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Disaggregating *Corpus Christi*: Illiberal Implications of *Hobby Lobby*'s Right to Free Exercise

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Many practice their religion within the context of structured, hierarchical organizations, yet legal discourse on religious freedom too often fails to open the black box of the church with an eye towards justice. Legal scholars talk of freedom for the church, but not of freedom within the church. They do so notwithstanding the notorious and horrifying scandals of contemporary religious history. The crimes of statutory rape, pedophilia, and child abuse committed by religious leaders shock to the very core. But jurisprudence is nevertheless loathe to subject internal church decision-making to public scrutiny. This should come as no surprise. The U.S. has a long history of support for religious liberty; the U.S. Supreme Court has a

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1 See Ronald Dworkin, Religion Without God 107 (2013).

2 For a representative example, see Marci A. Hamilton, God vs. The Gavel: Religion and the Rule of Law (1995).

3 Id.

4 Id.

5 Id.

"special solicitude to the rights of religious organizations." Thus, government meddling with that liberty is, to say the least, taken by many to be inherently suspect.

Freedom within the business corporation, in stark contrast, is a popular and well-established subject of discourse with the legal academy. Scholars seem perfectly willing to analyze the justices and injustices involved in internal business organizations. For "it is now widely accepted that the precious freedoms upon which government could not intrude are of little or no utility to those, who by the necessity to eat and find shelter, are forced to spend their lives in ceaseless, bone-grinding, dangerous, and life-shortening toil." Accordingly, many accept that a business does not have free reign to deal with its employees, shareholders, and customers as it may. Rules of fair bargaining, minimum wage laws, and the like constrain the liberty of corporate bosses in the interest of the liberty of workers. Similarly, thousands of pages—both of judicial opinion and scholarly excursion—inspect and critique the treatment of stockholders by company directors and executives.

Yet curiously, except upon manifestations of the gross abuses, rarely does scholarship inquire as to the status of the individual rights of church members against abuses perpetrated by religious

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8 HAMILTON, supra note 2, at ch. 1.
9 See, e.g., Susanna K. Ripken, Corporations Are People Too: A Multidimensional Approach to the Corporate Personhood Puzzle, 15 FORDHAM J. CORP. & FIN. L. 97, 141 (2009) ("Deep concern about the state's potential ability to threaten individual liberties results in an insistence on establishing laws to protect individual rights. There is little concern that corporate persons might grow to be so powerful that they too could have the capacity to violate individual rights.").
"bosses." Rather, it focuses on the rights of the group as a whole when they meet with obstacles presented by outsiders, whether those outsiders be private persons, other groups, or the state itself.\textsuperscript{12} The recent \textit{Hobby Lobby}\textsuperscript{13} litigation, however, presents a unique opportunity to examine how the rights of individual members fare in the context of group religious exercise. If only because the background noise of balance sheets, quarterly earnings, and financialized fiduciary duties leaves room for the kind of dispassionate analysis unavailable in other circumstances.

This Article will, therefore, begin to assess the insides of group religious practice by taking a peek behind the veil of the business corporation. In Part II, I argue that how the law defines a corporation will shape the kinds of religious rights and freedoms that such groups can assert on their own behalf. The application of each ontological understanding of the corporation bears fruitful insights about the kinds of legitimate claims to religious freedom the corporation may claim, regardless of whether it is registered, unregistered, closely held, for-profit, non-profit, or otherwise. These legal conceptions of corporate personhood are undoubtedly helpful when it comes to defining group rights as against outsiders. They, however, provide less helpful guidance when it comes to resolving conflicts between the rights of the group and those of their own members. Indeed, each conceptualization tends to gloss over, ignore, or deny the existence of hierarchical, non-consensual relationships that may do damage to individual rights that happen to fall within the corporation's sphere of influence. Whether one understands the corporation as a nexus of individual contracts, a state concession, or a real entity, internal imbalances of power threaten the freedoms valued by liberal democratic polities.

Though legal theory may not provide the satisfying answers we seek, another intellectual tradition may be of some use. Namely, the study of power and its justification is the particular provenance of political theory. I therefore enlist political theory in Part III to argue that legal scholars should not look to a discourse on legal personhood to resolve the conflicts and dilemmas within the black box

\textsuperscript{12} \textit{See generally} Hamilton, \textit{supra} note 2.

\textsuperscript{13} Burwell \textit{v.} Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).
that is religion, incorporated. They should look, rather, to the conceptions of toleration and voluntariness that lie at the very core of liberal religious freedom. Thus, inasmuch as the Supreme Court relied on the personhood discourse in its Hobby Lobby decision,\textsuperscript{14} it veered a bit off the track.

Had it applied instead the ideas of voluntariness and toleration, it might have inhibited the potential for the harmful exercise of corporate religious rights. And it might have done so while also satisfactorily respecting individual liberties and legitimate group claims to religious freedom. Just such an application is provided in Part IV.

II. THEORIES OF CORPORATION AND GROUP RIGHTS TO RELIGIOUS EXERCISE

Legal discourse invokes three ontological understandings of the corporation.\textsuperscript{15} The choice between them is not inconsequential. As shown below, a determination of whether the corporate phenomenon arises thanks to a concession from the state, from an aggregation of individuals, or as a real social entity with autonomous agency will commit us to certain conceptions of group rights. Each conception implies a different understanding of the scope and content of the rights that the group may claim. Regardless of which group right to free exercise is implied, however, each presents risks to individual members' own freedoms.

\textsuperscript{14} See id. at 2768, 2779. The Court first invokes an aggregation theory of group rights when it argues that the rights of the corporation are simply the collective rights of its individual shareholders, officers, and employees. Id. at 2768. Later, the Court implies a real entity theory of group rights when it refers to the "honest conviction" of non-human corporate entities (appealing to a real-entity conception). Id. at 2779.

A. Aggregation Theories of the Corporation

Aggregation theories of corporation, exemplified perhaps most famously by Michael Jensen and William Meckling’s theory of the firm,\(^{16}\) posit that the corporation as such has no independent, autonomous existence.\(^ {17}\) Rather, it is an aggregation of individuals acting interdependently through reciprocal agreements.\(^ {18}\) The individual members of the corporation may collaborate to pursue some joint goal; they may also indirectly pursue a joint goal as a means to achieve their more immediate individual interests.\(^ {19}\) For example, an employee may indirectly pursue a joint goal of corporate profits while working to achieve her immediate goal of earning a living. Realizing that her wages depend upon corporate revenues, she voluntarily and jointly with other corporate stakeholders works to ensure the business stays afloat. Often, such conceptions of corporation refer to the corporate phenomenon as a “nexus of contracts,” wherein an individual member bargains in her own interest, whether that interest is unique or shared by the rest of the membership, against each other member of the group, who each possess her own personal and joint interests.\(^ {20}\) Resulting from the several bargains is a cohesive organization of individuals who have agreed to perform specific functions or to donate certain assets in exchange for the benefits of the functions and assets donated by others.

However, horizontal coordination proves unwieldy and inefficient, especially as members have only imperfect information regarding future circumstances. As a result, aggregation theories assert that members will commonly agree to a hierarchical decision-making structure to set the precise terms of everyone’s bargains on a


\(^{17}\) *Id.* at 310–11. This is also an implication of the authors’ methodological individualism, an ontology shared by most mainstream economists.

\(^{18}\) *Id.* at 310.

\(^{19}\) *Id.* at 312 (discussing “agency costs”).

day-to-day basis. In other words, because their initial contracts with one another are "incomplete," members rationally consent to autocratic governance.

1. The Group Rights Implied by Aggregation Theory

Aggregation theories of corporation correspond well with notions of group rights understood as rights, or interests, held jointly and severally by group members who share an interest in achieving some end. "Under this view of the corporate person, the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being." Stated differently, corporate rights "supervene" upon the rights of their individual members. Moreover, such rights need not be reducible without remainder to an aggregation of individual rights. Margalit and Raz, for example, derive a group right to self-

\[ \text{22 R. H. Coase, The Nature of the Firm, ECONOMICA 386, 398-400 (1937). Under nexus-of-contracts theories, corporate law is understood (perhaps somewhat naively) as providing "default rules" to which freely bargaining parties to the corporate group might agree. It is meant, in other words, to provide a public good by reducing the transaction costs of shareholders, directors, executives, and incorporators. See Easterbrook, supra n. 21 at 15. In fact, much of the Delaware corporate code is subject to waiver or modification, depending upon the parties' unique preferences. See, e.g., 8 Del. C. Ann. § 102(b)(7) (fiduciary duty of care is waivable). It should be observed, however, that none of these "default rules" contain any provisions for employees. They, apparently, must pay their own transaction costs from their own (smaller) wallets. See Frederick Mark Gedicks & Andrew Koppelman, Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause, 67 VAND. L. REV. EN BANC 51, 65 (2014).} \]
\[ \text{23 They need not, of course, share all their interests. See, e.g., Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups 132-34 (1971).} \]
\[ \text{24 Ripken, supra note 9 at 110 (citation omitted); see also Peter Jones, Human Rights, Group Rights, and Peoples' Rights, 21 HUM. RTS. Q. 80, 105-07 (1999).} \]
\[ \text{25 Christian List & Philip Pettit, Group Agency: The Possibility, Design and Status of Corporate Agents 59 (2011).} \]
determination from a notion of individual well-being that includes individual dignity, self-respect, and opportunity. Under this theory, for example, while a group as a whole may benefit from a growing economy, not every group member need benefit individually from that growth before the group can claim a right to it. Nor need the members successfully claim an individual right to, and impose duties on others to provide, economic growth. It is enough that a group right to growth is in each individual member's interests in some fashion, however indirect. A group right to growth may, for example, provide individuals with better employment opportunities in the future. Consequently, "the relative independence of group interest is compatible with the view that... the moral importance of the group's interest depends on its value to individuals." In other words, a group need not fit perfectly into an ontological conception of individualism, or perfectly "supervene," before liberal morality can be applied.

Applying this logic, a group right to the free exercise of religion, under the aggregation theory, can arise from the interests of the individual members. If each member independently enjoys an interest in, or right to, the free exercise of her religion within and among the company of fellow corporate members, the corporation as a whole may assert a claim to the free exercise of religion. This is true even if no single person within the group can sensibly claim a right to an autonomous religious community on her own, without the participation of the other members. Or, in the parlance of contract, individual members express their shared interests by "consenting" to the exercise of religion together. And that consent may

27 Id. at 449.
28 Id. at 449-50.
29 Id.
30 Id. at 450.
31 LIST & PETTIT, supra note 25, at 59. Margalit and Raz's group right fits nicely with List and Pettit's "holistic supervenience."
include an agreement to abide by the corporation's decisional hier-
archy.

This is the conception of group rights and corporate person-
hood explicitly invoked by Justice Alito in *Hobby Lobby* when he ad-
dresses the First Amendment free exercise claims of the petition-
ers. According to Justice Alito, "[w]hen rights, whether con-
stitutional or statutory, are extended to corporations, the pur-
pose is to protect the rights of these people" including shareholders,
officers, and employees associated with a corporation. The claim
arises not from the corporation itself. It is, instead, derived from its
individual members—a derivative claim *par excellence*. Justice Alito
maintains that, separate from the owners or employees, a corpo-
rations cannot do anything at all, let alone pray, worship, or observe
sacraments. Hence, the corporation under the ontology applied by
Justice Alito has no independent claims to free exercise rights.

2. The Illiberal Implications of Aggregation Theory

Although aggregation theories implicitly incorporate, and
therefore recognize, individual rights, they prove problematic for
several reasons. First, a moral discourse atomizing the corporation
into individual interests and private rights risks neglecting the ex-
plotative impact of the unequal distribution of corporate and indi-
vidual resources on the exercise of those rights. Second, it is not at
all clear that one could reasonably infer consent to the corporate
leadership's direction regarding religious matters from an open-
ended employment contract. Finally, even if such consent proves ex-

dic individual

34 *Id.*
35 *Id.*
36 See *id.*
37 *Id.* at 2755.
38 Chandran Kukathas, *Are There Any Cultural Rights?*, 20 POL. THEORY 105, 113–
claims to religious freedoms might be aggregated into a cohesive and rational group claim.\textsuperscript{39} 

Aggregation theory as applied in modern legal discourse, viewing the corporation as a nexus-of-contracts between equal individuals, suggests that the parties lying in the path of corporate action, whether “insider” or “outsider,” can and do adequately protect their interests and rights via contract.\textsuperscript{40} As a result, that discourse presumes, usually \textit{post facto}, that individuals have willingly granted broad discretion to some corporate hierarchy to legislate over a variety of matters.\textsuperscript{41} This hierarchy might then claim a corporate right to religious freedom because it can point to its members’ broad consent to any decisions it takes. However, facts on the ground suggest that bargaining power between corporate members often remains anything but equal.\textsuperscript{42} If bargaining power is indeed unequal, the consent to religious governance implied by open-ended employment contracts and stockholder certificates may reflect not so much shared interests in religious exercise but instead the presence of ex-

\textsuperscript{39} See, e.g., LIST & PETTIT, supra note 25, at 42 (explaining the difficulties of aggregating preferences into a cohesive and rational corporate intent).

\textsuperscript{40} See, e.g., Viet D. Dinh, \textit{Codetermination and Corporate Governance in a Multinational Business Enterprise}, 24 J. CORP. L. 975 (1999); Tsuk, supra note 20, at 183; see generally Jill E. Fisch, \textit{Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy}, 31 J. CORP. L. 637, 659 (2006) ("This assumption proves problematic to the extent that stakeholder contracts are deficient. . . . [Their] contracts are neither complete nor perfectly priced. . . . [C]ontracts . . . are often illiquid and lacking both hedging options and market valuations."); Stephen M. Bainbridge, \textit{The Case for Limited Shareholder Voting Rights}, 53 U.C.L.A. L. REV. 601, 614–15 (2006) (stating that workers are protected by the labor market, collective bargaining, severance pay, etc.).


\textsuperscript{42} See, e.g., Dinh, supra note 40, at 984 ("Our national labor policy is focused on providing parity in bargaining power by facilitating collective bargaining by unions in order to offset the collective action problem inherent in coordinating employee interests. The structural relationship between shareholders and managers on the one hand, and labor on the other, contemplate arms length dealing, if not outright conflict, as opposed to the comparatively cooperative relationship among the three groups under the German approach.") (internal quote omitted).
Ploitation or coercion. A worker's ongoing employment in the face of corporate religious exercise, moreover, does not imply consent to a hierarchy's instructions regarding religious practices. Simply, employees' need for work, especially when considered concurrently with a corporation's superior resources and a slack labor market, may lead them to accept only grudgingly employment conditions that they would rather avoid. Because "the whole contractarian ethos derives its appeal from the claim that each individual's consent is a condition of legitimacy," a claim to exercise religion on behalf of the corporation, in the context of unequal bargaining power, becomes problematic. Without contractarian legitimacy, the justification for a group right weakens or may disappear.

There is good reason to believe that corporations cannot always, at least when it comes to religion, claim contractarian legitimacy. Inequalities in bargaining power, perhaps arising from asymmetries in information and collective action costs, underlie the equitable principles that protect minority shareholders under corpo-

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43 See Gedicks & Kopelman, supra note 22, at 65 ("Of course, one can easily imagine why employees lacking contractual or collective-bargaining protection are reluctant to intervene against challenges to the Mandate by their own employer."); IAN SHAPIRO, DEMOCRATIC JUSTICE 150–51 (1999) (explaining how the dual-market dynamic of unemployment and regressive redistribution challenge the justice of firm governance structures); Henry L. Chambers, Jr., The Problems Inherent in Litigating Employer Free Exercise Rights, 86 U. COLO. L. REV. 1141, 1166–67 (2015) ("The expansion of an employer's free exercise rights may eventually leave the employee with the potentially unpalatable option of working at a workplace governed by potentially limiting work rules allowed under the employer's newly recognized free exercise rights, or quitting.").

44 Chambers, supra note 43, at 166–67 (discussing how the lack of realistic exit options opens the employee to arbitrary and dominating commands from employers).

45 Id.

46 Margalit & Raz, supra note 26, at 456.

47 See, e.g., David Ciepley, Beyond Public and Private: Toward a Political Theory of the Corporation, 107 AM. POL. SCI. REV. 139, 149–50 (2013) (describing hierarchical decision-making power due to, inter alia, management's control over corporate resources).
rate law. Stockholders may be in no position to observe or to influence director and executive behavior as it impacts their religious beliefs. Even if they could, however, Delaware law might well deny stockholders the ability to do anything about it. One might also suggest that the federal regulations protecting workers likewise implicitly recognize inequalities in bargaining power that characterize employee-employer relations. Furthermore, critics of nexus-of-contracts theories malign them for failing to address the implications of excluding non-shareholder "stakeholders" from legal corporate governance structures. These stakeholders—employees, community members, major creditors and customers—are, just as much as any stockholder, susceptible to discrimination, exploitation, and loss as a result of inequitable director and executive conduct. Yet, unlike stockholders, they cannot vote. Without the vote, they cannot hold

48 See, e.g., Theodor Baums & Kenneth E. Scott, Taking Shareholder Protection Seriously? Corporate Governance in the U.S. and Germany, 53 AM. J. COMP. L. 31, 35 (2005) ("[E]quity investors may be taken advantage of in a number of ways. Those in control of the firm—who may be its managers or its largest shareholders—may find ways to appropriate corporate assets and income for themselves . . . . Or those in control may waste corporate resources . . . through poor managerial investment and operating decisions."); Richard Mitchell, Anthony O'Donnell & Ian Ramsay, Shareholder Value and Employee Interests: Intersections between Corporate Governance, Corporate Law and Labor Law, 23 WIS. INT'L L.J. 417, 432–33 (2005).
50 Id. The statute limits judicial case law in relation to a stockholder's right to inspect corporate books and records to business matters, not political or, potentially, religious matters.
52 See, e.g., Fisch, supra note 40, at 659 (2006); Douglas M. Branson, The Very Uncertain Prospect of "Global" Convergence in Corporate Governance, 34 CORNELL INT'L L.J. 321, 326 (2001) ("[T]raditional forms of corporate governance, which respond to the Berle-Means separation of ownership from control and the ensuing agency cost problem, simply are not responsive to the problems the growth of large multinationals portend. Worker exploitation, degradation of the environment, economic imperialism, regulatory arbitrage, and plantation production efforts by the growing stable of gargantuan multinationals, whose power exceeds that of most nation states, is far higher on the global agenda than is convergence in governance.").
corporate leaders accountable for misbehavior. They therefore lack the bargaining leverage this franchise right lends to shareholders. Instead, the law presumes that contractual rights and exogenous federal regulation adequately protect the stakeholder. This occasionally insensitive presumption is not levied upon shareholders. Indeed, the corporate governance literature often applauds the fact that these stakeholders possess no colorable claims to residual corporate profit, no equitable claims for breaches of fiduciary duty, nor any independent right to derivative standing. This is because their exclusion from corporate governance structures helps maximize corporate profitability. Whether the legal status quo ensures adequate consent to corporate decision-making—including decisions about religious exercise—is, therefore, a matter of ongoing legal controversy.

53 Tsuk, supra note 11, at 1861–64 (discussing how corporate law excludes worker interests); Jackson, supra note 15, at 350–52 (2011) (discussing how exogenous law protects non-shareholder interests); Strine, supra note 10, at 17.
54 Henry Hansmann & Reinier Kraakman, The End of History for Corporate Law, 89 GEO. L.J. 439, 442 (2001) ("Of course, asserting the primacy of shareholder interests in corporate law does not imply that the interests of corporate stakeholders must or should go unprotected. It merely indicates that the most efficacious legal mechanisms for protecting the interests of nonshareholder constituencies—or at least all constituencies other than creditors—lie outside of corporate law. For workers, this includes the law of labor contracting, pension law, health and safety law, and antidiscrimination law. For consumers, it includes product safety regulation, warranty law, tort law governing product liability, antitrust law, and mandatory disclosure of product contents and characteristics. For the public at large, it includes environmental law and the law of nuisance and mass torts."); Bainbridge, supra note 40, at 614–15 (asserting that workers are protected by the labor market, collective bargaining, severance pay, etc.).
55 See, e.g., Dinh, supra note 40, at 988 ("Within the contractarian framework, residual claimants are simply those parties to the corporate contract who have agreed to receive profits of the enterprise or to bear its losses . . . . [T]hose who contract for the residual risk are contributors of equity capital; but they need not be."); Fisch, supra note 40, at 657; Richard Mitchell et al., Shareholder Value and Employee Interests: Intersections Between Corporate Governance, Corporate Law and Labor Law, 23 Wis. INT'L L.J. 417, 427–28 (2005).
Even presuming the adequacy of contractual and federal protections, the consent actually given by workers to a corporate hierarchy may in reality prove less broad than that corporate hierarchy might assume.\textsuperscript{57} Without broad consent, many claims to group rights may simply prove nonsensical.\textsuperscript{58} For example, if workers consent to abide by the instructions of their superiors in regards to day-to-day production-oriented tasks in a non-coercive handshake-deal, it is not obvious that they also consent to abide by their superior’s wishes as to their conduct unrelated to those tasks.\textsuperscript{59} If they did not give any such consent—not an impossibility in the context of a large, for-profit business with 13,000 employees, as is the case with Hobby Lobby\textsuperscript{60}—then the corporation could not assert a collective “group right” to practice religion. This is simply because the individuals making up the group never intended to assert such a right, nor to delegate to the corporation the right to assert it on their behalf.\textsuperscript{61} Nor may the corporation credibly claim employee consent by arguing that religious exercise \textit{indirectly} fulfills workers’ express interests in earning wages. Religion has only, at best, a tenuous connection to the earning of the corporate revenues necessary to make payroll.\textsuperscript{62} If such can be called consent, it is consent devoid of normative meaning in a group rights discourse meant to give expression to individual religious rights in a joint context.


\textsuperscript{58} \textit{Id.} at 348.


\textsuperscript{60} Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2763 (2014); Chambers, \textit{supra} note 59, at 1157–58.

\textsuperscript{61} See Chambers, \textit{supra} note 59, at 1159 (2015).

\textsuperscript{62} See \textit{Hobby Lobby}, 134 S. Ct. at 2795 (Ginsberg, J., dissenting) (“Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community. Indeed, by law, no religion-based criterion can restrict the work force of for-profit corporations.”).
To explain, equating consent to an open-ended employment contract with an interest in free exercise, and then aggregating that interest with others’ similarly derived interests, to justify a group right to free exercise does great insult to the importance of religious freedom. If an employee agreed to support the assertion of a group religious right merely in exchange for a wage, her interest is in the wage, not the right of religious exercise. Ascertaining the group right claimed should, therefore, involve tallying interests in wages (e.g., in economic freedom), not tallying interests in free exercise. Moreover, whatever normative force that justifies a peculiar group right to religious freedom remains absent if the claims to such freedom are merely instrumental, namely, a kind of consent given as a means to earn a living and to pay the rent—and not as an expression of deeply held and genuine religious belief. As suggested by none other than John Locke, described below, not much would be left of the meaning of religious freedom if religious practice decayed into something over which one could bargain for money and wages. Religion should be more than that.

In any event, the Supreme Court, in *Sherbert v. Verner*, implied that a Hobson’s choice between practicing one’s religion and maintaining active employment was no choice at all. The Court ruled that the government could not deny unemployment benefits

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63 See Chambers *supra* note 59, at 1171 ("The transmission of church members’ free exercise rights through their church may be strong, whereas the transmission of owners’ free exercise rights though their corporation may be weak.").

64 See infra Part III.B.

65 See LOCKE, LETTER CONCERNING TOLERATION 5, http://www.thefederalistpapers.org/wp-content/uploads/2012/12/John-Locke-A-Letter-Concerning-Toleration.pdf ("[B]ecause no man can so far abandon the care of his own salvation as blindly to leave to the choice of any other, whether prince or subject, to prescribe to him what faith or worship he shall embrace. For no man can, if he would, conform his faith to the dictates of another.").


67 Id. at 404 ("[T]he pressure upon [the employee] to forego [her religious] practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.").
simply because an employee quit her job for religious reasons. It was unfair, the Court held, to force someone to choose between her religion and her livelihood. Why the same logic should not be applied to a Hobson's choice between unemployment or "coerced" religion is certainly not obvious.

Perhaps, therefore, it is telling that the majority opinion of the Court in Hobby Lobby makes no reference to employees' actual religious preferences. If it had, one can only wonder whether its reasoning, based upon an aggregative ontology, might have fallen apart.

Regardless, even if knowledge of individual religious beliefs were before the Court, the holding might still be questioned. Aggregation theories do not imply a precise procedure according to which the joint and several interests of the individuals involved in the corporation are to be ascertained and aggregated. Without the guidance of a legitimate group-will-formation procedure, theories of aggregated group rights risk favoring the individual rights of certain individuals at the expense of the rights of others. For example, simply taking a vote on individual religious preferences is insufficient. A tyranny of the majority might arise, wherein a plurality of corporate constituents might shape how the group religious right is

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68 Id.
69 Id.
70 See generally Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. at 2751.
72 See, e.g., List & Pettit, supra note 31, at 50–58 (forming a collective will violate, inter alia, the "anonymity" condition of group will formation, viz., the condition that all members have equal voice in the determination).
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exercised at the expense of a dissenting minority. Moreover, minority "pre-consent" to the outcome of such a vote, even if that outcome be other than what the minority might have wished, flies against the purpose of individual rights. Religious rights are, after all, generally understood to exist as a "trump" to democratic practice. On the other hand, a "tyranny of the minority" arises if corporate members' practice of free exercise rights is dependent on group unanimity, i.e., on the lowest common denominator of interests. If a group may only claim the rights to which its members can all agree, many individual rights may not be vindicated. Essentially, a single non-believer could veto the corporate religious exercise desired by everyone else. As a result, many theorists of liberal democracy believe "no procedure can fairly embody the preferences of all the governed."

Given the problems finding meaningful consent to religious exercise within the corporate context, and given the difficulties of discerning a group-wide intent to practice religion, the aggregative theory of the corporation seems to pose more questions than it answers.

73 See The Federalist No. 51 (James Madison) ("Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.").
74 See generally Jeremy Waldron, Taking Group Rights Carefully, Litigating Perspectives from Domestic and International Law 203 (Grant Huschcroft & Paul Rishwork eds., 2002); Dworkin, supra note 1; Chambers, supra note 59, at 1168.
75 See Waldron, supra note 74, at 203.
76 See generally Hans O. Staub & Harry Zohn, The Tyranny of Minorities, 109 Daedalus 159 (1980); see Ian Shapiro, Democratic Justice 14 (1999) (explaining the weakness of consensus-based democratic justice in that it papers over real-life dissensus—but that the alternative is resort to the lowest common denominator of shared principles, i.e., a Rawlsian "overlapping consensus.").
77 Shapiro, supra note 76, at 31.
B. Concession Theories of Corporation

However, the concession theory of the corporation, invoked by Justice Ginsburg in her dissent,\textsuperscript{78} fares no better. Its single-minded focus on the application of legal concepts and its unquestioned acceptance of political determinations neglect to address real-life coercive power structures that can impact members' own rights.

Under a concession theory, "[t]he corporation is, and must be, the creature of the State. Into its nostrils the State must breathe the breath of a fictitious life, for otherwise it would be no animated body but individualistic dust."\textsuperscript{79} It is, as Justice Ginsburg states, "an artificial being, invisible, intangible and existing only in contemplation of law."\textsuperscript{80} The concession theory posits that corporations do not exist unless and until the law recognizes them as such.\textsuperscript{81} In so recognizing them, the state grants them legal privileges not available to other individuals.\textsuperscript{82} Unlike aggregative theories, the concession theory holds that a corporation does not exist as a cohesive unit until certain laws enable it to organize, gather, and grow. Limited liability, legal personality, and other such juridical concepts turn what would otherwise be a mere aggregation of individuals, with their competing


\textsuperscript{79} OTTO V. GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE at xxx. (Frederic William Maitland, trans., 1958).

\textsuperscript{80} Hobby Lobby, 134 S. Ct. at 2794 (Ginsburg, J., dissenting) (citing Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 636 (1819)).


\textsuperscript{82} Ciepley, supra note 47, at 143–44. This point is, of course, weakened by the fact of general incorporation. Corporate status is now, and has been for nearly a century and a half, purely elective. Regardless, without such election, individuals and corporations are given very different treatment under the law.
interests, into an autonomous whole with a fabricated, state-defined "general will."\textsuperscript{83}

The law provides life support to a corporation by providing it with a legal artifice, or hedge, behind which much of corporate group life goes unrecognized and, therefore, unregulated by the state.\textsuperscript{84} In doing so, it endows the people guarding that hedgerow with decision-making authority over corporate affairs.\textsuperscript{85} In the contemporary context, corporate law grants original, undelegated, and nearly arbitrary decision-making power to a board of directors\textsuperscript{86} who are to be elected by shareholders, if any exist.\textsuperscript{87} The board of directors then must, according to law, hire executive officers to manage the corporation's business operations.\textsuperscript{88} Directors' and executives' mandate is broad, subject to some fiduciary duties that, for large part, are wai-vable by shareholders and incorporators.\textsuperscript{89} Shareholders and directors alike may initiate major corporate transactions, like mergers, liquidations, and buyouts, as well as changes to corporate legislation, whether in statutory (bylaw) or constitutional (charter) form;\textsuperscript{90} many of which are subject to shareholder plebiscite\textsuperscript{91} and most of

\textsuperscript{83} See PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATE LAW 10–11 (1999); see also Ciepley, supra note 47, at 144; Ripken, supra note 9, at 98.

\textsuperscript{84} See generally FREDERIC MAITLAND, STATE, TRUST, AND CORPORATION (2003).

\textsuperscript{85} See, e.g., Limes, supra note 71, at 688; MARK V. NADEL, CORPORATIONS AND POLITICAL ACCOUNTABILITY 205 (1976).

\textsuperscript{86} See 8 Del. C. § 141(a) (2014).

\textsuperscript{87} See 8 Del. C. § 141(d) (2014).

\textsuperscript{88} See 8 Del. C. § 142(a) (2014).

\textsuperscript{89} See 8 Del. C. § 142(b)(7); see, e.g., Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. 1993) (articulating the "business judgment rule"); Strine, supra note 10, at 20 (noting that such discretion can be used to pursue activities not immediately related to profit maximization).

\textsuperscript{90} See 17 C.F.R. § 240.14a-11 (vacated by Business Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011)) (stating shareholders may nominate directors); see also 17 C.F.R.§ 240.14a-8 (stating shareholders may make substantive proposals).

\textsuperscript{91} 8 Del. C. §§ 242(b), 251(c) (2014). There is admittedly some inconsistency here in the law, namely, with its granting to directors original, undelegated power to manage the affairs of the business while also subjecting some of their decisions and their selection for office to a shareholder vote. A partial resolution of this inconsistency is that (1) shareholders have no right to oversee day-to-day operations; (2) a corporation need not have any shareholders, 8 Del. C. s
which are subject to director veto.\(^9\) These actors, then, form the source of the corporation's "general will," and they do so according to the formula set out by law.

The theory deserves consideration. Notwithstanding the arguments of the English pluralists, addressed below,\(^9\) it is certainly true that the law as a sociological fact shapes the relationships among corporate group members and with "outsiders," who are often considered outsiders simply via the fiat of the law itself.\(^9\) Even Gierke, the inspirational muse of past and present legal pluralists, recognized as much.\(^9\)

However, the law defines, or at least sharply influences, the corporate group's internal decision-making structures in a fashion that often proves altogether undemocratic and inegalitarian.\(^9\) Although other corporate group members may certainly influence the corporation's legally mandated decision-making institution, they do so usually at its behest and according to procedures it establishes.\(^9\)

The law understands their existence in corporate group as "outsid-

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102(a)(4); (3) directors have a joint function, \(i.e.,\) to manage the affairs of the corporation while abiding by a separate and distinguishable fiduciary duty owed to shareholders alone; and (4) explicitly granting shareholders original power over corporate affairs might undermine their claim to limited liability. See, \(e.g.,\) Christopher M. Bruner, \textit{Power and Purpose in the "Anglo-American" Corporation}, 50 Va. J. Int'l L. 579, 598 (2010); \textit{see also} William T. Allen, Jack B. Jacobs, \& Leo E. Strine, Jr., \textit{The Great Takeover Debate: A Mediation on Bridging the Conceptual Divide}, 69 U. Chi. L. Rev. 1067, 1072–73 (2002).

\(^9\) See 8 Del. C. §§ 242(a), 251 (2014).

\(^9\) See infra notes 121–124 and accompanying text.

\(^9\) \textit{ERIC W. ORTS, BUSINESS PERSONS: A LEGAL THEORY OF THE FIRM} 3 (2013) (applying a neo-institutional ontology to the corporation, wherein the norms and incentives provided by law shape corporate behavioral outcomes).

\(^9\) \textit{See GIERKE, supra} note 79, at 30–31 (describing the impact of trade regulation and property laws on the structure of both internal and external corporate relationships); \textit{see also} JANET McLEAN, \textit{SEARCHING FOR THE STATE IN BRITISH LEGAL THOUGHT: COMPETING CONCEPITION OF THE PUBLIC SPHERE} 82 (2012).

\(^9\) \textit{See generally} Ciepley, \textit{supra} note 47, at 147. Note, however, that a party might glean some of the benefits associated with incorporation without incorporating through private contracting, \(e.g.,\) with indemnification agreements, insurance contracts, waivers, and the like. \textit{Id.}

ers," individuals subject to the constraints provided in, ostensibly, voluntary contractual relations with the fictive corporate person. They are, in a word, invisible.98 Employees, large customers, creditors, and other corporate stakeholders can create and enforce their own "endogenous" rights against the corporate hierarchy only by convincing that hierarchy to change its mind about things.99

1. The Group Rights Implied by Concession Theory

Taken seriously, concession theory suggests that if a corporation possesses rights independent of its several members, the state must directly grant those rights. Of course, American judicial precedent has, on occasion, enforced claims to religious freedom in the context of corporate group membership. The extent to which those claims arose from individual interests alone or from those asserted by a group as a unitary entity remains unclear. Moreover, the Court has never explicitly granted free exercise rights to a corporate person per se.100 Citizens United v. FEC101 leaves the matter unresolved, as the Court's opinion addressed the protection of speech as such, and any right held by a person—whether fictive or natural.102

2. The Illiberal Implications of Concession Theory

98 See Maitland, supra note 84, at 105 ("The judges in those courts [of litigation] if I may so say, could only see the wall of trustees and could see nothing that lay beyond it. Thus in a conflict with an external foe no question about personality could arise.").

99 See Douglas Litowitz, The Corporation as God, 30 J. Corp. L. 501, 525 (2005) (claiming that the corporation is not controlled by those most affected by it); Hansmann & Kraakman, supra note 54, at 442 (discussing how non-shareholder interests are protected through contract law and exogenous federal regulation).


102 See Magarian, supra note 100, at 71–72.
Regardless, whether or not the state chooses to explicitly grant religious rights to the fictive corporate person, concession theories of corporate identity prove problematic for the application of liberal rights.

First, and perhaps most importantly, concession theories imply that only the state can legitimately grant rights to the corporation. To condition the existence of rights, however, on a political determination by the state flies in the face of group rights discourse. Rights are meant, after all, to protect citizens from state actions—whether those actions are taken through democratic procedure or otherwise. To wait upon the state to grant rights is to deprive rights of their normative meaning and purpose. It also grates against the tradition in American political thought that views corporations as normatively meaningful private sector actors that not only enable individual market freedoms, but also serve as a limiting power set against a potentially overreaching state.

Regardless, even if the state should choose to grant rights to the fictive corporate person, undoubtedly the rights enforced will reflect the preferences of the occupants of the upper echelons of corporate management who, thanks to the state, have nearly absolute, original, and arbitrary discretion to manage corporate affairs. Furthermore, should the state refuse the corporation such rights, employees and others subject to the corporation's 'jurisdiction' will nonetheless remain at the mercy of the religious preferences of a corporate leadership—at least unless (1) the state takes affirma-

103 JAMES A. GRAFF, Human Rights, Peoples, and the Right to Self-Determination, in GROUP RIGHTS 194 (Judith Baker ed., 1994); see also Ciepley, supra note 47, at 139 (arguing that a rights-based rubric is not appropriate to the corporation because of its governmental provenance).
104 See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi-xii (1978).
105 See id. at 192–97.
107 See, e.g., Strine, supra note 10, at 259–60; Limes, supra note 71, at 687–88; Chambers, supra note 43, at 1165.
108 Chambers, supra note 43, at 1165 ("An employer acts through its employees and agents. Consequently, its religious rights will be protected and asserted by employees and agents, including management. Functionally, how those rights
tive steps to prevent it, or (2) the unlikely event that other corporate group members amass enough socioeconomic power to influence corporate decision-making using their own resources.

Specifically, shareholders, directors, and executives can assert individual free exercise rights when they personally "exercise" the functions of their offices. Other than the presence of some light-touched, and often toothless, fiduciary duties owed to the corporation and its stockholders, these individuals face the same, sometimes insignificant, limitations on their free exercise rights as anyone else. Yet, by virtue of their corporate office, they can fulfill these rights armed with more resources than most other citizens can claim. When considered along with their de jure power over the corporate group, the practice of executives' religion can amount to religious legislation within the corporation. One can only wonder just how far the business judgment rule might protect executives' religious practices against the claims and interests of others.

To illustrate, a CEO of a meat-packing company can exercise her religious rights by refusing to interact with suppliers of non-Kosher meat. She can also forbid employees from doing the same, claiming that (1) to supervise such employees would further violate her right; and (2) regardless, as CEO, she has the legal power to direct employees pretty much how she likes, so long as she's abiding by all applicable labor, safety, and environmental regulations. If em-

will be protected and asserted will depend on the religious prerogatives of whatever decision maker is cloaked with the employer's power.

109 Id.
110 See, e.g., In re Citigroup Inc. S'holder Deriv. Litig., 964 A.2d 106, 114 n.6 (Del. Ch. 2009) (holding that Citibank directors and officers breached no fiduciary duty, even though they bankrupted the company as a result of actions leading up to the financial crisis).
111 See Ciepley, supra note 47, at 149–50.
113 See, e.g., Bruner, supra note 91 at 600 (arguing that a team theory of corporation, in particular, gives directions so much discretion that they are free ignore stakeholder interests, regardless of any social costs).
ployees refuse, the CEO can fire them. Of course, those employees might be able to assert a discrimination claim against the company. But given Supreme Court precedent, the chances of success on such a claim are slim indeed. In 1987, the Court determined that a corporation could indeed fire an employee for religious reasons.

Indeed, one can even imagine a religious executive making a colorable claim that the application of a fiduciary duty might place a substantial burden upon her free exercise rights. For example, a shareholder might bring a claim for the breach of the fiduciary duty of care against a CEO who refused to take out a loan needed to prevent insolvency. That CEO, if her religion precluded the use of interest, could claim that the enforcement of the law would substantially burden her right to free exercise under the First Amendment. She should then be relieved of the burdensome imposition of fiduciary law.

It is thus no accident that briefing associated with the Hobby Lobby litigation focuses neurotically on the rights of the controlling shareholders, whether in their individual capacity or in their capacity as staffers, funders and controllers of corporate offices, all the while blinded to the impact those rights may have on employees—the individuals whom the contraceptive mandate seeks to protect. The reason is simple: The law affords employees no voice in


117 The Patient Protection and Affordable Care Act (ACA), passed by Congress in 2010, requires, among other provisions, employers' group health plans to furnish preventive care and screenings for women without any cost sharing re-
the formation of the corporate general will, no seat within the corpo-
rate halls of power. As a result, corporate stakeholders will face the
same coercive and exploitative circumstances attributable to the ag-
gregative ontology of the corporation.

C. The Real Entity Theory of Corporation

The real entity theory of the corporate group recognizes that
despite its promulgation of corporate law, the state "[can]not com-
pletely destroy the inner community life, the comradely togetherness, the corporate spirit ... communities continue[] a vigorous se-
cret existence, expressed in assemblies, secret agreements, banqueting, the exercise of authority and the execution of disobedient members." Corporations are not mere aggregations of indi-
viduals, nor are they creations of the state. Rather, for a real entity theo-
rist, corporations "exist by some inward living force, with powers of
self-development like a person ...." And they develop "out of the
natural associative instincts of mankind." A real conception of cor-
poration, however, need not invoke any transcendental metaphys-
ics. A team of oxen, for example, appears qualitatively different
than each animal on its own, but it is not thereby rendered into some
new fantastical two-headed beast. The pluralists typically under-
stand the state as but one corporate group among many, often en-

requirements, including coverage for the 20 contraceptive methods approved by
the Food and Drug administration. See Hobby Lobby, 134 S. Ct. at 2751.
118 OTTO VON GIERKE, COMMUNITY IN HISTORICAL PERSPECTIVE 130 (1990).
119 JOHN NEVILLE FIGGIS, CHURCHES IN THE MODERN STATE 40 (1914) (discussing
churches as independent entities); see also Ripken, supra note 9, at 141;
McLEAN, supra note 95, at 71.
120 FIGGIS, supra note 119, at 47-48.
121 Vernon Van Dyke, Collective Entities and Moral Rights: Problems in Liberal-
Democratic Thought, 44 J. POL. 21, 22 (1982).
122 PAUL Q. HIRST, INTRODUCTION to THE PLURALIST THEORY OF THE STATE 20-21 (Paul
Q. Hirst ed., 1989); see also LIST & PETTIT, supra note 25, at 75 (finding a non-
mystical group autonomy).
compassing all the rest like nesting concentric circles. For pluralists, laws that address associations do not mean to define or to create them, but merely to serve as prudential tools to manage, piecemeal, disputes between the association and outsiders.

Such real entities, developing without any vivifying power of law, will exhibit a diverse array of internal governance procedures and relationships. For example, Gierke, in Community in Historical Perspective, identifies two ideal types of corporation, each tracing its roots to medieval Europe: one of voluntary fellowship and one of imposed lordship. In regards to business corporations, Gierke locates their origins in fellowship, to communal or jointly held property around which emerged cooperative communities. Members of these communities often pursued their own diverse goals, failing to yield to any comprehensive corporate purpose beyond the maintenance of the commonly held property. Each member remained her own master; she was both worker and joint owner.

Such economic cooperatives, however, did not last through the emergence of the modern economy. Gierke, speaking provocatively, argued that "[t]he lordship of capital [Kapitalsherrschaft] created a new form of lordship group, based on capital, in the relationship between the entrepreneur and the employees." Unlike the more communal fellowship, modern corporate leadership sets group priorities and directs the activities of corporate members. Individuals do not come into the group free to use corporate property as they like; they may only use it in accordance with the direction of corporate owners. In the words of Gierke, "if [the busi-
ness corporation] alone ruled, it would lead to the despotism of capital."129

The ends pursued by these new corporate entities (i.e., profit) usually favor the privileged participants, the contributors of capital, and their (contractual or hereditary) descendants.130 If any voluntary association was implicated, it was a voluntary association among those contributors. They could form an "association of property" that strung the individual donors together through their personal interest in and legal claims to their property contributions.131 In regards to the formation of the corporate "general will," Gierke argues that a unique and autonomous corporate personality arises from donors' subjective interests in their property:

Capital, which has been set aside for a specific purpose, self-contained, is in itself lifeless and motionless. It can be imbued with vitality and direction solely and exclusively by a personality. Such a personality can be an individual, several individuals bound by a contract, the state, a local community or any volitional personal collective organism; or again an institutional personality... It is of course true that the members of the association are members with only a part of their property personality, but still with a part of their personality! But, if the elements from which the whole is constructed are partial personalities, and if, because it is organized, the whole is internally and externally an independent entity distinct from the sum total of its parts then this entity, too, is a personality.... Collective will brings the corporation into existence by a constitutive act (which has been falsely constructed as a contract...) and in the articles.132

129 Id. at 204; see also NORBERTO BOBBIO, THE FUTURE OF DEMOCRACY: A DEFENSE OF THE RULES OF THE GAME 57 (1987).
130 GIERKE, supra note 118, at 190, 197.
131 Id. at 197.
132 GIERKE, supra note 118, at 198.
Such metaphysics should not be consigned to the historical dustbin. More recently, Peter French, in *Collective and Corporate Responsibility*, elaborates Gierke's formulation by describing the formation of a corporate will with reference to internal decision-making structures, informal hierarchies, corporate cultures, and substantive policies established through past corporate action.\(^{133}\) List and Pettit, in their important 2011 work, likewise derive an autonomous group agency that cannot be attributed to a simple aggregation of individual interests.\(^{134}\)

Indeed, closely-held, family-owned companies like Hobby Lobby may still derive much of the content of their *zweck* from what Gierke calls "several individuals bound by a contract," \(^{135}\) and they may contain perhaps greater parts of the individuals' personalities—much akin to a partnership.\(^{136}\) It thus remains a possibility that these individuals would form a unitary general will that occasionally deviates from the pursuit of profit, depending upon their unique individual personalities. Corporate ends could be religious, environmentally conscious, socially responsible, or otherwise.\(^{137}\) Public

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\(^{133}\) FRENCH, * supra* note 97, at 41–50 (resting on a Kelsenian idea of a "foundational rule of recognition" that is invoked to discriminate between decisions made that can properly attributed to the corporation per se, and which are "ultra vires."); see generally Joshua Barkan, *Corporate Sovereignty: Law and Government Under Capitalism* (2013).

\(^{134}\) LIST & PETTIT, * supra* note 25, at 44.

\(^{135}\) GIERKE, * supra* note 118, at 198.

\(^{136}\) See 8 Del. C. §§ 341–51 (2014) (pertaining to close corporations). The corporate law governing close corporations sometimes echo those regulating partnerships. For example, shareholders can take on management duties and can restrict the otherwise nearly unlimited discretion of boards of directors 8 Del. C. §§ 350–51 (2014): If Gierke is correct, such laws merely codify "real" relationships. See GIERKE, * supra* note 118, at 198. At least in Delaware, the laws on close corporations were a legislative response to judicial common law precedent settling equity claims with reference to partnership law because such companies were, in fact, run like partnerships. Harwell Wells, *The Rise of the Close Corporation and the Making of Corporation Law*, 5 BERKELEY BUS. L. J. 263, 293 (2008). Needless to say, limited liability still holds. However, because of the more intimate involvement of stockholders, it may be easier to make a case to "pierce the corporate veil" by asserting an alter-ego theory based upon the commingling of funds, records, and purposes.

\(^{137}\) GIERKE, * supra* note 118, at 203; Strine, * supra* note 10, at 33. For example, if the Court decides that the corporate veil sufficiently separates the corporation
companies, however, arguably animate their capital through a socio-pathic "institutional personality" set by capital markets. The "personality" of these companies' dispersed, anonymous, largely apathetic and lightly-invested shareholders is presumed and pre-defined by market dynamics, statute, and judicial precedent. In fact, many shareholders, e.g., those who passively invest in managed 401Ks, cannot even identify the companies in which they invest. Consequently, the direction of a corporation's authoritative relationship over employees now derives not from the collective will of shareholders, but instead from salaried executives incentivized not only by their personal preferences, but also by financial market pressures to maximize shareholder value at almost all costs. The quarterly reporting requirements of the securities laws only exacerbate these pressures.

Yet despite the politically relevant impact of such authoritative relationships—whether between capital holder and worker or between executive and worker—the state and its laws treat such from its shareholders so as to repel any imposition of shareholders' religious practices, that same veil might also be used to repel shareholders' views regarding environmentalism, fair wages, diversity, and other salutary goals. See generally Strine, supra note 10, at 28–30 (compelling description of the anti-social results of a corporate general will, informed by mobile capital, institutional investors, and technology, that focuses psychopathically on short-term profit). Strine, the sitting Chancellor on the Delaware Court of Chancery, is not hopeful about the state's ability to regulate the worst of the damage wrought. By this I mean that competitive capital markets, such as those found on public exchanges like the NYSE, create economic pressures for corporate management to churn out as much profit as quickly as possible, lest they be subject to hostile takeovers from leveraged buy-out shops like Bain Capital. I would note that this particular understanding comports much more closely with Marxian ideas. See Strine, supra note 10, at 28–29 (giving a colorful description of this phenomenon in the context of globalization).

See generally R.B. Davis, Democratizing Pension Funds: Corporate Governance and Accountability (2008) [making a case for democratizing institutional investors so as to bring more of their "personality" into the firm]; French, supra note 97, at 45; Hirst, supra note 124, at 19–20; Strine, supra note 10, at 31–32.

Strine, supra note 10, at 32.

Id. at 29.

Adolf Berle & Gardiner Means, The Modern Corporation and Private Property (1932); Strine, supra note 10, at 13, 32–33.
communities as private, hidden behind the legal status of corporate personhood. Gierke went so far as to claim that "neither scholarship nor the law had any creative role in this: but they were forced to recognise what the autonomy of associating groups had created," and, once recognized, left them pretty much to their own devices. Meanwhile, corporate norms, codified in bylaws and charters, bind the membership stronger than any law ever could.

It is perhaps the real entity theory of the corporation that lurks behind the Court's opinion in Hobby Lobby. First, this conceptual schematic could explain why the Court cites stockholders' individual religious beliefs as evidence of the corporate religion, yet neglects to consider the individual rights of all corporate stakeholders—despite its earlier contention that such rights ought to represent those of employees as well as those of officers and shareholders. Rather, it seems more like the Court determined the corporate religious "zweck" by referencing (1) the statements of official spokespersons acting as representatives of a real entity as well as (2) the text of the entities' governing documents. Second, it is why, perhaps, the Court appears to disregard the corporate veil that traditionally separates the identity and claims of individual corporate members from those of the corporation as a whole. For if individual stockholders can project onto the corporation their individual claims for religious rights, it is not at all clear why they cannot also project their personal liabilities. This makes sense only if the Court assigned to the petitioner corporations an autonomous moral existence. And finally, it is maybe why the Court invoked the Dictionary Act—a statute—to afford Constitutional protection to "autonomous"

143 BARKAN, supra note 133, at 6 (describing corporate sovereignty, understood in terms of Agamben's "ban," that carves out spheres of jurisdiction for corporations to go largely ignored by the state.); GIERKE, supra note 118, at 197, 201; MAITLAND, supra note 84, at 95–96. 
144 GIERKE, supra note 118, at 197.
145 Id. at 197–98.
147 Id., at 2764–66.
148 Id. at 2764, 2766. 
corporate organizations. For if the Court had really embraced an aggregative ontology of corporation when asserting that apart from human beings, a corporation has no rights at all, it is not at all clear why it would search statutory law to find a reason to do so anyway.

1. The Group Rights Implied by Real Entity Theory

The real entity theories of corporation, like those described by the English pluralists, imply a corporate group right that does not ultimately derive from the moral status of individual members. The upside of this theory is that it takes into account a group's cultural and relational characteristics that collective rights concepts might neglect in the process of aggregating individual interests. For example, fellowship communities, based upon voluntary association, do not overlap perfectly with nexus-of-contract theories of corporations precisely because they recognize the unique organizational dynamics, identities, solidarities, and informal relationships that atomistic views of corporations ignore. Moreover, the group need not abide by liberal, Rawlsian comprehensive views and so at least appears to cohere better in societies exhibiting a plurality of value systems. A corporation need not, for example, heed the rights of majorities, minorities, and single individuals because it does not derive from individual member rights. It therefore might elide the prob-

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150 Hobby Lobby, 134 S. Ct. at 2768 (quoting 1 U. S. C. §1).
151 See Jones, supra note 24, at 80–81, 94–96.
152 See infra notes 159–61.
153 This point is controversial. For example, formal modeling in the social sciences explain the development of norms, institutions, and strategies in terms of prisoner's dilemmas, bargaining, and collective action. See generally Orts, supra note 94, (providing such a framework in the context of business corporations). The focus of such coordinated action might even be fairly described as serving as a group "general will," though unlike Rousseau's version, it relies upon the interaction of individual preferences.
155 Kukathas, supra note 38, at 113 ("The more important conflict of interest within groups, however, is that between the masses and elites. This conflict is starkly revealed within ethnic cultural communities confronted by modernization.")
lems of democratic interest aggregation implied by aggregative theories of the corporation.\textsuperscript{156} The real entity group right likewise acknowledges that the rights of groups might remain in existence long after individual members come and go, better reflecting reality than collective rights conceptions.\textsuperscript{157} Finally, if a group has autonomous moral standing, it serves as a repository not only for rights, but also for duties. Group rights theories therefore permit the allocation of blame to corporations for actions that harm others, even when blame cannot be directly traced to the actions of individual members.\textsuperscript{158}

Often, supporters of a real entity group right justify the right because the group exhibits attributes similar to those of human beings. As such, groups will merit rights based upon those attributes, just as human beings do. For many scholars, those rights are at least coeval with those of individuals. For example, Peter French argues that groups can form an intentionality to their actions in the same kind of way that human beings can.\textsuperscript{159} Such intentionality arises separate from the actual intents of the individuals involved in forming it. Accordingly, they can be held to account for their actions. And they can be said to have a moral interest in achieving the object of their intent.

\textsuperscript{156} See id. at 114 (embracing a “real entity” group right permits one, wrongfully, to elide the problem of “minorities within minorities”).
\textsuperscript{157} See id. at 113 (“[I]t is important to note not only that group composition changes over time but that most groups are not homogenous at any given moment.”).
\textsuperscript{158} FRENCH, supra note 15, at 167 (developing a principle of responsible adjustment that can be applied to corporate decision-making structures and which justifies holding corporations morally accountable). This conundrum might be the obstacle holding up prosecutions in connection with the financial crisis. Collective corporate neglect, greed, and dishonesty can be blamed for the meltdown, but no one banker, individually, can be said to have acted with the requisite intent to harm, nor can her contribution to the harm caused be quantified. For a more detailed discussion on corporate responsibility, see id.; Ripken, supra note 9, at 100–01; JEREMY WALDRON, LIBERAL RIGHTS 363–66 (1993); LIST & PETTIT, supra note 25, at 154.
\textsuperscript{159} FRENCH, supra note 15, at 164–69 (invoking the notion of a Wittgensteinian grammar, French argues that corporate intentionality is formed through internal decision-making structures just as biological human beings form intentions through linguistic rules).
However, "[t]he process of analogizing about the liabilities of corporations from the liabilities of individuals does not yield eternal or universal truths about identity – it is simply an analogy which should be evaluated against an independent standard of justice."\textsuperscript{160} That groups may exhibit some of the characteristics of individuals does not mean that they merit the same treatment as individuals in all circumstances.\textsuperscript{161} After all, if a business corporation mindlessly pursues profits at all costs and without either question or reflection, the only individual to whom one can realistically compare it would be, truly, sociopathic.\textsuperscript{162} Whether such an individual merits a full complement of rights is certainly open to debate.

2. The Illiberal Implications of Real Entity Theory

The assignment of original rights to groups implies that their members have a moral duty to make good on them.\textsuperscript{163} It means the group as a whole may make rights-based claims upon its own membership who must, to respect those rights, obey.\textsuperscript{164} Given the indeterminateness of the corporate will,\textsuperscript{165} and the possibility that elites

\textsuperscript{160} McLean, supra note 95, at 81; see also David Estlund, The Democracy/Contractualism Analogy, 31 PHILOSOPHY \\& PUBLIC AFFAIRS 387, 390 (analogizing between actual democratic procedures and a Rawlsian contractual theory of justice).

\textsuperscript{161} See McLean, supra note 95, at 85; Waldron, supra note 74, at 205. Ripken admits "the possibility that both human and corporation qualify as moral agents" but argues that doing so does not require one to "refuse to reduce each agency to a common denominator," \textit{i.e.}, a human personality. Ripken, supra note 9, at 130 (quoting Thomas Donaldson, Personalizing Corporate Ontology: The French Way, \textit{in} SHAME, RESPONSIBILITY AND THE CORPORATION (Hugh Curtler ed., 1986)).

\textsuperscript{162} Ripken, supra note 9, at 119.

\textsuperscript{163} Waldron, supra note 74, at 212.

\textsuperscript{164} Waldron, supra note 74, at 205; \textit{but see} Will Kymlicka, THE POLITICS OF MULTICULTURALISM, Ch. 2 (2003) (distinguishing between internal and external protections for group rights).

\textsuperscript{165} McLean, supra note 95, at 78; Alan E. Garfield, The Contraception Mandate Debate: Achieving a Sensible Balance, 114 COLUM. L. REV. SIDEBAR 1, 10-11 (2014). Garfield addresses the problem of identifying a precise collective "will" in regards to religious exercise in the context of a corporation:
can usurp the job of forming it, real entity theory presents several
dilemmas in regards to individual rights.

First, a group's ostensibly natural hierarchical power struc-
ture may possess a monopoly on the formation of group personality
and, therefore, the rights claimed by the group.\textsuperscript{166} It might therefore
violate the individual rights and liberties of group members who
have no role in the formation of the group personality and so may
disagree with its dictates.\textsuperscript{167} Moreover, group identities change over
time.\textsuperscript{168} Its members come and go, along with their individual inter-
ests and values. Assigning rights to the group as such, therefore, may
inappropriately empower status-quo group leadership at the ex-
pense of actual values and goals of present and future members.\textsuperscript{169}

Second, and similar to the aggregation issues mentioned
above, the majority consensus in ostensibly democratic "real" groups
might silence the unique voices of its members, much as Rousseau's
general will threatens to suffocate citizens' individual interests and
opinions.\textsuperscript{170} For example, a youth athletic league, as a group, may
claim an original right to include and exclude members based upon
its internal values, just as a person may claim an original right to as-
sociate with whom she likes.\textsuperscript{171} Imagine that an internal group deci-

\begin{flushright}
But even if one assumes that [a corporation can exercise reli-
gion], there is still the question of how a court can identify a
for-profit corporation's religious beliefs. Does it look to the
corporation's charter or bylaws? Can only a small, privately-
held family corporation have religious beliefs, or can a large,
publicly held company? Does the Board of Directors, the CEO,
or the shareholders holding a majority of the stock decide
what the corporation's religious values are?"
\end{flushright}

\textsuperscript{166} Kukathas, supra note 38, at 114.
\textsuperscript{167} Waldron, supra note 74, at 209–10.
\textsuperscript{168} Kukathas, supra note 38, at 110–11.
\textsuperscript{169} Id. at 114.
\textsuperscript{170} For an elegant derivation of institutional rules that might yield a "general
will" without implicating the violation of minority liberties, see Melissa
Schwartzberg, Voting the General Will: Rousseau on Decision Rules, 36 Pol.
\textsuperscript{171} See Kukathas, supra note 38, at 112 ("[T]here appears to be good reason to
recognize the right of groups to guard themselves against the intrusions of the
outside world and to determine their own destiny.").
sion-making apparatus—whether an elite hierarchy or a majority of members—determines that all children must attend a group-run religious school and that they will banish from their community any who instead choose a state-run public school. Though many children and parents may have had no say in the matter, they nevertheless have a corresponding duty to comply with the mandate by either attending the religious school or by leaving the community. To the extent that such children and parents might otherwise claim a right to remain participants in the community despite choosing a public school, for example, because the threat of expulsion constitutes an unconstitutional deprivation of educational equality, the enforcement of the group right yields an illiberal outcome.

Exacerbating these problems, pluralists, by investing such groups with a kind of sovereign autonomy, would deprive group members of protections that the state might offer. As a matter of reality, large corporations possess “functions and powers that are traditionally associated with the state, making corporations comparable to sovereign government-like bureaucracies.”

174 See BARKAN, supra note 133, at 20–21 (explaining that the incorporation of society implies that the law abandons corporate members, leaving them under the jurisdiction of the corporation instead); FIGGIS, supra note 119, at 102. Though Figgis recognizes that some corporations are quite powerful, and so merit more regulation than individuals, he also states “no power -- not even a religious society -- is absolute, but in the last resort his allegiance to his own conscience is final.” Id. at 154.
175 Ripken, supra note 9, at 142; see also Strine, supra note 10, at 42 (discussing how the exertion of state sovereignty over multinational corporations is “ludicrous” without a concerted, global effort, given the size and power of these corporations and the securities markets); see generally Elizabeth A. Clark, Religions as Sovereigns: Why Religion is “Special,” Feb. 2013, http://works.bepress.com/cgi/viewcontent.cgi?article=1029&context=elizabet h_clark.
theorists would add, however, that it ought to be just so. 176 For many pluralists, corporations and other human associations are, or should be, the constituent powers of the modern state. 177 The celebrated legal historian F.W. Maitland, for one, believes that "the thought of a 'jurisdiction' inherent in the Genossenschaft is strong in us," 178 while Figgis, a great defender of corporate religious rights, spent an entire chapter in his Churches in the Modern State railing against an ostensibly authoritarian ultramontanism, namely, the location of political power exclusively within a single state organ. 179 For these authors, the group is "prior" to the polity. Accordingly, the state is legitimate only insofar as it protects and respects groups.

The upshot, should these authors have their druthers: Members whose own rights have been harmed by corporate action will have no appeal. In any conflict between an asserted group right and an individual right, the individual may very well find herself without recourse because the state would be duty bound to protect the group.

III. VOLUNTARINESS AND TOLERATION: FORMING A BRIDGE ACROSS THE GROUP RIGHTS THICKET

As shown above, different legal theories of the corporation suggest different kinds of group rights that can be attributed to corporate religious practice. Unfortunately, none adequately assure the protection of their members' individual liberties, especially when groups are characterized by authoritarian, undemocratic, and hierarchical internal power structures. After all, "[e]very association, by
the mere fact of its existence, is endowed with some coercive power, and actually exercises some such power." It is here that political theory, dedicated as it is to the justification of power, may provide the law with some guidance.

Addressing how one might go about constraining the power of groups should not prove overly controversial for many. Certainly, the group rights associated with aggregate theories of corporation purport, in the first instance, to express certain individual rights that cannot be adequately protected in a more ontologically atomistic liberal framework. And Justice Ginsberg, in her Hobby Lobby dissent, perhaps invoked a concession theory to argue in defense of individual worker rights to reproductive healthcare. The presence of such coercion, therefore, will concern advocates of these conceptions of rights. In addition, though for many pluralists group rights are original, at least some recognize the importance of respecting the individual. The pluralists valued group freedom, after all, because they understood groups as serving emancipatory purposes. Therefore,

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180 Cole, supra note 123, at 98.

181 Of course, critics assert that liberalism's emphasis on the moral primacy on the individual "presupposes some view of society and community" that might not be shared by everyone. Kukathas, supra note 38, at 108. Contemporary critical theorists like Rainer Forst, however, counter by arguing in favor of a procedural theory of rights that purports to transcend cultural borders. See, e.g., Rainer Forst, The Justification of Human Rights and the Basic Right to Justification: a Reflexive Approach, 10 ETHICS 711, 711–40 (2010). It is not my intent, needless to say, to try to resolve this debate here.

182 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2794, 2799 (reciting the concession theory as articulated in Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819) and noting that the corporation is a creation of law while also noting that the government chose to further the public interest by mandating healthcare benefits via law).

183 Figgis, supra note 119, at 100 ("[F]alse conception of the state as the only true political entity apart from the individual is at variance not only with ecclesiastical liberty, but with the freedom of all other communal life, and ultimately with that of the individual." (emphasis added).

184 See, e.g., McLean, supra note 95, at 78–79 (discussing the view of group associations such as churches and trade unions as "bulwarks against the sovereign state"); Maitland, supra note 84, at xix; Ripken, supra note 9, at 142–43.
because "[i]ndividuals arguably can be victims of corporate oppression as easily as victims of state oppression," even a pluralist surely would concern herself with individual rights in group context.

Several political theoretical concepts may ease the tension created by this group/individual antagonism. Specifically, the application of the principles of voluntariness and toleration can mitigate some of the conflicts arising from the joint application of group and individual rights. Under liberal democratic theory, founded often on methodologically individualistic ideas of social contract, the legitimacy of power derives from consent of the individuals governed. Consent, however, need not always come in the form of democratic participation, or voice. It can also come from free entry and exit. Because individuals can choose to leave groups in many cases, the necessity of active democratic participation in lawmaking lessens. Thus, one might also elide the conundrums presented by the prospect of aggregating individual interests. As an alternative, embracing a right and duty of toleration can act as a constraint on illiberal applications of group power.

A. Voluntariness

Liberal theories justify state power over individuals by reference to individual consent. Locke, for example, famously deduced government powers to protect the life, liberty, and property of persons based upon a unanimous social contract that is expressly renewed every time anyone accepts an inheritance. Many view rep-

185 Ripken, supra note 9, at 142–43.
186 E.g., JOHN LOCKE, THE SECOND TREATISE ON GOVERNMENT Ch. VI § 73, 315 (Peter Laslett ed., 1988) (1714) ("For every Man's Children being by Nature as free as himself, or any of his Ancestors ever were, may, whilst they are in that Freedom, choose what Society they will join themselves to, what Common-wealth they will put themselves under.").
188 Id.
189 Id. at 33–34.
190 Discussed infra at IV.
191 LOCKE, supra note 186, at 348–49.
resentative democracy as helping to renew and extend that consent through the use of delegates or trustees. For under liberal ideas, "no man [should] have a legislator imposed upon him but whom [he] himself has chosen." Simply stated, to ensure that government represents policies that people accept, people must somehow exercise their "voice" to express and agree upon preferences. And it is only those preferences that may be translated into binding authority.

If Maitland is correct, if the state is just another "species" of the same group "genus," the same liberal democratic principles ought to apply to groups. Even Figgis thought the Church ought to exist as a "great democracy," though he was perhaps a bit too sanguine about the laity's ability to influence ecclesiastical leadership.

But unlike a state, under whose jurisdiction individuals must submit whether they like it or not, groups need not compel others' membership. Members can avoid laws they do not like simply by leaving the organization. To illustrate, Locke, in his Letter Concerning Toleration, presumed the voluntariness of participation in religious organization. Members exercised their full and free consent to governance by staying, their dissatisfaction, simply by leaving:

For, if afterwards, he discover any thing 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? . . . But since the joining together of several members into this church-society, as has already been demonstrated, is absolutely free and spontaneous, it

194 See MAITLAND, supra note 84, at 106.
195 FIGGIS, supra note 119, at 155.
196 LOCKE, supra note 193, at 20 ("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 judge acceptable to him, and effectual to the salvation of their souls. I say, it is a free and voluntary society. Nobody is born a member of any church . . .").
necessarily follows that the right of making its
laws can belong to none but the society itself, or
at least which is the same thing, to those whom
the society by common consent has authorized
thereunto. 197

As a result, the leaders of a religious group need not attend so closely
to the preferences of its members. Should those members confront
law to which they do not consent, they can protect themselves with
their exit option. 198

Consent, thus understood as either exit or voice, 199 or what I
call here “voluntariness,” already exists to some degree in the corpo-
rate context. However, under contemporary circumstances, the dis-
tribution of access to voluntariness is anything but equal. For exam-
ple, shareholders exercise their voice by electing directors,
approving major corporate transactions, and proposing and voting
on corporate “legislation.” Meanwhile, they generally benefit from
low exit costs. If a corporation attempts to pursue religious policies
they reject, they can take a Wall Street walk, i.e., sell their shares. 200
They can further mitigate their exit costs by diversifying their in-
vestments. In this way, shareholders need not remain beholden to
any particular corporation for their future income and, therefore,
need not feel stuck investing in a company whose religious practices
they disapprove. Unlike shareholders, however, employees rarely
have the time and resources to diversify their employment. Addition-
ally, as explained above, they have limited, if any, “voice” in cor-
porate governance. 201

Whether, and to what extent, the presence of an exit option
will satisfactorily proxy consent to corporate authority will, of
course, depend on factual circumstances—including circumstances

197 Id.
198 See SHAPIRO, supra note 43, at 34–35 (arguing that democratic rights need not
apply so stringently in situations where exit from regulation is available).
199 See, e.g., Joseph H.H. Weiler, The Transformation of Europe, 100 YALE L.J. 2403
(1991); HIRSCHMAN, supra note 187 (arguing that when members of a group
cannot easily exit they will demand more “voice,” or more influence over policy-
making).
201 Id.
beyond the corporation's control. Yet although corporate leadership may not create the tight labor markets that render employee exit costly, they cannot evade this understanding of liberal justice. For our liberal values can only justify an antidemocratic governance structure upon either uncoerced consent or the availability of free and seamless exit. Indeed, free exit is absolutely required if groups wish to enforce rules that violate higher order liberal principles like, e.g., harm principles.

B. Toleration

Free exit is perhaps an ideal never to be achieved in less than perfectly competitive markets. Voice, at the same time, may not provide a convincing framework to resolve issues of non-consent to corporate religious exercise. For reasons set forth above in Part III, finding a unanimous "voice" among a group of distinct individuals is itself an ideal unlikely to see the light of day. Fortunately, liberalism not only protects individuals via the democratic procedures of exit and voice, but it also protects them by affording them a right to toleration. Thus, when exit and voice alike prove impracticable, the right to toleration, i.e., to tolerate members' divergent interests despite the majoritarian will of the group, is appropriate.

The concept of toleration has many forms. Here, I will present two as possible tools that can help resolve the question of corporate religious exercise. First, John Locke gives both an epistemic and political argument for toleration as non-coercion, one shared in part by Figgis—at least when it comes to the treatment of outsiders. Epistemic, because faith cannot be forced, and so using coer-

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202 See also Stephen Biggs, Liberalism, Feminism, and Group Rights, 95 MONIST 72, 72–85 (2012) (arguing this schematic does not resolve issues arising from "false consciousness," or when people ostensibly freely choose to undergo what outsiders would consider harms or infringements of liberty); see generally MARCI A. HAMILTON, supra note 2.

203 See generally RAINER FORST, TOLERATION IN CONFLICT (2013) (providing a conceptual history of toleration in the West).

204 FIGGIS, supra note 119, at 116–17, 125.
cution to convert others is futile business indeed.\textsuperscript{205} Regardless, for Locke, God commands us to convert by love and not with the sword.\textsuperscript{206} Politically, Locke argues that tolerance is required because government, whose sole purpose is to protect people and their property,\textsuperscript{207} cannot harm its citizens without their consent.\textsuperscript{208} Instead, the state should leave individuals free to pursue their own interest and their own conception of the good life.\textsuperscript{209} Moreover, Locke advocates tolerance as among different religions, because for him, no qualified judges of the true faith walk the earth.\textsuperscript{210} Locke's concept of toleration might thus forbid corporate leadership from "coercing" employees into obeying religious tenets by, for example, threatening them

\textsuperscript{205} See Forst, Toleration in Conflict, supra note 203, at 215–18.

\textsuperscript{206} Lock, A Letter Concerning Toleration, supra note 65, at 16 ("If any one maintain that men ought to be compelled by fire and sword to profess certain doctrines, and conform to this or that exterior worship, without any regard had unto their morals; if any one endeavour to convert those that are erroneous unto the faith, by forcing them to profess things that they do not believe, and allowing them to practise things that the Gospel does not permit; it cannot be doubted, indeed, that such a one is desirous to have a numerous assembly joined in the same profession with himself; but that he principally intends by those means to compose a truly Christian church, is altogether incredible.").

\textsuperscript{207} Lock, Two Treatises of Government, supra note 186, at § 94.

\textsuperscript{208} Lock, A Letter Concerning Toleration, supra note 65, at 174 ("It is the duty of the civil magistrate, by the impartial execution of equal laws, to secure unto all the people in general and to every one of his subjects in particular the just possession of these things belonging to this life. If anyone presume to violate the laws of public justice and equity, established for the preservation of those things, his presumption is to be checked by the fear of punishment, consisting in the deprivation or diminution of those civil interests, or goods, which otherwise he might and ought to enjoy. But seeing no man does willingly suffer himself to be punished by the deprivation of any part of his goods, and much less of his liberty or life, therefore, is the magistrate armed with the force and strength of all his subjects, in order to the punishment of those that violate any other man's rights."); Lock, Two Treatises of Government, supra note 186, at 355–56; John Lock, An Essay Concerning Toleration, in An Essay Concerning Toleration and Other Writings on Law and Politics 269, 270 (J.R. Milton & Philip Milton eds., 2006) (While there can be no agreement about religion, the magistrate's duty to protect people from harm "is a rule so certain and so clear that he can scarce err in it, unless he do it willfully."); see Forst, Toleration in Conflict, supra note 203, at 230–31.

\textsuperscript{209} See Forst, Toleration in Conflict, supra note 203, at 215–16.

\textsuperscript{210} Id. at 221.
with discharge or by offering them a Hobson’s choice between employment and access to religiously proscribed medication. Regardless, Locke’s solution may be not acceptable to modern day liberal democracies because it is based on an avowedly religious authority: natural law and, through natural law, God.211

Second, Philosopher Rainer Forst develops a more secular view of toleration based on a foundational moral norm consisting of respect for others.212 On applying both deductive and critical-historical argument, Forst concludes that respect for others necessitates the practice of reciprocity and justification.213 Forst would thus allow a person “to live in accordance with his or her convictions and if necessary canvass for them, but he or she will not impose them on others who can reject these convictions on reciprocal and general grounds.”214 Specifically, reciprocity forbids people from making certain claims that they would deny others. It also forbids them from claiming to speak in others’ “real” interests by, e.g., asserting values they think others ought to have. And like Locke, Forst forbids appeal to a “higher truth”—at least unless it can meet with approval or consent that is given freely by all, based upon justifications all can and do reasonably accept.215 For example, with regards to abortion rights, Forst argues that:

[N]either of the two sides to such a dispute can justifiably claim that their conception should be made the basis of generally binding coercive norms. It is pre-

211 Id. at 223 (stating that Locke’s argument for toleration did not include toleration for atheists and presupposed a civic culture founded upon basic Christian principles).
212 Id. at 459–60. Note that morality and ethics serve two different purposes in Forst’s argument. Moral norms enjoy a lexical priority over ethics: “particular ethical convictions meet with objections which explain why these convictions can be reciprocally rejected does not show that individuals cannot meaningfully follow them in their personal or social lives; it is only that such convictions cannot provide the basis for general and reciprocal restrictions on action or for the exercise of political force among persons who are in reasonable disagreement about them.” Id.
214 Forst, Toleration in Conflict, supra note 203, at 455.
215 Id. at 455–56.
cisely here that toleration comes into play: based on the insight that, concerning the central issue in dispute, there are insufficient grounds for exercising legal force as long as the status of the embryo, for example, remains a matter of reasonable disagreement, and hence that other fundamental considerations (liberty rights, claims to psychological welfare, promoting health, long-term consequences, etc.) must prevail.

Thus, one group cannot force a second to accept a right to choose. Nor can the second group force the first to adopt a right to life. In a group rights context, even majoritarian group decisions cannot compel the compliance of individual members unless these criterion of reciprocity and justification hold within the group itself. All coercive rules enforced over its members must be reciprocally and actually justifiable to all group members. If a single member can and does claim reasonable disagreement, the proposed rule cannot be enforced against them.

As a solution, Forst's principle of toleration is imperfect. By granting a single individual a veto right over the group's religious practice, Forst's framework presents the same "tyranny of the minority" problem addressed above in Part II.A.2. A single individual may refuse to consent, and, as a result of Forst's reciprocity rule, derail the corporate exercise of religion. Rather than concede to this one rebel, however, the group might instead provide that individual a seamless exit option. It might, for example, secure comparable employment for that individual elsewhere. As another alternative, the Court might settle for a Rawlsian "justifiability" rather than "actually justified." It need not look for actual unanimous acceptance of a rule, but rather for reasons justifying the rule that ought to be accepted by reasonable people. In this manner, the Court could ignore

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216 Id. at 466.
217 JOHN RAWLS, POLITICAL LIBERALISM 216 (1996) ("[O]ur exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of the principles and ideals acceptable to them as reasonable and rational.")
the idiosyncratic preferences of a solitary hold-out. Moreover, the search for the standards embraced by the "reasonable man" is a logic that ought to be familiar to any law school graduate. Thus modified, it should provide a workable solution in the context of corporate rights.

Finally, it should be noted that neither voluntariness nor toleration resolves completely the problems of plural sovereignty suggested in Part II.A.2 above. In a liberal democratic polity, social and political justice may require that the state provide individuals with adequate freedoms to autonomously pursue their own conception of the good life. Accordingly, norms of consent and tolerance prohibit the state from pursuing, through, e.g., legislation, any ethical value superfluous to fundamental liberal norms. The state cannot, for example, compel religious observance or, for that matter, compulsory vegetarianism. But groups, as expressions of individuals' particular shared conception of the good life, are allowed a more ethical bent. Groups can, even when applying voluntariness and toleration within the unique group context, pursue a specific "comprehensive viewpoint" (in Rawls' language) that would violate norms of social justice if applied in a broader context. This is because each individual

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218 This modification approaches Rawls' take on justice, viz., to assign rights and liberties based upon objectively rational human decision-making rather than from actual, real-life consent. See generally RAWLS, THEORY OF JUSTICE (1971); JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 92–94 (William Rehg trans., 1996). Habermas argues that a discursive framework of rights, like the one elaborated by Forst, derives from a Kantian model (like Rawls') based upon reason, e.g., the Categorical Imperative and universalizing logic. Id. Habermas, Forst, and other deliberative democrats reject objective "R"eason because, inter alia, it is unreliable and has no particular claim to authority. They instead offer a democratic solution: Laws (rights) are just in so far as people actually accept them based upon reasons they also accept—whether those reasons are based upon "Reason" or not. Rainer Forst, trans. Jeffrey Flynn, THE RIGHT TO JUSTIFICATION: ELEMENTS OF A CONSTRUCTIVIST THEORY OF JUSTICE 41-44 (2007).

219 See Rainer Forst, The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach, 120 ETHICS 711 (July 2010). In this essay, Forst provides a way out of the "comprehensive" vs. "liberal" conundrum by offering a procedural, discursive theory of democratic rights. Id. Specifically, for Forst, rights do not exist transcendentally, are not deduced logically, but are instead
group member may reciprocally and generally agree to, for example, impose religious norms on the group’s membership—an imposition unthinkable if undertaken by the state. If such a group becomes large and powerful, one might find two centers of political power beginning to compete and to overlap, pitting universal social justice and liberal rights, i.e., the jurisdiction of the liberal state, against the group’s self-determined commitment to pursue a particular religious faith. Scholars of legal pluralism should find this dilemma familiar. Depending on the size and resources of the group in question, as well as the availability, openness and vigor of other groups within civil society, it is conceivable that a liberal democratic polity might slouch towards a modern-day Investiture Crisis. The liberal state might find itself confronting a powerful and influential religious ‘polity’ that has eschewed, democratically and deliberately, the Bill of Rights. Nevertheless, applying the concepts of exit and tolerance to groups will ameliorate at least some of the areas of contestation that emerge out of the conflicting claims of these competing sovereigns. One example is addressed below.

IV. APPLYING VOLUNTARINESS AND TOLERANCE TO HOBBY LOBBY

To tease out the implications of applying voluntariness and toleration, an example may prove useful. The Hobby Lobby litigation involves the exercise of a group right in the context of potentially coercive circumstances. Namely, Hobby Lobby claims a right to refuse to provide funding for certain contraceptive medication (which "redeemed discursively." Id. Our rights are precisely those that we grant each other upon reflexive agreement—and nothing more. Id. In this way, the “ethical” values that are eliminated from our menu of rights by a more a rationalist, Rawlsian conception of political justice (e.g., those rights that cannot be justified using his contractualist “original position”) can instead be incorporated. See JOHN RAWLS, A THEORY OF JUSTICE (1971) (giving an illustration of illiberal group practices).


221 This point is somewhat controversial. If we view the “funding” of a health insurance plan as part of employee compensation, rather than as part of corpo-
Hobby Lobby deems "abortifacients") mandated for coverage by the Patient Protection and Affordable Care Act (ACA), a mandate meant to protect the interests of some of Hobby Lobby's "members," *i.e.*, its employees. Given their control over the internal corporate decision-making hierarchy, the company's small set of shareholders sets the corporate "personality," and, therefore, shapes the corporation's claim to free exercise. It is as yet unclear whether the company's 13,000 employees consent to the claimed group right. It is not unreasonable to assume that because employees usually agree to work so that they can earn a wage, and not so they can practice religion, they had no role in forming this particular corporate will. Having been successful in its litigation, the company can now effectively prevent many employees from accessing the medication, which bears exorbitant costs if purchased outside an insurance plan. In other words, the *Hobby Lobby* litigation perhaps "has more to do with religious employers foisting their religion on female employees than with government foisting its secular values on religious employers."

Given the facts of the case, applying the principles of voluntariness weigh in favor of employee voice rather than exit. The availability of free exit for Hobby Lobby's employees, who make, at most,
$14 an hour,\textsuperscript{226} is in all likelihood limited. In the contemporary economic climate, a replacement job may not be forthcoming. Nor is it likely that these low-wage workers have sufficient savings to weather long-term unemployment. The barrier to exit may be amplified by the lack of many affordable health care insurance alternatives should the employees quit their jobs. If the facts do show that exit is unrealistic, employees could be given “voice” over the issue through, \textit{e.g.}, unionization, worker control over their own health plans, or a corporate franchise akin to the kind enjoyed by Hobby Lobby shareholders.\textsuperscript{227} The company could hold a referendum on the single issue of the provision of the medication at issue. Meanwhile, the shareholders, who appear to have greater resources, might more easily exercise their “exit” option. They perhaps do not rely on participation in Hobby Lobby as much as its employees—at least not financially. By giving employees voice and affording shareholders relatively seamless exit, no worker would be coerced into religion, and no shareholder need be coerced out of it.

Alternatively, as perhaps a more compelling and pragmatic option, a principle of toleration could be applied. Such would forbid the corporation from forcing its members to abide by a religious proscription that is, as described above by Forst,\textsuperscript{228} actually subject to reasonable disagreement—a proposition supported by the ongoing and lively public debate regarding Planned Parenthood and the


\textsuperscript{227} Douglas Laycock, \textit{Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy}, 81 \textit{Columbia L. Rev.} 1373, 1392, 1398 (1981). Laycock argues that empowering paid church employees with, \textit{e.g.}, employment protections, may pervert religious doctrine and practice, disrupt the free development of religious doctrine, and infringe upon church autonomy. \textit{Id.} He is, in a nutshell, invoking an undemocratic “real entity” theory of corporation and claiming a group right to infringe upon members’ individual labor rights. \textit{Id.}

\textsuperscript{228} See supra, Part IV.B.
right to contraceptive healthcare. Nor could employees force the employer to abide by their own unique religious beliefs. Such could only be a fair outcome, because as the law stands now, employers [like Hobby Lobby] are obligated to accommodate the religious practices of their employees only if the cost of doing so is "de minimus" or insignificant. If the Court grants a RFRA exemption to Hobby Lobby, however, it will create a religious accommodation regime in which the religious practices of for-profit employers are entitled to accommodation despite imposing significant costs on their female employees and covered female dependents, while those same employers are free from accommodating the religious practices of those same employees when doing so entails significant costs.

Applying a principle of toleration, i.e., of reciprocal and general justification, any accommodations can only impose equal and reciprocal costs, and must be made for all.

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230 Gedicks & Koppelman, supra note 22, at 66 (emphasis added).
V. Conclusion

Regardless of whether or not the U.S. Supreme Court ever chooses to incorporate principles of voluntariness and toleration to the growing body of corporate religious law, disaggregating the corporation should at least clarify what is at stake. To date, much of the debate regarding *Hobby Lobby* boils down to an overly simplistic and dichotomous invective.231 On one side, progressives proclaim that for-profit businesses merit no rights—religious or otherwise.232 For them, corporations are fictions and can claim nothing that the democratic legislature has not granted to them. On the other side, advocates of religious freedom demand that any and all people choosing to exercise religion, no matter how they choose to organize themselves, must be granted autonomy.233 To get to the nut of the conflict, though, we have to open the black box of group religious exercise. We must examine, as any proponents of liberal freedoms must, the impact of public policy and law on actual individuals, not on non-human organization. When we do so, the illiberal implications of granting rights to certain groups without first inquiring into the internal governance structures of those groups becomes quite obvious. For a church, identifying sufficient possibilities for members to enjoy exit and voice may be quite straightforward. It would not be surprising to discover that churchgoers do not depend upon their religious community for their wages; they join because they expressly consent to the church’s tenets. And so we need not worry about the possibility of coercion and domination. For a for-profit corporation, however, matters may prove entirely different.

To be sure, finding a space in liberal democratic thought for religious rights in the corporate context, as byzantine, fact-intensive, and context-dependent as that task might be, is an uphill battle. It is one, however, that is worth fighting. If we are true to our liberal freedoms, we cannot lose sight of the individuals who may suffer real

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232 Id.
233 Id.
harm from the duties and costs imposed when we enforce the religious rights of others.