieval rule of law prepared for the institutionalization and rationalizing of modern law, inclusive of the latter's emphasis upon individual rights and contract).

conclusions on this front, let us turn back to the third article of Question 21 in the *Prima Secundae*.

We recall that Aquinas deploys metaphoric language in his discussion of retribution and the moral quality of acts. He writes: "The helping or harming of anybody in the community therefore extends to the whole; it is *like* hurting a hand and consequently hurting a man."[21] Given the fact that Aquinas's simile precedes the three-fold distinction between agent-types observed in Article 3, it is highly probable that Aquinas treats "the whole community" (*a toto collegio*) metaphorically and therefore recognizes only two distinct agent-types: the individual person affected (*a singulari persona*) and all the members of the community (*ab omnibus collegii partibus*). Historical research seems to support this eliminationist interpretation. "[F]rom the twelfth century on," writes Coleman, "discussions of the natural shape of society frequently used natural, organic metaphors."[22] Perhaps, then, Aquinas endorsed neither form of group realism and instead viewed the world through a type of elimination theory.

Although a tempting position, there are strong reasons to dismiss an eliminationist interpretation of Aquinas. To start, let us consider the weakness of elimination theory itself and the appeal of a plausible group realism. As alluded to above (see Sub-section 3.1.1), elimination theory cannot explain fully why group agents are able to do things that no individual member can do on his or her own. An eliminationist position, for example, would claim that an army's act of surrounding the enemy is entirely reducible to the actions – and, by extension, the intentions – of individual soldiers. But this conclusion does not

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[21] ST I-II, 21, 3 (italics mine).

[22] Coleman, *From the Middle Ages to the Renaissance*, 42.

account for a variety of nuanced situations in which group agency is *not* a mere aggregation of individual acts and aims. These situations could include: (i) when a group's individuals or subordinate group-units act, but do not intend to the same end; (ii) when they intend the same end, but do not act; or (iii) when they act towards different ends, despite the group itself ultimately attaining its originally proposed end. Detailed explanation of any of these situations is not required at this point. But already we intuit that a metaphorical gloss over group agency in complex situations such as these is insufficiently explanatory of the nature of collective action (or group agency, as I refer to it here). Therefore, we require a more sophisticated account – one that allows us to attribute agency to a group itself, especially when aggregation of individual actions and intentions fails. Barring strong group realism and its metaphysical fantasy,[23] modest group realism offers a plausible way forward.

I suspect that Aquinas was privy to the complexity of group agency and so did not describe group agents on all occasions in metaphorical terms. The fourth article of Question 21 in the *Prima Secundae* corroborates this suspicion. Following his discussion of retribution in the third article, Aquinas asks in the fourth article whether human acts are rewarded or punished by God. His *responsio* reads:

> As we have noted, each man's actions have the quality of merit or demerit through being directed to another, whether another single person (*ejus*) or the community (*communitate*). In both respects our acts, good or bad, are meritorious or otherwise in the sight of God.
>
> First, with respect to God himself. He is our last end, and this and all our acts ought to serve, as we have said. Consequently he who does an evil deed, which cannot be fitted into this service, fails to give God the honour due to him as our last end.
>
> Next, with respect to the community of the entire universe (*communitatis universi*). In every polity (*communitate*) it is the ruler above all (*praecipue*) who takes care of the common good (*boni communis*); and it is his office to requite (*retribuere*) the good and evil done in the community. God is the governor and ruler (*rector*) of the whole universe, as

[23] Though, see my discussion of strong group realism and the invisible Church in Chapter 4 below.

> we have shown in the *Prima Pars*, and especially of the world of intelligent creatures. Therefore it is clear that human actions will meet their reward and deserts from him; otherwise it would follow that he exercised no care (*non haberet curam*) over them.[24]

Here, Aquinas focuses upon God's authority over the entire universe, an authority that Aquinas likens to that of an earthly governor who has charge over the common good of a polity. Apart from the theological point made regarding God's kingship, Aquinas's response is interesting for us because it (i) introduces yet another agent that is involved in, or that has relevance for, group action (i.e., the *rector* or "governor and ruler"). When read in continuity with the third article, Aquinas's response (ii) suggests that the ruler must contend with all three agent-types already introduced: the individual person, the whole community, and all members of the community. After briefly discussing the full range of agent-types involved and the authority relationships between them, I consider three political scenarios involving these agent-types that are meant to highlight Aquinas's tacit understanding of modest group realism and its inherent complexity.

Aquinas invites us to read the third and fourth articles of Question 21 in the *Prima Secundae* as a single unit. Most obviously, it is a lesson on moral action, including the praise and blame that attends good and bad acts. But, as we have seen, it is also a lesson concerning the group-agential thought of Aquinas himself. Considering the group-agential terms of both articles, we see that Aquinas touches upon four agent-types involved in the (communal) actions of reward and punishment. These are: the individual person (*a singulari*

[24] ST I-II, 21, 4, resp.

*persona*), the whole community (*a toto collegio; communitate*),[25] all members of the community (*ab omnibus collegii partibus*), and the ruler (*rector*).

Between them, Aquinas identifies an order of authority or a manner in acting with regard to meting out retribution. First and foremost, as the fourth article notes, the ruler acts "above all" (*praecipue*). As for the other agent-types, the authority relationship is somewhat convoluted, but ultimately is able to be discerned. The third article indicates that the individual person involved (either as a recipient or agent of an action) acts "in one way" (*uno modo*), while the community acts "in another way" (*alio modo*). The community itself is also said to act "in the first place" (*primo quidem et principaliter*), while all members of the community act "then" and "afterward" (*secundario vero*).

Let us attend to the relationship between the community and its members. That the community itself acts first, I take it, is not so much a statement about temporality, as it is about public recognition. After the ruler, the agent that has a recognized public authority to reward or punish is the whole community, the *collegium* or *communitas*. Thus, by acting "in the first place," the community acts on behalf of its members since it has been given the prerogative to do so (we assume), either by its members or ruler, or both. We can therefore understand all the members of the community to be private persons, just as the individual person involved. Viewing them as an unorganized collection, the *omnes collegii partes* (including the single *persona*) lack public authority to act "in the first place." Nevertheless,

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[25] In the context of discussions surrounding the common good and God, Aquinas prefers the term *communitas* and its variations to *collegium* and *omnes partes collegii*. This is a viable explanation in light of the high frequency with which Aquinas uses *communitas,* and not *collegium*, in these exact contexts throughout the *Summa Theologiae*. For example, see: ST I-II, 91, 1, sc.; I-II, 19, 10 sc.; I-II, 109, 3, sc.; III, 46, 2, ad. 3. Therefore, when we approach the term *communitas* and its variations in the third full paragraph of the *responsio*, we accept their usage as a means to emphasize a political or theological point and not as a break with the logic of group agency begun in the previous article.

they can act; so Aquinas recognizes their act of retribution as secondary (*secundario vero*), not merely temporally speaking, but in terms of authoritative and public importance.

We see then that, from the third and fourth articles, a three-tiered hierarchy of authority between the identified agent-types can be discerned. The superior authority is the ruler (*rector*). The intermediary authority, having some sort of public recognition, is the whole community (*a toto collegio; communitate*). And the inferior authorities, being private persons lacking public authority, are the individual person involved (*a singulari persona*) and all members of the community (*ab omnibus collegii partibus*). Taking this to be a plausible interpretation, I now consider how the abovementioned hierarchy can be used to elucidate Aquinas's modest group realism.

Consider three hypothetical scenarios involving Aquinas's four agent-types (I include the "single person" within "all members of the community"): The first scenario entails all members of the community consenting to the ruler's charge over them and their community; the ruler effectively acts on behalf of the group as a whole. The second scenario entails the ruler and the community acting in one way, but all members of the community acting in another; this scenario can arise when the people of a polity are said to disagree with the "nation" and/or its ruler. The third scenario entails the community acting separately from its members, including its ruler; this may occur when a group's procedures and institutions force it to act in one way, despite all its members wanting it to act differently.

Some might claim that the first scenario evinces a thin notion of group agency, which features a corporately empowered individual rather than a group agent proper.[26] And others might claim that the second and third scenarios cannot involve group agents because the actions and/or intentions of all members of the community do not add up to what the group itself is doing.[27] But I would contend that, in all three scenarios, a modest group agent exists. That this is so is the result of several factors, which I discuss in detail in the sub-section immediately following this. However, let it suffice here to note that an institution or practice that allows Aquinas's whole community to act "in the first place" (*primo quidem et principaliter*) and all members of the community to act "then" and "afterward" (*secundario vero*) also makes it possible for modest group agency to exist at all. In the context of group action, commonly recognized institutions and practices – what Finnis calls "public policies"[28] – are required as a means of coordination among individual members. Without them, individuals cannot act together efficiently or even effectively since one party of a collective might wish to achieve a shared end in one way, while another part of the same collective might wish to achieve the shared end in contrary manner. A recognized public policy mitigates this confusion by coordinating the intentions and actions of individuals into a group endeavour. This holds in the case of the corporately empowered individual (the first scenario) because individuals already agreed to a public policy that makes the group act through this means. And it holds even when individuals

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[26] List and Pettit, *Group Agency*, 7-8 (discussing *Leviathan*, Chapter 16, where Thomas Hobbes describes how group members may authorize an individual, majority, or aristocratic majority to act on their behalf and also form a group agent).

[27] For related discussion, see Ekins, *The Nature of Legislative Intent*, chap. 3 (arguing that "[t]he aggregate of intentions of each legislator does not constitute the intention of the legislature").

[28] Finnis, *Aquinas*, 28.

eventually disagree with a group act (the second and third scenarios) because they too have already agreed to a public policy that allows the group – via its ruler and/or any other individuals that abide by the public policy – to act in a certain manner or towards a certain end.

It should now be clear that strong group realism and elimination theory cannot be attributed easily – if at all – to Aquinas. The moral and politico-legal practice of his time did not admit of group agents as organic wholes or as mere fictions, since both paradigms departed from a medieval custom of "law following practice"[29] and ultimately rested uncomfortably against the Christian Aristotelianism of the age. Indeed, Aquinas himself seems to follow these general points, as can be observed in the group-agential language found at the end of the Treatise of Human Acts.

### 3.1.3 The "anatomy" of group agency

Let us continue onward to this section's second aim of determining how Aquinas's modest group realism might aid us in the prescription of corporate religious liberty rights. The above sub-section began a broad exposition of Aquinas's group-agential thought, primarily by eliminating some available options. The present sub-section completes that expository work with a more systematic presentation of Aquinas's modest group realism. Here, I draw extensively upon the interpretation of John Finnis and subsequent development by Richard Ekins. My own contribution to this interpretive school, given at the end of this sub-section, highlights how external influences upon a group agent's coordinative

[29] Coleman, *From the Middle Ages to the Renaissance*, 41.

intentions can facilitate or restrict the agent's corporate religious actions. This suggests that the legal prescription of corporate religious liberty rights must be attentive to the actual anatomy of group agency.

We begin with Finnis's interpretation, starting with conceptual contexts attributed to Aquinas. According to Finnis, Aquinas understood a theory of associations (or of groups more generally) within the order of moral philosophy. Finnis writes: "In the parts of *moralis philosophia* dealing with human societies including states, the social group is understood as an order of human persons considered as *acting* persons; indeed, the group is studied as an order – system, pattern, interrelationship, co-ordination – of voluntary (and thus also intelligent, even if misguided) actions, activities, *operationes*."[30] Categorization under moral philosophy permits normative assessment of groups' contributions to human well-being and fulfillment. But such categorization does not prohibit us from treating a theory of associations (or a theory of group ontology, as I here call it) as a descriptive theory. For we are able to discern still what a group *is*, in terms of its "anatomy," that is, its coordinating and coordinated parts. Indeed, we must be able to do this descriptive work if we eventually are to evaluate associational life and group-design for their moral value.

Surveying Aquinas's political and ethical writings, Finnis offers a descriptive definition of groups – first, by way of a collection of positions already discussed, but useful here to review for their further details; then, by determining "two kinds of element" that constitute a (using my term) "modest group agent." With regard to the first, Finnis writes:

> A group, association, society, or political community is, says his *Ethics* prologue, a kind of whole {*totum*}; actions, says his own treatise on justice, are of persons and wholes {*suppositorum et totorum*}. But a group, Aquinas underlines, is not a unity of 'composition or conjunction{*colligation*} or continuity'; it is no more and no less than a unity of order.

[30] Finnis, *Aquinas*, 26.

> So the individuals who are 'parts' or members of an armed force not only do things which are part of the actions of that force, but also do things which are not the action or even part of the action of the force as a whole. Contrariwise, the armed force *does* things – surrounds the enemy, occupies the town, wins the war – which none of the human individuals who belong to it as its parts do. Thus Aquinas firmly discourages attempts to understand human societies as organisms or substances. There are analogies between organisms and societies; 'the different people in different jobs in a society are *quasi* (like) the different members (limbs, organs) of a single natural body'; but the disanalogies are fundamentally more important.[31]

Again, we are familiarized with a modest account of group agency – one that accounts for the *sui generis* actions of a group, actions that cannot be entirely reduced to the acts of a group's individual members. In describing group agency thus, Finnis attributes group action to a "whole," that is, a unified subject. This is a genuinely existing group agent, but it is not an organism that has a natural life of its own. What then is the nature of Aquinas's modest group agent, what Finnis refers to as a "unity of order"?

Understood as having a "distinctive reality as [an order] of intelligent, voluntary, purposive action,"[32] a group agent is a coordination of individual human acts. Finnis identifies "two kinds of elements" involved. First, there is the (i) *purpose* that gives point to individuals' associating or coordinating together as a group. Following logically from this is (ii) the actual *coordination* (the "interrelationships," "factors co-ordinated" or "patterns of association") identified within the group or between the group's individual members ("the parts of the whole").[33] Some explanatory comments are required for each element.

First, we consider the moral dimension of group purpose. Finnis rightly considers a group's purpose to be the most fundamental element normatively speaking. After all, it is

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[31] Finnis, 24–25 (italics in original).

[32] Finnis, 27.

[33] Finnis, 25–26.

against a collective end, say, of promoting the physical well-being of a society's ill-bodied, that we are able to evaluate whether a given coordination is indeed meeting an objective end.[34] Moreover, I would add that it is a group's purpose (particularly, its primary purpose) that helps to distinguish intelligibly one group from another. Hence, groups coordinated around health can be referred to as hospitals and groups coordinated around politics, as civic bodies.[35] The ability to discern a group's purpose is not merely a descriptive act: it is ethically relevant for the coordinating individuals, since they must be able to answer *why* they are coordinating and to judge the effectiveness and moral value of their coordinating around that end. It is also ethically relevant for parties external to the group, including outsiders interested in joining the association and civic authorities charged with protecting or regulating associational life.

As regards the second element, the coordination of the group's members, this topic requires more descriptive explanation than moral application upfront. One contention raised against Aquinas's act-centered definition of group agency pertains to a skepticism towards the *sui generis* reality of social action. Finnis recognizes this eliminationist position and a potential motivation behind it: "Perhaps the notion of a social act is merely a legal or moral fiction, a 'manner of speaking' useful for ascribing to individuals, justly or unjustly, some culpability or liability for the acts of others?"[36] But, following Aquinas, Finnis again affirms that social action, and thus group agency, has a reality that is analytically distinct

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[34] Finnis, 25–26.

[35] See Miller, *The Moral Foundations of Social Institutions*, 47 (stating that "organizations are individuated [or differentiated from other groups] by the kind of activity that they undertake and by their characteristic *ends*"); and Seumas Miller, *Social Action: A Teleological Account* (Cambridge: Cambridge University Press, 2001), 182 ("social institutions are . . . defined in part in terms of normatively described ends").

[36] Finnis, *Aquinas*, 27.

from the mere actions of individuals. This reality is attributed in large part to two factors considered under the second element – public policy and a group's ruler. Finnis writes:

> There is, then, no social act without the acts of individual human persons (just as there is no society without its individual human members). Yet the social act is a real, not a fictitious resultant of the individual acts, for there is indeed what I shall call a policy (however implicit, 'unstated,' informal, and privy to the group itself), a policy which the relevant members choose to *participate* in carrying out.
>
> This will also explain why acts of rulers (directors, coaches . . .) and their delegates can be acts of the group even when it is not obvious that some co-ordinated, joint action is under way. For it belongs to rulers and their delegates to initiate group action by words and deeds which define what shall be the public policy co-ordinating the future actions of relevant members of the group.[37]

We encounter here the two concepts anticipated in our discussion of the fourth article of Question 21 in the *Prima Secundae*, wherein I posed three scenarios that explain why a modest group agent exists even when (i) full consent is given to a ruler to act on behalf of the group, or (ii) the ruler and the group act apart from all group members, or (iii) the ruler and all group members eventually dissent or act apart from the group. In short, according to Finnis's interpretation, group agency exists in instances such as these because of the group's rulers (who authoritatively establish the group's coordinating public policy) and because of the relevant members who "choose to participate in carrying out [the ruler's public policy]."[38]

To round off our exposition of Aquinas's modest group realism, we would do well to examine Richard Ekins's account, which, through engagement with contemporary social

[37] Finnis, 28.

[38] Finnis, 28.

ontologists like Searle and Bratman, focuses upon the important descriptive (and normative) category of intention.

Accepting Aquinas's position that "groups are associations that coordinate the action of individuals to some defining end," Ekins extends the Thomistic account of group agency by detailing the relationship between a group's intentional act with the reasoning of the group's individual members.[39] Of focus for Ekins are the intentions – related to both the group itself and to the individual members – that constitute modest group agency. Ekins describes two types of relevant intention. The *particular intention* of a group is "the intention (the plan, the means-end package) that explains and defines the particular action of the group on this [i.e., any given] occasion." Supporting the particular intention is the *standing intention* – that is, "the group's general plan to select particular plans" or, put differently, the "intention to use certain procedures to determine . . . [the group's] particular intention[s]." Standing intentions are characteristic of complex or formalized groups; and, importantly, such intentions denote the "enduring nature of the [general] plan, to which members of the group conform over time and within which particular plans are formed." As Ekins stresses, the particular intention of a complex group is understood *in light of* its standing intention.[40]

For Ekins, the importance of both types of intention is their capacity to generate *authority procedures*, which, by establishing how a group's particular plan of action is to be

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[39] Ekins, *The Nature of Legislative Intent*, 64 ("The account I have set out is I think consistent with the classical understanding of social action found in Aquinas and restated by Finnis, Grisez, and Boyle. I accept Aquinas' insight that groups are associations that coordinate the action of individuals to some defining end. And I have argued for the central importance of the open plan in the same way that Finnis argues that group acts are defined by the 'public' proposal that is put to the members of the group for them to participate in or not. Where I have sought to extend the classical account is in setting out in some detail the relationship between the intentional act of the group and the reasoning of the individuals who constitute the group.").

[40] Ekins, 57–58.

selected, directs the group to act "in the absence of unanimity." Hence, authority procedures are especially valuable for groups that cannot wait for or depend on unanimity among members before acting.[41] To illustrate how authority procedures function within complex groups, Ekins provides the following example:

> A company is a group (employees, management, and shareholders) that exists to profit in commercial enterprise. The group acts by reference to a corporate structure that includes a rule authorizing the CEO to set future company strategy. The rule provides that the intentional action of the CEO counts as the act of the group in deciding on strategy. The group's standing intention is to pursue its purpose, to profit in commercial enterprise, by means of a general plan that includes this rule, which will in turn be used to generate further, particular plans on which the group will act. It follows that irrespective of the consequences that the law may attach to the action of the CEO, his intentional action is truly part of a group act: the group intends the individual act to be its act, the CEO acts intending to direct the group, and the other members of the group coordinate their further action as his act directs.[42]

Ekins's illustration explains well the description of a corporately empowered individual, that is, the kind of modest group agent discussed in our hypothetical first scenario following from Question 21, Article 4 of the *Prima Secundae*. But it is not difficult to see how authority procedures extend to situations captured by the third scenario, wherein the group acts in one way despite the members (here, the employees and shareholders) and even the ruler (the CEO) intending to act in a different way from the group. This can happen, for example, when the CEO holds particular intention A and later changes to an antithetical particular intention B, but doing so only after all other members (begrudgingly) began coordinating their actions around A despite their original desire to go about advancing B. In this situation, the group itself (acting through its individual members who

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[41] Ekins, 58.

[42] Ekins, 58–59.

have chosen to participate in its standing intention or public policy) ultimately acts towards A, despite all the members (including the CEO) eventually wanting or intending to act towards B. While the CEO could order an about-face to align himself and the company's members to act towards B, there will inevitably exist a time in-between wherein the group itself acts on a particular intention upon which no one (else) quite agrees.

At this point in our discussion, we have detailed the anatomy of a modest group agent according to two thinkers working within the Thomistic tradition. Finnis describes this anatomy as constituted by a group *purpose* and a *coordination* of factors. Ekins describes it in similar terms to Finnis, pointing to an authority procedure that utilizes *particular* and *standing intentions.*

With a basic exposition of Aquinas's group-agential thought (inclusive of contemporary developments) now complete, I conclude this sub-section by briefly considering how a group's particular intention to exercise religion might be challenged by external influences (such as governmental regulation) upon a group's internal public policy or standing intention. This discussion will prepare us to consider implications of a Thomistic form of modest group agency for purposes of legal prescription.

In his business firm illustration, Ekins alludes to the fact that external influences bear upon the actions and intentions of groups and their individual members. He writes: "irrespective of the consequences that the law may attach to the action of the CEO, his intentional action is truly part of a group act."[43] Ekins's point, of course, is to note that an individual ruler's act does indeed constitute part of a group action. But his point is made with reference to external influences, such as state corporation law or criminal law, that

[43] Ekins, 58–59.

could, say, prohibit the CEO's intentional action of withholding dividends from shareholders or employing child laborers. As I see it, external influences such as these affect both a group's ruler (who helps establish and/or maintain the group's standing intention) and the group's standing intention itself. Because of this, for those rulers and policies that abide by the constraints of external influences (whether state regulations, terms of private agreements, social mores, etc.), certain actions *prohibited by those external influences* will be unavailable to a group. In other words, external influences could (legally) preclude certain types of group action and, by extension, particular instances of modest group agency.

Returning to the *Hobby Lobby* dissent, we see then that Justice Ginsburg's corporate-theory argument (see Section 2.1) is an attempt to preclude the possibility of corporate religious exercise for for-profit firms through recourse to external influences such as Court precedent, religious liberty laws, and theories of corporate personality. "Until this litigation," Ginsburg writes, "no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law . . . The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities."[44] Seen against the anatomy of modest group agency, Ginsburg's argument seeks to bar for-profit corporations from acting upon or even forming particular intentions of a religious nature by first frustrating the firms' underlying standing intentions through legal and conceptual means. As Ginsburg might say: No precedent permits individuals within non-church entities to coordinate for religious purposes; no religious liberty laws, either statutory or constitutional, permits those

[44] *Hobby Lobby*, 134 S.Ct. at 2794 (Ginsburg, J., dissenting)

same individuals to coordinate for religious purposes; and no viable theory of the corporation permits them to do so either. On Ginsburg's account, external influences simply do not grant the existence of corporate religious exercise in non-church organizational contexts. Hence, we are not wrong to categorize Ginsburg's corporate-theory argument and relevant parts of her wider *Hobby Lobby* dissent as a form of group-agency elimination. More importantly, in examining Ginsburg's dissent, we are explicitly attuned to the general and normatively significant fact that external influences (whether hypothetical or actual) can work against the mere possibility of corporate religious exercise and thus merit our moral evaluation.

It follows then that, when adjudicating corporate religious liberty disputes, we must ask whether a particular external influence (e.g., a federal statutory law) should be permitted to prohibit an occasion of corporate religious exercise. If we arrive at a negative conclusion to this query, we then must ask how the law should change in order to permit the corporate religious exercise to happen as intended by its group-participants. This sort of inquiry is nothing more or less than an exercise of legal prescription – one made possible, we note, through an awareness of a modest group agent's "anatomy." In the next section, I elaborate upon how this form of legal prescription can proceed if we, first, make assumptions about the group-members' procedurally related beliefs and, second, prescribe the legal conditions necessary to bring those beliefs into social reality (see Sub-section 3.2.1). The second part of this procedure, especially, entails the construction of a theory of corporate religious liberty.

## 3.2 The theory in outline

Having provided an exposition of Aquinas's modest group realism, I turn now to the central aim of this chapter. My task in this section is to outline a theory of corporate

religious liberty that (i) identifies its appropriate legal subjects and (ii) provides just grounds and practical limitations for the protections it suggests or endorses.[45] As seen against our preferred method of legal prescription (see Figure 7), my proposed theory is constructed by observing the anatomy of Aquinas's modest group agent in different organizational contexts (Level 2) and determining the general legal conditions required to facilitate or restrict occasions of group agency (Level 3), as guided by a Christian ethical vision (Level 1). I begin this section with a theory of freedom of the church, then move to outline a corresponding theory of organizational exemptions.

### 3.2.1 Religious actions and freedom of the church

A typical question in freedom-of-the-church disputes concerns the extent to which the government should protect the distinctively religious actions of churches or religious organizations.[46] How might a morally and group-realist account of church freedoms respond? To find out, we can detail a basic response (i.e., a theory) by determining what legal conditions would need to be in place in order to permit a church's standing intention (its internal public policy) to culminate uninterruptedly into a particular religious intention (an act of corporate religious exercise).

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[45] The "just grounds and practical limitations" promised in this section follow from the Catholic and Protestant reflections surveyed in Chapter 1. Recall that this doctoral thesis does not aim to substantially critique the churches' moral teachings on religious liberty. Instead, it seeks to apply those teachings in a novel way – that is, through the group ontologies of the Christian tradition. This speculative or theory-building work answers the thesis's guiding question: To whom or to what does corporate religious liberty apply? See Section 1.4.

[46] In developing my theory of corporate religious liberty, I take the controversial move of distinguishing between religious and secular actions. For an explanation of certain contentions behind distinguishing the religious from the secular and for an explanation of why I think this distinction is practically important, see Sub-section 3.3.2.2.

This manner of proceeding has two stages. The first stage is straightforward and simply involves establishing a particular intention for a church group agent. The second stage involves looking to the group's standing intention (i.e., its "general plan" or "intention to use certain procedures to determine . . . [the group's] particular intention"[47]) and recognizing that it is constituted by two elements: (1) assumptions concerning the procedurally related intentions and moral or religious beliefs of the groups' members, and (2) the external and specifically legal influences that do *not* restrict the procedurally related intentions of the groups' members and thereby permit the group's religious action to be legally possible. At this stage, we determine the content of the first element and prescribe the content of the second. That is to say: We first make assumptions concerning the members' procedurally related intentions and, second, prescribe the legal influences that would permit those intentions to play out into their intended religious action. It is the second part of this step that highlights the conditions that make the religious action of a church (e.g., its catechesis) legally possible. It is those conditions, when morally and theologically informed, that constitute a Christian theory of freedom of the church.

**Figure 8. A procedure for legal prescription, based on modest group realism**

| | | | |
|---|---|---|---|
| Particular intention | → ← | Standing intention | |
| | | (1) Members' procedurally related beliefs | (2) Legal influences to facilitate corresponding beliefs |
| Religious action (e.g., Sunday catechesis) | → ← | Assumptions about (1) members' procedurally related beliefs | Proposed legal influences, (2), which constitute a legal regime of "freedom of the church" |

[47] Ekins, *The Nature of Legislative Intent*, 57–58.

Let us now execute the procedure just outlined and visualized in Figure 8, using for our particular intention a church's act of Sunday catechesis. With the first step completed, we immediately turn to the second step where we inquire into (1) the procedurally related intentions and beliefs of the groups' members and (2) the legal influences that work with those intentions to facilitate the group's intended act.

Concerning the members' procedurally related beliefs, there are three reasonable assumptions to make (which hold for catechesis, as well as for any of the church's distinctively religious acts). First, we assume that all the members of the group act towards religious truth when coordinating in their particular church community. Their shared end (religion or religious truth) makes intelligible the point of their coordinating and, thus, helps identify them as a church. But, perhaps more importantly for us, it also serves the church as a procedural guide for deciding whether to do certain discrete actions. With regard to Sunday catechesis, a shared commitment towards religious truth serves as a normative standard against which to determine the value of engaging in such an act. Therefore, it constitutes part of the community's general plan for decision-making.

Second, we can assume that all members, in joining or remaining in the church community, consent to the church's authority figures and authority mechanisms in general, especially with regard to distinctively religious matters such as doctrine.[48] With regard to consent in general, this second assumption follows from the logically prior idea that a

[48] For a discussion of members' consent and ostensibly secular actions engaged in by churches see Lund, "Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor," *Northwestern University Law Review* 108, no. 4 (2014): 1201-1220 (arguing that imposed legal obligations, which usually pertain to secular activities and/or harms inflicted upon members, are able to curtail church autonomy claims).

(modest) group action requires unanimity with regard to standing intentions, but not to particular intentions.[49] Hence, members can disagree with the way catechesis is done (the particular intention), but they have already agreed upon, or consented to, the procedures by which catechesis will be developed and executed (the standing intention). These procedures may involve top-down decision-making, wherein an assigned minister decides catechetical practices without direct input from the wider church community. As for the direct moral or religious beliefs animating this second assumption, we can point to a Christian respect for the free-response of the will to God. Consent is inextricable to this theological concept, as is seen in the various ecclesial understandings of religious liberty (see Section 1.1). In the context of corporate religious actions, especially of church communities, consent to particular and standing intentions is simply part of one's free response of faith.

A third reasonable assumption about members' procedurally related intentions and beliefs follows from the notions of religious truth and consent: This is the assumption that members would agree to internal adjudication of the (moral, theological, or legal) propriety of their church's religious action. Internal adjudication in this context denotes evaluation from appropriate church authorities, that is, those within the community who have been given the responsibility to assess the (moral, theological, or legal) value of a given religious act. It is assumed that members would object in the first instance to an equivalent evaluation from individuals or entities external to their church, since those third-parties

[49] Ekins, *The Nature of Legislative Intent*, 63 and 70. Lacking unanimous consent with regard to the standing intention does not necessarily eliminate group agency since, as Ekins argues, "apparent compliance is sufficient to enable a type of group action . . . [A] member's [secrete defection] is not necessarily fatal to the group act so long as his action is in fact coordinated by reference to the common plan."

may not understand the church's doctrine and practices, and thereby may pass unflattering or generally misinformed judgement upon the religious act in question and, ultimately, infringe upon their religious exercise. That said, it is also assumed that members could welcome third-party evaluation in circumstances where moral wrongs persisting within or through the church require external adjudication and action for their redress.[50]

Having laid out the aforementioned assumptions, it is important to note that all three assumptions must hold in actual fact if the groups' standing intention is to result in the particular intention (i.e., the actual group action) of Sunday catechesis. Hence: If the members do not intend to aim towards religion, or if they do not consent to the church's (catechetical) authorities, or if they reject the premise of internal adjudication in the first instance, then we are unable to say that the group's members jointly intend the religious act in question. Lacking this intentionally coordinated effort, there is no group-agential act and thus (i) we cannot say that the "church catechizes" and (ii) we lose a viable (group-agential) subject to whom it is analytically and normatively intelligible to prescribe legal rights.

Being concerned with the protection or facilitation of a group's corporate religious act, let us turn to the second dimension of a group's standing intention. This dimension involves the external and specifically legal influences that work with procedurally related beliefs to make the group's act of catechesis legally possible. To say that such influences "work with" the beliefs identified evinces the normative character of our inquiry. In effect,

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[50] For various suggestions and reports of investigations into the Catholic Church by lay people and external persons (i.e., non-members), see Daniel Burke and Susannah Cullinane, "Report Details Sexual Abuse by More Than 300 Priests in Pennsylvania's Catholic Church," *CNN*, August 14, 2018, https://edition.cnn.com/2018/08/14/us/pennsylvania-catholic-church-grand-jury/index.html; Russell Shaw, "Transparency and Accountability, But Above All Truth," *The Catholic World Report*, August 30, 2018, https://www.catholicworldreport.com/2018/08/30/transparency-and-accountability-but-above-all-truth/; and Dominic Legge O.P., "Cleansing The Church of Clerical Sacrilege," *First Things*, August 16, 2018, https://www.firstthings.com/web-exclusives/2018/08/cleansing-the-church-of-clerical-sacrilege.

we determine what a theory of freedom of the church *should* look like, so that a religious action like Sunday catechesis can be executed without undue governmental interference.

How then should this doctrine be shaped? I offer three proposals: first, governmental recognition of religious truth; second, governmental deference to church autonomy; and, third, governmental interference upon church actions (whether religious or secular) when morally justified.

My first proposal holds that the state should recognize religious truth. This claim aligns with the assumption that, when in church, a church's members coordinate their religious activities towards religious truth. To facilitate these activities, then, the state's practice of freedom of the church should recognize the distinct moral value of collective religious action and encourage an appropriate governmental response in turn – either through a non-establishment that creates space for churches to pursue such activity or through an establishment wherein the government itself actively engages in or directly supports ecclesial activity. Leaving aside the merits of non-establishment and establishment (and of their possible varieties), it will be useful next to focus upon a concept central to either form of church-state relation – namely, the idea of religion or religious truth itself.

As our survey of the conceptual foundations of religious liberty suggests, religion – on a Catholic or Protestant understanding – entails activities from every area of life (see Section 1.1). But, for purposes of a theory of freedom of the church, it is necessary – or, at minimum, helpful – to define religion more precisely. On this point, Aquinas proves useful. In the *Secunda Secundae*, Question 81, Aquinas defines religion as one of the moral virtues, "whose objects are the *means* to the last end [i.e., God]."[51] The "means" evoked

[51] ST, II-II, 81, 5 (italics mine).

imply a special relationship with God that is expressed in forms of behavior normally associated with various Catholic customs.[52] These include devotion, prayer, and adoration (which Aquinas recommends be done in places set apart for veneration),[53] as well as other exterior actions such as making genuine promises in the name of God and praising God through voice and music.[54]

While some might object that a Thomistic definition of religion is immediately too narrow (and too Catholic), it can speak more generally to a contemporary (American and Christian) conception of religion as involving ritual or practices engaged in by diverse churches and houses of worship. In this sense, it is catholic (universal) and, given its focus on *cultus*, is well suited for a social-action and teleological understanding of freedom of the church. Moreover, Aquinas's conception of religion is directed toward an objective and transcendent end (namely, God himself), and so religion is grounded not in any set of practices but in a particular subject that has irreplaceable normative value for human beings. As Aquinas notes: "[W]hen we [give honor and reverence to God] our mind is subjected to him and in this our perfection consists."[55] In this sense, religion is specified as religious *truth*; and truth is recognized for its normative import.

Returning to the external and legal influences at stake, a Christian doctrine of freedom of the church would insist that the government, at minimum, recognize the

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[52] Brian Davies O.P., *Thomas Aquinas's Summa Theologiae: A Guide & Commentary* (Oxford: Oxford University Press, 2014), 258. As Davies notes, Aquinas's discussion conforms to "what he takes to be owed to God in the light of Christian revelation and in the light of certain Roman Catholic customs."

[53] ST II-II, qq. 82-84. See also ST II-II, 81, 7 ("The human mind, however, needs to be led to God by means of sensible things . . . . Hence, in divine worship the use of corporeal things is necessary so that by using signs, man's mind may be aroused to the spiritual acts which join him to God.").

[54] ST II-II, qq. 89 and 91.

[55] ST II-II, 81, 7, resp.

normative value (or perfectionist function) that distinctively religious activities have for church communities and for the human person more generally. Such a doctrine would insist that religious activities (like catechesis in prayer) be free from governmental interference *precisely because* the government itself recognizes the distinct and heightened moral value of such activity. In a certain sense, then, a Christian doctrine of freedom of the church demands that the state relativizes the importance of its own activities to the supreme activities that concern the soul directly. Following this sentiment, theologian James Schall S.J. writes, "However important politics might be, the real drama and action in the world has to do with the City of God and the City of Man, neither of which could be located in an existing polity but passed through the hearts and choices of each person."[56] If particular churches are kernels of the City of God, then, following Schall, to interfere with their religious activities is to censor their members' hearts and choices.

My second proposal aligns with the assumption that all members, in joining or remaining in the church community, consent to the church's authority figures and authority mechanisms. To respect the group's standing intention in this context, an appropriate theory of freedom of the church requires governmental deference to the church's authority structures and procedures. This proposal maintains a long-standing tradition in Christian political thought concerning two separate spheres, the church and the state, that interact with each other throughout time in constant tension. I follow Finnis's general claim that such an arrangement need not (and should not) result in the state's complete submission to the church. The proposal here, I suggest, is "more like the

[56] James V. Schall, *At the Limits of Political Philosophy: From 'Brilliant Errors' to Things of Uncommon Importance* (Washington D.C.: The Catholic University of America Press, 1996), 41.

perennial Catholic doctrine that the secular and religious realms exist in parallel, within the heart and mind of the believer and in public forms[,] . . . each free from the supervisory management of the other."[57]

The concept of separate spheres of authority is a logical corollary to the idea provided by modest group realism that organized groups are differentiated according to their distinct primary ends. Far from being a Catholic doctrine alone,[58] Calvinist thought also has long supported this notion. According to theologian William Stevenson, Calvin attributed "dramatically distinct" roles and authorities for the governmental and ecclesial spheres.[59] The civil government's primary role, writes Calvin, is "to enable men to breathe, eat, drink, and be warmed"; secondarily, it should see "that a public form of religion may exist among Christians."[60] This second task, however, entails more than mere negative liberties. For Calvin, the government should work actively to "foster and maintain the external worship of God" and "defend sound doctrine and the condition of the Church."[61] Despite these strongly religious or ecclesio-centric tasks, Calvin's civic government or state does not usurp the church's authority. Rather, it serves the church, whose distinguishing

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[57] Finnis, *Religion & Public Reasons*, 5.

[58] As philosopher Thomas Pink notes, the idea of distinct and parallel competencies runs deep in Catholic political history. He writes, "The ends natural to this life that were the particular competence of the state simply did not justify coercion on behalf of any revealed religion. So [as Suarez's 1613 *Defensio fidei catholicae* notes] we had a natural right not to be so coerced on the state's authority. Vatican II's statement about the state's lack of authority in matters of religion is not novel at all." See Thomas Pink, "The Right to Religious Liberty and the Coercion of Belief: A Note on Dignitatis Humanae," in *Reason, Morality, and Law: The Philosophy of John Finnis*, ed. John Keown and Robert P. George (Oxford: Oxford University Press, 2013), 432–33.

[59] William R. Stevenson Jr., "Calvin and Political Issues," in *The Cambridge Companion to John Calvin*, ed. Donald K. McKim (Cambridge: Cambridge University Press, 1994), 175.

[60] John Calvin, *Institutes of The Christian Religion*, vol. 2, trans. Henry Beveridge (London: James Clarke & Co., 1957), 653, bk. 4, ch. 20, para. 3.

[61] Calvin, *Institutes*, 652, bk. 4, ch. 20, para. 2 (In his chapter, Stevenson Jr. translates "condition of the church" as "position of the church," better emphasizing the political or societal status of the church: see p. 175).

marks are the administration of sacraments and the preaching of God's Word.[62] As for the state's proper authority, the church cannot infringe upon the former's role. In the Neo-Calvinist thought of Abraham Kuyper, the proper "supremacy" of the state is evident in its threefold obligation: "(1) . . . to compel mutual regard for the boundary-lines [of all spheres]; (2) to defend individuals and the weak ones, in those spheres, against the abuse of power of the rest; and (3) to coerce all together to bear personal and financial burdens for the maintenance of the natural unity of the state."[63] Given a Calvinist attribution of each sphere's sovereignty to God's created order and grace, neither the church nor any other sphere can rightfully usurp the state's distinct role.[64]

It might seem that the idea of separate and autonomous spheres undermines a proposal of state deference to the church's authority structures and procedures. But this proposal is not an appeal to a theocratic government or what Finnis refers to as "theocratic monism."[65] Instead, it is an Augustinian appeal that the church and state should *cooperate* with each other in their respective competencies or jurisdictions and in light of man's final (religious) end – namely, communion with God. Drawing upon Augustine's *City of God*, theologian John Milbank emphasizes the redemptive role that secular or governmental activity plays in this relationship. "[Secular rule] is in fact crucial for human salvation," he

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[62] Calvin, *Institutes*, 289-290, bk. 4, ch. 1, para. 10 ("when the preaching of the gospel is reverently heard, and the sacraments are not neglected, there for the time the face of the Church appears without deception or ambiguity and no man may with impunity spurn her authority, or reject her admonitions, or resist her counsels, or make sport of her censures, far less revolt from her, and violate her unity").

[63] Kuyper, "Third Lecture: Calvinism and Politics," 83.

[64] Kuyper, 77. For a Catholic perspective concerning the limitations of ecclesial intervention into state affairs, see Finnis, *Religion & Public Reasons*, 7 (arguing that bishops should not give pronouncements on moral matters that require "judgments on empirical or predictive issues about which clerics have no specific competence to judge").

[65] Finnis, 6.

writes. "For given the requirement of fallen man for the sway of political coercion and somewhat impersonal economic transaction, *unless* these things are self-denyingly ordered towards peaceful agreement and reciprocal exchange, then human beings will remain unredeemed and 'unjustified' as unjust, since we cannot be saved merely in part."[66] Milbank's reference to self-denial, of course, points to the pastoral role of the Church in this cooperative relationship. "The visible Church on earth," writes Milbank, " . . . seeks to shape a trans-community on the basis of metaphysical honour alone," that is to say, on the basis of God's love alone.[67] It is the Church's sanctifying and prophetic tasks (also recognized by Calvin and Aquinas[68]) that imbue civic and governmental activities with God's love. "[N]o alienation from charity is involved here," Milbank notes.[69] Thus, a freedom of the church that insists upon governmental deference to the church's authority structures is, in the final analysis, a cooperative church-state arrangement – subject to ongoing tension concerning proper jurisdiction, yet ordered to Love itself nevertheless.

We now turn to my final proposal that a Christian doctrine of freedom of the church endorses governmental interference upon a church's actions when morally justified. This proposal is not a collapse into "secular monism," that is, the complete subordination of church activity to the prerogatives of the state.[70] Rather, it is an explicit recognition of a

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[66] Milbank, *Beyond Secular Order*, 231–32 (italics in original).

[67] Milbank, 239.

[68] Calvin, *Institutes*, 289-290, bk. 4, ch. 1, para. 10; Aquinas, ST III, qq. 60-90 (see the Treatise on the Sacraments, especially q. 61 on the necessity of the sacraments for salvation).

[69] Milbank, *Beyond Secular Order*, 232. According to Augustine, the love of a Christian ruler or state necessarily involves atonement for sin: "[A]nd, if, for their sins, they do not neglect to offer to their true God the sacrifices of humility and contrition and prayer" See *The City of God against the Pagans*, trans. R.W. Dyson (Cambridge: Cambridge University Press, 1998), 232, bk. V, ch. 24; and related discussion in Milbank, *Beyond Secular Order*, 229.

[70] Finnis, *Religion & Public Reasons*, 6.

(Neo-)Calvinist and Thomistic insight concerning the state's divinely ordained role as "umpire" over circumscribed inter- and intra-jurisdictional disputes.[71] Furthermore, this proposal acknowledges the distinct competencies and corresponding sovereignties of church and state. It is aligned therefore with the third assumption made above – namely, that church members consent to an internal (i.e., church-led) evaluation of the moral, theological, or legal propriety of their group's religious actions.

What this third proposal suggests, then, is that the government is justified in exercising its adjudicative function within churches when their actions – including their distinctively religious actions – involve moral wrongs. To be sure, the third assumption still holds in normal circumstances. But once a specifically religious act requires the defense of "individuals and . . . weak ones . . . against the abuse of [e.g., ecclesial] power," governmental interference is morally justified.[72]

In order for this proposal to hold, it must be accepted that the state itself can hold what Rawls terms a "conception of the good" or "comprehensive doctrine."[73] So much has already been implied. For, a state that cooperates with the Church towards a final end in God has indeed taken a moral and specifically religious conception of the good as its own. While a Neo-Calvinist might claim that the state's moral knowledge is derived squarely from its own divine mandate,[74] it is also useful to refer to the Aristotelian and Thomistic

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[71] Peter S. Heslam, *Creating a Christian Worldview: Abraham Kuyper's Lectures on Calvinism* (Cambridge: William B. Eerdmans, 1998), 158; and Kuyper, "Third Lecture: Calvinism and Politics," 83.

[72] Kuyper, "Third Lecture: Calvinism and Politics," 83.

[73] Rawls, *Justice as Fairness*, 18–24 (see §7 on "The Idea of Free and Equal Persons").

[74] Kuyper, "Third Lecture: Calvinism and Politics," 82–83. Kuyper writes: "In all these four spheres [social, universities, domestic, and communal] the state-government cannot impose its laws, but must reverence the innate law of life. God rules in these spheres, just as supremely and sovereignly through his chosen *virtuosi*, as he exercises dominion in the sphere of the state itself, through his chosen magistrates.

notion that the discipline of politics falls under the category of moral theory (see Sub-section 2.3.2). Hence, the state, as a coordination of human beings subject to the natural moral law, is perforce a practically (i.e., morally) reasoning community. In this sense, the Anglican theologian Keith Ward is right to say that "[t]he church will not have uniquely privileged insight into what is right and wrong, in particular cases."[75] Indeed, the state, constituted by the exercise of practical reasoning, will have moral insights of its own. These insights might even be privileged – not in the sense of following directly from revelation, but rather as cutting through theological pretenses deployed in hiding or defending morally egregious acts.

Let us take stock. In this sub-section, we have applied a Thomistic account of modest group realism to a theologically informed prescription of corporate religious liberty rights, specifically with regard to the distinctively religious actions of churches. The resulting theory of freedom of the church proposes three broad legal conditions that could facilitate members' procedurally related beliefs, thus protecting or facilitating their corporate religious exercise or, differently put, their religious group agency. Figure 9 summarizes the assumptions made (concerning members' procedurally related beliefs) and the external influences proposed (i.e., the legal conditions for religious group agency). It is the legal proposals, especially, that constitute a theory of freedom of the church.

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Bound by its own mandate, therefore, the government may neither ignore nor modify nor disrupt the divine mandate, under which these social spheres stand."

[75] Keith Ward, *Religion & Community* (Oxford: Oxford University Press, 2000), 233.

**Figure 9. Freedom of the church**

| | | | |
|---|---|---|---|
| Particular intention | → ← | Standing intention | |
| | | (1) Members' procedurally related beliefs | (2) Legal influences to facilitate corresponding beliefs |

| | | | |
|---|---|---|---|
| Religious action (e.g., catechesis) | → ← | *Assumptions* | *Proposed influences (freedom of the church)* |
| | | 1. Collectively aim towards religious truth in church setting | 1. Governmental recognition of religious truth |
| | | 2. Consent to church's authority in religious matters | 2. Governmental deference to church authority |
| | | 3. Expect internal adjudication of church's religious actions | 3. Governmental interference when morally justified |

I reserve further comment on the substantive moral content of my proposed theory for below (see Section 3.3). At present, it is worth stressing once more that the methodological means by which this theory was offered took into account insights from *both* group ontology *and* morality. Which set of insights is more foundational (and therefore fundamentally required) for legal prescription? In a certain sense, insights from the former are foundational since the anatomy of modest group agency allows us to identify the discrete actions and intentions (both individual and corporate) involved, which are part of the full range of corporate religious liberty's appropriate legal subjects. In another sense, insights from Christian political theology are foundational since these are required in determining ethically appropriate legal conditions that can facilitate or protect the (religious) intentions and actions in question. Of course, it should be admitted that neither order of rational inquiry demands definitive placement as *the* originating point of legal prescription. As illustrated in Figure 7, there is a bilateral exchange between moral theory and descriptive theories like group ontology. It is appropriate therefore to see both orders

as foundational; and, *pace* certain political liberal theorists,[76] we reaffirm that group ontology can and should play a role in the process of legal prescription.

### 3.2.2 Religiously motivated secular actions and organizational exemptions

The discussion above focused upon a central case (i.e., a core example) of corporate religious liberty – namely, freedom of the church. In its essential emphasis and application, freedom of the church pertains to the distinctively religious actions (e.g., catechesis and worship) of distinctively religious organizations (i.e., churches and houses of worship). Of course, religious activities (or, activities that are subjectively considered to be religious) take place outside of this narrow categorization. Hence, as recognized in the ecclesial traditions discussed in Chapter 1, in order to account for (or protect) religious activity within non-church organizational contexts, there ought to be a form of corporate religious liberty applicable to non-church forms of organization. This additional form is what I call a theory of organizational exemptions.

What legal conditions should this theory supply for non-church entities, including the individuals and actions that constitute them? Put differently, and with regard to for-profit corporations in particular, we ask: What legal conditions should hold in order to facilitate the religiously motivated secular actions of for-profit firms?

We are able to answer this question using the same procedure adopted in our development of a theory of freedom of the church. But, before commencing this constructive work, we must first provide a working definition of the term "religiously

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[76] Laborde, *Liberalism's Religion*, 172–73.

motivated secular actions." For the sake of argument, let us assume that religiously motivated secular actions (RMSAs) are actions that (i) do not have a direct and distinctively religious end, such as catechesis or worship of God (see Sub-section 3.2.1), but instead are (ii) more immediately aimed towards secular or mundane ends like commerce, despite (iii) being ultimately aimed towards religion's end (i.e., communion with God) via the subjective intent of the believer. In short, RMSAs are a level removed from the ends of distinctively religious actions and, as such, are appropriately described according to their more proximate or immediate end, be it commerce, physical health, or art. Relatedly let us agree that groups primarily organized towards non-religious (that is, secular) ends are appropriately identified as business firms, hospitals, performing arts centers, etc., rather than churches per se. We let this objective categorization hold, despite the religious ends subjectively attributed to the organizations or group actions in question.

With this stipulated definition in place, and given our familiarity with the anatomy of modest group realism, we can proceed quickly through the assumptions and proposals of a theory of organizational exemptions.

To begin, we choose a particular intention that features a RMSA, such as the sale of arts and crafts supplies executed for the glory of God, and we assume the action takes place within a relevant organizational context: here, an arts and crafts for-profit corporation. Next, we turn to the group's standing intention, which supports the execution of the particular intention through agreement upon decision-making procedures for the group as a whole. Following our freedom-of-the-church analysis, we construct a theory of organizational exemptions by offering three assumptions of for-profit firms. These assumptions concern (1) religious truth as an end of the for-profit corporation, (2) consent to internal authorities with regard to religious truth, and (3) expectations around adjudication when the moral, theological or legal propriety of a RMSA is in dispute. Let us

take our particular intention as given and immediately consider each assumption *and* a corresponding Christian legal proposal in turn.

First, it is reasonable to assume that, as a procedural matter, not all members of a for-profit corporation[77] join the firm with the intention of advancing its religious aims or RMSA.[78] Nevertheless, with regard to the notion of religious truth itself, an appropriate governmental response to this situation need not consider the internal popularity of the religious position advanced. So, while churches' members may collectively act towards religious truth with unanimity, and while for-profit corporations' members may do so in a more attenuated manner,[79] a theory of organizational exemptions would encourage the government to recognize and focus upon the broadly religious nature of the act in the first instance. Should the government do this, it would recognize that even RMSAs are eventually aimed towards religion's final end (i.e., communion with God); and thus religion *as a moral virtue* – as opposed to "religion as distinctively religious action" – would be the definition the government stresses.[80] Accordingly, a theory of organizational exemptions would encourage the government to protect the RMSA in question due to the normative stake it has in believers' lives and due to the honor it brings to God through the free

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[77] I understand "members" of a for-profit corporation to include persons who hold the following, typical roles: employees, managers, directors and shareholders.

[78] Cf. Michael A. Helfand, "What is a 'Church'?: Implied Consent and the Contraceptive Mandate," *Pepperdine University School of Law: Legal Studies Research Paper Series* (2013): 423 (arguing that employees give their implied consent to the religious aims of for-profit firms, especially when "religious symbols, organized religious prayer, or other concrete manifestations of a religious mission" are "pervasive").

[79] We can claim that all members actually do intend to advance the firm's RMSA, for the relevant particular intention is ultimately supplied by the firm's standing intention, which grants certain members (who do "believe") the authority to shape the religious dimension of the group's particular act. See Sub-section 3.2.2.

[80] Aquinas defines religion as a moral virtue. ST II-II, 81, 5. Finnis, by contrast, but not in opposition to Aquinas, describes religion as pertaining to man's relationship with the divine. Finnis, *Natural Law & Natural Rights*, 89. See related discussion at n. 141 below.

response of those believers. With respect to organizational exemptions, what I propose therefore is not substantially different from our first proposal for a theory of freedom of the church. In both cases, we claim that the state should recognize religious truth.

The divergence between both theories, however, is more pronounced when we expand upon the assumption (or fact) of religious and moral pluralism within for-profit corporations' membership. Let us pose a second assumption then that, given the fact of moral pluralism, when a RMSA negatively bears upon members, some or many members may renege on the consent given to the group's standing intention which allows the RMSA to happen. If this assumption holds true in actual fact, a situation may arise wherein the group action cannot take place at all. To avoid this situation and thereby protect the religiously motivated group action at stake, a theory of organizational exemptions requires governmental deference to the corporation's internal authority procedures or, differently put, the integrity of its standing intention.

What does this deference entail? As applied to for-profit corporations, such deference involves respecting the group's decision-making procedures supplied by state corporation law and any other relevant bodies of law. This upholds the ability of the firm to execute its RMSA, despite the fact that some or many members publicly dissent from the action – inclusive of the religious tenant it represents, the side-effects it may cause, etc. Such deference essentially uses legal action to override the internal dissent, which, barring an appropriate legal framework, could easily stop the group's particular RMSA from happening.

The question remains, however, as to whether the government *should* allow the group action to take place. After all, the group's public dissenters may have good moral and religious reasons for insisting that the RMSA not occur or, at minimum, be altered in some ethically relevant manner. This point suggests that the governmental deference encouraged by a doctrine of organizational exemptions is a notably conditional deference,

one responsive to the various moral considerations inevitably at stake in the context of religiously and morally pluralist organizations. In the end, the state – indeed, the Christian state to whom Calvin attributes the defense of "sound doctrine" and material well-being[81] – will need to deliberate upon the ethical appropriateness of interfering with or facilitating a group's standing intention in the face of group-internal dissent.

Already we anticipate our third assumption concerning the procedurally related beliefs of for-profit membership. This is the assumption that members expect the group's RMSA to be subject to external (i.e., governmental) adjudication.[82] This is put forth for two reasons. First, since the action is intelligibly secular (i.e., pertaining to the non-religious), it is assumed that various governmental bodies (such as the Bureau of Consumer Protection or the Equal Employment Opportunity Commission) will regulate the action in accordance with relevant laws and governmental competence or expertise.[83] Second, it is assumed that, when the action causes reflexive harms (i.e., harms upon members themselves), the government will have a general (or Kuyperian) interest in helping the weak and vulnerable and thus alleviate negative consequences to an appropriate extent.[84]

The third assumption does not take for granted that the government has an ecclesial competency or authority to evaluate the religious nature of RMSAs, however. Separate spheres of authority, ordained by God and recognized by natural reason, account

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[81] Calvin, *Institutes*, 652-653, bk. 4, ch. 20, para. 2 and 3.

[82] There is the possibility of private, non-state adjudication, as preferred in some libertarian circles. See, for example, Bruce Benson, *The Enterprise of Law: Justice Without the State* (San Francisco: Pacific Research Institute for Public Policy, 1990), 349-378. I do not engage with this possibility here. But the general principle that there ought to be external adjudication of some sort, from some adjudicative body, still holds.

[83] Finnis, *Religion & Public Reasons*, 5 (on the separate spheres of church and state) and 7 (on the limited competencies of clerics in certain moral matters, with regard specifically to empirical facts).

[84] Kuyper, "Third Lecture: Calvinism and Politics," 83.

for this jurisdictional position (see Sub-section 3.2.1). The hard lessons of political history do, as well.[85] It follows that our third assumption presents jurisdictional difficulties for government action. The state has competence and authority over the secular dimension of a RMSA; but that jurisdiction stops at a religious boundary difficult (if not impossible) to demarcate.

In the face of this complexity, I propose that a theory of organizational exemptions would encourage the government to embrace its competency over secular actions with confidence but to tread lightly when religious motivations are at stake. Practically speaking, this calls for an interest-balancing regime of organizational exemptions.[86] Will any harm override religious motivations? No. Will every religious claim win? No. In truth, responses to such questions depend in part upon the particular circumstances of a dispute. In the end, governmental action – despite being informed by the Church's pastoral discourse – may or may not protect the RMSA in question. Christians wanting RMSAs to outweigh on every occasion should not be dismayed when they do not, however. As Augustine writes, "the place of . . . promised peace and secure habitation is eternal, and rightly belongs eternally to Jerusalem the free mother, where the true people of Israel shall dwell."[87] That place does not subsist in the *saeculum*, where a doctrine of organizational exemptions is morally required. But, as the Christian hopes, that place is to come.

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[85] For example, see discussions on religious violence and freedom throughout various periods of Western history in Greenawalt, *Religion and the Constitution*, Vol. 1, 11-34; and Douglas Laycock, "Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century," in *Religious Liberty*, Vol. 1, *Overviews & History* (Grand Rapids, Mich.: William B. Eerdmans, 2010), 651-702.

[86] I understand the term "interest-balancing" in a qualified, Christian ethical sense. See Chapter 1, n. 79.

[87] Augustine, *The City of God*, 801, bk. XVII, ch. 13.

We have now outlined three legal conditions that a Christian theory of organizational exemptions would embrace in response to the procedurally related beliefs of a for-profit corporation's membership. Figure 10 visualizes these conditions (or proposed influences) with their corresponding assumptions.

**Figure 10. Organizational exemptions**

| Particular intention | → ← | Standing intention | |
|---|---|---|---|
| | | (1) Members' procedurally related beliefs | (2) Legal influences to facilitate corresponding beliefs |

| RMSA (e.g., arts and crafts retail) | → ← | *Assumptions* | *Proposed influences (org. exemptions)* |
|---|---|---|---|
| | | 1. Can join firm without directly intending to advance RMSA | 1. Governmental recognition of religious truth, despite ambivalence of firm's members |
| | | 2. Can renege on consent to internal authority if RMSA affects members negatively | 2. Governmental deference to internal authority, but attentive to competing moral/religious claims |
| | | 3. Expect external adjudication of RMSA | 3. Governmental interference as interest-balancing |

To conclude, allow me to point out one similarity and one difference between the theories of organizational exemptions and freedom of the church as described above. Like my theory of freedom of the church, this proposed theory of organizational exemptions seeks to facilitate a group's standing intentions so that the group's coordinated act (i.e., its particular intention or corporate religious exercise) can take place in actuality – with little to no external interference, unless deemed morally necessary. The threshold for justifiable interference is lower for non-church entities than it is for churches, however. This is due in large part to a basic feature of non-church membership (i.e., a heterogeneous religious population) that requires sensitive moral navigation. And accounting for this basic feature is the fact that non-church entities primarily coordinate around secular ends. Such ends give non-church entities their purpose and point. But, more importantly, such ends allow

us to describe our proposed theory as one specifically concerned with religiously motivated secular actions and the moral implications of granting their corporate exercise. This teleological focus differentiates organizational exemptions from freedom of the church, both descriptively and normatively. As I further discuss in the next section, differentiation in both regards is vital in understanding the logic and limits of corporate religious liberty.

### 3.2.3 Summary

At the outset of this chapter, I stated that I would construct a theory of corporate religious liberty that identifies the appropriate legal subjects at stake and the practical moral limits of the freedoms prescribed. Through use of Aquinas's modest group realism and in conversation with diverse political theologies, I have done just that. My proposed theory holds that (i) the group-agential activity of individuals serves as an intelligible legal subject for corporate rights to religious freedom and, further, that (ii) the legal conditions required to facilitate group-agential activity suggests reasonable, theologically informed moral limits – characterized by governmental recognition of religious truth, governmental deference to group decision-making, and governmental interference when morally justified. The strength and nature of these limits differ according to: (a) the type of corporate activity involved (i.e., a religious action or a religiously motivated secular action) and (b) assumptions made concerning group-members' procedurally related beliefs as viewed within organizational contexts where religious convictions may be uniform (as in churches) or diverse (as assumed in for-profit firms). Accordingly, such limits suggest, and corroborate the churches' understanding of, two forms of corporate religious liberty: freedom of the church and organizational exemptions.

In the next section, I expound my theory's social-action focus, which allows us to hold the position that the appropriate (but not the only) legal subject of corporate religious liberty rights is the group-agential activity of coordinating individuals.

## 3.3 Modest group agents as legal subjects

My theory proposes that group-agential actions (or social actions, or modest group agents) are the appropriate legal subject of corporate religious liberty rights. We arrived at this conclusion by: (1) noting that the churches' theory of corporate religious liberty requires clarification as to what religious organizations, churches, or groups in general are (see Section 1.4); and, then, (2) providing this clarification through Aquinas's modest group realism which, we determined, can and ought to be part of a methodologically appropriate procedure of corporate rights prescription, group-agency skepticisms notwithstanding (see Sections 2.4 and 3.2, especially).

In order to appreciate the benefits and limits of this proposition, we now need to step back from the details of my proposed theory in order to see how its identification of modest group agents as legal subjects speaks to relevant contentions raised in political liberal discourse and theological reflection upon corporate rights to religious freedom. In this section, I first examine how my theory moves beyond the individual-group divide of the corporate religious liberty debate. I then note how use of a religious-secular distinction helps my theory to resist descriptions of the Church as merely voluntary and avoids overly expansive definitions of the term "religious institution." For each set of considerations, we will see that a legal and moral attention towards modest group agency helps solve a number of descriptive and normative challenges.

### 3.3.1 Political-liberal contentions

The contemporary debate over corporate religious liberty is often framed in terms of two opposing camps. On one side are those who conceive of group rights and autonomy in terms of, or reducible to, individual rights and autonomy. On the other side are those who conceive of group rights and autonomy as having a *sui generis* logic and value, that is, as being non-reducible to the rights and autonomy of individuals. I refer to this basic distinction as the individual-group divide. And, while it is commonly used to describe the contemporary debate,[88] I argue here that it is mistaken with regard to the actual position of group-rights advocates and, further, that it is in need of replacement altogether. Shifting the conversation from "groups and individuals" to "group-agential activities," I argue, has numerous conceptual and practical benefits.

#### *3.3.1.1 The individual-group divide*

To begin, let us consider an individual-rights position, inclusive of an individualist construal of what group-rights advocates hold. Here, Schragger and Schwartzman again prove useful. Recall their Lockean description of churches as voluntary associations and their "general account of conscientious objection,"[89] which is a form of corporate religious

[88] Schragger and Schwartzman are two prominent theorists who describe the contemporary debate in similar terms. See Schragger and Schwartzman, "Against Religious Institutionalism," 919-920 (arguing that "proponents of freedom of the church . . . [hold] that religious groups do not owe their distinction to the rights and interests of their members . . . [and that] [t]heir sovereignty is basic and irreducible, not a function of anything more legally or morally fundamental"); and "Some Realism," 345 (saying that "[t]he argument that the church *qua* church has a right of religious freedom separate and apart from the rights or interests of individuals can be understood more generally as an argument based on group rights").

[89] Schragger and Schwartzman, "Against Religious Institutionalism," 969.

liberty applicable to all group-types – from "an ideologically committed business that hires hundreds of employees, to a religious hospital, or to a non-religious non-profit" (see Sub-section 2.3.4).[90] Behind these two ideas, one finds a liberal commitment to individual dignity and individual rights. And, with respect to corporate entities, this liberal commitment translates into a derivative account of group rights, that is, the idea that group rights and autonomies are reducible to the rights and autonomies of individuals. On this point, Schragger and Schwartzman write:

> [I]t seems obvious that what grounds the assertion of group autonomy in the religion context is not the dignitary or conscience-based rights of institutions – for what would those be? – but rather the fact that individuals' dignitary and conscience-based rights can only be vindicated because they are exercised through institutions. Certainly, the individual rights of conscience and association encompass the right to gather together in a group, to decide the group's purpose and doctrine, and to engage in group governance and decision-making in ways that advance one's aims (albeit within limits) . . . [T]hese rights are sufficient to explain what is important about church autonomy [or 'associational freedom more generally'].[91]

I take the sort of reasoning displayed in the passage above to be at the heart of the individual-rights position. Not only is it fundamentally Lockean in its tacit acceptance of the voluntarist principle,[92] it is also thoroughly Rawlsian. Rawls describes the freedom of association as necessary for the development of individuals' "moral powers," one of those being "the capacity for [developing] a (complete) conception of the good." As Rawls notes, "Liberty of conscience and freedom of association are [proposed] to ensure the opportunity for the free and informed exercise of this capacity and its companion powers

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[90] Schragger and Schwartzman, 981.

[91] Schragger and Schwartzman, 967, 969.

[92] Schragger and Schwartzman, 957–62.

of practical reason and judgment."[93] Given its intellectual pedigree, the individual-rights position is strongly liberal and thereby resistant to the conceptualization, even, of *sui generis* group rights.

But what does such conceptualization entail? Schragger and Schwartzman understand the idea of *sui generis* group rights to entail a standard form, what they refer to as a "standard argument." We have already seen this argument in full schematic form (see Sub-section 2.3.4), but it is worth re-presenting here in a more precise form: It first establishes that groups themselves have rational agency; second, shows rational agency to support moral personality; third, uses moral personality to ground moral rights; and, fourth, protects moral rights through corporate legal protections.[94]

Schragger and Schwartzman claim that the intellectual heritage of the standard argument is traceable to medieval corporatism[95] and, more recently, to nineteenth-century German idealism and British Pluralism.[96] In this vein, we see that the conservative philosopher Roger Scruton puts forth a version of the standard argument in his moral defense of corporations. Scruton argues that certain corporate persons (especially the Church) possess a *sui generis* agency, enjoy moral personality and, ultimately, are ends in themselves.[97] They embed individuals within an "ecology of rational agency," whereby

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[93] Rawls, *Justice as Fairness*, 113.

[94] Schragger and Schwartzman, "Some Realism," 438–353.

[95] I contest Schragger and Schwartzman's attribution in part (see Sub-section 2.3.4) and through examination of Aquinas's modest group realism (see Section 3.1). I do, however, acknowledge a certain corporatism or strong group realism in the medieval tradition, especially in Roman Catholic thought (see Section 4.1 and Sub-section 4.2.1 below).

[96] Schragger and Schwartzman, "Some Realism," 349–50.

[97] Roger Scruton, "Corporate Persons: I – Roger Scruton," *Proceedings of the Aristotelian Society, Supplementary Volumes* 63 (1989): 257–60.

individual persons are made aware of their heritage, including their moral obligations generated by past generations for the sake of present and future societies.[98] And while corporate persons serve individuals in their moral formation, corporate persons themselves – on Scruton's account – are agents ("institutions . . . which have personality"[99]) deserving of their own legal protection.[100]

It is worth noting Scruton's argument, if even briefly, because it might be one of the few "standard argument" accounts written in recent years. And, even if it is actually one of many, it still falls outside of the corporate religious liberty debate proper. Indeed, in the corporate religious liberty debate itself, I find *no* prominent scholars who endorse the view that (some) corporations are actual beings or rational agents having moral personality, asserting moral rights and claiming legal protections. Schragger and Schwartzman attribute the standard argument to religious institutionalists like Richard Garnett and Steven D. Smith.[101] But, in defense of religious institutionalism, Garnett himself writes that "[t]he 'freedom of the church' proposal . . . is not [a claim] that the freedom of religious conscience from government coercion 'derives' from the autonomy, sovereignty, or independence of churches . . . . [It is neither] the source of [n]or the substitute for the immunity of the person from coercion in religious matters, but instead [is] a structural protection for that immunity."[102] And, with respect to corporate religious liberty more

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[98] Scruton, 266.

[99] Scruton, 252.

[100] Scruton argues that corporate persons (i.e., non-instrumental institutions, which have moral personality) are best protected by the English law of trusts, which "enable moral persons to create their own legal identity, and to claim the recognition which is due to them, while asking permission of no one besides their members." See Scruton, 260.

[101] Schragger and Schwartzman, "Some Realism," 348, n. 13.

[102] Garnett, "The Freedom of the Church," 55.

generally, the *Hobby Lobby* Court itself argues that the federal Religious Freedom Restoration Act was designed to protect the rights of the "people associated with the corporation," not the rights of corporation *per se*.[103] Thus even the U.S. Supreme Court, the progenitor of corporate religious liberty as an emerging legal doctrine,[104] does not hold the standard argument.

Therefore, let us consider the standard argument to be a strawman put forth by individual-rights advocates in their attempt to emphasize (and avoid) potential dangers that group rights can present to various liberal values. But let us also consider Garnett's "structural protection"-view of religious institutionalism and the *Hobby Lobby* Court's rights-derivation approach as being genuine aspects of the group-rights position of the individual-group divide. If we grant these points, then what is the group-rights position? And how can a group-agential or social-action focus improve upon *both* it *and* the individual-rights position discussed above?

#### *3.3.1.2 Bridging the individual-group divide*

Garnett articulates the group-rights position well in the following passage. Although it is offered specifically in the "freedom of the church"-strand of the corporate religious liberty debate, I find that its generality affords application to all group-types. Garnett writes:

> The 'freedom of the church' can and should be seen as a structural feature of social and political life – one that promotes and enhances freedom by limiting government – and

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[103] *Hobby Lobby*, 134 S.Ct. at 2755.

[104] Chad Flanders, Micah Schwartzman and Zoë Robinson refer to corporate religious liberty as a legal doctrine, comparable to the U.S. Supreme Court's doctrine of church autonomy. See Flanders, Schwartzman, and Robinson, "Introduction," xix.

> also as a moral right to be enjoyed by religious communities. It is not simply an effect or implication of private, individual claims to freedom of conscience and immunity from government coercion in matters of religious belief. If the immunity of conscience from coercion in religious matters can be said to depend on the 'freedom of the church,' it is not in the sense that institutions are somehow prior to persons, and not in the sense that this immunity is somehow conferred by a church, but rather in a more practical, political sense.

What is this "practical, political sense"? Again, as Garnett states, it deals *not* with a conception of groups preceding, either temporally or ontologically, their members. Instead, it pertains to the vulnerability of individuals as seen against intrusive state power. Garnett continues:

> [John Courtney] Murray's claim was that 'the protection of . . . aspects of life from the inherently expansive power of the state . . . depended historically on the freedom of the Church as an independent spiritual authority.' True, he worried that the conscience of the individual was vulnerable, that it was not up to the task of protecting itself, and that the modern state should not be trusted to honor it. But he did not seek to subordinate it to, or to substitute for it, the 'freedom of the church.'[105]

To solidify our understanding of the group-rights position, two points are worth highlighting from Garnett's passage. Firstly, as alluded to above, insofar as Garnett's basic argument seeks to protect individual conscience from government intrusion, it is applicable to church *and* non-church organizational contexts. It may be that non-church contexts require more governmental intrusion, given (the assumption of) religiously heterogeneous memberships. But the basic argument concerning the value of individual conscience holds across all group-types, nevertheless. Secondly, if we take Garnett's passage as representative of the actual group-rights position (which I think we could), then we see that the group-rights position is not only structural (i.e., affirming of institutions that help

[105] Garnett, "The Freedom of the Church," 56.

shield individual conscience from state interference) but also affirming of group moral rights.

The latter point concerning group *moral* rights tempts us to view Garnett's proposal as falling within the standard argument. But it avoids this categorization chiefly by denying an ontological primacy or strong group agency to groups themselves. Hence, on Garnett's view, group moral rights stem, or are derived, from the fundamental value of individual conscience. Such derivation, however, is "not simply an effect or implication of private, individual claims to freedom of conscience."[106] Instead, Garnett invites us to consider group moral rights as (translating practically into) structural protections that are recognized on behalf of individuals. Effectively, then, group moral rights and structural protections are one in the same on the group-rights account.

We see then that the group-rights position is not crudely corporatist as its liberal critics tend to portray. With regard to individuals and individual rights, the group-rights position is not unaware; it simply seeks to protect those individuals and rights by means of a different way – not through a weakening of group autonomy, but through a limiting of government interference via structural protections or "group moral rights."

Yet, therein lies a weakness of the group-rights position: Insofar as it uses terminology or concepts which suggest that groups themselves are moral rights-holders, the group-rights position risks falling into what I refer to as the corporate personality trap. This is the situation in which groups themselves are categorized into standard theories of corporate personality and then, based upon tacit moral assumptions smuggled into those

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[106] Garnett, 56.

theories, are denied or granted certain legal rights.[107] The problem with this line of reasoning pertains primarily to moral analysis. As Dewey, Schragger and Schwartzman note, it obfuscates moral deliberation by operating upon pre-determined moral conclusions and/or by not making explicit its tacit moral assumptions (see Section 2.3). Furthermore, depending on the corporate theory chosen, the corporate personality trap claims that the group itself has (or does not have) a moral personality like (or equivalent to) that of a natural human being. But, as Finnis notes, this tempting position should be resisted: when used in moral analysis, "'[p]ersonality' is a distracting metaphor." Given its moral obfuscations, it ultimately diverts attention away from the actual flesh-and-blood individuals involved, "whose well-being and fulfilment [are] seriously injured by the restrictions upon . . . the various forms of association which they have, or might otherwise have, with one another."[108] What can cause these injurious restrictions? Theories of corporate personality.[109]

Insofar as the group-rights position falls into the corporate personality trap, we should resist siding with it completely. But this does not mean that we should endorse the individual-rights position as a result. For although the individual-rights position does focus upon the actual flesh-and-blood individuals involved in corporate disputes, it has the tendency to narrowly restrict organizational autonomy for the sake of individual claimants.

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[107] Orts lists two theories: concession theory, which holds that states grant firms the right to exist, and participant theory, which holds that group-members are primary and that the state should respond to them. See Orts, *Business Persons*, 13. Justice Ginsburg alludes to two theories: artificial entity theory, which holds that corporations are artificial creations of the state, and corporate realism, which holds that corporations have minds of their own and are metaphysically distinct from their members (see Sub-section 2.1.1).

[108] John Finnis, "Persons and Their Associations," in *Intention and Identity: Collected Essays*, Vol. II (Oxford: Oxford University Press, 2011), 98.

[109] As we have seen, this is the trap that Ginsburg falls into; that Orts seeks to avoid; and that Dewey, Schragger and Schwartzman criticize: see Sub-sections 2.1.1 and 2.3.3 above.

(One need to look only to Laborde's freedom of association, Schrager and Schwartzman's liberal account of church autonomy, and Marci Hamilton's "common sense" theory of religious freedom to find this to be the case.[110]) We are thus left wanting a third way – that is, a way in which we can protect *both* a larger expanse of groups (without attributing moral personality to them) *and* the individuals involved (without unduly interfering with their associational efforts and well-being).

Given its social-action focus, my proposed account of corporate religious liberty can provide a useful alternative to the positions that constitute the individual-group divide. Instead of wrestling between individuals and groups, the social-action approach shifts immediate attention away from them and focuses upon the group-agential action involved. This has two important benefits: Firstly, the social-action focus allows the process of legal prescription to escape the corporate personality trap, since the legal subject immediately recognized is an action and not a "thing" to which one might attribute moral personality. Secondly, it still allows the process of legal prescription to account legally and morally for the individuals and groups involved, since group-agential action cannot occur without them.

Allow me to expand upon these benefits through two illustrations that draw from the *Hobby Lobby* case and Aquinas's schematic of agent-types identified in the *Prima Secundae*, Question 21, Article 4.

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[110] Laborde, *Liberalism's Religion*, 175 (arguing that associational freedoms should be granted only to voluntary groups that have strong "coherence" and "competence" interests); Schragger and Schwartzman, "Against Religious Institutionalism," 957 (constructing a Lockean, voluntarist conception of freedom of the church); and Hamilton, *God vs. The Gavel*, 278-313 (using historical survey in part to defend a Millian, no-harm understanding of religious freedom).

In our first illustration we replace Aquinas's generic agent-types – the (1) group, (2) ruler, (3) all members of the group and (4) an individual from the group – with the agent-types specific to the *Hobby Lobby* case. These include: (1) the group-agential action (i.e., the corporate religious exercise), (2) the firm's owner-controllers, (3) all members of the firm (shareholders and employees), and (4) any single member of the firm.

**Figure 11. The group as group-agential action**

| | 1 | 2 | 3 | 4 |
|---|---|---|---|---|
| ST I-II, 21, 4 | Group | Ruler | All members | Individual |
| Hobby Lobby | Corporate religious exercise | Owner-controllers | All shareholders and employees | Individual shareholder or employee |

We now ask how this set-up influences the process of legal prescription. In this regard, we see that the group is no longer a thing or person to whom moral personality and moral rights are attributed. Instead, the group is an action or, specifically, the group-agential action of coordinating individuals. Therefore, the process of legal prescription applies a legal right to the (1) group-agential action itself. Yet, while doing so, it also protects the individuals who bring the group-agential action about; these are the (2) firms' owner-controllers and (3) all members of the firm, including (4) any given individual. Understood in this way, legal prescription transforms the individual-group divide from disagreement between individual and group rights to a consideration of individuals and their group-agential actions. This effectively keeps the normative focus upon individuals, while recognizing that individuals engage in and depend upon coordinated activities in order to promote their dignity, fulfill aspects of their well-being and protect their individual rights. Hence, the "group" (that is, the specific occasion of group-agential action) is kept within moral focus, as well.

While it may be tempting to think that the social-action approach is much too esoteric to be practically useful, it is important to note that contemporary legal thought and

practice are seen to support it. Consider the *Conestoga Wood Specialties* opinion from the Third Circuit Court of Appeals. Judge Jordan of the Court writes:

> Given the special place the First Amendment plays in our free society, the Supreme Court in *Bellotti* instructed that, instead of focusing on 'whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons,' 'the question must be whether' the activity at issue falls within an area 'the First Amendment was meant to protect.' . . . In other words, the operative question under the First Amendment is what is being done—whether there is an infringement on speech or the exercise of religion – not on who is speaking or exercising religion. Hence, in the political speech context that it then faced, the *Bellotti* Court emphasized that, '[i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.' . . . Likewise here, the right to object on religious grounds to funding someone else's reproductive choices is no less legitimate because the objector is a corporation rather than an individual.[111]

Here we see that the Third Circuit and the U.S. Supreme Court interpret First Amendment jurisprudence as having an action-based, not person-based focus. Leaving aside the question of whether this interpretation is accurate of the Supreme Court's jurisprudence, we can at least recognize an action-based approach in actual practice. And, even if the action-based approach observed does not make explicit the potential (and specifically) group-agential character of the actions in question, the basic emphasis upon acts as opposed to persons is enough to note the practical usefulness of the social-action approach in general.

A question remains, however, concerning the status of the group itself. Often, corporate religious liberty disputes speak of groups themselves as agents existing over time

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[111] Conestoga Wood Specialties v. U.S. Dept. of HHS, 724 F.3d 377, 402-403 (3rd Cir. 2013) (holding that business owners could not make First Amendment or RFRA claim against government's contraceptive mandate) (Jordan, J., dissenting) (citing First National Bank of Boston v. Bellotti 435 U.S. 765, 776 (1978) and *Id.* at 777).

and as rights-holders that are situated among natural persons in the legal landscape. So the question is this: If we accept that groups are not *just* instances of group-agential action, then how does the social-action approach account for groups' existence over time and the common practice of attributing rights to groups themselves? To answer this question, we can propose a second illustration, which is a slight variation of the first.

In this second illustration we replace Aquinas's generic agent-types with the agent-types specific to the *Hobby Lobby* case, but view the group agent in two different ways. Hence, while we still make note of (2) the firm's owner-controllers, (3) all members of the firm, and (4) any single member of the firm, we understand the group agent as: (1)(a) the group-as-social-action, which is a specific occasion of group-agential activity, and (1)(b) the group-over-time, which refers to the perduring collection of standing intentions recognized, maintained and engaged in by coordinating individuals.

**Figure 12. The group as group-as-social-action and group-over-time**

| | 1 | 2 | 3 | 4 |
|---|---|---|---|---|
| ST I-II, 21, 4 | Group | Ruler | All members | Individual |
| Hobby Lobby | (A) Group-as-social-action | Owner-controllers | All shareholders and employees | Individual shareholder or employee |
| | (B) Group-over-time | | | |

Understood thus, the group-over-time is the public policy that coordinates or orders the associating individuals, that brings distinction to their particular efforts, and that is capable of existing over a large expanse of time despite (high-levels of) turnover among coordinating individuals. The group-over-time, then, is the "thing" to which legal rights could be ascribed so as to protect the interests and rights of the coordinating individuals. That said, as effectively constituting the standing intentions of a collection of individuals, the group-over-time is inextricably tied to the intentional actions of natural (human)

persons. It is therefore not far removed from the social-action focus of (1)(a). It is but a nuanced understanding of the latter, in light of the lasting existence of groups and the direct attribution of legal rights to them. And, in the end, it speaks to the fact that particular occasions of group-agential action emerge from standing intentions that pertain not to those isolated activities alone, but to the individuals' collective actions engaged in across spans of time.

It should be clear that the idea of the group-over-time does not return us to the edge of the corporate personality trap. Legal rights given to the "thing" in question do not follow from the idea of corporate moral personality as construed in the standard argument (see Sub-section 2.3.4). Instead, they follow from the value of coordinated actions, from the benefit of lasting institutions (i.e., the public policies or standing intentions) that help make coordinated actions possible, and from the individual dignity and rights implicated. We conclude therefore that legal rights can be attributed intelligibly to groups themselves. And, hence, we see that Justice Alito's derivative-rights argument, wherein he defends RFRA's application to corporate persons, is not an example of standard-argument reasoning.[112] Instead, we can understand it as a recognition that the for-profit corporate form is able to shape individuals' standing intentions, which affects their ability to coordinate with each other over time. As Alito says, "Protecting the free-exercise rights of closely held corporations thus protects the religious liberty of the humans who own and

[112] Alito writes: "RFRA's text shows that Congress designed the statute to provide very broad protection for religious liberty and did not intend to put merchants to such a choice. It employed the familiar legal fiction of including corporations within RFRA's definition of 'persons,' but the purpose of extending rights to corporations is to protect the rights of people associated with the corporation, including shareholders, officers, and employees." *Hobby Lobby*, 134 S.Ct. at 2755.

control them."[113] But we might also say that protecting the free exercise rights of closely held corporations thus protects the ability of owner-controllers, and of those who coordinate with them, to engage in corporate religious activity.

#### *3.3.1.3 The primacy and moral use of social-action*

The above illustrations have helped us to appreciate how my proposed social-action theory allows legal prescription to account legally and morally for individuals and groups, thus bridging the individual-group divide and escaping the (seemingly ever-present) corporate personality trap. But, to round off this discussion, there are three remaining points to address briefly.

The first point concerns the reason for establishing laws that specifically protect the group-over-time, as opposed to the (group-agential) act in question. After all, if we can protect individual occasions of group-agential action, why fashion laws that cover things or corporate persons? The answer to this question, I suggest, relates to the intuition behind Lon Fuller's concept of the law's "inner morality." In short, Fuller holds that the law must have certain moral qualities in order to be a worthwhile enterprise for legislators and those subject to the law. Public promulgation, ease of understanding and stability over time are but three Fullerean moral qualities[114] that a corporate religious liberty regime can promote *if* it (simply) settles upon the extension of rights to "persons" broadly understood. This decision then signals to coordinating individuals and to the public at large (including

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[113] Ibid.

[114] Lon Fuller, *The Morality of Law*, rev. ed. (London: Yale University Press, 1969), 39.

regulatory bodies and potential third-parties) that any group can be considered to be a "person" under law for relevant religious liberty purposes. The protection of "persons" is arguably quickly and easily understandable (perhaps more so than the identification of group-agential action), and so long as such protection persists over time (as standing intentions can also exist over time), then there is moral reason to fashion laws that explicitly protect things or corporate persons.

Nevertheless, the ability of corporate persons to enjoy publicly recognized standing under relevant law does not settle the question of whether a particular group, involved in particular disagreement, should receive corporate religious liberty rights. This brings us to my second point: that no matter if we recognize (with Alito) that corporate bodies themselves can and should receive legal rights, we look *in the end* to the group-agential action involved in order to assess its overall moral quality. In effect, we subject the group action itself to interest-balancing since no (moral or legal) right to religious liberty (specifically, religious free exercise) is absolute.[115] And, with regard to the group-over-time (versus the group-as-social-action), our process of legal prescription looks to it insofar as the group-over-time helps inform our assumptions about the standing intentions of the group-agential action under analysis. Such analysis may find, for example, that the group in question features a religiously heterogeneous membership and so expects a high level of

[115] In political liberal discourse, freedom of belief is often understood to be absolute, that is, only when the belief in question causes no harm to others. (Cf. Justice Kennedy's opinion in Obergefell v. Hodges 576 U.S. ___ (2015): "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."). By contrast, a Roman Catholic (and post-Vatican II) understanding of freedom of belief holds that there is no right to error (i.e., erroneous belief). On this construction, freedom of belief, like freedom of religious exercise, is not absolute. See *Compendium of the Social Doctrine of the Church*, para. 422; and Sub-section 1.1.1 above.

governmental interference when internal religious disputes arise through a particular group-agential act. Thus, the moral deliberation involved in legal prescription requires attention to the group-over-time. But, in the end, the group-agential action (i.e., the group-as-social-action) is our most important legal subject.

Finally, we should note that the social-action focus of my proposed theory assists in understanding why the religious interests of group-members (and not others) are immediately relevant for legal and moral analyses in religious liberty disputes. One contention in the *Hobby Lobby* case involved justifying the attention given to the religious beliefs of the firm's owner-controllers and not to those of its 32,000 employees.[116] The modest group realism of Aquinas shows that it is (i) a group's authority figures and (ii) the public policy that they help shape which justify care towards the authority figures' beliefs in particular. The non-authoritative members of the group consent to the public policy developed by the authority figures, and so the (religious) beliefs of non-authoritative members (whether dissenting from or consonant with the authority figures) are secondary in terms of explaining the nature and existence of group-agential action itself. Hence, so long as the group members consent at the basic standing-intention level, then the standing intentions (which are ultimately shaped by the authority figures) result in the particular religious intention, that is, the given group-agential action.

This theoretical understanding has bearing upon, or is compatible with, actual legal practice it seems. One legal scholar interprets Justice Kennedy's *Hobby Lobby* concurrence as creating a "doctrine of corporate sincerity," which, in my opinion, closely aligns with the group-agential insights of Aquinas's modest group realism. According to this proposed

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[116] Hobby Lobby, "About Us."

doctrine, Kennedy is said to hold that: (1) "the only relevant beliefs [in corporate religious liberty disputes] are the ones [directly] burdened by an exercise of governmental authority – that is, the beliefs that would have guided a corporation's conduct if the government had not acted in the challenged manner."[117] Following this, the doctrine also holds that: (2) "the corporation has no beliefs or rights as a corporate entity, . . . [and] that the courts are concerned with the religious beliefs that govern corporate conduct because those are the beliefs that could be burdened by government regulations of corporations. Beliefs that did not guide corporate conduct [i.e., the beliefs of non-authoritative members] were burdened by private decision makers [i.e., the owner-controllers] rather than by government and are therefore irrelevant to the corporate claim."[118]

This proposal seems sound. It recognizes core aspects of the anatomy of modest group agency, such as the importance of authority figures or mechanisms in the formation of corporate conduct and the attenuated role that non-authoritative members play in this formation. However, insofar as the proposal goes on to suggest that a "balancing [of] competing dignitary interests" can be eschewed and replaced with "an inquiry into whose religious beliefs guide corporate conduct,"[119] then I would suggest that the proposal forgets Aquinas's normatively relevant insight that *all members* are involved in the actual execution of group-agential action itself. Indeed, since group-agential action requires an unanimity of intention among members, all individuals (even those who lack the relevant authority) are

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[117] Spencer Churchill, "Justice Kennedy and the Unfolding Doctrine of Corporate Religious Sincerity," *Social Science Research Network* (May 2015): 65, http://dx.doi.org/10.2139/ssrn.2716699. See also Spencer Churchill, "Duty or Dignity?: Competing Approaches to the Free Exercise Rights of For-Profit Corporations," *Harvard Journal of Law & Public Policy* 37, no. 3 (2014): 1171–93.

[118] Churchill, "Corporate Religious Sincerity," 66.

[119] Churchill, 65.

involved in the social act's execution. Morally speaking, the group-agential act should be subject to some level of interest-balancing[120] for the sake of the individuals involved. Descriptively speaking, however, we need not discount the existence of group agency just because not every member played a direct and authoritative role in the formation of the group's corporate religious action.

Thus far, I have shown how the social-action focus of my proposed theory of corporate religious liberty helps navigate and move beyond the individual-group divide of the political-liberal debate. Not only is this divide inaccurate with regard to the actual position of group-rights advocates, but, once accurately understood, it seems to ensnare us between an individual-rights position that too narrowly restricts corporate religious (or religiously motivated) exercise to certain group-types and a group-rights position that risks falling into the corporate personality trap. The social-action approach avoids the problems of both positions by emphasizing a moral and legal attention towards group-agential action. This bridges normative concerns between individual rights and group rights, and helps clarify why and how legal prescription can apply to "groups" – that is, group-agential actions – themselves.

Having focused our attention upon the (notably secular) individual-group divide, I turn now to some theological ambiguities noted in Chapter 1.

### 3.3.2 Theological considerations

[120] I understand "interest-balancing" in a qualified, Christian ethical sense. See Chapter 1, n. 79.

In the U.S. religious liberty debate, Catholic and Protestant descriptions of the Church evince a reductionism (inasmuch as the Church is described merely as a voluntary association) and an over-expansion (insofar as the term "religious institution" – which, in statutory law, denotes churches and their integrated auxiliaries – is applied to virtually any type of non-church organization). Both characteristics are problematic. Reductionism works against a theologically grounded view of the Church being more than the sum of her parts; and the over-expansive use of the term "religious institution" for legislative and adjudicative purposes risks diluting freedom of the church protections (see Sections 1.2 and 1.3).

In this final section of the chapter, I aim to show how my theory of corporate religious liberty avoids both types of problems through its distinction between religious and secular actions. I begin by defending the religious-secular distinction (*pace* theologian William T. Cavanaugh) and discussing the two forms of corporate religious liberty that can be seen to follow from its two sides (*cum* philosopher Nicholas Wolterstorff). My aim here is to show that the religious-secular divide does not inevitably lead to truncated or inappropriate protections for religious activity, so long as religion itself is appropriately (i.e., theologically) defined. Afterward, I apply this conclusion to the reductionism and over-expansion issues raised above. I argue that my preferred definition of religion works with Aquinas's modest group realism to encourage a disciplined use of the term "religious institution" and a non-reductive image of the Church herself.

#### *3.3.2.1 The religious-secular distinction*

According to my theory of corporate religious liberty, group-agential actions and organizations are made intelligible according to their distinct ends. These ends can be distinctly religious (having religion as their immediate *and* ultimate end) or secular (having a

secular purpose as their immediate end and religion as their ultimate end) (see Sub-sections 3.2.1 and 3.2.2). This sort of distinction is unwelcomed, however, by theologians who seek to avoid labeling anything as "religious." In religious liberty contexts, such categorization, it is argued, concedes too much ground to a "secular" state which seeks to relegate the "religious" to a strictly private sphere. Better to not adopt the label, then to be marked out for systematic privatization.

I am sympathetic to this general position, but it seems to presuppose that the definition of religion must always come from a secular state. It need not, however. The definition could come from the churches in the first instance, and thus religion could be legally protected by an appropriately theological standard. To see how this might happen, let us consider William T. Cavanaugh's criticism of the term "religious" (or "religion") in American religious freedom discourse.

In his article "Are we free not to be a religion?," Cavanaugh claims that "religion" and the "religious/secular distinction" of which it is part are products of modern constructivism.[121] He writes:

> '[R]religious' and 'secular' are constructed categories that are used in different times and places for different purposes, sometimes benign, sometimes not . . . I agree with constructivists that the categories . . . are invented, constructed categories, not simply part of the way things are. And I think, furthermore, that that construction is not neutral, but has often distorted the reality of Christianity in the West.[122]

On Cavanaugh's account the question of *who* has constructed the relevant definitions is settled. It was not the Church, thinks Cavanaugh, because Augustine himself said, "for we

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[121] William T. Cavanaugh, "Are We Free Not to Be A Religion? The Ambivalence of Religious Freedom," *Pro Ecclesia* XXIII, no. 1 (2014): 9.

[122] Cavanaugh, 11.

cannot strictly speaking say that *religio* means nothing other than the worship of God"[123] and because there was no political, religious-secular divide in the medieval period – although there was, Cavanaugh admits, "a distinction between civil and ecclesiastical authorities."[124] Instead the term "religion" was (and still is) defined by the modern state, which triumphed over ecclesiastical authorities and claimed that "the direct concern of the church would henceforth be the area of life designated 'religion,' which would leave 'politics,' 'business,' and other secular pursuits in the hands of civil rulers." Religion thus understood is "a matter of voluntary interior individual belief" which, being kept within the walls of the church, causes no harm to one's neighbor.[125]

Continuing, Cavanaugh thinks that this constructivist account of religion has been forced upon and even willingly adopted by church authorities. Commenting on the federal government's contraceptive mandate, Cavanaugh laments that the U.S. Catholic bishops adopt the constructivist account in their religious liberty efforts. Such a definition, Cavanaugh writes, poses three problems: "When the church allows itself to be defined as a religion, . . . individualism, separation of religion from the rest of life, and assimilation to the dominant culture are clear and present dangers."[126] Without detailing the extent of these problems, we see already the general shape and normative point of Cavanaugh's argument: If we are a religion (or identify as a religion), then we risk subjecting ourselves to a theological reductionism (whereby we understand the Church as a mere voluntary

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[123] Augustine, *The City of God*, 392, bk. X, ch. 1 (italics in original) (a different translation of the same phrase is quoted in Cavanaugh, 9).

[124] Cavanaugh, 9.

[125] Cavanaugh, 10.

[126] Cavanaugh, 17.

association) and a state-imposed social ostracism (under which our "religious" activities are relegated to the private sphere).[127]

What are we to make of Cavanaugh's argument? I think Cavanaugh correctly identifies the reductionist and assimilationist tendencies of the U.S. Catholic bishops in their response to the contraceptive mandate (see Section 1.2). Such a response does little to affirm a theologically grounded vision of the Church and thus risks the social ostracism mentioned above. However, I think Cavanaugh is wrong to assume that the term "religion" itself (even if constructed) will lead inevitably to problems like individualism, separation, and a regrettable assimilation to the dominant culture. Cavanaugh suggests that we should be free from (the term) religion. But I suggest we simply need to re-claim it as our own. If we can, then the churches' religious liberty discourse will operate according to its own theological paradigms instead of the political-liberal terms of the debate. Religion, therefore, could be seen to involve the true worship of God and even an irreducible corporate body known as the People of God or the Body of Christ. This sort of discourse can help preserve theological thought and practice. Thus law could follow theological practice, instead of such practice following (and being regrettably shaped by) secular law.

Can the Church reclaim "religion" as her own, however? Apparently, there is room for doubt. After all, Cavanaugh argues that the Church historically has eschewed the term "religion" and the secular-religious divide that follows. But I think we can reclaim the term, chiefly because I think Cavanaugh's history is wrong. Augustine, for instance, may have refrained from using the word *religio* to identify the worship of God. Augustine, however, never claimed that a sphere of the distinctively religious does not exist or should not be

[127] Cavanaugh, 21.

recognized in our vocabulary. Indeed, in the chapter Cavanaugh quotes, Augustine refers to the "religious" sphere as entailing *theosebeia*, the Greek term for the worship due to God alone. The Latin terms *religio,* as well as *cultus* and *latreia*, were inadequate for describing what is due to God alone since, in Augustine's time, all three were used for the distinctly "theosebeian" *as well as* for the mundane (i.e., earthly or secular tasks).[128] Hence, while we recognize that Augustine refrained (on one occasion) from using the term "religion," he did so *not* out of fear that the civil authority or any other body would recognize the distinctively "theosebeian" and then proceed to manipulate it or relegate it to private life. He simply noted how the Latin vocabulary of his time was inadequate for identifying the uniquely "religious" act of true worship. Therefore, as I see it, Augustine still gives us theological warrant to engage in the act of defining religion.

Cavanaugh's further claim that the medieval period did not make distinctions between secular and religious areas of life also seems suspect. We might recognize with John Milbank, for example, that the medieval Church often did tasks that (we think) pertain most appropriately to the state,[129] but that historical fact speaks more to a lack of robust (civic) political structures and less to an arrangement in which separate civil and ecclesiastic authorities did exist. In fact, Cavanaugh recognizes the existence of these two types of authorities in the medieval period.[130] But, I wonder, how was medieval society able to differentiate between these two types of authorities if not through an awareness of their distinct primary ends, that is, the religious and the secular? Moreover, are we to think, as

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[128] Augustine, *The City of God*, 392, bk. X ch. 1.

[129] Milbank, *Beyond Secular Order*, 232.

[130] Cavanaugh, "Are We Free Not to Be A Religion?," 9.

Cavanaugh suggests, that only the state desired this distinction for normative reasons, and that it was the state alone who ultimately prevailed in various church-state settlements throughout history?[131] I suspect that the Church, or various thinkers within the Church, sought to maintain the religious-secular divide for good normative reasons. Christ's admonition to "[r]ender to Caesar the things that are Caesar's, and to God the things that are God's" may have played a role in this regard.[132]

So, the religious-secular distinction has theological and normative warrant. Further to this, it can be defined (or constructed) by the Church herself, who, in doing so, could set the terms of the religious liberty debate. Leaving Cavanaugh aside, we see that the practice of demarcating the religious and secular is embraced by Nicholas Wolterstorff, who uses this basic demarcation in order to distinguish between two types of religious freedom and to reflect upon their strength or reception in contemporary American society. Let us briefly examine his use of the religious-secular distinction to appreciate the distinction's use in my own proposed theory.

In a short essay, entitled "Freedom for Religion," Wolterstorff defines two forms of religious freedom. The first form, freedom *of* religion, pertains to paradigmatic examples of religious activities, such as "liturgical actions and acts of private devotion," and has four component parts: "[1] the freedom of citizens to engage in religious activities, [2] the freedom of citizens to establish and participate in institutions whose central purpose is to sponsor religious activities, [3] the freedom of citizens to induct their children into their

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[131] Cavanaugh, 10.

[132] Mark 12:17 (Revised Standard Version, Second Catholic Edition).

religion, and [4] the freedom of citizens to present their religious convictions to others than their co-religionists."[133]

By contrast, the second form, freedom *for* religion, primarily concerns secular activities. Wolterstorff writes: "I understand freedom *for* religion to be freedom for citizens to engage in secular activities in religiously distinctive ways, whether by establishing and maintaining faith-based organizations and institutions for this purpose, or by doing so in pluralist or secular institutions." Summarily put: "Freedom *for* religion consists of being free to go beyond the [distinctively] religious activities [of liturgy and devotion, for example] in the exercise of one's religion."[134]

Behind Wolterstorff's twin theories is a theoretical and normative concern regarding the freedom *for* religion in particular. By Wolterstroff's account, freedom *of* religion has experienced a pattern of legal protection that "has been quite clear and consistent throughout the twentieth-century." Protection for freedom *for* religion, however, has been "more complex and less consistent."[135] Why? Wolterstorff argues that the actual implementation of freedom *for* religion has been governed by a political liberal "Idea" of *Wissenschaft*, according to which one must accept a "standpoint of rationality and universality" in order to participate in political debate.[136] Wolterstorff, however, thinks this "Idea" is indefensible and, wanting to add clarity and consistency to the practice of freedom *for* religion, encourages the adoption of *Wissenschaft*'s opposite – namely, the particularist and non-irrational standpoint of religion. By Wolterstorff's lights, doing so

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[133] Wolterstorff, "Freedom for Religion," 298.

[134] Wolterstorff, 299.

[135] Wolterstorff, 299–300.

[136] Wolterstorff, 301.

would culminate in an "if any, then all" policy, through which (generally speaking) religiously motivated secular activities (to use my term) would be legally protected if any equivalent secular activities are as well.[137]

Wolterstorff's theory shares at least two characteristics with my proposed theory of corporate religious liberty. Both characteristics speak to the moral importance of maintaining the religious-secular distinction. Firstly, since my and Wolterstorff's theories distinguish between distinctively religious actions and religiously motivated secular actions, both theories afford nuanced reflection over the logic and limits of legal protections for each action-type. Wolterstorff, for example, is able to identify the governing epistemological and normative standards currently used to restrict freedom *for* religion in particular; and my theory discerns that the standing intentions of churches and non-church entities differ according to their intended actions and so merit different degrees of governmental interference. *Pace* Cavanaugh, then, there seem to be good theoretical and practical reasons for maintaining the religious-secular distinction. Secondly, while Wolterstorff is not concerned about the nature of corporate bodies or group-agential action as I am, he does embrace the foundational Aristotelian and Thomistic idea that actions (and organizations) are made intelligible by their distinct primary ends.[138] By extension, religious and secular actions, on Wolterstorff's account, are identifiable as distinct subjects for organizationally specific theories of corporate religious liberty. With certain adjustments, Wolterstorff's freedoms *of* and *for* religion could be transformed into my proposed freedom of the church and regime of organizational exemptions. This would

[137] Wolterstorff, 304, 302.

[138] Wolterstorff, 298–99.

be a natural move, since, like my proposed theory of organizational exemptions, Wolterstorff's freedom *for* religion both (i) extends corporate religious liberty from churches alone to non-church entities and (ii) recognizes that non-church protections must be prescribed with great care in light of religious pluralism within society at large and within particular organizations.[139]

In sum: Examination of Wolterstorff's theory helps us to appreciate how the religious-secular distinction does not perforce result in inappropriate or inadequate protections for corporate religious exercise. On the contrary, a demarcation between the religious and secular assists in the moral deliberation required for legal prescriptive purposes.

Thus, having defended the general religious-secular distinction on which my theory depends, I now directly address two morally and theologically problematic ambiguities identified in the churches' statements on corporate religious liberty (see discussion of the Catholic and Protestant traditions in Chapter 1). I start with the over-expansion of the term "religious institution" and conclude with the voluntarist understanding of the Church. For both ambiguities, I ask: How does my proposed theory of corporate religious liberty, inclusive of its religious-secular distinction, help clarify the churches' understanding of to whom or to what corporate religious liberty applies?

#### *3.3.2.2 Demarcating the term "religious institution"*

[139] Wolterstorff, 304.

Recall the 2012 open letter, entitled "Free Exercise of Religion: Putting Beliefs into Practice," in which religious leaders argued that religious institutions should not be forced to violate their beliefs by complying with the U.S. federal government's contraceptive mandate. In this letter, the authors – including Catholic and Protestant leaders – define "religious institutions" broadly, incorporating virtually any organizational-type within its purview.[140] Noting how this broad term can be taken out of its original context (i.e., as applicable to churches as a central case) and thus used to justify freedom-of-the-church rights for entities with attenuated religious purposes, we asked whether we might follow the religious leaders' lead and insist that non-church entities (like religiously inspired for-profit firms) should receive legal protections *as if* they were houses of worship (see Sub-section 1.3.1).

Already in Chapter 1, we responded negatively to this query. But with my theory of corporate religious liberty now outlined, we can provide a more complete response. In short, we can say that: Instead of protecting non-church entities *as if* they were churches, we should protect the former under a separate theory of organizational exemptions, according to which (i) non-church entities are identified by their primary secular purpose and (ii) non-church religious liberty rights are tempered in recognition of ethically salient organizational features that generally follow from having a primary secular end. At the core of this response is not only the religious-secular distinction, but also the anatomy of modest group agency. Considered together, both allow us to appreciate the fact that non-church entities (as groups-over-time) are constituted by members who have procedurally

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[140] "Free Exercise of Religion: Putting Beliefs into Practice," para. 1.

related beliefs (i.e., expectations concerning governmental recognition of religious truth, deference to group authorities and interference when necessary) that differ from the procedurally related beliefs of members within religiously homogeneous groups. The relevant beliefs of non-church entities are immediately distinguishable as a descriptive matter, therefore. But they, too, are distinguishable for their ethical salience. Hence, distinct legal conditions are required in order to facilitate the procedurally related beliefs that specifically non-church groups (or non-church corporate RMSAs) are assumed to have.

What we see in this response is an awareness of important descriptive distinctions between "religious institutions" and primarily secular organizations, as well as an awareness of important normative differences grounding distinct legal rights for each type of group. If taken up by the churches, my proposed theory could afford them two benefits. Firstly, it helps provide theologically distinctive definitions of religion, religious actions, and religious institutions – especially if Aquinas's or even Wolterstorff's definition of religion is used. Such definitional work helps avoid conflation between non-church and church entities, which risks making proposed legal protections seem unreasonable due to poor organization-to-rights fit. Secondly, my theory helps cultivate an attentiveness towards the religious pluralism and diverse moral stakes involved within non-church or RMSA-based organizations in particular. This attentiveness alone would be an improvement upon statements like the 2012 open letter discussed above, which glosses over ethically salient differences between houses of worship and effectively secular organizations. Of all types of institutions to speak out in defense of corporate religious liberty protections, the churches themselves – as prophetic and pastoral voices in society – must understand these basic differences. Failing this, the churches risk falling out of touch with the world, simply by virtue of an inattentiveness towards basic social realities: hence, the great emphasis my theory places upon Aquinas's modest group realism, which seeks to understand social (and

associational) reality as best we can. According to this reality, secular organizations and distinctively "religious institutions" exist in tandem. They might even be treated differently for religious liberty purposes.

#### *3.3.2.3 The Church as not merely voluntarist*

Another way in which the churches' understanding of corporate religious liberty should be improved pertains to their public conception of what the Church is. On this count, the churches are reductionist in their religious liberty discourse, settling on descriptions of the Church as predominantly or even merely voluntarist (see Section 1.2). But a Christian theory of corporate religious liberty would resist reductionism in order to maintain the theological distinctiveness and moral consequence of the Church herself. It could do so by emphasizing religion's distinct normative value.

We need not discuss the substantive content or meaning of religion's moral value at great length for the time being.[141] Instead, what I wish to highlight is that, on my account of corporate religious liberty, the general idea of religion's distinctive moral value is *paired with* the notion of voluntary membership in a description of churches or "religious institutions." This pairing is meant to combat the description of churches as being ethically salient solely because they promote various political liberal (or voluntarist) values like

[141] Definitions of religion and, by extension, interpretations of its moral worth are innumerable. For example, compare Finnis (who describes religion as a basic form of human good, concerning "the establishment and maintenance of proper relationships between oneself . . . and the divine") with Laycock (who considers religion to be of normative value insofar as it is subject to individual liberty). Finnis, *Natural Law & Natural Rights*, 89; and Douglas Laycock, "Religious Liberty: Not for Religion or against Religion, but for Individual Choice," in *Religious Liberty*, Vol. 1, *Overviews & History* (Grand Rapids, Mich.: William B. Eerdmans, 2010), 123-125.

collective integrity[142] and not because they (also) promote a distinctively theological value like right worship of God. At the same time, this pairing does not look over the fact that churches are often and appropriately described as having voluntary membership. It may be the case that some (Christian) religious beliefs promote non-voluntarist teachings,[143] but the ecclesial accounts of religious liberty examined above and upon which my theory stands affirm the freely given response of individuals in the act of faith (see Chapter 1). As a result, my theory not only recognizes the general empirical trend of voluntary membership among religious institutions, but, on separate grounds, it also recognizes the normative value of voluntary membership itself.

Hence, the pairing of religion's distinctive normative value with voluntary membership portrays the Church in a Christian and moral realist light – that is, as an institution that should be free because the free response of faith required in giving due honor to God necessitates this legal condition. This portrayal, of course, is meant for religious liberty purposes and so does not capture the nature of the Church in her entirety (as demanded in a mature ecclesiology, for instance). But it does get us a step closer to a theologically robust understanding of the Church and thus resists reductive descriptions of the Church as yet another voluntary association in search of collective rights.

At this point, we must ask what Aquinas's modest group realism has to contribute to the argument just made. Does our description of religious institutions (or of the Church) improve when we claim that they are (or the Church is) constituted by group-agential action? For reasons already described, I think that it does: Most importantly it

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[142] Laborde, *Liberalism's Religion*, chap. 5.

[143] See the list of theological positions presented in Schragger and Schwartzman, "Against Religious Institutionalism," 957–62.

allows us to bridge the individual-group divide and so identify the diverse legal subjects involved in corporate religious liberty disputes. Such identification is necessary if we are to exercise the moral deliberation required for legal prescriptive purposes in a reasonable (i.e., empirically informed) manner (see Sub-section 3.3.2.2). Moreover, claiming that religious institutions feature a distinctive moral (i.e., religious) value *and* voluntary membership is simply a restatement of certain assumptions made concerning the procedurally related beliefs of a church's members (see Sub-section 3.2.3). So, we see that Aquinas's modest group realism is already taken into account in the argument just made.

### 3.3.3 Summary

This section has shown that modest group realism helps identify the full range of legal subjects relevant for corporate rights prescription. Such identification moves political liberal discourse beyond the individual-group divide, which generally holds that corporate rights belong to *either* individuals *or* groups. Modest group realism bridges this divide by claiming that the most appropriate legal subject for corporate rights prescription is group-agential action itself, since the protection of a group-as-social-action entails protection of *both* individuals *and* their association (i.e., their group-over-time). With regard to theological considerations, this section has also shown that modest group realism adds analytical substance to the term "religious institution" and works to dispel the idea that the Church is merely a voluntary association. So long as modest group realism is able to accept some form of a religious-secular distinction – say, along the lines suggestive of Aquinas or Wolterstorff – then the legal prescription that it informs is able to distinguish between church and non-church legal subjects. This basic distinction is necessary if the prescription of corporate religious liberty rights in their two distinct forms (i.e., freedom of the church and organizational exemptions) is to achieve a normatively appropriate organizational fit.

## 3.4 Conclusion

To conclude this chapter, allow me to summarize this chapter's discussion and to highlight a remaining issue or question. Having drawn upon the churches' moral reflections and with political liberal skepticisms concerning group ontology already addressed, this chapter at last developed a Christian ethical and group-ontological account of corporate religious liberty. Section 3.1 offered a Thomistic account of group agency on which my proposed theory descriptively depends. In part responding to those who attribute a crude corporatism to medieval theologians and jurists, I began with an extensive account of why we cannot attribute a strong group realism (or even its opposite, an eliminationism) to Aquinas and his contemporaries. I argued that Aquinas endorses a social-action or "modest" form of group realism, and I provided an overview of how Aquinas understands the "anatomy" of a modest group agent thus conceived. For this latter task, I drew extensively upon the interpretive work of John Finnis and Richard Ekins to show that Aquinas's group agent is constituted by a particular intention (the group act) and standing intentions (the internal public policy) which coordinate members toward execution of the group act itself. At the end of this exposition, I proposed that external legal influences (i.e., governmental action) can either facilitate or restrict a group's standing intentions and thereby grant or withhold legal rights to particular group actions. This point suggests that the prescriptive task of a theory of corporate religious liberty is to help the government determine which legal conditions are most appropriate with respect to facilitating or restricting the standing intentions of particular group-types.

This prescriptive work then was executed in Section 3.2, where an outline of my theory took shape, as seen through the interaction between diverse political theologies and the standing intentions (or "anatomy") of Aquinas's modest group agent. I began by

outlining a theory of freedom of the church based upon (i) assumptions made about churches' standing intentions and (ii) the appropriate legal conditions required to facilitate or restrict those intentions, which affect the distinctively religious action of a church-group itself. The same procedure was applied subsequently to the religiously motivated secular actions of non-church entities; this culminated in a theory of organizational exemptions. Considered together, the resulting theories of freedom of the church and organizational exemptions constitute my proposed account of corporate religious liberty.

Finally, Section 3.3 explained how my proposed theory responds to certain political liberal and theological contentions related to the individual-group divide. I first examined how my theory moves the political liberal debate beyond the divide itself and, then, noted how the assumed religious-secular distinction of my account avoids an overly expansive definition of the term "religious institution" and even resists descriptions of the Church as merely voluntary. Both sets of discussions highlight the descriptive and normative benefits of grounding a theory of corporate religious liberty in a Thomistic group ontology.

So much for this chapter's summary. At this point, I would like briefly to address a glaring challenge posed to a theory of corporate religious liberty that is constructed upon the idea of modest group agency. In brief, it seems to me that the application of Aquinas's modest group realism reaches a legal-prescriptive limit when we consider the Church's supernatural personality – that is, the general theological premise which holds that the Church has a life of her own and who, we might say, stands "over and above" any physical church. This is a theological premise that, while attentive to the individuals that make up the People of God, views the Church as the Body of Christ, whose inner life and activities are understood not only via an ordering of parts (i.e., Aquinas's modest group realism) but

also through a strong group-realist framework supplied by various theological models of the Church.[144]

The theory of corporate religious liberty that I have offered within this chapter has taken modest group realism to be its descriptive framework. Strong group realism, especially of a Christian theological kind, challenges this framework because it could be used to claim that the Church herself should receive legal rights to religious freedom due to her moral (and supernatural) personality. But, as we argued above, this sort of argument falls into the corporate personality trap, which my theory seeks to avoid. We wonder, then: Is the corporate personality trap not the danger I have made it out to be? And does the prescription of corporate rights based upon strong group realism have theological and normative merit? If so, how should it be incorporated into my proposed account of corporate religious liberty? I respond to these and related questions in the next chapter.

[144] For sources, see Section 4.1 and Sub-section 4.2.1 below.

# 4 Integrating the strong group agency of the Church

Corporate religious liberty, I have argued, is best understood to apply to modest group agents (i.e., group-agential actions), rather than to individuals or groups *per se*. This conclusion follows from the moral insights of the Christian tradition, but especially from the normative implications of Aquinas's group ontology. Indeed, with regard to the political community or state, it is a well-established position that Aquinas was a modest group realist. It seems that this position also holds with respect to the Church.

According to Thomas Gilby O.P., "when [Aquinas] discussed the mystical body of the Church[,] there the cohesion [between members] was certainly more intimate than in any State." However, Gilby continues,

> [Aquinas] would not have the Church's physical unity pressed too literally. Of the individuals composing a human group he said cautiously, *reputantur quasi unum corpus*, and of the Church, *dicitur unum corpus mysticum per similtudinem ad corpus natural* . . . . , lest theology match an uncritical fashion in social philosophy, which lifts a social organism from biology or a Mass-Will from psychology, or in foreign history which treats the John Bull or Uncle Sam of the cartoonist as real figures. The rhetoric may be more genial, the logic is no less invalid.[1]

Granting the accuracy of Gilby's interpretation of Aquinas, it seems that the agency of both the state and the Church are best (and only logically) understood within the paradigm of modest group realism. But even if we accept Aquinas's metaphorical position, might it be the case that the *corpus mysticum*, the mystical body of the Church, defies description solely within the logic that we attribute to Aquinas (and to ourselves)?

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[1] Thomas Gilby O.P., *Principality and Polity: Aquinas and the Rise of State Theory in the West* (London: Longmans, Green and Co, 1958), 255–56 (quoting ST I-II, 81, 1, resp.; and ST III, 8, 1, resp.).

Henri de Lubac S.J., for one, suggests a different perspective with regard to the Church's agency or ontology. In one of several works that anticipated the ecclesiology of the Second Vatican Council, de Lubac writes:

> [The] unity [of the Church] is so close that the Church is constantly personified. She is the betrothed, the bride that Christ has chosen, for the love of whom he gave himself up, whom he has made clean by baptism. She is the "chosen people," the "son of God," etc. She appears to Hermas in the guise of an aged woman "created before all things." And here *we are not dealing with mere metaphor*.[2]

But, if not mere metaphor, then with what (or whom) are we dealing? Like Aquinas, de Lubac never describes the Church in explicitly group-ontological terms.[3] Nevertheless, de Lubac's use of Scripture and of the Early Church Fathers, as evinced in the excerpt above, seems to suggest a group-ontological paradigm that, when applied to the Church, moves beyond modest group realism and the merely metaphorical. Could this paradigm be a form of strong group realism? Granting this, and assuming that certain believers hold this paradigm to be true, how might the Church thus understood be accounted for by my proposed theory of corporate religious liberty – especially given its explicit recognition of *modest* group agency?

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[2] Henri de Lubac S.J., *Catholicism: Christ and the Common Destiny of Man*, trans. Lancelot C. Sheppard (London: Universe Books, 1962), 19 (referencing Ephesians 5:25-32, Augustine, Jerome, Hildebertus, and Sophronius of Jerusalem: see nn. 18-20) (italics mine).

[3] Immediately following the excerpt just reproduced, de Lubac argues that the personifications used are not merely metaphorical specifically with respect to "the doctrinal legacy" of man's universal destiny, that is, man's destiny to be a single "chosen people." Thus, de Lubac here is *not* making a group-ontological argument regarding the Church. De Lubac, *Catholicism*, 19-21. Nevertheless, soon afterward, de Lubac applies his "no mere metaphor" argument to the Church's ontology, as he wrestles with the mystery of her visible and invisible forms. She is neither a "transcendent hypostasis", nor its opposite, a "simple gathering together of . . . individuals." Further still, she is not "an external organism brought into being . . . by a community of believers," but is a "mother," both a "visible Church and . . . the invisible body of Christ." De Lubac, 21-23. See further discussion on this point in Sub-sections 4.1.2 and 4.3.1.

# Chapter 4

In this final chapter, I offer an illustration of how strong group realism can fit within the theory of corporate religious liberty outlined in Chapter 3. The group realism explored is theologically grounded, following from Roman Catholic thought (especially from theologians who influenced or were influenced by the Second Vatican Council); and it pertains specifically to the Church (and not to for-profit firms, for example[4]). The chapter therefore builds upon the Roman Catholic, corporatist reflections offered in earlier chapters.[5] But, most importantly, it makes a general prescriptive argument, concerning how strong group-realist beliefs and practices can and should be legally protected.

To construct my argument, I divide this chapter into three sections. Section 4.1 is analytical in nature, drawing upon Catholic theological reflection to consider the extent to which the Church could be understood as a strong group agent. Section 4.2 then explores why the Church is not commonly described in strong group-realist terms today, doing so by tracing a gradual eschewal of the Church's agency (as conceived in patristic and early medieval thought) via two historical transformations: first, the secularization of the term *corpus mysticum* in medieval Europe and, second, the reduction of Locke's "true church" into a mere voluntary association.[6] Finally, Section 4.3 engages with Schragger and Schwartzman's "standard argument"[7] to demonstrate how the Church (understood specifically as a moral and supernatural person) ought to be integrated into my proposed theory and thereby protected by law.

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[4] The reasons for this subject-matter specification is discussed below (see Sub-section 4.3.2 especially).

[5] See Sections 1.2.1 and 2.3.4. Though, also note the Protestant references to the Body of Christ in Section 1.2.2.

[6] For sources, see Section 4.2.2 below.

[7] The standard argument was first discussed in Section 2.3 above.

## 4.1 The Church as strong group agent

The first aim of this chapter is to determine the extent to which the Church could be understood within a strong group-realist paradigm or, differently put, to be understood as a strong group agent. To achieve this end, I offer a stipulative definition of strong group realism and, throughout this section, demonstrate how Catholic ecclesiological thought meets this definition.

In Chapter 3, I claimed that the Christian tradition offers two conceptualizations of group realism – a modest form, proper to Aristotelian-Thomistic reasoning, and a strong form, which takes inspiration from scripture and theological reflection, especially within certain strains of Roman Catholic thought. Strong group realism, we recall, generally holds that group agents are beings with minds and intentions that are somehow divorced from the minds and intentions of a group's individual members (see Sub-section 3.1.1). More thoroughly put, List and Pettit write:

> [Strong group realism or "animation theory"] treats talk of group agents literally and seriously, thereby embracing realism about such entities. But where [other accounts treat] such talk as a way of speaking about simple acts of coordination among individuals . . . the animation theory takes it to refer to entities that coordination alone could not explain, at least not if its organicist metaphors are to be taken seriously. The view implicit in these metaphors suggests that it is possible, in a philosophical thought experiment, to replicate all the properties and relations we find among the individual members of a group agent without replicating the group agent itself. For the group agent to exist, so it is suggested, there must be something extra present: a force . . . surging from above."[8]

[8] List and Pettit, *Group Agency*, 9.

In a similar vein, and with equal incredulity,[9] James D. Nelson describes strong group agents as "naturally occurring phenomen[a] that [have] an independent life and personality of [their] own."[10] Eric W. Orts, too, echoes this understanding, writing that "[t]he strongest version of this 'real entity' theory holds that intermediary institutions . . . should be considered to have a metaphysically 'real' existence and an 'organic' institutional permanence separate from their individual participants."[11]

As the descriptions from List, Pettit, Nelson and Orts make plain, strong group realism has neither a standard name (e.g., animation theory or real entity theory) nor a detailed definition. Nevertheless, common among theorists is a general understanding that strong group agency involves (i) an external force that accounts for group action and (ii) literal treatment of organicist or corporatist language. For our purposes, we can refer to these two points as the *animation requirement* and the *literalness requirement*. As I explain below, theological reflection upon the Church – especially from the Roman Catholic tradition – can be seen to support both requirements. Let us consider each requirement in turn, highlighting theological reflections that corroborate each.

[9] As its name suggests, this form of group realism is strongly metaphysical. But, for social ontologists like List and Pettit, this "strength" is not a positive characteristic. Pejoratively speaking, strong group realism is "metaphysically incredible" or, differently put, it defies logic. As List and Pettit note, "[i]t offends against methodological individualism" insofar as it suggests that "group agency requires something above and beyond the emergence of coordinated, psychologically intelligible dispositions in individual members." List and Pettit, 9. Given the individualisms that mark modern group-ontological and moral discourse, it is unsurprising that strong group realism is met with opposition, especially within political contexts.

[10] Nelson, "Conscience, Incorporated," 1571.

[11] Orts, *Business Persons*, 15.

### 4.1.1 The animation requirement and individual consent

The animation requirement holds that the actions of a strong group agent are explained by an external force, one distinct from the internal inputs (so to speak) of members' consent and coordinated activities, entailing both particular and standing intentions (see Subsection 3.1.3). When analyzing a religious organization or church, we ask: What could possibly account for its actions apart from its (internal) members?

One plausible answer is that Christ himself works from without and upon the group in order to direct its actions. He is the external force in question and thereby accounts for the strong group agency that mysteriously operates independently of a church's internal members. In a discussion of the free gift of faith, Joseph Ratzinger suggests this interpretation. He writes:

> But from whom does one receive this gift? Proximately, of course, from the Church [i.e., "the believing community"]. But even the Church does not possess it of herself. It is bestowed on her by the Lord – and not just in the distant past. On the contrary, the Church is able to live the faith both now and forever because she receives it as a gift. For the Church is not a club that makes her own statutes and rules and whose activities are limited to the sum of the activities of her individual members. She receives herself again and again from without: she lives from the word that is given her; she lives from the sacraments that she cannot institute but can only receive. If faith is directly a gift of the Church, it is nevertheless also true that the Church herself exists at all times only as the Lord's gift.[12]

In this excerpt, Ratzinger's use of the term "Church" refers to a "believing community" of individuals. But, as Ratzinger makes clear, neither this community nor its discrete actions are mere aggregations of individual inputs.

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[12] Joseph Ratzinger, *Principles of Catholic Theology: Building Stones for a Fundamental Theology*, trans. Sister Mary Frances McCarthy S.N.D. (San Francisco: Ignatius Press, 1987), 37.

This could suggest a form of modest group realism, according to which the community's standing intentions account for the group-agential actions of the Church. But modest group realism is not implied in Ratzinger's discussion. Instead, he points explicitly to a force (or person) "from without" that makes the group, the Church, what it is – that is, a sacramental community that exists for all time as "the Lord's gift." Thus, if we accept (i) Ratzinger's non-aggregative description of the Church, (ii) his omission of modest group-realist discussion, and (iii) his emphasis upon the Church's external life-source, then there are plausible grounds on which to interpret Ratzinger's reflections as meeting the animation requirement and thereby suggesting a strong group-realist account.

Another strong group-realist description of the Church can be found in de Lubac's classic text, *Catholicism*. While discussing the necessity of the Church for salvation, de Lubac emphasizes her active agency and even her physical bonds or body. With regard to (certain) unbelievers, he writes, "[t]hose who do not know the Church *are saved by her* . . . in such a way that they incur the obligation of belonging to her."[13] And concerning Jews and Gentiles who lived before Christ's "visible coming," de Lubac writes that they "must be described as *saved by Christ* . . . [even] though they lived before the appearance of the visible Church among them." Continuing, de Lubac points out that "they are saved not by belonging in a purely spiritual, intemporal manner to the soul of the Church, but by means of *a very real* though indirect and more often hidden *bond with her body*."[14]

De Lubac's comments evince a literal interpretation of the Church's body, a topic I will address in the following sub-section. At the moment, we can dwell upon the active

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[13] De Lubac, *Catholicism*, 121 (italics mine).

[14] De Lubac, 122-123 (italics mine).

agency that both de Lubac and Ratzinger attribute to the Church. We read that the Church saves; and, while de Lubac and Ratzinger recognize the necessity of human cooperation in this context,[15] they unapologetically speak of the Church's agency (again, made possible through Christ working "from without") as both operative without members' unanimity[16] and necessary for the individual's life of faith. In the opinion of some political liberals, this position threatens group domination at the expense of individual consent.[17] But, as a theological and specifically Christian ethical position, this point recognizes that the individual's act of consent (or faith) is necessarily embedded within a larger community. "No one can represent himself alone," Ratzinger notes, "however much he may believe. Faith is . . . an active passivity and a passive activity that need[s] other persons."[18] Inasmuch as the Church is a distinct agent – irreducible even to group-agential actions of her individual members, that is, irreducible to a modest group agent – she herself could be one of those necessary "other persons" to which Ratzinger refers. After all, as it is said in faith, believers consider her necessary for, not antithetical to, their well-being.[19]

Let us turn now to the literalness requirement, keeping in mind that our aim in this chapter's first section is not to supply an exhaustive account of Roman Catholic group

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[15] Ratzinger, *Principles*, 41; and De Lubac, *Catholicism*, 122-123.

[16] Recall that modest group realism requires unanimity with respect to a group's standing intentions in order for a group-agential action to exist. See the discussion on Ekins in Sub-section 3.1.3.

[17] For example, see Schragger and Schwartzman, "Against Religious Institutionalism," 959 ("The acceptance of a non-voluntarist conception [of religious institutions and church membership] is virtually unthinkable, for once one begins to undermine the notion of individual choice, it is very difficult to figure out what freedom of conscience might mean. If churches are not freely chosen, then how do we distinguish between 'coerced' membership and its opposite?").

[18] Ratzinger, *Principles*, 41.

[19] Ratzinger, 50 ("[The Church] makes present the redemptive love of Jesus Christ, which, as love, frees men from their loneliness and leads them to one another by leading them to God.").

realism, but rather to indicate how strands of Catholic reflection align with a baseline understanding of group realism in its strong form.

### 4.1.2 The literalness requirement and the invisible Church

The literalness requirement holds that group-agential language (i.e., language pertaining to group agency) can be interpreted in a literal, that is, a not-merely metaphorical, way. Catholic theology and more specifically Catholic ecclesiology seem to align with this requirement.

To begin to support this claim, we can look first to Saint Paul's exhortation concerning prostitution in 1 Corinthians 6:15. It reads: "Do you not know that your bodies are members of Christ? Shall I therefore take the members of Christ and make them members of a prostitute? Never!"[20] In this passage, we may be tempted to attribute a merely metaphorical intention to Paul's words since, "obviously," Paul knew better than to think that sexual impurity would *actually* join the body of Christ to that of a prostitute. But there is reason to doubt this interpretation. Consider this alternative perspective:

> We might judge that someone who calls the church 'the body of Christ' is employing a metaphor. But even if the biblical authors were capable of writing in a self-consciously metaphorical manner, we should not assume they understood their language in this way. A person can be said to be using a phrase metaphorically only if he or she recognizes a distinction between the two realities involved. If I say . . . that 'man is a wolf to man' . . . I am not intending to say that human beings have fur. The phrase does convey meaning, but I recognize that it is literally false. Would Paul, or an author writing in his name, have regarded his talk of the body of Christ as literally false? Given

[20] 1 Corinthians 6:15 (Revised Standard Version, Second Catholic Edition).

> his concern that sex with a prostitute would pollute the body of Christ (1 Cor 6:15), this seems unlikely.[21]

This argument seems cogent, particularly in light of other literal interpretations of scripture, including, for example, Roman Catholic readings of John 6:51 ("I am the living bread which came down from heaven; if any one eats of this bread, he will live for ever [*sic*]; and the bread which I shall give for the life of the world is my flesh.") and 1 Corinthians 11:24 ("This is my body which is for you.").[22]

Of course, it must be admitted that a literal or not-merely metaphorical interpretation of the term "body of Christ" by no means necessitates a strong group-realist conclusion. It could suggest a different, non-group-agential point. For example, Pope Pius XII's encyclical, *Mystici Corporis Christi*, primarily interprets the phrase "Mystical Body of Christ" to mean that the Church is a visible institution, "something concrete and visible," not a mere assembly of various Christian communities "join[ed] together by an invisible link."[23] Being a visible institution is one thing, being a strong group agent is quite another.

That said, we here are concerned with specifically group-agential language or argumentation; and it is evident that, within Roman Catholic circles, the terms "body of Christ" and "Mystical Body of Christ" are also interpreted literally with respect to group agency itself. Recall our discussion of the freedom of the church (see Section 1.2.1 above), where we noted that the Second Vatican Council chose to speak of the Church as existing

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[21] *The Oxford Encyclopedia of the Bible and Theology*, eds. James E. Harding and Gregory W. Dawes (Oxford: Oxford University Press, 2009), s.v. "Body."

[22] John 6:51 and 1 Corinthians 11:24 (Revised Standard Version, Second Catholic Edition). See also *Catechism of the Catholic Church*, para. 1337-1344 (on the nature and institution of the Eucharist).

[23] Pope Pius XII, *Mystici Corporis Christi* (London: Catholic Truth Society, 1943), para. 14.

in two inextricable forms. According to a hermeneutic of continuity,[24] these forms are (i) the invisible Church of Christ (i.e., the one, unique Church founded by Christ), which subsists (*subsistit*) or is fully present in (ii) the visible Roman Catholic Church. To appreciate the strong group agency that this distinction implies, we must explore the controversy behind the Council's choice of the term *subsistit* as used to describe the relationship between the Church's two forms. A brief commentary, picking up from *Mystici Corporis*, will here suffice.

As mentioned above, Pius XII's *Mystici Corporis* claimed that the invisible Church of Christ is a visible institution. Specifically, the encyclical held that the invisible Church is identical with the visible Roman Catholic Church – that is, it simply *is* (Latin: *est*) the visible Roman Catholic Church. But the Second Vatican Council, roughly twenty years after *Mystici Corporis*, somewhat departed from or refined this ecclesiological position. In particular, the Council recognized explicitly that authentic ecclesial elements (or genuine aspects of the invisible Church) do exist within Protestant communities. It therefore decided that *Lumen Gentium*, the Council's dogmatic constitution on the Church, would need to account for this more inclusive, theological reality. The Latin phrase *adest in* ("is present in") was therefore substituted for *est*. But the new term was ultimately deemed insufficient, as it did not go far enough to affirm the long-held belief that the visible

[24] Interpretations of the Second Vatican Council's constitutions on the Church (*Lumen Gentium* and *Gaudium et Spes*) have been diverse and incompatible. For this reason, Pope John Paul II convened an extraordinary assembly, the Synod of Bishops in 1985, to stress that the Council's teaching should be read "in continuity with the great tradition of the Church". See Synod of Bishops of 1985, "Final Report," *Origins* 15 (1985): 445-46. Moreover, Pope Benedict XVI warned against a "hermeneutic of discontinuity and rupture", encouraging instead a "hermeneutic of reform [or continuity]", which Benedict refers to as "renewal in the continuity of the one subject-Church that the Lord has given us". See Pope Benedict XVI, "A Proper Hermeneutic for the Second Vatican Council," in *Vatican II: Renewal within Tradition* (Oxford: Oxford University Press, 2008), x; and Dulles, "Nature, Mission, and Structure of the Church," 26.

Roman Catholic Church possesses the "fullness" of the invisible Church of Christ. Therefore, turning to a philosophically more substantive term, the Theological Commission in 1963 dropped *adest in* and replaced it with *subsistit*.[25] As Joseph Ratzinger noted, all the Council fathers thought *subsistere* was substantially different in meaning from *esse*. He writes: "[*S*]*ubsistere* is the form of existence of a being resting in itself, as in particular occurs in the case of an 'active agent.'"[26] And Guy Mansini O.S.B. describes the term in this way: Subsistence implies the "unique and complete capacity to act [that] is located only in the Catholic Church; it makes of her an agent in a unique sense as compared with all other churches and ecclesial communities. This unique agency, moreover, connotes existence as of a hypostasis or individual – subsistence in the philosophical sense."[27]

It is not difficult to see how theological deliberations like the one just described evince a group-agential logic that is compatible with the literalness requirement. A Church that *subsists* has an agency unlike that of any other group. To speak of her as an active agent is no utilization of mere metaphor; it is to make a literal, even philosophical, statement.

### 4.1.3 The Eucharist makes the Church

Thus far we have explored how certain strains in Catholic ecclesiology meet the animation requirement (insofar as an external force, Christ himself, accounts for the Church's group

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[25] See Dulles, "Nature, Mission, and Structure of the Church," 28.

[26] Joseph Ratzinger, "The Ecclesiology of the Constitution *Lumen Gentium,*" in *Pilgrim Fellowship of Faith: The Church as Communion*, trans. Henry Taylor (San Francisco: Ignatius Press, 2005), 148, n. 18.

[27] Guy Mansini O.S.B., "Lumen Gentium," in *The Reception of Vatican II*, ed. Matthew Lamb and Matthew Levering (Oxford: Oxford University Press, 2017), 52.

agency) and the literalness requirement (insofar as group-agential language describing the Church is not merely metaphorical and is even substantiated by philosophical argument). Meeting both requirements, the theological reflections above fulfill a basic definition of strong group realism.

To this conclusion, a brief and complementary point can be made. This point concerns a Eucharistic dimension of the Catholic form of strong group realism just observed. Carrying forward de Lubac's reflections upon the Church, we can say not only that Christ accounts for the Church's agency, but also that he does so in a particular way – that is, through the Eucharist. On this point, de Lubac writes:

> [I]n order thus to bypass the [merely] sociological order and to become in all truth this 'body of the Church made alive by the Spirit,' the ecclesial body has to become in all reality the body of Christ: 'let it be made the body of the Church,' 'the Church, made into the body of Christ.' Now, the Eucharist is the mystical principle, permanently at work at the heart of Christian society, which gives concrete form to this miracle. It is the universal bond, it is the ever-springing source of life. Nourished by the body and blood of the Saviour, his faithful people thus all 'drink of the one Spirit,' who truly makes them into one single body. Literally speaking, therefore, the Eucharist makes the Church.[28]

Quoting Anselm, John Chrysostom and others, de Lubac here conveys a patristic understanding of the Church that succumbs neither to mere metaphor nor to a strict separation between *corpus verum* (Christ's natural body), *corpus mysticum* (the Eucharist) and *corpus Christi* (the Christian society or Church). This earlier, tripartite understanding of the body of Christ unifies what high medieval categories would later sever into distinct and, perhaps, unrelated parts (see Sub-section 4.2.1). In putting forward this understanding,

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[28] Henri De Lubac S.J., *Corpus Mysticum: The Eucharist and the Church in the Middle Ages*, ed. Laurence Paul Hemming and Susan Frank Parsons, trans. Gemma Simmonds C.J., Richard Price, and Christopher Stephens (London: SCM Press, 2006), 87–88 (referencing Saint Anselm at n. 85 and quoting Anselm of Havelberg, Odo of Ourscamp, Placidus, and Saint John Chrysostom at nn. 88-91) (original italics removed).

therefore, de Lubac seeks to reclaim the mystical and corporate nature of the Church. For our purposes, this helps us to view her as an active agent (but not a "transcendent hypostasis" or "external organism"[29]) who nourishes the faithful with the body of Christ, thus transforming them into a single body.[30]

In sum: The preceding analysis demonstrates how Catholic ecclesiology lends itself to a strong group-realist paradigm, meeting the animation and literalness requirements through (i) a proposed distinction between the visible and invisible Church and (ii) an inextricable connection among Christ's real, Eucharistic, and mystical bodies.

## 4.2 Historical episodes of group-agency elimination

I now move to this chapter's next aim. Having concluded the preceding section with a patristic account (or de Lubac's implied account) of the Church's strong group agency, I explore in this section why the Church is not so commonly described in strong group-realist terms today and how this situation affects our contemporary understanding of Church protections. To achieve this aim, I provide a historical account of two transformations that contributed to a gradual group-agency elimination[31] with respect to the Church. The first transformation involves the application of the term *corpus mysticum*

[29] De Lubac, *Catholicism*, 21.

[30] De Lubac, *Corpus Mysticum*, 88. The earthly members of the Church are by no means passive in this Eucharistic miracle. Ratzinger, who to a large extent appropriates de Lubac's thought into his own, emphasizes the role of individual believers in creating a Eucharistic community. See Ratzinger, *Principles*, 50 ("[T]he Church is not merely an external society of believers; by her nature, she is a liturgical community; she is most truly Church when she [as a community] celebrates the Eucharist and makes present the redemptive love of Jesus Christ.") and 53 ("The Church is communion; she is God's communing with men in Christ and hence the communing of men with one another.").

[31] Group-agency elimination is first discussed in Section 2.1 above.

(once reserved only for the Eucharist and Church) to the (secular) state in the High Middle Ages; the second transformation involves the secularization of John Locke's "true church"[32] to today's voluntary association. In the account that follows, I claim no direct causation from the former transformation to the latter. But I do suggest that (i) the movement from strong group realism to group-agency elimination runs parallel with (ii) a gradual secularization of the concept of the Church herself. As we shall see, this conclusion has bearing upon how we recover and accommodate the (idea of the) Church as strong group agent for legal-prescriptive purposes.

Without further delay, we turn to our first transformation.

### 4.2.1 The medieval *corpus mysticum*

In his classic text, *The King's Two Bodies,* historian Ernst Kantorowicz details the extent to which the term *corpus mysticum*, which originally applied to the Church, influenced late medieval and early modern understandings of the political commonwealth (i.e., the state). Drawing largely upon de Lubac's interpretation of theological sources, Kantorowicz finds that the original sacramental meaning of the term was replaced by a formally corporational understanding. This allowed the term *corpus mysticum* – now secularized, but still having residual spiritual connotations – to be applied to the state itself, thus helping to legitimize the burgeoning power and independence of medieval civil authority.[33] Let us review Kantorowicz's historical narrative and subsequently analyze it through a group-realist lens.

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[32] For sources, see Sub-section 4.2.2 below.

[33] Ernst Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton: Princeton University Press, 1957), 193–206. I focus upon the beginning of fifth chapter in Kantorowicz's work.

We begin *in media res* with a corporational, or sociological, understanding of the Church prevalent in the High Middle Ages. According to Kantorowicz, a corporational doctrine of the Catholic Church was officially promulgated in the papal bull *Unam Sanctam* (1302), wherein Pope Boniface VIII writes:

> Urged by faith we are bound to believe in one holy Church, Catholic and also Apostolic . . . , without which there is neither salvation nor remission of sins . . . , which represents one mystical body, the head of which is Christ, and the head of Christ is God.[34]

Far from abstract speculation, both Boniface's statement and *Unam Sanctam* in general can be read as a direct response to political opponents of papal authority. To justify ecclesial (and especially papal) prerogative, Boniface sought to relativize the power of political figures by embedding them within the social community of the *corpus mysticum Christi* (i.e., the Church), of which the visible head is no king, but rather Christ's representative on earth (i.e., the Roman pontiff).

According to Kantorowicz, Boniface's preferred term (the *corpus mysticum Christi*) was relatively new in the 1300s, being used primarily, if not exclusively, in the context of church-state disputes (as evinced in *Unam Sanctam* above). Of much more ancient lineage was the term *corpus Christi*, which, like *corpus mysticum Christi*, also applied to the Church. Its roots however were much deeper than that of the *mysticum* variation; they were traceable to Saint Paul himself.[35] In light of this fact, two related questions immediately arise: First, where did the qualifying word *mysticum* (in *corpus mysticum Christi*) come from? Second, why

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[34] Pope Boniface VIII, *Unam Sanctam* (1302), quoted in Kantorowicz, *The King's Two Bodies,* 194 (see n. 4, esp.). For a complete translation of the papal bull, see Pope Boniface VIII, "Unam Sanctam," trans. Bob van Cleef, accessed December 15, 2018, http://www.newadvent.org/library/docs_bo08us.htm.

[35] Kantorowicz, 194–95. For scriptural verses, see the beginning of Sub-section 4.2.2 below.

did *corpus mysticum Christi* replace the more ancient term *corpus Christi* in high medieval descriptions of the Church?

To answer these questions, Kantorowicz looks to de Lubac's examination of patristic sources. Following de Lubac, Kantorowicz notes that the term *mysticum* in its original usage signified the *sacramental* body of Christ (the Eucharist) and was often used in contradistinction to Christ's "proper and true" (*proprium et verum*) body, that is, his actual physical body.[36] On this point, de Lubac quotes the Carolingian theologian Paschasius Radbertus, whose *Liber de corpore et sanguine Domini* is useful for us to consider. Paschasius writes:

> Because assuredly the universal Church of Christ is his body, where Christ is the head, and all the elect are called members, from whom one body is assembled daily to form the perfect man . . . , from this (body) whoever removes a member of Christ and makes it the member of a prostitute . . . is assuredly no longer in the body of Christ . . . Therefore he has no right to eat of this *mystical body of Christ*, the body which, in order to be the true flesh of Christ, is consecrated daily through the Holy Spirit for the life of the world . . . They feed on it worthily, who are in his body, with the result that only the body of Christ [i.e., the Church], while it is on pilgrimage, is nourished by his flesh . . .[37]

De Lubac notes that contemporaries of Paschasimus agreed with the distinction between the physical body of Christ, "containing nothing either mystical or figurative," and the mystical body of the Eucharist, "created by the oil of sacred prayer . . . through the ministry of priests."[38] But, as Kantorowicz observes, this distinction collapsed by the

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[36] Kantorowicz, *The King's Two Bodies*, 195.

[37] Paschasius, "Liber de corpore et sanguine Domini," in *Patrologia Latina Cursus Completus*, ed. J.P. Migne (Paris: Garnier, 1844-1864), 120, 1284-6, quoted in De Lubac, *Corpus Mysticum*, 30 (italics in original).

[38] Ratramnus, "De Corporae et sanguine domini," in *Patrologia Latina Cursus Completus*, ed. J.P. Migne (Paris: Garnier, 1844-1864), 121, 167A, quoted in De Lubac, 31 (see nn. 102-103); and Rabanus Maurus, "De clericorum institutione," in *Patrologia Latina Cursus Completus*, ed. J.P. Migne (Paris: Garnier, 1844-1864), 107, 324, quoted in De Lubac, 31, (see n. 104).

twelfth and thirteenth centuries when, in response to heresies that over-spiritualized the Eucharist, Church authorities felt compelled to emphasize the real or physical presence of Christ within the sacrament. A major change in theological terminology thus ensued: *Corpus Christi* came to be applied to the sacramental species (thus bringing together the "sacramental" and the "physical"); and *corpus mysticum* was transferred away from the Eucharist to instead describe the body of the Church. "It was in [this] relatively new sociological sense," writes Kantorowicz, "that Boniface VIII defined the Church as 'one *mystical* body [the *corpus mysticum Christi*] the head of which is Christ.'"[39]

So we see that *mysticum* had been exclusively sacramental in meaning and later was appropriated into a corporational understanding of the Church, according to which authoritative or broadly institutional roles were emphasized for political purposes. Noting this move from the sacramental to the institutional (or sociological), let us conclude with Kantorowicz that the term *mysticum* of *corpus mysticum Christi* became secularized to a certain extent, at least from the time of the Carolingians to the years of Boniface VIII's pontificate. Before drawing connections between this period of secularization and the idea of the Church's group agency, let us consider how Aquinas features in Kantorowicz's narrative.

According to Kantorowicz, it was John of Salisbury who, in his *Policraticus* (1159), famously deployed Pauline imagery to compare the medieval political commonweal to the human body;[40] and his contemporary, Isaac of Stella, utilized Saint Paul to describe the *institutional* Church – portraying Christ as the head, and various ranks of clerical office as

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[39] Kantorowicz, *The King's Two Bodies*, 196 (italics in original).

[40] For the relevant Pauline verses, see Sub-section 4.1.2 above and Sub-section 4.2.2 below.

limbs. This "administrative organism" became the standard image of the medieval Church[41] and even Aquinas, Kantorowicz argues, adopted this predominantly juristic and sociological representation.[42]

To support this latter position, Kantorowicz points to a peculiar phrase Aquinas deployed in describing the Church – namely, *corpus Ecclesiae mysticum* (the mystical body of the Church).[43] This phrase is theologically significant because, in contrast to *corpus Christi mysticum* (the mystical body of Christ), it seems to suggest that the Church herself has a body that is distinct from the body of Christ. The phrase *corpus Ecclesiae mysticum* therefore moves the Church further away from the earlier patristic or Carolingian paradigm (which maintains an inextricable link between *corpus verum*, *mysticum*, and *Christi*) that de Lubac favors (see Sub-section 4.1.3).[44]

In the end, de Lubac concludes that Aquinas's choice of terminology, though indicative of an "advanced evolution," does *not* mark Aquinas as completely removed from the Carolingian and Eucharistic tradition. (Indeed, Aquinas employs the term in close proximity to discussion of the Church's sacraments.[45]) Kantorowicz, however, suggests a more radical, alternative position. He sees a decidedly juristic and secularized conception of the Church in Aquinas's chosen terminology. Kantorowicz writes:

> Hitherto it had been the custom to talk about the Church as the 'mystical body of Christ' (*corpus Christi mysticum*) which sacramentally alone makes sense. Now, however,

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[41] Kantorowicz, *The King's Two Bodies*, 199–200.

[42] Kantorowicz, 200–201. Kantorowicz writes that Aquinas uses the sociological interpretation of *corpus mysticum* "rather freely." He also describes Aquinas as *deliberately* continuing the sociological usage, transforming the liturgical use of *corpus mysticum* into a juristic idiom. Kantorowicz claims that de Lubac also stressed this change emphatically. See Kantorowicz, 200, n. 23.

[43] ST III, 8, aa. 3-4.

[44] Kantorowicz, *The King's Two Bodies*, 201; and De Lubac, *Corpus Mysticum*, 113.

[45] De Lubac, 113. See also ST III, 8, 3, ad. 3.

> the Church, which had been *the* mystical body of Christ, became *a* mystical body in its own right . . . The change in terminology was not haphazardly introduced. It signified just another step in the direction of allowing the clerical corporational institution of the *corpus ecclesiae iuridicum* to coincide with the *corpus ecclesiae mysticum* and thereby to 'secularize' the notion of 'mystical body.' In that development Aquinas himself holds a key position.[46]

While I agree with de Lubac that Aquinas did not intend the *corpus Ecclesiae mysticum* to be an essentially juristic concept, Kantorowicz's underlying historical point remains sound: The *corpus mysticum,* once sacramental in its central meaning, became "less and less mystical as time passed on" and – whatever Aquinas's contribution – eventually "came to mean simply the Church as a body politic or, by transference, any body politic of the secular world."[47]

So much for Kantorowicz's narrative. We now must consider what connections we might draw from the secularization just observed and the strong group realism outlined above (see Section 4.1). Two brief points will suffice.

First, assuming that the Carolingian interpretation of the Church meets the animation requirement, we could say that early medieval usage of the term *corpus mysticum* espoused a form of strong group realism. On this construction, Christ in the Eucharist accounts for the agency of the Church (see Sub-section 4.1.3).

Second, insofar as a sacramental or specifically Eucharistic explanation explains the Church's strong group agency, we can reasonably conclude that a desacralized conception of *corpus mysticum* rejects any strong group-realist connotations. Hence, *corpus mysticum* – understood specifically as a juridical or sociological term – can be used to describe modest

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[46] Kantorowicz, *The King's Two Bodies*, 201 (ialics in original).

[47] Kantorowicz, 206.

group agency at best. This inference, of course, supports the interpretation of Aquinas's group realism offered thus far. Adapting Gilby's commentary, we might say that on Aquinas's model "the rhetoric [of strong group realism] may be more genial, [but] the logic is no less invalid."[48] Perhaps, then, it is not entirely inappropriate to attribute a certain group-agency reduction, that is, a movement from strong to modest group realism, to Aquinas. The ending point of that transformation certainly fits within the paradigm of group agency that we attribute to him.

Leaving behind the medieval, we turn now to a more recent transformation of the Church: the contemporary shift from John Locke's "true church" to today's voluntary association.

### 4.2.2 Locke's "true church"

When we look to John Locke's description of Christianity or the Church, we find neither theological hints toward strong group realism nor consideration of Christ's coordinative activity as head of the spiritual body, the Church. For example, *The Reasonableness of Christianity* (1695), Locke's scripturally grounded re-articulation of the Faith, does not cite any of the standard Biblical verses relating to the unity of the Church (Rm 12:3-8; 1 Cor. 12:12-30; Col. 2:11-13, 3:15) or Christ's headship of a spiritual body (Col 1:18, 2:10, 19; Eph. 1:22, 4:15, 5:23).[49] This omission is telling, further solidifying Locke's reputation as

[48] Gilby, *Principality and Polity*, 256.

[49] A look through Higgins-Biddle's second appendix, the Table of Biblical References, reveals an exclusion of scriptural references to the body of Christ as a corporate entity. See John Locke, *The Reasonableness of Christianity: As Delivered in the Scriptures*, ed. John C. Higgins-Biddle (Oxford: Oxford University Press, 1999) app. 2.

the "first great liberal philosopher" and a (if not *the*) progenitor of the modern emphasis upon individual rights as set against corporate absolutisms, whether secular or religious.[50] My examination of Locke, then, does not focus upon a group-ontological reductionism of the sort discerned in medieval political theology, for Locke seems to have taken this reduction for granted. Instead, I draw attention to defining characteristics of Locke's "voluntary society of men," the "true church,"[51] and note how its minimal theological ground gives way to today's secular conception of voluntary association wherein the individual herself is normatively paramount. At bottom, the transformation of the Church noted here is one of religious to secular individualism.

Locke's oft quoted definition of the church (not, "the Church") is found in *A Letter Concerning Toleration* (1683-1689). It reads:

> A church then I take to be a voluntary society of men, joining themselves together of their own accord, in order to the public worshipping of God, in such a manner as they may judge acceptable to him, and effectual to the salvation of their souls.[52]

As indicated in Locke's definition, there are two characteristics central to a church or religious society: salvation as the members' primary end, and voluntary membership. A third characteristic is made plain at the beginning of the *Letter* ("I esteem that toleration to be the chief characteristical mark of the true church") and this entails a peaceable, tolerant morality toward religious others, whether Christian or not.[53] Despite overly secularized

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[50] Maurice Cranston, "Introduction," in *Locke on Politics, Religion, and Education* (London: Collier-Macmillan, 1965), 7.

[51] John Locke, "A Letter Concerning Toleration," in *Locke on Politics, Religion, and Education*, ed. Maurice Cranston (London: Collier-Macmillan, 1965), 110–11.

[52] Locke, 110–11.

[53] Locke, 104–5.

interpretations of Locke's understanding of religion,[54] Locke's description of churches themselves involves no complete abandonment of Christian doctrine. For Locke, the salvific message and public worship of churches *should* be of a Christian, scripturally based variety. But a brief examination of Locke's three marks of the "true church" allows us to see how easily a caesura between the first and second characteristics (Christian salvation and voluntary membership) gives way to today's secularized "religious" association.

The first mark of Locke's church pertains to salvation, but we may also refer to this characteristic more broadly as entailing a minimal Christian theology. At the core of Locke's theology is a belief that one should attend to his own salvation, recognizing this as "the highest obligation that lies upon mankind."[55] Locke, however, is insistent that care for one's own soul "belongs only to himself," and Locke condemns all efforts to force others into religious truth: "Any one may employ as many exhortations and arguments as he pleases, towards the promoting of another man's salvation. But all force and compulsion are to be forborn. Nothing is to be done imperiously." Nevertheless, Locke is *not* agnostic with respect to the content of true doctrine, that is, to the "believing and doing those things in this life, which are necessary to the obtaining of God's favour, and are prescribed by God to that end."[56] For Locke, such "believing and doing" aligns with a minimal (and Protestant) Christianity, grounded in the Biblical texts. He writes:

> But since men are so solicitous about the true church, I would only ask them here by the way, if it be not more agreeable to the church of Christ, to make the conditions of her communion consists in such things, and *such things only, as the Holy Spirit has in the*

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[54] For example, in a recent publication, the political theorist Judd Owen offers a pointedly materialist interpretation of Locke's understanding of religion. See J. Judd Owen, *Making Religion Safe for Democracy: Transformation from Hobbes to Tocqueville* (Cambridge: Cambridge University Press, 2015), 109-112.

[55] Locke, "A Letter Concerning Toleration," 134.

[56] Locke, 135.

> *Holy Scriptures declared, in express words*, to be necessary to salvation? I ask, I say, whether this be not more agreeable to the church of Christ, than for men to impose their own inventions and interpretations upon others, as if they were of divine authority; and to establish by ecclesiastical laws, as absolutely necessary to the profession of Christianity, such things as the Holy Scriptures do either no mention, or at least not expressly command?[57]

While we might attribute the Protestant character of Locke's theology to his political leanings leading up to the Glorious Revolution (Locke called the protestant King William the great "restorer"[58]), we must also look to Locke's epistemology or philosophy of religion to appreciate the minimal creed which he professed.

In this area, commentators like Nicholas Wolterstorff provide sophisticated analyses of Locke's *An Essay Concerning Human Understanding* (1689), wherein natural theology plays a prominent role for Locke in knowing God's existence, power and all-encompassing knowledge.[59] Apart from what reason alone can know of God, revelation too provides a certain knowledge of the divine. "Whatever GOD hath revealed, is certainly true," Locke writes, "no Doubt can be made of it."[60] Such is the domain of faith; also in the *Essay*, we see that Locke's argument in defense of faith leads him to conclude that "[w]hatsoever is divine *Revelation*, ought to over-rule all our Opinions, Prejudices, and Interests, and hath a right to be received with full Assent."[61]

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[57] Locke, 112 (italics mine).

[58] Cranston, "Introduction," 13.

[59] Nicholas Wolterstorff, "Locke's Philosophy of Religion," in *The Cambridge Companion to Locke*, ed. Vere Chappell (Cambridge: Cambridge University Press, 1994), 187–88.

[60] John Locke, *An Essay Concerning Human Understanding*, ed. Peter H. Nidditch (Oxford: Oxford University Press, 1975), 695, bk. IV, ch. xviii, line 10. See discussion in Wolterstorff, "Locke's Philosophy of Religion," 191.

[61] Locke, *An Essay Concerning Human Understanding*, 695, bk. IV, ch. xviii, line 10 (italics in the original).

In the end, however, Locke subjects virtually all revelation to the regulation of reason. For Locke, notes Wolterstorff, "Reason overcomes faith."[62] It is, therefore, only a minimal revelation that Locke accepts as true and regulative of one's life. This is the revelation – emphasized at the beginning of the *Reasonableness of Christianity* – that Christ is the messiah, that "we are restored to by Jesus Christ."[63] Following from this, as Judd Owen notes, Locke proceeds to abide by Hobbes's maxim "to stick to those parts of Scripture whose 'sense is most plain and agreeable to [1] the harmony and scope of the whole Bible,'"[64] *and*, we might add, to [2] reason itself. Hence, according to Wolterstorff, "Locke's project . . . was not to show that it was probable on satisfactory evidence that the New Testament records revelation from God, but to show that a great deal of the *content* of revelation there recorded can be arrived at by reason."[65]

Commentators note that Locke's navigation between faith and reason is convoluted or weak.[66] Yet, regardless of its details, we can already appreciate how Locke's philosophy of religion provides the basic shape of his minimally doctrinal theology. As a final note on this matter, we highlight that Locke's assertion of (what he thought to be) fundamental tenets of Christianity leads him to disavow claims of doctrinal orthodoxy

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[62] Wolterstorff, "Locke's Philosophy of Religion," 190.

[63] Locke, *Reasonableness*, 5, bk. I, lines 7-8.

[64] Owen, *Making Religion Safe for Democracy*, 85, quoting Thomas Hobbes, *Leviathan*, trans. Richard Tuck (Cambridge: Cambridge University Press, 1996), 414-415, ch. 43, sec. 331.

[65] Wolterstorff, "Locke's Philosophy of Religion," 192.

[66] For example, see Owen, *Making Religion Safe for Democracy*, 84–85; and Wolterstorff, "Locke's Philosophy of Religion," 190. In contrast, Higgins-Biddle provides a more sympathetic interpretation of Locke on this point. See John C. Higgins-Biddle, "Introduction," in *The Reasonableness of Christianity: As Delivered in the Scriptures* (Oxford: Oxford University Press, 1999), cxi.

made by any Christian church concerning (what he thought to be) inessential matters. In the *Letter*, he writes:

> For every church is orthodox to itself; to others, erroneous or heretical. Whatsoever any church believes, it believes to be true; and the contrary thereunto, it pronounces to be error. So that the controversy between these churches about the truth of their doctrines, and the purity of their worship, is on both sides equal; nor is there any judge, . . . elsewhere upon earth, by whose sentence it can be determined. The decision of that question belongs only to the Supreme Judge of all men, to whom also alone belongs the punishment of the erroneous.[67]

What Locke affirms here anticipates our discussion of the third and most "characteristical mark of the true church" – namely, toleration. As is suggested in the excerpt above, Locke's argument for religious toleration moves beyond a mere exhortation to do no harm. Instead, it is grounded in man's ignorance of religious things. As Higgins-Biddle puts it: "Locke's defence of toleration . . . rest[s] heavily upon his argument that, since no one has infallible knowledge in the realm of religion, no one has the right to impose his religious opinions on others as though they were divine requirements."[68] This position, of course, has bearing upon one's understanding of what churches are. Indeed, with all men lacking infallible knowledge of religion, perhaps no orthodox churches exist.[69]

Before discussing toleration in more depth, let us turn briefly to the second aspect of Lockean churches: their voluntary membership. It is here perhaps where a Lockean individualism comes most to the fore. Coupled with his minimal theology, voluntary membership (or voluntarism) assures that individuals can worship "in such a manner as

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[67] Locke, "A Letter Concerning Toleration," 115–16.

[68] Higgins-Biddle, "Introduction," cxiii.

[69] Owen, *Making Religion Safe for Democracy*, 65.

*they* may judge acceptable to [God]."[70] Assuming adherence to doctrinal essentials, individuals themselves should join and leave religious societies as they see fit. "The hope of salvation," Locke writes,

> as it was the only cause of [a man's] entrance into that communion, so it can be the only reason of his stay there. For if afterwards he discover anything either erroneous in the doctrine, or incongruous in the worship of that society to which he has joined himself, why should it not be as free for him to go out as it was to enter?[71]

Yet, likewise, churches as voluntary need not retain "heretics" within their ranks on Locke's account: "I hold, that no church is bound by the duty of Toleration to retain any such person in her bosom, as after admonition continues obstinately to offend against the laws of the society."[72] Were this condition not to hold, then the obstinately heterodox individual would be able to impose belief upon the religious society, thereby violating individuals' dignity and rights[73] and transgressing "the duty of Toleration." It follows that voluntarism is both an individual and group privilege for Locke. However, the group privilege itself is morally intelligible with respect to the obligation of the *individual* to obtain favor from God.[74]

The obligation to attend to one's salvation, of course, must be executed in accordance with the toleration characteristic of the "true church." This third and "chief characteristical mark," we already noted, follows from Locke's philosophy of religion or, as

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[70] Locke, "A Letter Concerning Toleration," 110–11 (italics mine).

[71] Locke, 111.

[72] Locke, 114.

[73] For an insightful account of individual dignity and equality as theologically supported in Locke, see Jeremy Waldron, *God, Locke, and Equality: Christian Foundations in Locke's Political Thought* (Cambridge: Cambridge University Press, 2002), chap. 8.

[74] Locke, "A Letter Concerning Toleration," 135.

Higgins-Biddle might frame it, his argument of religious ignorance.[75] But what, we ask, does tolerance actually entail for Locke? To begin, we can look to the full excerpt in the *Letter* where Locke speaks of this chief characteristic:

> I esteem that toleration to be the chief characteristical mark of the true church. For whatsoever some people boast of the antiquity of places and names, or of the pomp of their outward worship; others, of the reformation of their discipline . . . Let any one have ever so true a claim to all these things, yet if he be destitute of *charity, meekness, and good will in general towards all mankind*, even to those that are not Christians, he is certainly yet short of being a true Christian himself. "The kings of the Gentiles exercise lordship over them," said our Savior to his disciples, "but ye shall not be so" (Luke xxii).[76]

A series of virtues – "charity, meekness, and good will in general" – comprise Christian tolerance; and, indeed, a scriptural mandate exists to elevate these virtues onto a theological or revelatory plane. Further to this, the *Essay* speaks of the need for "Peace . . . and Friendship, in the diversity of Opinions" to follow from recognition of man's fallible (religious) knowledge.[77] We might here speak of certain fruits of the Spirit (Galatians 5) flowing from Locke's tolerant Christianity.

Apart from these seemingly abstract virtues and benefits, Lockean tolerance applies concretely to the everyday person, the "laboring and illiterate Man,"[78] and it is aimed to no insignificant degree toward the well-being of man in the here and now.[79] The *Letter* especially supports this worldly interpretation. Consider the following passage:

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[75] Higgins-Biddle, "Introduction," cxiii. Locke refers to human ignorance with regard to various truths in *An Essay Concerning Human Understanding*, 659, bk. IV, ch. xvi, line 4.

[76] Locke, "A Letter Concerning Toleration," 104–5 (italics mine).

[77] Locke, *An Essay Concerning Human Understanding*, 659, bk. IV, ch. xvi, line 4 (original italics removed).

[78] Locke, *Reasonableness*, 169, bk. XV, line 302.

[79] Drawing upon material near the end of *The Reasonableness of Christianity*, Owen argues that Locke understood religion to be chiefly concerned with material prosperity. I think Owen's interpretation is not quite accurate, in light of Locke's recognition (and exhortation) that men have an obligation to attend to their

> No private person has any right, in any manner to prejudice another person in his *civil enjoyments*, because he is of another church or religion. All the *rights and franchises* that belong to him as a man, . . . are inviolably to be preserved to him. These are not the business of religion. *No violence nor injury is to be offered him*, whether he be Christian or pagan . . . . If any man err from the right way, it is his own misfortune, no injury to thee: *nor therefore art thou to punish him in the things of this life, because thou supposest he will be miserable in that which is to come*.[80]

Commenting on Locke's emphasis upon the mundane or worldly, Owen writes: "The mundane goods of this world and not the sublime goods of the next, to say nothing of natural philosophy, are[, in Locke's opinion,] man's naturally greatest concerns."[81] And, as Higgins-Biddle notes, "[t]he simple requirements of faith and obedience would, Locke hoped, bring . . . peace, stability, and security to England and Christendom."[82] Further still, Jeremy Waldron argues that Locke's Christian toleration, and religious argumentation in general, remains "indispensable" for contemporary (and earthly) public life.[83] In sum: Lockean tolerance, the "chief characteristical mark of the true church,"[84] entails a markedly worldly emphasis – notwithstanding a soteriological end.

Without doubt, the image that emerges of Locke's "true church" is distinctively Christian. But insofar as this church is built upon a minimal theology, reliant upon a weak evidentialism,[85] and constructed primarily to foster personal choice as well as toleration and

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own eternal salvation. Nevertheless, Owen convincingly highlights the emphatically mundane or earthly aspects of Lockean religion and goes on to contrast this against Tocqueville's more transcendent idea of what religion should be. See Owen, *Making Religion Safe for Democracy*, 108–12.

[80] Locke, "A Letter Concerning Toleration," 114–15 (italics mine).

[81] Owen, *Making Religion Safe for Democracy*, 110.

[82] Higgins-Biddle, "Introduction," cxiv.

[83] Waldron, *God, Locke, and Equality*, 237–43.

[84] Locke, "A Letter Concerning Toleration," 104–5.

[85] Wolterstorff, "Locke's Philosophy of Religion," 197–98 (arguing that "it is Locke's evidentialist demands that ought to be given up" today for purposes of defending religion and even of "science and other matters").

public peace, its eventual secularization in the centuries after Locke should come as no surprise. One simply needs to detach or further reduce its minimal Christian theology, and the resulting caesura marks the church's voluntary membership and tolerant morality as the only intelligible (or worthwhile) characteristics left. Hence, contemporary appropriations of, or references to, Locke's church are noticeably secular and are articulated solely in terms of its (i) voluntary membership, understood as a necessary condition for a (ii) political-liberal freedom of association.[86] Furthermore, inasmuch as freedom of association gains its normative currency from the rights or integrity of individual citizens, Locke's church need not be postulated as a group agent of any sort for religious liberty purposes.[87] Its possible group agency is overlooked or denied by political liberalism's emphasis upon the individual. By default, it seems, the political liberal church – Locke's "true church" – is no group agent at all. Far from remaining agnostic toward issues of group ontology, present-day adherents of Locke's church inevitably preach the good news of group-agency elimination.

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[86] Schragger and Schwartzman refer to Locke's church solely as a voluntary association, built upon a voluntarist principle. See Schragger and Schwartzman, "Against Religious Institutionalism," 957–59. Cécile Laborde, invoking Locke, argues that only institutions that are voluntary and identificatory (this term being a political liberal replacement for "religious") are deserving of certain collective freedoms (especially a *pro tanto* right to discriminate). See Laborde, *Liberalism's Religion*, 174.

[87] Cécile Laborde, for example, argues that we need only look to the "particular interests, values, and relationships [that] are promoted by religious groups" and therefore not occupy ourselves with determining what churches are ontologically. But immediately after affirming this, Laborde herself asserts that only voluntary and identificatory groups (i.e., voluntary associations) are normatively appropriate subjects for certain group rights. See Laborde, *Liberalism's Religion*, 172–74.

Whether Laborde arrived at this (inevitably) ontological position from a prior consideration of values alone is doubtful. For, her apparent group-agency agnosticism (adopted from Schragger and Schwartzman) is immediately colored by a political liberal emphasis, or bias even, upon flesh-and-blood individuals. How could she view churches as anything but associations of individual citizens, therefore? It seems to me then that Laborde actually *does* postulate a group metaphysic (specifically, a group-agency eliminationism), as liberal egalitarianism itself takes this foundational task upon itself by first identifying what sort of subjects (i.e., individuals) are worth protecting by law.

### 4.2.3 Recovering strong group realism for legal prescription

This section thus far has highlighted two historical episodes in the gradual reduction of the Church, from Christ's mystical body (a strong group agent) to a voluntary association (with no reference to group ontology). Following Kantorowicz and de Lubac, we first saw a Eucharistic form of strong group realism give way (through various permutations of the term *corpus mysticum*) to a secularized and administrative conception of the Church that is most compatible with modest group realism's coordinative framework. Afterward, we saw that John Locke's "true church" is described today not with reference to the unity and coordination typical of modest group realism, but to the voluntarism prescribed by "tolerant Christianity" and, later, contemporary political liberalism. In this second transformation, group realism already was presumed dead and a secularization of Locke's church put the final nail in the coffin.

We now can answer directly the two queries posed at the beginning of this section. First, we asked why the Church is not commonly described in terms of strong group realism today. As the above narrative suggests, widespread acceptance of a secularized version of Locke's true church accounts for the contemporary situation. Undoubtedly, there are some to whom the idea of the Church's strong group agency may indeed be common (e.g., certain Roman Catholics: see Section 4.1); but, in the contemporary American context, at least, a secularized Lockean paradigm reigns as the default legal position, thus serving as a legal-normative standard against which individual rights are secured and group-ontological speculation is deemed irrelevant or dangerous for purposes of legal prescription (see Section 2.3).

This political liberal context challenges strong group realism and its integration with a theory or regime of corporate religious liberty. Hence, to this section's second query, we (i) recognize the difficulties associated with strong group-realist defenses of

church rights and, in turn, (ii) affirm the need to respond carefully. Such care, I contend, can meet political liberal expectations concerning group-agency skepticism, voluntarism, and secularization. But it should do so only in part. Careful Christian ethical engagement should not accept political liberal positions uncritically. Rather, it should challenge basic normative and descriptive assumptions within the prevailing political liberal consensus (e.g., a reductionist view of the Church or a conflation of for-profit firms with houses of worship: see Sub-section 3.3.2). In doing so, Christian engagement can protect houses of worship, as well as religious beliefs and practices grounded in the Church's strong group agency, both sufficiently and appropriately. In the following section, I outline a possible way in which Christian engagement might achieve these aims.

## 4.3 The standard argument

Recall the "standard argument" that legal scholars Richard Schragger and Micah Schwartzman attribute to religious institutionalists (see Section 2.3). The argument holds that:

> (1) Some groups are agents.
> (2) Some group agents are rational.
> (3) Rational agents are moral persons.
> (4) Moral persons have moral rights.
> (5) Legal rights protect moral rights.
> (6) Therefore, some groups are moral persons (by 2 and 3).
> (7) Therefore, some groups have moral rights (by 4 and 6).
> (8) Therefore, legal rights protect some groups' moral rights (5 and 7).[88]

[88] Schragger and Schwartzman, "Some Realism," 352, n. 32.

In this section, I revisit the standard argument; however, I no longer adopt Schragger and Schwartzman's skepticism towards it (see Sub-section 2.3.4). Instead, I demonstrate how we might accept the standard argument, inclusive of an associated belief in the Church's strong group agency, for legal-prescriptive purposes. In particular, I demonstrate how we might integrate the standard argument within my proposed theory of corporate religious liberty, thus accounting for an ecclesial strong group realism within a framework that specifically protects modest group agents.

Towards this end, I first build upon the ecclesiological reflections from earlier sections to consider explicitly the Church's (moral) personality. Doing so helps align the idea of the Church's strong group agency with the standard argument as presented by Schragger and Schwartzman. Afterward, I consider whether the standard argument should inform legal prescription and, if so, how it could be integrated in fact – that is, within my theory of corporate religious liberty. I conclude with a past, practical example from the U.S. Supreme Court, which illustrates the integration I propose.

### 4.3.1 The supernatural personality of the Church

Our first task is to determine in what way the Church is a "person" and thereby comfortably fits within the standard argument's logic. For our purposes, I consider *legal* constructions of "person" or "personhood" to be irrelevant, since Schragger and Schwartzman focus on medieval-ontological and non-juristic accounts of personhood in their discussion of the standard argument.[89] I therefore focus upon *metaphysical*

[89] Schragger and Schwartzman, 349–50.

constructions to see how the Church fares. On this front, we immediately encounter a theoretical difficulty. Consider de Lubac's Eucharistic conceptualization of the Church. De Lubac, we recall, implicitly identifies the active agency of the Church through her (non-metaphorical) calling-together of the faithful into a Eucharistic community (see Sub-section 4.1.3). De Lubac, however, is quick to note that this agency is not indicative of a "transcendent hypostasis" or "external organism."[90] This suggests that the Church is not a *persona* in a substantially metaphysical sense. But if this is so, then the Church cannot fit within the standard argument, and our present query concerning the integration of strong group realism ceases before it begins.

As construed, this difficulty assumes a particular Aristotelian or Thomistic understanding of *persona*, such as the one found in Question 16 of the *Tertia pars*: "a person is nothing else than an individual substance of rational nature," or "a person signifies something complete and self-subsisting in rational nature."[91] But we can avoid the above difficulty if we accept that the Church is a *persona* in a different, yet still metaphysical and non-metaphorical, sense. Two modern theologians, Jacques Maritain and his former spiritual advisor Humbert Clérissac O.P., are here useful. Both describe the Church's personality in *super*natural terms, that is, in terms that build upon the "natural" or metaphysical aspects of the Thomistic *persona*. This allows Maritain and Clérissac to emphasize the continuity between the Church as a supernatural person and the human being as a natural person (i.e., as a self-subsisting, rational individual). And the differences they note, we infer, constitute what is *super*natural in the group-*persona* described.

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[90] De Lubac, *Catholicism*, 21.

[91] ST III, 16, 12, obj. 2 (Boethius) and ad.3 (Aquinas).

Clérissac recognizes that a (Thomistic) *persona* is a self-subsisting, substantial whole. The Church as supernatural therefore meets and goes beyond this requirement by overcoming its composition of parts. Clérissac writes:

> although the Church is composed of these elements that are so divine – Humanity, Christ and the Holy Ghost – and although from their union there can only result, philosophically speaking, an accidental or imperfectly substantial whole, nevertheless the bond which unites them, being a divine Person, confers upon their conjunction a unity, a stability, a rational and intelligent autonomy of a superior kind, which merits in a superior way, under a certain aspect, the name of personality. Or we should say rather that this personality is absolutely new and that the Church is its sole realization.[92]

The work of the divine persons, especially of Christ and the Holy Spirit, account for the *sui generis* unity of the Church and thus contribute to its supernatural personality. Clérissac continues by claiming that this unity persists over time immemorial and integrates in the Church "all the varieties of human individuals . . . [in] an ever increasing number." For Clérissac, this is but one obvious way in which the Church surpasses the limits of a human group, to which we attribute a metaphorical "moral personality."[93]

Continuing his exposition of the Church along Aquinas's definition of *persona*, Clérissac then notes how the Church surpasses natural persons with regard to the rational faculties. Of particular focus for Clérissac are memory and conscience. With regard to the former, the Church surpasses all natural capacity: "since that time when our Lord . . . gave to His Church the definitive deposit of the Truth, even since then, the memory of the Church has not ceased to stand out as prodigious."[94] And to the latter, Clérissac affirms

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[92] Humbert Clérissac O.P., *The Mystery of the Church* (London: Sheed and Ward, 1937), 35 (cf. the bond of human members' intentions, as understood within modest group realism: see Sub-section 3.1.3 above).

[93] Clérissac, 35.

[94] Clérissac, 36–37.

that the Church's conscience is "no less superhuman." Concerned as it is with morality, the conscience of the Church enjoys certitude, discerned in gradations and graduated in strength (never relaxed) throughout history. Martyrdom witnesses to this certitude: "if an attempt is made to force the Church . . . to disavow Her divine Certitude, then the Church accepts or commands martyrdom in order to affirm it all the more . . . [M]artyrdom thus become[s] the most distinctive sign of the invincible personality of the Church."[95]

Writing close to four decades after Clérissac and not long after the Second Vatican Council's reflections upon the Church, Maritain reiterates the distinctive and metaphysical manner in which the Church is truly a person. In his work *On the Church of Christ*, Maritain notes:

> The Church, while subsisting naturally with the subsistence of her innumerable individual members, possesses herself, supernaturally, insofar as she is the whole – one and universal – of this multitude, a personality, truly and ontologically and not in a wholly analogical sense, in the fashion of that which the jurists call "collective persons" or "moral persons"[.] [S]he is herself a person in the proper and primary sense of the word, a person who renders a worship to God, who proposes to us the truths revealed by Him, who sanctifies us by her sacraments, who speaks, who teaches, who acts.[96]

Towards the end of this statement, Maritain seems to play fast and loose with the definition of "person," as if the Thomistic definition to which he had tacitly alluded is understood in its "proper and primary sense" to entail worship, speech, and sacramental action. These capacities may pertain uniquely to the Church as *persona*, but certainly they do not constitute the formal definition or the "proper and primary sense" of the term.[97] Nevertheless, the most important point to take from the above is this: that Maritain, like

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[95] Clérissac, 38–39.

[96] Maritain, *On the Church of Christ*, 18–19.

[97] See the definitions provided in ST III, 16, 12, obj. 2 (Boethius) and ad.3 (Aquinas).

Clérissac, points to the *super*natural personality of the Church by viewing it in light of, and "not in a wholly analogical sense" to, the standard metaphysical definition of *persona*.

The comparison Maritain makes between natural and supernatural persons is perhaps most successful in the following passage, where Maritain deploys a useful theological distinction to understand the unique personality of the Church. He writes:

> No community of the merely natural order can be a person at the same time as a multitude of human beings. A nation subsists with the subsistence of all its individual citizens; it has a history, it has typical characteristics, common customs, it pursues a common end and has common interests: this history, these typical characteristics, these customs, this common end, these common interests are purely and simply those of its citizens, or of the great mass of them. And it has no divine mission, nor any promise of lasting always and of being constantly assisted by God.
>
> It is altogether different with the Church. The Church has a *double subsistence*: a *natural subsistence* like every human community, -- that of the human persons who are her members: if all Christians were exterminated there would no longer be a Church here on earth. And she has, insofar precisely as she is the whole, one and universal, of the organized multitude of those who live with her life, a *supernatural subsistence*, which presupposes but transcends the natural subsistence of the individual persons who are her members.[98]

Maritain's "double subsistence" captures well the uniqueness of the Church's unity, demonstrating how analogical thought can result in the reasonable conclusion that the Church's personality – while similar to that of natural persons – is of a different order.

That this order is deemed *supernatural* is an apt choice of term. For it evokes the super-substantial bread written of in the Vulgate's translation of the Lord's Prayer (Matthew 6:11) – the *panem nostrum supersubstantialem*.[99] We therefore return to de Lubac's sacramental account of the Church, wherein the supernatural or mystical Body is seen to call together and constitute a Eucharistic community. Through analogy, we can say that

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[98] Maritain, *On the Church of Christ*, 18 (original italics removed) (italics mine).

[99] "Give us this day our supersubstantial bread." Matthew 6:11 (Douay-Rheims Version).

this agent – who transcends the natural subsistence of her members and incorporates them into Christ's body – is a *persona supernaturalis*.

### 4.3.2 Integrating the standard argument

Let us assume that the Church thus understood is a belief held by some Christians in fact, and that these Christians seek legal protection, in part, through strong group-realist claims.[100] As the above analysis suggests, it is now possible to advance these legal protections by means of the standard argument. This is so because the Church – now understood as a supernatural person – is an appropriate metaphysical subject for the standard-argument framework. I now ask (i) whether the standard argument (inclusive of the strong group realism attendant to the Church's supernatural personality) should be integrated into my proposed theory of corporate religious liberty and, if so, (ii) how it could be integrated in actual fact.

With respect to the first question, it would seem that the standard argument should not be accepted into any theory or regime of corporate religious liberty. The long history of secularization and group-agency elimination (i.e., the long history of church-state disputes) appears to advise against it (see Section 4.2). Locke, in particular, would object on epistemological grounds to the sacramental strong group-agency attributed to the Church.

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[100] John Garvey articulates a strong group-realist defense of church autonomy, writing that "[t]he group [i.e., the Church] is a legal and moral person distinct from its members; its interests may conflict with theirs. Its freedom is not a compound of individual freedoms, like the effort of ten horses drawing a single load. It is a right to act in ways peculiar to the group. The freedoms of contract, association, and belief play no part in this scheme of things." John Garvey, *What Are Freedoms For?*, 146-147.

Consider the following excerpt, where Locke criticizes the Roman Catholic doctrine of transubstantiation. He argues that:

> the reality and essence of bread being in respect of us nothing but a collection of several simple ideas, which makes us know it, distinguish it from flesh, and call it bread, it is as impossible for a man, where he finds that complex idea, to know it to be flesh or receive it for such, as it is to believe himself a loaf[.][101]

Locke's biting criticism is, of course, tied to his understanding of the basic requirements of salvation as made plain in scripture. Analogic reasoning of the sort evinced by Maritain (and Aquinas before him) does not meet Locke's evidentialist demands relating to reason and, by extension, faith. Hence, it is reasonable to conclude that Locke would reject a supernatural subsistence of the Church, just as he eschews Eucharistic transubstantiation. Furthermore, we could infer that, for Locke, the supernatural personality and strong group-agency of the Church is an epistemologically invalid and morally reckless position. Such a position would be tantamount to asserting infallible knowledge and rejecting the ignorance-based toleration required of Lockean Christianity. As present-day political liberals might put it, appeal to the Church's supernatural personality could be used as a trump-card in legal-prescriptive discussion and thus lead to group domination and an abuse of vulnerable third-parties.[102] No wonder contemporary political liberals, secular adherents of Locke's "true church," eschew this metaphysical position and the standard argument that embraces it.

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[101] John Locke, "Journal entries for 26-27 Aug. 1676," in *Essays on the Law of Nature*, ed. W. von Leyden (London: Oxford Clarendon Press, 1954), 278, quoted in Higgins-Biddle, 'Introduction,' cxi–cxii.

[102] See Laborde, *Liberalism's Religion*, 173; and Schragger and Schwartzman, "Some Realism," 367.

The moral lessons of history, especially those involving religious (and secular) group domination, are to be taken seriously. But an eschewal of the standard argument in religious liberty contexts need not be involved. For one, there are good theological and normative reasons to keep it. As previously discussed, churches on a modest group-realist account gain normative importance insofar as they promote distinctive moral values like the right worship of God (see Sub-section 3.3.2). The supernatural personality or agency of the Church (which is made manifest in concrete visible churches: see below) adds to this normative and theological weight. For example, it points to a theological reality in which the initiative of the Church, and *not* the initiative of individual members, is fundamental to salvation. Hence, it is of tremendous normative and soteriological importance for believers that churches are legally free to engage in the mystical Body's divine act of salvation.[103] The standard argument can contribute to this freedom by making clear that the theological beliefs at stake (i.e., the Church's supernatural personality and the salvation-through-incorporation that she brings) are deserving of legal solicitude. For, without such solicitude, believers could be in a perilous situation – namely, alienation from the saving Body of Christ.

Another reason to preserve the standard argument involves normative limits. The above paragraph mentions the Church acting (via concrete visible churches) upon individual people, *without* the initiative or initial consent of the latter. That prospect certainly sounds alarm bells for political liberals of any stripe, from Lockeans to Labordeans, as it signals group domination and disrespect of individual rights. But it must

[103] Garvey, *What Are Freedoms For?*, 149–50; and William T. Cavanaugh, *Theopolitical Imagination: Discovering the Liturgy as a Political Act in an Age of Global Consumerism* (London: T & T Clark, 2002), 46–52.

be admitted that the standard argument could never stand on its own, normatively speaking. Its final conclusion that "legal rights protect some groups' moral rights" is by no means exhaustive of moral deliberation. It merely adds one procedural datum or institutional fact to the process of moral reasoning, which, I argued, should look to social reality as best and widely understood (see Figure 7 and Chapter 3). The standard argument, therefore, must be complemented by or embedded within a procedure of legal prescription that takes into account a wider array of empirical and normative data. That procedure, I propose, could be my theory of corporate religious liberty.

Let us therefore accept that the standard argument has normative merit and, further, that it could be integrated into my proposed theory without risking group domination. We now must consider what this integration looks like – clarifying, first, how legal rights can extend to the Church as supernatural and, second, how the logic of the standard argument fits within legal prescription as facilitated by modest group realism.

Perhaps the greatest challenge raised by the standard argument relates to its supernatural subject – the mystical body, the Church – who, according to various theological traditions, exists invisibly and encompasses all the Christian faithful, if not all people. Locke, for example, argues that the true church exists "'wheresoever two or three are gathered together in his name . . .' (Matt. xviii.)," this being a "very express and positive" position made plain by scripture.[104] And de Lubac suggests that, through over-extension, the term "mystical body" can be and has been used to describe society at large: "Suárez would say that people grouped into society formed . . . 'a mystical body that morally can be called on in itself,' and, . . . Kant would address his readers on the mystical

[104] Locke, "A Letter Concerning Toleration," 112.

body of reasonable beings formed by the free submission of each one to the rule of moral laws."[105] In these constructions, the Church is present virtually everywhere. However, it is unreasonable to presume that *all* groups of individuals (or even a single person) should receive robust freedom-of-the-church protections simply because they, in some manner, are members of the mystical body. The challenge, then, involves determining where this mystical body or supernatural person is *concretely*, such that the Church can be subject to legal protection in actual practice.

To meet this challenge, I take inspiration from the Roman Catholic tradition, following especially de Lubac's call to "return to the sacramental origins of the 'mystical body'"[106] and recognizing the Second Vatican Council's distinction between the invisible and invisible Church. In particular, I propose the following: that we protect the *invisible* Church (i.e., the Church as mystical or supernatural) through extension of legal rights to *visible* churches.

How does this proposal work? In short, it turns upon an understanding that the invisible Church exists wherever genuine sacramental activities take place (i.e., within visible churches). As understood within Catholic theology, the most distinctive and important of such activities is the celebration of the Eucharist.[107] But *all* Christian sacraments or sacramental activities – inclusive of preaching – are included in this

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[105] De Lubac, *Corpus Mysticum*, 118 (original italics removed).

[106] De Lubac, 260.

[107] *Catechism of the Catholic Church*, para. 1324 ("The Eucharist is the source and summit of the Christian life. The other sacraments, and indeed all ecclesiastical ministries and works of the apostolate, are bound up with the Eucharist and are oriented toward it" (internal quotation marks removed)).

proposal.[108] Hence, if we follow de Lubac when he says that "[a]ll the sacraments are essentially sacraments of the Church; in her alone do they produce their full effect,"[109] then we can infer that legal rights extended to sacramental organizations (i.e., *visible* churches) are legal rights extended, albeit indirectly, to the *corpus mysticum* or *persona supernaturalis* (i.e., the *invisible* Church).

Immediately, one might object that this approach is entirely too Christian and specifically too Catholic to be useful in a religiously pluralist society. But we must remember, first, that this proposal is meant to sit within a *Christian* theory of corporate religious liberty (which is developed in part to combat reductive images of the Church) and, second, that this proposal could be extended through analogy to non-Christian houses of worship.

With regard to the second point, we can consider churches that administer (an array of Christian) sacraments[110] to constitute the central case or core example of legally protected "houses of worship." Then, in comparison to the central case, we can identify similarities in other non-Christian religious organizations. Entities with relevant similarities are deemed "houses of worship" and, as such, are viable recipients of corporate religious

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[108] As John Calvin argues, the administration of the sacraments *coupled with* the preaching of God's word signify the presence of the true Church. See Karl Barth, *The Theology of John Calvin*, trans. Geoffrey W. Bromiley (Cambridge: William B. Eerdmans, 1995), 183.

[109] De Lubac, *Catholicism*, 32.

[110] I take it that all Christian churches are sacramental to some extent, even if only in the sense of affirming the presence of Christ in others as modeled by the incarnation or if only in the sense of preaching the Gospel (see discussion of Calvinist, Neo-Calvinist and Thomistic ideas of the Church's proper activities in Sub-section 3.2.1 above).

liberty rights[111] – in this case, rights that are indirectly ascribed to a strong group agent, the Church herself.

As for the first point, we can look to Cardinal Avery Dulles who judges the sacramental view of the Church to be the most comprehensive and true to the Church's *Christian* identity. The following excerpt from his *Models of the Church* is illuminating:

> [T]he sacramental type of ecclesiology in my opinion has special merit. It preserves the value of the *institutional* elements because the official structures of the Church give it clear and visible outlines, so that it can be a vivid sign. It preserves the *community* value, for if the Church were not a communion of love it could not be an authentic sign of Christ. It preserves the dimension of *proclamation*, because only by reliance on Christ and by bearing witness to him, whether the message is welcomed or rejected, can the Church effectively point to Christ as the bearer of God's redemptive grace. This model, finally, preserves the dimension of worldly *service*, because without this the Church would not be a sign of Christ the servant.[112]

As Dulles notes, the sacramental vision of the Church faithfully ties together the Church's diverse characteristics: her institutional design, communal nature, evangelical witness, and selflessness. But, even more usefully for us, the sacramental model discretely brings forth the Church's corporate ontology, her *invisible* agency, which works through the sacraments, institutions, community, proclamation and service of *visible* churches.

So, when we read in de Lubac that baptism bestows a "'concorporation' of the whole Church in one mysterious unity"[113] and that the Eucharist ("the sacrament in the highest sense of the word"[114]) truly binds us to "the body born of a virgin" (the *corpus*

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[111] Relevant similarities can include the teaching of religious beliefs, rituals, patterns of worship, and the like.

[112] Avery Dulles S.J., *Models of the Church* (New York: Doubleday, 2002), 189 (italics mine).

[113] By this term, de Lubac means an incorporation of more than one member into the Church. See De Lubac, *Catholicism*, 33.

[114] De Lubac, 35.

*verum*), we understand that the sacraments of the Church purposefully direct believers toward a *sui generis,* mystical unity: "the Body of Christ which is the Church."[115] Thus, given the comprehensive substance of the sacramental model, it is fitting for a *Christian* theory of corporate religious liberty to utilize it in fashioning a central case (specifically, an *organizational* central case) for purposes of legal prescription.

Objections now aside, I maintain that the supernatural person, the Church, can be legally protected when rights are extended to organizational entities that engage in sacramental action (as a central case) and to entities with similar purposes (as identified through analogy).

The question now remains as to how the standard argument fits within a procedure of legal prescription that is facilitated by modest group realism. This question is no longer so mysterious. For, in admitting that the invisible Church is protected *via* rights granted to visible churches, we put ourselves squarely within the freedom-of-the-church framework established in Chapter 3.

Specifically, we are able to say that the standard argument – especially in its final conclusion ("Therefore, legal rights protect some groups' moral rights"[116]) – fits within the first legal condition prescribed by our proposed theory of church freedoms (see Figure 13 below). In saying this, we (1)(i) assume a procedurally related belief whereby church members expect the invisible Church to act upon them, or incorporate them, in whatever religious or specifically sacramental group-agential action they intend to perform; and so

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[115] De Lubac, 38–39.

[116] Schragger and Schwartzman, "Some Realism," n. 32.

we (1)(ii) prescribe governmental recognition of this religious truth[117] in order to create legal conditions wherein belief of that truth may be corporately exercised. In other words: We place the standard argument within the legal reasoning of the government, as the government recognizes the idea of religious truth (here, the idea of a supernatural person) and responds to facilitate the communal acting-out of that truth through diverse church protections (for legal examples, see Section 1.2).

**Figure 13. Integrating the standard argument**

| | | (i) *Assumptions* | (ii) *Proposed influences* |
|---|---|---|---|
| Religious group-agential action | → ← | 1. Collectively aim towards religious truth (e.g., incorporation by supernatural person into the mystical body) | 1. Governmental recognition of religious truth (here: granting rights to Church as supernatural person, the *Standard Argument*) |
| | | 2. Consent to church's authority in religious matters | 2. Governmental deference to church authority |
| | | 3. Expect internal adjudication of church's religious actions | 3. Governmental interference when morally justified |

By embedding the standard argument within our proposed theory of corporate religious liberty, we maintain belief in the supernatural personality of the Church and continue to describe her explicitly as such for legal-prescriptive purposes. This resists a Lockean reduction of the Church into a mere voluntary association, both on the part of religious claimants (e.g., church authorities speaking to public officials: see Sub-section 1.3.1) and on the part of government authorities. Consequently, it adds a third legal subject for consideration in freedom-of-the-church cases – namely, the *group-as-moral-person*, which

[117] By "governmental recognition of religious truth," I mean establishment or a "space-creating" non-establishment (see Sub-section 3.2.1).

is a category that belongs to the only genuine strong group agent: the supernatural person, the Church (see Figure 14 below).

**Figure 14. Agents involved in freedom-of-the-church cases**

| | 1 | 2 | 3 | 4 |
|---|---|---|---|---|
| ST I-II, 21, 4 | Group | Ruler | All members | Individual |
| Visible churches | (A) Group-as-social-action | Recognized authorities | All associating believers | Individual believer within the group |
| | (B) Group-over-time | | | |
| | (C) Group-as-moral-person | | | |

So, the concept of the invisible Church can feature within public discourse and legal reasoning. But it must be stressed that the group-as-moral-person and the standard argument do not stand on their own. While legal prescription features them at the first pair of procedurally related beliefs and governmental responses, it also considers other procedurally related beliefs and further legal conditions that are involved in, or are required for, the exercise of a given group-agential action. Hence, a theory of freedom of the church also accounts for: (2)(i) members' consent to church authority in religious matters and (2)(ii) governmental deference to that authority, as well as (3)(i) members' expectation of internal adjudication in religious matters and (3)(ii) governmental interference when morally justified.

Such contextualization subjects the legal reasoning of the standard argument to a comprehensive procedure of legal prescription. In effect, this means that any rights of the group-as-moral-person (ascribed by means of the standard argument) may be contradicted and overwhelmed by moral conclusions arrived at through a full process of legal prescription (i.e., consideration of all three pairs of procedurally related beliefs and corresponding governmental responses). In the end, the rights of the group-as-social-action (the group-agential act itself) and the group-over-time (the "thing" to which legal

rights can be prescribed: see Sub-section 3.3.1.2) could coincide with the rights of the group-as-moral-person. However, diverse circumstances could justify numerous occasions when the former set of rights contradicts and overwhelms the latter, notwithstanding the normative import of the invisible Church herself.

### 4.3.3 *Corp. of Presiding Bishop v. Amos*

A recent example of similar legal reasoning can be found in *Corp. of Presiding Bishop v. Amos* (1987), wherein the U.S. Supreme Court held that religious non-profits can legally discriminate on religious grounds in the employment of seemingly non-religious (i.e., secular) roles.[118] While this case does not explicitly recognize modest group agents as legal subjects, it does feature a rare judicial reference[119] to the Church as an organic entity (i.e., a strong group agent) and illustrates how such a conception can be used for legal prescriptive purposes. To appreciate the *Amos* Court's integration of the standard argument, we focus upon Justice William Brennan's concurring opinion in the case.[120]

Brennan begins his opinion by noting the "confrontation between the rights of religious organizations and those of individuals" that characterizes the *Amos* dispute.[121]

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[118] Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Christine J. Amos, 107 S.Ct. 2862 (1987) (Brennan, J., concurring) (holding that it is not a violation of the Establishment Clause to grant religious exemptions to the secular, not-for-profit activities of religious organizations, specifically with regard to Title VII prohibitions against religion-based employment discrimination).

[119] Cf. *Hosanna-Tabor*, 132 S.Ct. at 706 (justifying the existence of the ministerial exception through normative appeal to consenting individuals: "The members of a religious group put their faith in the hands of their ministers").

[120] Justice Thurgood Marshall joins J. Brennan's concurring opinion.

[121] *Amos*, 107 S.Ct. at 2870. Differently put, this confrontation can be referred to as the "individual-group divide." See Sub-section 3.3.1.1 above.

And while recognizing the discriminatory risks that individuals may face when employed by religious organizations, Brennan ultimately affirms the autonomy of the latter to organize their internal affairs (specifically, employment practices) without governmental interference made on behalf of disgruntled individuals. To argue this point, Brennan emphasizes the role that organizational autonomy plays in protecting the rights of individual believers. Interestingly, Brennan does so with reference to a form of strong group realism. A passage near the beginning of his opinion reads as follows:

> For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, *an organic entity not reducible to a mere aggregation of individuals*. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.[122]

If understood in apposition to "tradition," Brennan's "organic entity" could be interpreted metaphorically. However, mention of the entity's irreducibility, coupled with the adjective "organic," evokes strong group realism and so discredits a metaphoric interpretation.[123] Discernible in Brennan's passage, then, are references to a religious community that transcends individuals' coordinated efforts and a corresponding belief that such a community (which we refer to as a strong group agent or moral person) holds normative importance for believers. But, importantly, we note that any relevant rights are not

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[122] *Amos*, 107 S.Ct. at 2871-2 (footnotes removed) (italics mine). Of theological interest: To support a non-reductive or non-aggregative vision of the Church, Brennan here references Karl Barth's essay, "The Christian Community and the Civil Community" in *Community, State and Church* (New York: Doubleday, 1960), 149.

[123] See discussion of strong group realism and the literalness requirement in Sub-section 4.1.2 above.

assigned to the organic entity *per se*. Instead, the relevant rights are granted both to the particular religious community that *represents* the organic entity ("furtherance of the autonomy of religious organizations") and to the individuals who exercise their religious belief within the particular community ("furthers individual religious freedom as well"). Brennan's argument thus entails (i) a group right applicable to the particular (or visible) community and (ii) individual rights that adhere to each associating believer.

As for the relative normative importance of each category of rights, Brennan avoids crudely reducing the normative justifications of the former into those of the latter. Unlike Justice Ginsburg's *Hobby Lobby* dissent,[124] Brennan is not so explicit in accounting for the autonomy of religious groups in terms of individual rights alone (as evinced in the passage above). Nevertheless, we see that Brennan's discussion of "[t]he authority [of religious communities] to engage in th[e] process of self-definition"[125] presupposes their *voluntary* character.[126] Therefore, it is reasonable to conclude that his normative defence of religious group autonomy weighs strongly upon individual rights to religious freedom and self-determination, as opposed to group rights (especially of the organic entity) that are normatively underived from the individual rights at stake.

At this point, we are able to appreciate the basic contours of Brennan's approach to religious group autonomy and its integration (and moral contextualization) of strong

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[124] Ginsburg writes: "Religious organizations exist to foster the interests of persons subscribing to the same religious faith." *Hobby Lobby*, 134 S.Ct. at 2795 (Ginsburg, J., dissenting).

[125] *Amos*, 107 S.Ct. at 2872.

[126] Brennan never refers to the religious community as voluntary, but the reference is undoubtedly implied. Brennan, for example, cites Douglas Laycock who argues that "[v]oluntary affiliation with the group is the premise on which [religious] group autonomy depends." See *Amos*, 107 S.Ct. at 2871; and Douglas Laycock, "Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy," *Columbia Law Review* 81, no. 7 (November 1981): 1405.

group realism. In sum, his approach turns normatively upon individuals and their belief that religious exercise requires association within (visible) religious communities. These communities represent and tie individuals to an "organic entity" of theological and normative importance. Legal autonomy granted to the visible communities allows the communities (or associating individuals) to define their internal practices in relation to that organic entity and this, in turn, furthers the religious freedom of the individuals who voluntarily choose to associate within them.

Understood in this way, Brennan's approach of religious group autonomy is not dissimilar to my own understanding of the freedom of the church and of its integration of strong group realism and the standard argument. Brennan's approach remains more closely aligned than my own to the individual-group divide – resting primarily and implicitly with the individual side, while admirably refraining from crude reductions of the group-rights position. However, by contrast, my approach seeks to move beyond that divide: My approach focuses explicitly upon group-agential actions and, by means of this, seeks to protect all the agent-types involved – from the individual believers to the diverse group-types involved, including the group-over-time *and* the group-as-moral-person.

It must be reiterated, of course, that both my and Brennan's approaches protect the group-as-moral-person, or the "organic entity," by positioning (the idea of) it within the beliefs of associating religious believers. As both of our approaches show, this idea requires legal protection for any corresponding religious exercise to take place. But my theory in particular then goes on to demonstrate that other procedurally related beliefs (pertaining to religious authority and internal adjudication) are involved and are morally at stake. The corresponding governmental responses to these other procedurally related beliefs help explain why the (idea of the) group-as-moral-person, although normatively important, may not receive such robust legal protections as some might expect. In short,

this is so because *visible* churches (through which the group-as-moral-person acts) may justly be subject to external adjudication (i.e., governmental interference).

On this last point, the *Amos* case may not be the most illustrative since the Court ultimately protected the religious communities in question.[127] However, one could imagine scenarios in which the protection of individuals employed by religious nonprofits for presumably secular roles would merit governmental interference. In such scenarios, protection of the (idea of the) group-as-moral-person may not be so robustly protected.[128]

In the end, we must admit that the standard argument is no silver bullet. Legal prescription requires moral deliberation upon relevant facts, beyond the normative import of the group-as-moral-person itself. Nevertheless, we should recognize that the ontological reality of the Church, as *corpus mysticum* or *persona supernaturalis*, gives incomparable normative meaning to believers; and, following Steven D. Smith, we can say that so long as individuals and communities believe in this onto-normative fact, then legal prescription *should* recognize it through an integration of the standard argument or something akin to standard-argument reasoning.[129] Doing so shows respect for individuals' acts of believing,

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[127] Specifically, the Court ruled that (i) secular actions or roles can be deemed religious when embedded within religious, not-for-profit contexts and that (ii) governmental attempts to distinguish between the secular and religious in these contexts "create[s] the danger of chilling religious activity" and effectively bars religious organizations from pursuing the (seemingly secular) actions that constitute their (religious) self-definition. *Amos*, 107 S.Ct. at 2873.

[128] The federal government tried to make an argument along these lines in *Hosanna-Tabor*, 132 S.Ct. 694 (2012), arguing in part that (i) Cheryl Perich, the teacher released from her job, held a predominantly secular role and that (ii) churches should not enjoy a ministerial exception due to the government's interest in eradicating occasions of employment discrimination.

[129] Smith, "The Jurisdictional Conception," 35. Referring specifically to a jurisdictional conception of church autonomy, Smith writes: "Suppose that millions of Americans—not all, probably not a majority, but millions nonetheless—believe that the church is an institution that receives its authority from God. *What* these people believe is theological, and hence by hypothesis inadmissible in political decision-making; *that* they believe it is a nontheological, empirical fact that may serve as a 'secular' consideration" (italics in original).

which is a normative touchpoint within Christian and secular approaches to religious liberty (see Section 1.1). And, importantly, it preserves a non-reductive image of the Church. As Brennan's concurring opinion in *Amos* indicates, this image can have bearing upon legal prescription in actual practice. Therefore, in the interest of maintaining a proper theological self-identification and of adding a distinctively Christian or theological voice to public discourse, churches and other religious organizations should not be hesitant to describe themselves in strong group-realist terms (cf. contemporary ecclesial engagement to the contrary: see Section 1.2). Moreover, so long as those terms are kept within our proposed theory of corporate religious liberty, churches and secular liberals need not fear group domination. Instead, they should expect reasoned moral deliberation over the *actions* involved.

## 4.4 Conclusion

This chapter set out to determine how a strong group-realist interpretation of the Church could be integrated into an account of corporate religious liberty that recognizes modest group agents as its primary legal subject. I structured this investigation into three sections. In Section 4.1, I considered the extent to which the Church could be understood as a strong group agent, particularly within a Roman Catholic ecclesiological framework. This work was aided by a stipulative definition of strong group realism, constituted by the animation requirement (which holds that an external force – Christ himself – accounts the Church's group agency) and the literalness requirement (which holds that group-agential language describing the Church is not merely metaphorical).

Then, in Section 4.2, I asked why the Church is not commonly described in strong group-realist terms today and how this situation affects our understanding of Church protections. My response to both questions was preceded by a historical narrative, wherein

I traced a gradual eschewal of the Church's strong group agency (as suggested in patristic and early medieval thought) via two historical transformations: first, a medieval secularization of the term *corpus mysticum* and, second, the secularization of Locke's "true church" into a today's voluntary association. Through this narrative, I concluded that contemporary secularism, voluntarism, and group-agency elimination challenge any effort to integrate strong group agency into legal prescription. Therefore, a careful means of integration is necessary.

I presented a possible means of integration in Section 4.3. There, I revisited the standard argument to demonstrate how the Church (understood through Clérissac and Maritain as a *persona supernaturalis*) could be integrated into my proposed theory and thereby protected by law. Prominent among my conclusions, I argued that the Church (understood as an *invisible*, supernatural person) could be legally protected when rights are extended to her unique sacramental activities, as engaged in by *visible* churches. Furthermore, I explained how the standard argument fits within the standing intentions of a church's members and so subjects the idea of the Church's strong group agency to governmental protection (or interference).

What we see through this proposal is the protection of a Christian social reality – that is, the Church as strong group agent – through means amenable to both (i) Christian conviction and (ii) action-based moral deliberation. It is attention to the latter that gives traction to a Christian strong group realism in secular, political liberal contexts (like that observed in *Amos*) since it allays the threat of group domination based solely upon group-ontological conclusions. And it is attention to the former, that is, to Christian conviction, that helps preserve the distinctly Christian *and* group-ontological in our moral reasoning over corporate religious liberty rights.

# 5 Conclusion

In this doctoral thesis, I offered a Christian ethical response to an observed divide in the corporate religious liberty debate between those who prioritize individual rights over group rights and those who are seen to endorse the opposite. My response took the form of an account of corporate religious liberty that answered a fundamental question underlying both the divide and the debate. This is the question concerning to whom or to what corporate religious liberty applies. In response to this question, my account holds that corporate religious liberty rights should apply to the group-agential actions of coordinating individuals and not to individuals or groups *per se*.

This position bridges the individual-group divide since both groups and individuals are involved in group-agential acts. But it also maintains the distinctive Christian character of religious institutions and, perhaps most significantly, it encourages the assessment of corporate religious liberty disputes to operate in consideration of a more complete range of moral values as opposed to an organizationally narrow, voluntarist paradigm typical of secular political liberal frameworks. This wide moral vision supports and develops proposals from Christian churches that advocate for two forms of corporate religious liberty: (i) freedom of the church and (ii) a form applicable to non-church entities – namely, organizational exemptions.

The thesis was divided into four substantive chapters. The introduction provided an overview of the contemporary American debate and summarized political liberal and Christian ethical stakes in the question concerning to whom or what corporate religious liberty applies. Three dimensions to this dispute were addressed: the individual-group divide, the distinction between group-types, and the use of group ontology for purposes of

legal prescription. The chapter demonstrated that the normative, political liberal debate is markedly polarized because it is unclear about the legal subjects concerned.

Chapter 1 claimed that the Christian ethical tradition offers a way forward. But it noted that the tradition is most convincing with regard to normative foundations and not so much as concerns the issue of appropriate legal subjects. Catholic and Protestant statements on religious freedom were examined and were seen to track certain political liberal failures – such as overlooking ethically salient empirical differences between churches and non-church entities, clumsily straddling the individual-group divide, and reducing the Church herself into a mere voluntary association. The chapter concluded that a Christian ethical contribution to the debate must draw upon its own group-ontological resources in order (i) to respond adequately to the question concerning to whom or to what corporate religious liberty applies and, by extension, (ii) to navigate confidently the contemporary rights debate.

Chapter 2 then began to lay the foundations for a Christian ethical *and* group-ontological theory of corporate religious liberty. But recognizing political liberal objections to the use of group ontology for legal-prescriptive purposes, the chapter focused upon meeting the relevant contentions. Three positions in particular were addressed throughout the chapter: first, Justice Ruth Bader Ginsburg's attempt to eliminate the possibility of group agency for profit-making corporations; second, James D. Nelson's social theory of conscience, which reduces group agency to an unduly narrow range of group-types; and, third, Richard Schragger and Micah Schwartzman's argument that group ontology is both indeterminate and morally distracting for legal prescription. Through critical engagement with the latter theorists especially, the chapter ended with a basic framework for legal prescription that combines group ontology and (Christian) ethical thought in a methodologically appropriate way. This preferred method of legal prescription was taken

into the next chapter, where it served to ground a Christian and group-ontological theory of corporate religious liberty.

Chapter 3 then constructed the bulk of the promised theory. At its core, the account constructed holds that corporate religious liberty rights are best understood to apply to group-agential actions, pursued for ends that are either distinctively religious or religiously motivated yet secular in nature. This account was arrived at through a retrieval of Aquinas's group-ontological thought and a subsequent integration of it into the method of legal prescription endorsed in the previous chapter. In particular, the chapter showed that Aquinas primarily understands groups not as things or persons, but as instances of coordinated activity. The chapter then demonstrated how the "anatomy" of Aquinas's modest group agent – as interpreted by John Finnis and Richard Ekins especially – can be used to prescribe legal conditions necessary to support (and limit) corporate religious exercise within church and non-church organizational contexts. The chapter concluded by highlighting conceptual and practical benefits of the account's modest group-agential focus, including: movement beyond the individual-group divide, preservation of churches' distinctive normative value, and justification for degrees of governmental interference when disputes arise.

With the promised account outlined, Chapter 4 addressed a remaining question: assuming that the Church can be understood as a strong group agent (i.e., a group whose agency is *not* entirely attributable to members' coordinated intentions), how can we account for it with a theory built exclusively on the foundations of modest group realism? The chapter answered this question in three sections. The first section considered the extent to which certain strains of Roman Catholic ecclesiology meet a stipulative definition of strong group realism. The second section then engaged with medieval interpretations of the term *corpus mysticum* and the contemporary secularization John Locke's "true church" to explain (i) why the Church is not commonly described in strong group-realist terms today and (ii)

how this situation affects proposals to recognize and legally protect her as such. Finally, in light of contemporary secularism and group-agency elimination, the third section demonstrated how the Church – understood in Catholic terms as a *persona supernaturalis* – could be integrated into my proposed theory and thus protected by law. In short: This integration relies upon conceiving of the Church's strong group agency (i.e., its status as a moral person) as a religious belief around which individuals coordinate. The resulting group-agential action then becomes an appropriate subject for legal prescription.

Having reached the end of this thesis's constructive work, we now have in hand a Christian ethical and group-ontological account of corporate religious liberty. Built in conversation with the churches' moral reflections and in response to the question concerning to whom or to what corporate religious liberty applies, the theory accounts for individual and group rights via protections granted to group-agential actions.

As a final point, we would do well to recognize that the theory's strong group realism has normative implications extending well beyond the identification of appropriate legal subjects. Arguably its most important contribution to the religious liberty debate rests with a Eucharistic ethic that accompanies the concept of *corpus mysticum* and that guides individuals and communities to care for each other in support of a flourishing regime of corporate religious liberty. An explanation of how this ethic coordinates Christian moral principles and thereby supports a regime of corporate religious liberty will be considered in a future work.

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