

POPE FRANCIS, TRUE RELIGION, AND RELIGIOUS LIBERTY

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ABSTRACT

This article examines Pope Francis’s understanding of the relationship between church and state, the ends of civil authority, and the importance of religious liberty. It argues that Francis challenges claims made by legal and religious scholars that civil authority must be neutral as to religious ends. Francis, the article contends, uses the categories of idolatry and solidarity as opposing ends that are cultivated by civil authorities caring for, most notably, the economy and the environment. Both are religious. Idolatry is the solipsistic pursuit of created things as an ultimate end and solidarity entails living in communion with God and others. The article further considers how these arguments have shaped Francis’s views on religious liberty. Francis points to the importance of civil authorities respecting conscientious objection, the desirability of cultivating healthy pluralism, and religious liberty as securing the end of solidarity. This presents two challenges: first, to recent legal scholarship questioning the special importance of religious liberty; and second, to the exercise of religious liberty itself. If religious liberty is protected for the end of solidarity, can it be exercised wrongly? The article concludes by considering the Supreme Court’s 2014 *Hobby Lobby* decision.

KEYWORDS: Pope Francis, religious liberty, civil authority and religious ends, idolatry, solidarity, *Hobby Lobby*, *Dignitatis Humanae*

INTRODUCTION

In a 2015 article, William Cavanaugh suggests that Pope Francis represents an opportunity to consider and shift discourse concerning secularization.¹ Cavanaugh’s focus is the economy or the market. He notes that in both Catholic commentary post-Vatican II and secular academic discourse, the economy has often been viewed as a neutral and autonomous field, separable that is from the claims or authority of any religious view.² In contrast, Francis writes of the market as a field of faith, in which, critically, persons are frequently captured by “the din of countless idols crying out: ‘Put your trust in me!’”³ In this way, Cavanaugh suggests that for Francis neutrality or autonomy are illusive; persons are always orientated by religious desires, and our institutions can thus direct these desires

1 William T. Cavanaugh, *Return of the Golden Calf: Economy, Idolatry, and Secularization since Gaudium et Spes*, 76 *Theological Studies* 698 (2015).

2 *Id.* at 708–11.

3 FRANCIS, LUMEN FIDEI [Encyclical on faith] (2013), § 13, http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20130629_enciclica-lumen-fidei.html [hereinafter FRANCIS, Lumen Fidei].

consistent with human flourishing or else toward idols, that is, objects, or persons given an ultimate worth that nevertheless leave the individual solipsistically enclosed within him or herself. Cavanaugh suggests that Francis's challenge may have implications not only for economics but for other "secular phenomena" as well.⁴

This article examines Francis's challenge in the context of the state's relationship to religion and the freedom of religious liberty. On what might be seen as the conventional view, the state is a neutral arbiter facilitating or regulating the free exercise of different religious beliefs; indeed, consistent with secularization, this gives political authority its autonomous logic: promoting and negotiating freedom rather than a vision of a shared religious end for the community. Some have argued that the Catholic Church adopted this view, or a similar view, at the Second Vatican Council. They claim that *Dignitatis Humanae*, the church's Declaration on Religious Freedom, rejected traditional claims that the civil authority is tasked with promoting true religion.⁵

I suggest that Francis complicates this account. Traditionally, Catholic thought claimed that the civic community has a duty to honor God and to recognize the Catholic Church as embodying true religion. Francis does not recapitulate this claim in its entirety. He is largely silent on formally recognizing the church. Nevertheless, he does argue that there must be a cooperative relationship between the church and civil authority *and* that such a relationship is directed toward a shared religious end. Consistent with St. Augustine,⁶ I refer to this as "true religion." By this I mean the orientation of the community (our institutions, our actions, our communal economic and political life) toward the source of all being, God, which then necessarily gives rise to or is experienced as a life of solidarity, fraternity, and charity.⁷

This is not a neutral or tradition-independent account of religion and of the end of the community; it is particularistic, theological, Christian, and thus internal to Francis's own arguments.⁸ Its theological nature is deepened by Francis's frequent invocations of the opposite—idolatry. With this category, Francis implicitly argues that political authority is already shaping our religious desires in particular ways. Idolatry is religious, albeit false, because it entails placing ultimate worth in a created object; it is, accordingly, a misguided end of worship.

By drawing out the categories of true religion and idolatry, Francis challenges attempts to demarcate spheres of religious and secular action. He considers that "secular" spheres are either the domain of false gods or else orientated toward the true transcendent source of life. We must live in communion and, as Francis puts it, emerge from the "desert of the selfish and self-enclosed ego."⁹

I suggest that this is the direction of Francis's thought; that while he has certainly not set out a defined treatise on church and state, he has nevertheless pointed toward clear themes that can be recapitulated (or perhaps developed with "a certain exegetical freedom") into an emerging body of thought.¹⁰ Much of it is found in Francis's writing on the market and the environment. However, I suggest that these same ideas shape Francis's largely unexplored thoughts on religious liberty. How could they not? His criticism of the apparent neutrality of the market and of politics,

4 Cavanaugh, *supra* note 1, at 699.

5 See *infra*, the section titled "True Religion."

6 See *infra*, the section titled "True Religion."

7 See *infra*, the section titled "Solidarity, Fraternity (and Love)."

8 In this, Francis follows his two immediate predecessors, who tended toward explicitly theological construals of political and social space. See LUKE BRETHERTON, CHRISTIANITY AND CONTEMPORARY POLITICS 54–55 (2010).

9 FRANCIS, LUMEN FIDEL, *supra* note 3, at § 46.

10 See similarly Zachary R. Calo, *Human Rights and Healthy Secularity*, 7 JOURNAL OF CATHOLIC SOCIAL THOUGHT 231 (2010).

and his criticism of contemporary notions of liberty or freedom, point toward cultivating a common life in which freedom is exercised toward right religious ends. His emerging views on religious liberty are unsurprisingly continuous with this criticism and positive vision; indeed, for Francis, religious liberty—entailing principally the free creation of communities of solidarity, seeking the truth about God—is fundamental to this quest. I argue that he develops three related themes: the importance of conscience, the benefit of healthy pluralism, and the right ends of religious liberty.¹¹

The main purpose of this article is to understand the direction of Francis's thoughts on church and state, as well as religious liberty, through his encyclicals, apostolic exhortations, homilies, speeches, and other writings. However, doing so engages two further areas of debate. First, Catholic (and then broadly, Christian) views on rights, church and state, and religious liberty. Francis's arguments implicate a much-contested question following Vatican II: whether the state has care for the "true religion" and whether this means formally affirming Catholicism as true. Exploring this debate requires, first, unpacking key arguments from *Dignitatis Humanae*. Second, Francis's arguments raise current points of contest in legal religious liberty discourse. He does not simply speak to how *Catholics* should understand legal and political questions.¹² Rather, his arguments invite others into conversation with Christian claims. In his developing thoughts on religious liberty, he at times appears to allude to or else implicitly touch on contemporary legal debates. In particular, a growing number of commentators argue that religion should be subject to the law in the same manner as any other matter of conscience or deep concern.¹³ Often this ends in a claim that the law should apply uniformly to all groups.¹⁴ Francis, however, affirms the claims of religious conscientious objection and accommodating difference amidst plural groups. And he does so while developing an account of religion's end, beyond cultivating the individual's "ethical independence."¹⁵ This means Francis challenges not only those commentators who would deny the specialness of religious liberty claims, but also potentially those making religious liberty claims. He prompts the question: "Is the person or group exercising their liberty *rightly*?" To explore this question, I conclude by considering briefly the Supreme Court's 2014 decision in *Hobby Lobby*.¹⁶

TRUE RELIGION

Traditionally, the Catholic Church affirmed that both the church and temporal authority (in time, the state) were engaged in building a society more perfect in justice, which necessarily entailed

11 See *infra*, the section titled "Pope Francis and Religious Liberty."

12 This is often explicitly noted. *Laudato Si'* is directed to "every person living on this planet . . . [a] dialogue with all people about our common home." Francis, LAUDATO SI' [Encyclical on care for our common home] (2015), § 3, http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html [hereinafter FRANCIS, LAUDATO SI'].

13 See, e.g., Micah Schwartzman, *What If Religion Is Not Special?*, 79 UNIVERSITY OF CHICAGO LAW REVIEW 1351 (2012); JOCELYN MACLURE & CHARLES TAYLOR, *SECULARISM AND FREEDOM OF CONSCIENCE* (2011); CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, *RELIGIOUS FREEDOM AND THE CONSTITUTION* (2007).

14 See, e.g., RONALD DWORKIN, *RELIGION WITHOUT GOD* chapter 3 (2013). This is also increasingly reflected in case law in different jurisdictions. See Joel Harrison & Patrick Parkinson, *Freedom beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society*, 40 MONASH UNIVERSITY LAW REVIEW 413, 424–27 (2014).

15 RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 4 (2011).

16 *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

pursuing true religion through conformity to Christ. Augustine argued that a true commonwealth requires pursuing justice under the aspect of “right,” that is right action rendering to each what is due.¹⁷ “Right” required true religion: that the commonwealth itself would render to God what is his due in worship, and thus cultivate practices for a life habitually orientated to God.¹⁸ Rulers were exhorted to “cleave to God, the sole ruler of all things.”¹⁹ Church discourse (the only political discourse) had centered on how this was pursued through the temporal and spiritual jurisdictions of Christendom. Pope Gelasius had argued for mutual subordination.²⁰ Kings took care of temporal matters, but the spiritual authority was higher in dignity: kings submitted to the “admonitory overruling” of popes in matters of eternity (which could potentially relate to anything), with the king’s rule always administered in light of true religion.²¹ Although this dualism underwent numerous contests in proceeding centuries, to the benefit of kings and then states accruing increasingly unchallenged power, Catholic teaching maintained a focus on the church’s authority and the role of states both as counterpart to this authority and in furthering the church’s mission. For example, faced with the crisis of revolutionary change and movements in the nineteenth century, Pope Leo XIII stated, “The Almighty . . . has given the charge of the human race to two powers, the ecclesiastical and the civil, the one being set over divine, and the other over human, things.”²² While Leo continued by stating “[e]ach in its kind is supreme,” this presented a doctrine of jurisdictional cooperation, not separation or distinction as to politics and religion.²³ Pope Pius XII would state in 1955, “The Church does not hide the fact that she considers such collaboration normal, and that she regards the unity of the people in the true religion and the unanimity of action between herself and the State the ideal.”²⁴

A central question in Catholic political thought is whether *Dignitatis Humanae* changed this traditional position. *Dignitatis Humanae* itself is “short, terse, and anything but loquacious,” and so disagreement on its content is unsurprising.²⁵ Some of its statements lend themselves to the view that the state is under a duty to protect individual conscience without any concern for true religion. Notably, the Second Vatican Council writes that religious acts “transcend by their very nature the order of terrestrial and temporal affairs.” This means that while a government should take account of its citizens’ religious life “and show it favor,” “it would clearly transgress the limits set to its

17 AUGUSTINE, CONCERNING THE CITY OF GOD AGAINST THE PAGANS [Book XIX], chapters 13 and 21 (Henry Battenson trans., 2003).

18 See Augustine, *Of True Religion*, in AUGUSTINE: EARLIER WRITINGS 218, 231 (J.H.S. Burleigh ed., 1953) (discussing the catholic and orthodox people as “guardians of truth and followers of right” who “make use of the nations as material for its operations”).

19 *Id.* at 273.

20 Gelasius I, *Letter to Emperor Anastasius*, in FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT 100–1625, at 179 (Oliver O’Donovan & Joan Lockwood O’Donovan eds., 1999).

21 JOHN MILBANK, BEYOND SECULAR ORDER: THE REPRESENTATION OF BEING AND THE REPRESENTATION OF THE PEOPLE 219 (2013); JEAN BETHKE ELSHTAIN, SOVEREIGNTY: GOD, STATE, AND SELF 12–13 (2008).

22 LEO XIII, IMMORTALE DEI [Encyclical on the Christian constitution of states] (No. 1, 1885), § 13, https://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_01111885_immortale-dei.html [hereinafter LEO XIII, IMMORTALE DEI].

23 *Id.*

24 Quoted in Patrick McKinley Brennan, *The Liberty of the Church: Source, Scope, and Scandal*, 21 JOURNAL OF CONTEMPORARY LEGAL ISSUES 165, 174 (2013).

25 Russell Hittinger, *Dignitatis Humanae, Religious Liberty, and Ecclesiastical Self-Government*, 68 GEORGE WASHINGTON LAW REVIEW 1035, 1039 (2000).

power, were it to presume to command or inhibit acts that are religious.”²⁶ But the document itself also states that it “leaves untouched traditional Catholic doctrine on the moral duty of men and societies toward the true religion and toward the one Church of Christ.”²⁷ The traditional teaching, of course, was that “the civic community as such [...] has a duty to honour God, and to recognise as uniquely true the religion entrusted by Christ to the Catholic Church.”²⁸ *Dignitatis Humanae* pointedly does not address the question of church establishment, but it does state that “Government is also to help create the conditions favorable to the fostering of religious life,” which is directed to “faithfulness to God and His holy will.”²⁹ Indeed, alongside freedom of conscience, *Dignitatis Humanae* emphasizes the “preeminent” liberty of the church as “the fundamental principle in what concerns the relations between the Church and governments and the whole civil order.”³⁰ And this liberty, *Dignitatis Humanae* claims, is divinely granted.³¹ This means that the church has authority that does not proceed from the state; indeed, it is what Russell Hittinger, reflecting on a series of encyclicals and Vatican II documents, characterizes as a “living spiritual and social corporate body.”³² According to *Gaudium et Spes*, it shapes the laity in order to “see that the divine law is inscribed in the life of the earthly city.”³³ Arguably, the claim that the government must take account of the citizens’ religious life concerns contributing to the conditions that ensure a person’s perfection (even though this lies ultimately beyond this world).³⁴ The government’s inability to command or inhibit acts that are religious focuses attention back onto the more limited claim of immunity from coercion into the faith, as well as the liberty of the church itself.

Despite this, some prominent commentators, often influenced by the American tradition of religious liberty, have interpreted *Dignitatis Humanae* as supporting an understanding of the state as a neutral authority, that is, one principally concerned with promoting freedom itself.

John Courtney Murray argued that *Dignitatis Humanae* made establishment a matter of history, not doctrine, and he clearly differentiated the secular task of the state from the religious task of the church.³⁵ For Murray, establishment was linked to the coercive exercise of public power; he argued it by definition entailed attempts to “exterminate” all dissenting religions.³⁶ The state should, he continued, engage in moderate forms of public recognition—public holidays or prayers at

26 SECOND VATICAN COUNCIL, DIGNITATIS HUMANAЕ [Declaration of religious freedom] (1965), § 3, http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html [hereinafter SECOND VATICAN COUNCIL, DIGNITATIS HUMANAЕ].

27 *Id.* at § 1.

28 Gerard Bradley, *Pope John Paul II and Religious Liberty*, 6 AVE MARIA LAW REVIEW 33, 51 (2007), quoting BRIAN W. HARRISON, RELIGIOUS LIBERTY AND CONTRACEPTION 60 (1988) (Bradley’s ellipses).

29 SECOND VATICAN COUNCIL, DIGNITATIS HUMANAЕ, *supra* note 26, at § 6.

30 *Id.* at § 13. Russell Hittinger argues that the liberty of the church is primary in *Dignitatis Humanae* and should be used to interpret the Council’s statements on conscience. See Russell Hittinger, *An Issue of the First Importance: Reflections on the 50th Anniversary of Dignitatis Humanae*, 30 JOURNAL OF LAW AND RELIGION 461 (2015).

31 SECOND VATICAN COUNCIL, DIGNITATIS HUMANAЕ, *supra* note 26, at § 13.

32 Hittinger, *supra* note 30, at 473.

33 SECOND VATICAN COUNCIL, GAUDIUM ET SPES [Pastoral constitution on the church in the modern world] (1965), § 43, http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html [hereinafter SECOND VATICAN COUNCIL, GAUDIUM ET SPES].

34 *Id.*; and SECOND VATICAN COUNCIL, DIGNITATIS HUMANAЕ, *supra* note 26, at § 6; see also Bradley, *supra* note 28, at 52.

35 See also Brennan, *supra* note 24, at 180–81.

36 John Courtney Murray, *Leo XIII and Pius XII: Government and the Order of Religion*, in RELIGIOUS LIBERTY: CATHOLIC STRUGGLES WITH PLURALISM 49, 50 (J. Leon Hooper ed., 1993).

important national events, for example—but was not tasked with care for true religion.³⁷ Rather, he appealed to the optimism displayed in *Dignitatis Humanae*. Echoing the opening line of *Dignitatis Humanae*, Murray argued that the “growth of man’s personal consciousness” points to civil society (and indeed, individual conscience) pursuing religion, rather than the state.³⁸

As David L. Schindler discusses, this promoted a *juridical* or *jurisdictional* understanding of *Dignitatis Humanae*, but one focused on separate tasks for civil and spiritual authority.³⁹ For Murray, civil authority was tasked with public order, which entails securing the conditions necessary for coexistence. This was in contrast to the “more perfect conditions of social welfare.” The latter, understood as the common good, was the task of societal actors.⁴⁰ Religious freedom, as a civil right, was a matter of public order. But this was understood in wholly negative terms, entailing the absence of constraints upon individuals, who may then freely pursue religion. As Schindler argues, religious freedom for Murray was thus abstracted from any connection to truth.⁴¹ This was, of course, for civic purposes only. Murray was clear in his view that individuals have a duty to seek and pursue truth. However, the state’s task is characterized as wholly “secular”; its powers cannot be used “for the spiritual purposes of the Church, the maintenance of her unity or the furtherance of her mission.”⁴²

In part, this was a rejection of regalist doctrine, in which the state asserted the right to determine internal church governance and forms of worship.⁴³ However, Murray went further, and argued Vatican II supported him.⁴⁴ The emphasis he placed on the church’s own authority finds its counterpart in defining a limited role for the state, now tasked with protecting the secular value of freedom.⁴⁵ Rather than being a complementary arm for pursuing human perfection (as was the case with Gelasius), the state has “no share whatever in the care of souls.”⁴⁶ Indeed, it “knows nothing” of the truth of Christ’s gospel.⁴⁷ For Murray, this meant *Dignitatis Humanae*, on his interpretation, reflected the church reaching the conclusion already set out in the U.S. Constitution.⁴⁸ Civil authority was divorced from the expression of ultimates in order to allow the liberty of society, groups,

37 *Id.* at 53–54; John Courtney Murray, *The Problem of Religious Freedom*, in RELIGIOUS LIBERTY: CATHOLIC STRUGGLES WITH PLURALISM, *supra* note 36, at 127, 183.

38 See Murray, *supra* note 37, at 137, 152; John Courtney Murray, *The Issue of Church and State at Vatican Council II*, in RELIGIOUS LIBERTY: CATHOLIC STRUGGLES WITH PLURALISM, *supra* note 36, at 199, 232–33.

39 David L. Schindler, *Freedom, Truth, and Human Dignity: An Interpretation of Dignitatis Humanae on the Right to Religious Liberty*, 40 COMMUNIO 208, 211–12 (2013).

40 See Murray, *supra* note 37, at 145.

41 Schindler, *supra* note 39, at 215–16 (discussing John Courtney Murray, *The Declaration on Religious Freedom: A Moment in its Legislative History*, in RELIGIOUS LIBERTY: AN END AND A BEGINNING 28–29 (John Courtney Murray ed., 1966)).

42 Murray, *supra* note 37, at 144.

43 See, e.g., Murray, *supra* note 36, at 55 (discussing the Elizabethan Acts of Uniformity).

44 See Murray, *supra* note 38, at 203. In writing before Vatican II, Murray arguably gives the state a larger role. Discussing the encyclicals of Leo XIII, he contends that the civil order “must facilitate the passage of man to a higher life.” Murray, *supra* note 36, at 85.

45 See, e.g., Murray, *supra* note 36, at 79.

46 Murray, *supra* note 37, at 185.

47 John Courtney Murray, in 3 PROCEEDINGS OF THE CATHOLIC THEOLOGICAL SOCIETY 30, 73 (1948): 30, 73, quoted in Patrick McKinley Brennan, *An Essay on Christian Constitutionalism: Building in the Divine Style, for the Common Good(s)*, 16 RUTGERS JOURNAL OF LAW AND RELIGION 478, 490 (2015).

48 JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 56–60 (1960).

and individuals. To the juridical sphere of civil authority, a person's fulfilment of the responsibility to conform to a "transcendent order of truth" was "irrelevant."⁴⁹

Some contemporary legal scholars have followed Murray.⁵⁰ For example, Richard Garnett points to *Dignitatis Humanae's* emphasis on the state's obligation to cultivate the "conditions favorable to the fostering of religious life ... [so that] people may be truly enabled to exercise their religious rights and to fulfil their religious duties."⁵¹ He argues that this concerns a more limited pursuit: care for the conditions of religious liberty.⁵² The state, Garnett contends, is neutral on questions of the truth and falsity of religion because it lacks jurisdiction over religion.⁵³ Garnett continues to emphasize the freedom of the church; indeed, he argues for its applicability in modern jurisprudence.⁵⁴ However, he presents a watered-down version. In a liberal pluralist vein, he argues freedom of the church provides a "structural protection" against encroaching civil power.⁵⁵ Overhauling the traditional doctrine, he claims that church and secular authorities "in the West" have "abandoned" the claim that the latter has care for the true religion.⁵⁶ Indeed, because the state is now *not* tasked with care of the true religion, leaving this to other institutions, it is seen as limited, and this ensures individual freedom of conscience.⁵⁷ Garnett claims this is consistent with the US establishment-clause requirement that the law have a "secular purpose."⁵⁸

Garnett's argument, and Murray's before him, fits a secularization narrative. The state no longer pursues true religion; rather, *Dignitatis Humanae* points to the "fully desacralized" state, as Paul Horwitz similarly argues.⁵⁹ To be sure, Murray (and Garnett) contend against a secularism that would exclude religious argument in public life. Garnett considers the goal of the First Amendment to limit the reach of government, not exclude churches, individuals, and civil society actors from arguing for the common good in religiously grounded argument.⁶⁰ Murray considered that the state is secular in the sense that it is governed by natural law and natural rights, a mode of

49 John Courtney Murray, *The Declaration of Religious Freedom*, in VATICAN II: AN INTERFAITH APPRAISAL 571–72 (John Miller ed., 1966), quoted in Schindler, *supra* note 39, at 221–22.

50 See also Anna Su, *Catholic Constitutionalism from the Americanist Controversy to Dignitatis Humanae*, 91 NOTRE DAME LAW REVIEW 1445, 1446–49 (2016). Su frames *Dignitatis Humanae* as the product of the U.S. experiment, in which religious plurality is negotiated by nonestablishment and Catholics have sought to demonstrate they can fit within this. For criticism of such attempts, see William T. Cavanaugh, *Are We Free Not to Be a Religion? The Ambivalence of Religious Freedom*, in FIELD HOSPITAL: THE CHURCH'S ENGAGEMENT WITH A WOUNDED WORLD 234, 242–48 (2016).

51 Richard W. Garnett, "The Freedom of the Church": (Towards) An Exposition, Translation, and Defense, 21 JOURNAL OF CONTEMPORARY LEGAL ISSUES 33, 41 (2013), quoting SECOND VATICAN COUNCIL, *DIGNITATIS HUMANAe*, *supra* note 26, at § 6.

52 Richard W. Garnett, *Neutrality and the Good of Religious Freedom: An Appreciative Response to Professor Koppleman*, 39 PEPPERDINE LAW REVIEW 1149, 1155–56 (2013).

53 See Richard W. Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME LAW REVIEW 837, 861–62 (2009).

54 Garnett, *supra* note 51.

55 *Id.* at 51.

56 Garnett, *supra* note 52, at 1156.

57 Elsewhere Garnett writes of individual religious conscience as the ultimate beneficiary of religious freedom. See Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILLANOVA LAW REVIEW 273, 295 (2008).

58 Garnett, *supra* note 51, at 41; *Lemon v. Kurtzman*, 403 U.S. 612 (1971).

59 Paul Horwitz, *Freedom of the Church without Romance*, 21 JOURNAL OF CONTEMPORARY LEGAL ISSUES 59, 87 (2013).

60 See Richard W. Garnett, "Two There Are": *Understanding the Separation of Church and State*, in THE AMERICAN EXPERIMENT: RELIGIOUS FREEDOM 319 (2008).

reasoning naturally available to all persons (albeit originating in God's eternal reason).⁶¹ He argued this was the original position of the American nonestablishment settlement—a secular nation that was nevertheless still “under God.”⁶² As with Garnett, however, such reasoning for Murray fundamentally pointed to cultivating freedom as its own end for civil authority. Natural rights and natural law meant governing by the consent of the people and securing a limited state through institutions for freedom—the freedom of the church, free press, free speech.⁶³ To him, Thomas Aquinas was the “first Whig” proposing a doctrine of limited government that then came of age with the American nonestablishment settlement.⁶⁴

At its heart, secularization as differentiation entails separating civil authority from religious ends, such that politics can be understood as pursuing its own autonomous logic. This may concern cultivating and distributing power or managing interest groups, as Max Weber argued, mutual protection of rights, if we follow Jürgen Habermas, or else what Charles Taylor identifies as a common contention—pursuing “the greatest benefit to the greatest number.”⁶⁵ In a similar vein, economics may concern “maximum gain.”⁶⁶ In each case, a distinct logic for a particular sphere of action is proposed. Although not entirely on the same footing, in their focus on limited government separated from religion, Garnett and Murray before him arguably contribute to a similar claim: politics is tasked with cultivating freedom, not true religion—“freedom was to be the rule and method,” as Murray put it.⁶⁷ True religion is the task of intermediary organizations and individual conscience. In this way, the argument points to a differentiation of spheres between politics and religion that is, José Casanova notes, “constitutive of modernity.”⁶⁸

On one reading, parts of the Second Vatican Council endorsed this differentiation.⁶⁹ Those who adopt this view can point to *Gaudium et Spes*, the church's Pastoral Constitution on the Modern World. It speaks of the “autonomy of earthly affairs.”⁷⁰ It continues by pointing to the political community as “autonomous and independent” of the Catholic Church, identifying culture itself as an autonomous realm, and claiming “economic activity is to be carried on according to its

61 MURRAY, *supra* note 48, at 44.

62 *Id.* at 44, 54, 78. Murray acknowledged that what he considered to be the American consensus was arguably fractured. He believed this would result in problematic consequences, such as a rejection of the church's claim to public status; states would claim an indivisible sovereignty. *Id.* at 66. But Murray claimed that this was a recent problem, not something traceable to America's origins. *Id.* at 54–56. A contrast could at least be made with Steven Smith's argument that America's constitutional founding posed competing schools of public philosophy—providentialist and secularist. See STEVEN D. SMITH, *THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM* chapter 3 (2014).

63 MURRAY, *supra* note 48, at 47–50.

64 *Id.* at 47.

65 See, respectively, Max Weber, *Politics as Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 77–78, 82–94 (H. H. Gerth & C. Wright Mills eds., 1948); JÜRGEN HABERMAS & JOSEPH RATZINGER, *THE DIALECTICS OF SECULARIZATION: ON REASON AND RELIGION* 25–28 (Brian McNeil trans., 2006); CHARLES TAYLOR, *A SECULAR AGE* 2 (2007).

66 TAYLOR, *supra* note 65, at 2.

67 MURRAY, *supra* note 48, at 77.

68 JOSÉ CASANOVA, *PUBLIC RELIGIONS IN THE MODERN WORLD*, 40 (1994).

69 This is not inevitable. Tracey Rowland notes that the references in *Gaudium et Spes* to *aggiornamento* (“bringing up to date”) have been interpreted in broadly two ways. Some see it as arguing that the church must update itself to the standards of the modern world. Others argue that openness to the modern world entails *ressourcement*—understanding contemporary conditions in light of church tradition (especially Patristic and Scholastic thought). TRACEY ROWLAND, *CULTURE AND THE THOMIST TRADITION: AFTER VATICAN II* 6–7, 19, 93 (2003).

70 SECOND VATICAN COUNCIL, *GAUDIUM ET SPES*, *supra* note 33, at § 36.

own methods and laws within the limits of the moral order.”⁷¹ The church has “no proper mission in the political, economic or social order.”⁷² As Cavanaugh notes, strong claims of autonomy do not mean completely excluding God, whose will “sets the limits of the moral order.”⁷³ Rather, autonomy here means that such spheres are “nonreligious” in the sense of being governed by the techniques and reasoning specific to their nonreligious concerns. Failures in the market or politics are thus not understood as arising because these domains may be captured by a competing faith or religiosity, what Cavanaugh calls being “in the grip of something larger than themselves.”⁷⁴ Rather, such failure within one of these domains is a failure of “sober and rational men attempting to properly arrange the material world of goods.”⁷⁵

However, Pope Francis, as Cavanaugh argues, challenges this narrative of desacralization, the claimed autonomy of secular spheres, or the contention that civil authority can be divorced from what Murray called “ultimates” or religious ends in the name of freedom.⁷⁶

In a 2016 interview, Francis affirms that “States must be secular.”⁷⁷ Here he shares Murray’s criticism against regalist doctrine, contrasting the rightful secularity of the state with “[c]onfessional states.”⁷⁸ But he also affirms that such secular authority has its own rightful independence. This is associated with the deliberative autonomy of legislative bodies: “It is up to Parliament to discuss, argue, explain, reason [on matters like same-sex marriage].”⁷⁹ Francis consequently does not propose that the church itself exercises secular authority. And his comments could be taken as rejecting, at least implicitly, church establishment—that is, formal recognition of the Catholic Church as embodying the true religion. However, I suggest that if we focus solely on this possible rejection, we will miss the challenge that Francis presents—a challenge that, I contend, proposes that civil authority must be concerned with “true religion.”

Care for true religion does not necessarily take the form of formal recognition. Rather, the rightful deliberative autonomy of civil authority does not prevent the church from exercising what it has traditionally claimed—a suasive authority that directs civil authority to rule in light of the person’s ultimate end (and not simply freedom).⁸⁰ Indeed, Francis argues that “civil power finds its limits before the law of God” and that the “ecclesiastical authority and civil power are called to cooperate for the integral good of the human community.”⁸¹ In this, Francis is in continuity with his immediate predecessors. For Popes Benedict XVI and John Paul II, as with Francis, the distinction between church and state is maintained, but they are considered to be arms working in coordination toward the same goal.⁸² Benedict described this as “advanc[ing] mankind on the road to

71 *Id.* at §§ 55, 64, and 76.

72 *Id.* at § 42.

73 Cavanaugh, *supra* note 1, at 702.

74 *Id.* at 700.

75 *Id.* at 702.

76 MURRAY, *supra* note 48, at 67.

77 Guillaume Goubert & Sébastien Maillard, *Interview: Pope Francis* (Stefan Gigacz trans.), LA CROIX (May 17, 2016, 8:57 AM), <http://www.la-croix.com/Religion/Pape/INTERVIEW-Pope-Francis-2016-05-17-1200760633>.

78 *Id.*

79 *Id.*

80 See, *supra* text accompanying note 17.

81 Francis, Message of Holy Father Francis to the President of the Pontifical Council for Promoting Christian Unity on the Occasion of the 13th Inter-Christian Symposium (Aug. 19, 2013), http://w2.vatican.va/content/francesco/en/messages/pont-messages/2013/documents/papa-francesco_20130819_xiii-simposio-intercristiano.html.

82 JOHN PAUL II, CENTESIMUS ANNUS [Encyclical on the hundredth year] (1991), § 5, http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01051991_centessimus-annus.html; BENEDICT XVI, DEUS

communion with God and one another.”⁸³ Indeed, Francis’s contentions are arguably in continuity with what Benedict called “healthy secularity.”⁸⁴

As Zachary Calo argues, Benedict was not simply concerned with advancing the importance of religion to our common democratic life—its role in the life of civil society groups, for example.⁸⁵ Rather, “healthy secularity is more fundamentally an invitation to resacralize the political life of modernity.”⁸⁶ Benedict contended that the secular must always be related to the divine economy. For Benedict, as faith in shared reason breaks down, an explicitly theological, particularistic account of reason, authority, and politics is required to reconnect Western thought to its foundations.⁸⁷ Civil authority, he argued, exercises its own authority, and reason has its own space and rigor that must be pursued. However, he questioned reason’s independence. It must be connected to Reason itself, allowing for the recognition of right-reasoning or an understanding that our reason responds to an invitation to engage with a Creator in a created world; nature, in other words, must always be understood as graced.⁸⁸ Cut adrift from religious tradition, reason ushers in an understanding of freedom severed from truth, which amounts to the negation—or an indifference—to God at the heart of politics.⁸⁹ Francis agrees with such an account, but, as we will see, arguably extends upon it by emphasizing that a politics stripped bare of God does not lead to an absence of sacrality; rather, unfurnished by the gospel and an incarnational politics, the secular becomes the realm of false idols.

Arguably, this is not entirely removed from Murray’s (and Garnett’s) contentions. All parties recognize the decisional autonomy of civil authorities. Perhaps what I am suggesting as “true religion” for Francis, a relationship to the transcendent that is manifest in a community of solidarity in contrast to idolatry, could fit with much of their arguments. Murray and Garnett may argue that the state does not pursue this directly, but that this end is reached through ensuring the real good of religious liberty. In this way, the civil authority cooperates with the church. However, I suggest that there is an important difference.

Francis’s own thoughts are arguably much closer to Schindler’s interpretation of *Dignitatis Humanae*, against Murray’s. Schindler emphasizes that, following *Dignitatis Humanae*, freedom must be allied to the pursuit of truth. *Dignitatis Humanae* does not speak to establishment specifically, but it is firmly against coercion into the Catholic faith.⁹⁰ However, Schindler argues that this does not mean civil authority is tasked merely with securing freedom, a freedom that is understood as then facilitating the diverse pursuits of ultimates within society. Murray’s contention would privilege, he contends, a “freedom of indifference” for legal-political purposes.⁹¹ Schindler then notes the problem that this would create: “the juridical state, insofar as it would act consistent with its own inner logic, must always treat such natural claims [concerning truth, the nature of the good,

CARITAS EST [Encyclical on Christian love] (2005), § 28, http://w2.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est.html.

83 Benedict XVI, Address of His Holiness Benedict XVI to H.E. Mrs. Cristina Castaner-Ponce Enrile New Ambassador of the Republic of the Philippines to the Holy See (Oct. 27, 2008), http://w2.vatican.va/content/benedict-xvi/en/speeches/2008/october/documents/hf_ben-xvi_spe_20081027_ambassador-philippines.html.

84 See Calo, *supra* note 10, at 231.

85 *Id.* at 234.

86 *Id.* at 236.

87 *Id.* at 249–50.

88 *Id.* at 241, 248.

89 *Id.* at 240.

90 See *infra*, the subsection titled “Conscience.”

91 Schindler, *supra* note 39, at 249.

and of religion], *for all legal-constitutional purposes*, as contingent objects of choice.”⁹² The very good that Murray affirms for society’s actors, religion, is rendered into another instance of freedom, encouraging, Francis argues, a solipsistic turning inwards and a flattening out—as freedom, it is perhaps equally important, perhaps equally irrelevant, most likely equally subject to the law.

In keeping with this line of argument, and, as I have suggested, with his immediate predecessors, Francis contends that an emphasis on freedom alone leads to an indifference to truth. But he takes this further. He argues that such indifference leads to truth being captured by idols.

IDOLATRY

Cavanaugh notes that Francis’s first encyclical, *Lumen Fidei*, uses the word *idol(s)* or *idolatry* fourteen times, and that he continues its use in the apostolic exhortation *Evangelii Gaudium* and returns to it in multiple speeches.⁹³ For Francis, both the individual person and our institutions have been captured by the “din of countless idols.”⁹⁴ These idols include the pursuit of profit or the “enticement of money,” financial speculation, a misplaced trust in trickle-down economic theories, “frivolous pleasures,” and consuming goods.⁹⁵

In Christian thought, idolatry entails the human desire for God being directed toward a created thing. Augustine argued that humanity is constituted by a religious desire.⁹⁶ The institutions we establish, the things we create, the power we exercise—all of this, according to Augustine, shares a religious orientation. They can either function as a means to pursue and enjoy God, the right end of our religious desire, or they can be desired for themselves. If an object or created thing is pursued as its own ultimate end, then it is a substitute for God and so an idol. For example, money is a means of exchange and so may facilitate forms of reciprocity or even neighborly love in sharing individual talents. But as an idol, it is pursued as its own end, cut off from a transcendent horizon.⁹⁷

Reflecting on Francis’s statements, Cavanaugh writes, “The people standing ready to burst into Best Buy at midnight on Thanksgiving are not disenchanting.”⁹⁸ In other words, a person may claim not to be religious—not a Christian, Jew, or Muslim, for example—but as that person participates in a political culture that promotes free market consumerism, Francis is pointing to the possibility that his or her life will be potentially shaped by a religious impulse toward consumption. There is, in other words, no neutral ground. The person is identifying an ultimate good or love—consumption. Indeed, on the view Francis represents, the person is seeking a religious experience that ends in a created good. This may be the purity of the high-definition television with its transporting effect or the

92 *Id.* at 251 (emphasis in original).

93 See Cavanaugh, *supra* note 1, at 699–705.

94 FRANCIS, LUMEN FIDEI, *supra* note 3, at § 13.

95 See *respectively*, Francis, Profession of Faith with the Bishops of the Italian Episcopal Conference (May 23, 2013), https://w2.vatican.va/content/francesco/en/homilies/2013/documents/papa-francesco_20130523_omelia-professio-fidei-cei.html, quoted in Cavanaugh, *supra* note 1, at 704; FRANCIS, EVANGELII GAUDIUM [Exhortation on the proclamation of the Gospel in today’s world] (2013), § 56, https://w2.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html [hereinafter FRANCIS, EVANGELII GAUDIUM]; *Id.* at § 54; *Id.* at § 2; *Id.* at § 54; FRANCIS, LAUDATO SI’, *supra* note 12, at § 203.

96 AUGUSTINE, CONFESSIONS [Book I] (Henry Chadwick trans., 2008).

97 Graham Ward, *The Commodification of Religion, or the Consummation of Capitalism*, in THEOLOGY AND THE POLITICAL: THE NEW DEBATE 327, 335 (Creston Davis, John Milbank, & Slavoj Žižek eds., 2005).

98 Cavanaugh, *supra* note 1, at 715.

sense of belonging and transcendence brought about by participating in the Apple logo, as the person rushes through the cathedral-mall.⁹⁹ Francis explicitly associates such consumption with modern quests for authenticity or spirituality.¹⁰⁰ He notes that such quests represent real desires for meaning or transcendence, a reaction against rationalism, and a reality of unwelcome experienced within the churches.¹⁰¹ We could say that religion on this account has a functionalist hue—products and shopping function in the role of the sacred in a person’s life. However, Francis’s use of idolatry points not simply to analogy or functional equivalents; rather, he suggests money, goods, and trust in the market are worshipped. That is, they are created things that are accorded an ultimate worth.

In using the category of idolatry, Francis does two things: he links structural or institutional concerns with questions of moral reform and individual practice; and he punctures any divide between material or secular matters and a concern for the transcendent.

Idolatry is not simply a matter of reforming the private choices and actions of individuals. Rather, Francis clearly claims that idolatry is a concern for the political community. He continually points to “idolatrous economies.”¹⁰² In a similar vein, he argues the environment is “defenseless before the interests of a deified market.”¹⁰³ As a category, idolatry concerns our actions, and ultimately religious desires, directed toward the wrong end or love. Francis is claiming that our institutions can likewise be orientated toward such ends. Care for the economy and the environment is not simply a matter of the social environment or civil society. Rather, it entails the exercise of public power—taxation, contract law, corporation law, international agreements, resources policy, and so on. This is why Francis writes of failing international cooperation with respect to the climate,¹⁰⁴ low levels of institutional effectiveness (from the family to local and national bodies);¹⁰⁵ reifying “the market” as the pursuit of profit;¹⁰⁶ the need to develop environmental education;¹⁰⁷ the goal of a “true world political authority”;¹⁰⁸ the importance of policies aimed at securing “access to capital, services, educational resources, healthcare and technology” to reduce wealth inequality;¹⁰⁹ and the inadequacy of carbon trading as a response to climate change.¹¹⁰ Such statements are attempts to persuade civil authorities to reorientate market practices or else environmental policy away from idolatrous ends.

Francis argues that such false ends, when institutionally ingrained, support a narrative in which individuals are cast as pursuing, and encouraged to pursue, their own desires, however formed. He is critical of what he identifies as a modern understanding of freedom: “it is easy nowadays to

99 Others have developed this claim. See, e.g., GRAHAM WARD, *POLITICS OF DISCIPLESHIP: BECOMING POSTMATERIAL CITIZENS* chapter 3 (2009); JAMES K. A. SMITH, *DESIRING THE KINGDOM: WORSHIP, WORLDVIEW, AND CULTURAL FORMATION* Part I (2009). Cavanaugh also discusses scholars who analyze branding and other consumption practices as religious. Cavanaugh, *supra* note 1, at 713–15.

100 FRANCIS, *EVANGELII GAUDIUM*, *supra* note 95, at § 89.

101 *Id.* at § 63.

102 See the multiple references in Cavanaugh, *supra* note 1, at 705.

103 FRANCIS, *EVANGELII GAUDIUM*, *supra* note 95, at § 56.

104 FRANCIS, *LAUDATO SI'*, *supra* note 12, at § 54.

105 *Id.* at § 142.

106 *Id.* at §§ 190–95.

107 *Id.* at § 175.

108 *Id.* at § 120.

109 Francis, Message of His Holiness Francis for the Celebration of the World Day of Peace (Jan. 1, 2014), at § 5, http://w2.vatican.va/content/francesco/en/messages/peace/documents/papa-francesco_20131208_messaggio-xxviii-giornata-mondiale-pace-2014.html [hereinafter Francis, Message for the Celebration of the World Day of Peace].

110 FRANCIS, *LAUDATO SI'*, *supra* note 12, at § 171.

confuse genuine freedom with the idea that each individual can act arbitrarily.”¹¹¹ Like Popes Benedict XVI and John Paul II before him, Francis continually criticizes abstract understandings of freedom, focused on the capacity of the individual to pursue his or her choices or desires, as promoting relativism.¹¹² In *Laudato Si'*, he argues that both the social and the ecological environment suffer from “the same evil: the notion that there are no indisputable truths to guide our lives, and hence human freedom is limitless.”¹¹³ But he takes this criticism perhaps a step further. Relativism is not simply the rejection of a moral truth, but, for Francis, the condition of persons caught in “an aimless passing from one lord to another.”¹¹⁴ Relativism, in other words, is a precondition for the “deified market.” Individuals may pursue their own ends, but by employing the category of idolatry, Francis is arguing that free acts without direction toward what is truly desirable will be captured by a false religion that is not simply a matter of individual decision.¹¹⁵ The pursuit of profit and the aimless quest for further consumer goods are shared practices, cultivated by institutions.

And yet, while shared, Francis argues, the end of such idolatry is solipsism (we could say, shared solipsism). Idolatry consists in claimed “self-sufficiency.”¹¹⁶ Rather than orientating oneself to the source of all goodness, truth, and being, which is then experienced as love for others, the idol turns the person inwards; it entails accumulating and prioritizing created things as ends in themselves.¹¹⁷ Francis argues that this leaves the community incapable of “devis[ing] a common plan which transcends individual gain and personal ambitions.”¹¹⁸ Idolatry—the religious desire turned awry—is, he considers, depoliticizing, or rather it precipitates a certain kind of dehumanizing politics. The society in which desires are consumed by idols is rendered “insensitive to the cry of the poor.”¹¹⁹ In *Evangelii Gaudium* he is excoriating: “Such an economy kills. How can it be that it is not a news item when an elderly homeless person dies of exposure, but it is news when the

111 FRANCIS, AMORIS LAETITIA [Post-synodal apostolic exhortation on love in the family] (2015), 25–26, https://w2.vatican.va/content/dam/francesco/pdf/apost_exhortations/documents/papa-francesco_esortazione-ap_20160319_amoris-laetitia_en.pdf [hereinafter FRANCIS, AMORIS LAETITIA].

112 Cardinal Ratzinger wrote of modern autonomy leading to “the increasingly vacuous entertainments of leisure-time society, a society ... sated by the usual shabby pleasures.” JOSEPH RATZINGER & MARCELLO PERA, WITHOUT ROOTS: THE WEST, RELATIVISM, CHRISTIANITY, ISLAM 126 (2006). As pope, Benedict XVI was critical of “mere licence” uncoupled from duties. BENEDICT XVI, CARITAS IN VERITATE [Encyclical on integral human development in charity and truth] (2009), § 43, http://w2.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate.html [hereinafter BENEDICT XVI, CARITAS IN VERITATE]. On Pope John Paul II, see Bradley, *supra* note 28, at 35. Bradley also notes that before becoming pope, Karol Wojtyła expressed concern that freedom of conscience as recognized in *Dignitatis Humanae* could, if “exercised improperly,” lead to religious indifferentism and a relativistic world view.

113 FRANCIS, LAUDATO SI', *supra* note 12, at § 6. Elsewhere, Francis argues that the ecological and cultural crisis—the environmental threat to our common home, the growth of inequality, a breakdown in solidarity—is fundamentally a “human crisis.” Francis, Address of the Holy Father Francis: Vigil of Pentecost with the Ecclesial Movements (May 18, 2013), http://w2.vatican.va/content/francesco/en/speeches/2013/may/documents/papa-francesco_20130518_veglia-pentecoste.html.

114 FRANCIS, LUMEN FIDEI, *supra* note 3, at § 13.

115 Charles Taylor makes a related argument, noting that searches for individual authenticity can be entirely at one with corporations cultivating more and more products for “mutual displays of identity.” TAYLOR, *supra* note 65, at 483.

116 Cavanaugh, *supra* note 1, at 705.

117 See Graham Ward, *supra* note 97, at 335 (distinguishing the logic of the icon and the idol in Christian thought). On the claimed contrast to orientating oneself to God, see *infra*, the section titled “Solidarity, Fraternity (and Love).”

118 FRANCIS, EVANGELII GAUDIUM, *supra* note 95, at § 61.

119 Cavanaugh, *supra* note 1, at 705 (quoting Francis).

stock market loses two points?”¹²⁰ In his widely lauded encyclical *Laudato Si'*, he links the “[t]he violence present in our hearts, wounded by sin” with “the symptoms of sickness in the soil, in the water, in the air and in all forms of life.”¹²¹

Francis’s exhortations could be taken as simply another social or political commentator suggesting or endorsing necessary actions to reduce harms faced by the community, actions not dependent on religious conviction. And yet he uses the category of idolatry for reflecting on the right ends that the political community ought to pursue. In using this category, Francis squarely raises the importance of a transcendent orientation in the material world of politics and economics and so blurs attempts to differentiate secular and religious spheres. The idol turns the community inwards toward created things, an entirely immanent frame. As a criticism, then, idolatry points to material things being invested with transcendent significance. Idolatry entails closing ourselves to this, such that a religious desire (which Francis affirms all people have)¹²² is unfulfilled and captured by the pursuit of profit or goods. In this way, idolatry also points to a contrast: that created things can, if pursued correctly, orientate us toward something greater than ourselves, a common good that unites all persons, a common quest, or a common pursuit of love that may bind us. Indeed, after discussing the need for politicians who accept their “lofty vocation,” Francis is explicit: “I am firmly convinced that openness to the transcendent can bring about a new political and economic mindset which would help to break down the wall of separation between the economy and the common good of society.”¹²³

Faced with such alternatives, the political community cannot be concerned simply with the “secular value” of freedom or “know nothing” of God.¹²⁴ As with Augustine, Francis appears to be arguing that where the political community is not orientated toward ends consistent with the love of God, there is no alternative neutral ground that it can rest upon.¹²⁵ Put another way, writing in this tradition, Francis is claiming that the political community is *already* in the business of promoting and cultivating religion, it just happens to be the destructive religion of profit, markets, and goods.¹²⁶ In response, he points to an alternative: seeking solidarity or fraternity.

SOLIDARITY, FRATERNITY (AND LOVE)

In Catholic social teaching, solidarity concerns, broadly, understanding the mutual dependence of persons, our responsibility for each other, and the vocation to act for others. It is, in this sense, the contrast to idolatry’s solipsism. Unsurprisingly then, it is central to Pope Francis’s writing and

120 FRANCIS, *EVANGELII GAUDIUM*, *supra* note 95, at § 53.

121 FRANCIS, *LAUDATO SI'*, *supra* note 12, at § 2.

122 See *infra* note 174.

123 FRANCIS, *EVANGELII GAUDIUM*, *supra* note 95, at § 205.

124 See *supra* text accompanying note 47.

125 See *supra* text accompanying note 17.

126 I leave to one side the important possibility that “worshipping earthly powers” (FRANCIS, *LAUDATO SI'*, *supra* note 12, at § 75) can include the state itself. Rather, my focus is on Francis’s writing and speeches. On this possibility see, e.g., Paul S. Kahn, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (2011). Kahn updates Carl Schmitt. For the latter, war is the ultimate political act; it determines the existence of a people (friends) as against enemies, and renders the sovereign visible in ensuring existential survival. See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL*, 29, 32–33 (George Schwab trans., 2007 [1932]). The category “political theology” examines this. It is grounded on the willingness to demand sacrifice: wars, even on Kahn’s account the total war of nuclear annihilation, as well as acts of affiliation (like pledges and flag veneration) all point to the will to endure and constitute the sacred space of the state itself, requiring ultimate allegiance.

speeches. For example, in his message celebrating the World Day of Peace in 2014, Francis writes of cultivating a “lively awareness” of ourselves as “relational beings.”¹²⁷ The absence of a “culture of solidarity,” he states, leads to a “rampant individualism, egocentrism and materialistic consumption” that is indifferent to others and, in particular, the poor. Our common task, he argues, is “to form a community composed of brothers and sisters who accept and care for one another.”¹²⁸ Solidarity thus entails being concerned for each person’s development, that each person may come to exercise and realize his or her gifts and talents. Francis notes that this means “access to capital, services, educational resources, healthcare and technology,” but it also means cultivating a community characterized by “reciprocity, forgiveness and complete self-giving.”¹²⁹

Francis’s emphasis on solidarity can be explored further in two related directions: first, the appeal to personhood and forming a body of people; and second, how solidarity entails participating in a divine economy.

In his speech to the European Parliament in 2014, Francis argued that the European Union was based not on the person “as a citizen or an economic agent.” This had given rise to “selfish lifestyles, marked by an opulence which is no longer sustainable and frequently indifferent to the world around us, and especially to the poorest of the poor.”¹³⁰ Rather, Europe must be based on the person “endowed with transcendent dignity,” in which each individual is understood as desired and needed, and as exercising duties for the common good.¹³¹ Here, Francis continues the Catholic tradition’s understanding of the person as dignified through a common relationship to God and, importantly, the realizing of this relationship through exercising roles and talents that contribute to social groups.¹³² For this line of thought, the reference point is Saint Paul’s discussion of the body of Christ.¹³³ For Paul, the one God is manifested through the bestowal of a diversity of gifts exercised for a social whole or directed toward the common good.¹³⁴ Each person is a “part” that is recognized or dignified because he or she shares their unique talent, creativity, or role in exchange with others.

In a 2017 speech, Francis more explicitly associated this understanding of personhood with “fraternity.” Fraternity entails affirming persons “participat[ing] differently in the common good according to their abilities, their life plan, their vocation, their work, or their charism of service.”¹³⁵ Interestingly, he contrasted this with solidarity, which operates more as a prelude to fraternity. Solidarity, he stated, entails recognizing the equal dignity of persons. For present purposes, however, we may see a continuity between the two ideas; indeed, Francis has more typically referred to solidarity to capture both claims.

127 Francis, Message for the Celebration of the World Day of Peace, *supra* note 109, at § 1.

128 *Id.*

129 *Id.* at §§ 5 and 10.

130 Francis, Address of Pope Francis to the European Parliament (Nov. 24, 2014), https://w2.vatican.va/content/francesco/en/speeches/2014/november/documents/papa-francesco_20141125_strasburgo-parlamento-europeo.html [hereinafter Francis, Address to the European Parliament].

131 *Id.*

132 See also Joel Harrison, “A Communion in Good Living”: Human Dignity and Religious Liberty beyond the Overlapping Consensus, in UNDERSTANDING HUMAN DIGNITY 451, 461–64 (Christopher McCrudden ed., 2013) (discussing the personalist tradition developed by Jacques Maritain and Karol Wojtyła, in particular).

133 See also John Milbank, *Paul against Biopolitics*, in PAUL’S NEW MOMENT: CONTINENTAL PHILOSOPHY AND THE FUTURE OF CHRISTIAN THEOLOGY 21 (John Milbank, Slavoj Žižek, & Creston Davis eds., 2010).

134 1 Corinthians 12:7.

135 Francis, Message of the Holy Father to the Participants in the Plenary Session of the Pontifical Academy of Social Sciences (April 28, 2017), <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2017/04/28/170428h.html> [hereinafter Francis, Message to the Plenary Session of the Pontifical Academy of Social Sciences].

Recognizing the fundamental role and creativity of persons as “parts,” the Catholic tradition has emphasized both the importance of nurturing multiple contexts for social and political involvement (like workplaces) and the genius of the individual realized in these different contexts.¹³⁶ So, for example, Pope John Paul II emphasized the personal dignity of the worker “as a sharer in responsibility and creativity” applied for “himself and others.”¹³⁷ Francis similarly states that the “personal aspect” of individuals must be combined with the common good of “individuals, families and intermediate groups.”¹³⁸ Doing so, he states, resists a tendency to understand the person as a “monad.”¹³⁹

Forming this body cultivating solidarity or fraternity is not, however, simply a matter of developing good social practices. Rather, for Francis drawing heavily from John Paul II and Benedict, such practices necessarily participate in a divine economy. In *Sollicitudo Rei Socialis*, John Paul II had emphasized that solidarity requires overcoming “structures of sin”—desires for profit, thirst for power, or oppression of others to ensure security or economic gain.¹⁴⁰ He argued that such overcoming presupposes participating in divine grace. To commit oneself to a life of self-giving, to understand one’s life as a service to others, to live a life marked by forgiveness, is precipitated and sustained by God’s own life of love that overflows into creation.¹⁴¹ Francis continues this argument. In *Lumen Fidei*, an encyclical begun by Benedict, he characterizes faith as a journey toward embracing God and neighbor. The person, he writes, places his or her trust in an “objective and shared light which points the way.”¹⁴² Rather than a leap in the dark, faith is characterized as an encounter with the God who has already reached out to humanity.¹⁴³ The person comes to know the source of his or her own being, and embrace “a love which precedes us.”¹⁴⁴ Embracing this love is characterized as illumination—faith reforms how we see “every aspect of human existence.”¹⁴⁵ And because God is love, loving God—participating in that very source of being—must necessarily overflow into love of others. Francis consequently writes that the “mystical fraternity” becomes “a fraternal love capable of seeing the sacred grandeur of our neighbor, of finding God in every human being, of tolerating the nuisances of life in common by clinging to the love of God.”¹⁴⁶

Solidarity and fraternity are thus spurred on by and grow a life of charity. Francis exhorts his audience to build a city based in charity, the divinely granted habit of cherishing God and then cherishing others for the sake of God. This is needed, he argues, to establish a “true basis of brotherhood.”¹⁴⁷ He draws from Benedict’s encyclicals, in which the latter argued that beyond simply according persons their rights lies “relationships of gratuitousness, mercy and communion” in

136 See John Milbank, *Dignity Rather than Rights*, in UNDERSTANDING HUMAN DIGNITY 189, 201–20 (Christopher McCrudden ed., 2013).

137 JOHN PAUL II, LABOREM EXERCENS [Encyclical on human work] (1981), § 15, http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens.html.

138 Francis, Address to the European Parliament, *supra* note 130.

139 *Id.*

140 JOHN PAUL II, SOLICITUDO REI SOCIALIS [Encyclical for the twentieth anniversary of Populorum Progressio] (1987), § 38, http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_30121987_sollicitudo-rei-socialis.html [hereinafter JOHN PAUL II, SOLICITUDO REI SOCIALIS]; Francis, Message for the Celebration of the World Day of Peace, *supra* note 109, at § 4.

141 JOHN PAUL II, SOLICITUDO REI SOCIALIS, *supra* note 140, at §§ 38–40.

142 FRANCIS, LUMEN FIDEI, *supra* note 3, at § 3.

143 *Id.* at § 8 (“Faith is our response to a word which engages us personally, to a ‘Thou’ who calls us by name.”).

144 *Id.* at § 3.

145 *Id.* at §§ 3, 18.

146 FRANCIS, EVANGELII GAUDIUM, *supra* note 95, at § 92.

147 FRANCIS, LUMEN FIDEI, *supra* note 3, at §§ 51, 54.

which the person “offer[s] what is ‘mine’ to the other.”¹⁴⁸ Benedict exhorted individuals to be “instruments of grace” who, being loved by God, “pour forth God’s charity.”¹⁴⁹ But, in a passage from *Caritas in Veritate* that Francis quotes, Benedict furthers this statement by arguing charity concerns “not only . . . micro-relationships (with friends, with family members or within small groups),” but also “macro-relationships (social, economic and political ones).”¹⁵⁰

This means that faith is a political task, in which the civil authority is tasked with supporting and coordinating a community orientated to a particular, indeed religious, end. Solidarity and fraternity, as this end, consequently contrasts the end of idolatry. Both entail the very material practices of forming a political community that shapes market practices and cares for our common home, but both are also religious. As discussed, idolatry renders persons into a “myriad of unconnected instances” as the religious desire is misdirected inward toward one’s own self.¹⁵¹ In contrast, if we pursue solidarity through spheres of action thought to concern merely material or secular matters, Francis is suggesting that we are sustained by and open toward a transcendental “economy.” Politics would thus be directed toward the person’s transcendent dignity—that is, each person’s participation in a divine economy of gift and love.

Fundamentally then, in developing the categories of solidarity, fraternity, and idolatry, Francis disturbs any easy division between what is religious and what is secular. Civil authority may exercise its own jurisdictional autonomy, but this is understood as the capacity to deliberate and make decisions for the common good. And the common good, Francis argues, concerns “form[ing] a community composed of brothers and sisters who accept and care for one another.”¹⁵² In contrasting solidarity and fraternity with idolatry, Francis appears to reject any contention that the state’s exercise of power concerns a logic independent of religious ends or is for a “secular purpose.” Indeed, solidarity and fraternity seems to be the shape of true religion.

POPE FRANCIS AND RELIGIOUS LIBERTY

Francis himself identifies concrete implications following from his arguments, and I have noted some.¹⁵³ But we can continue Francis’s thoughts on church and state by analyzing further his specific comments on religious liberty. He argues the civil order must recognize conscientious objections and what he calls “healthy pluralism.” However, neither is for the sake of simply liberty or the individual’s (or group’s) pursuit of ethical freedom. Rather, Francis argues that the civil authority must care for religious liberty, as it does for economic or environmental policy, for the principal purpose of supporting the free building of communities of solidarity and fraternity.

Conscience

Perhaps first and foremost, Francis, unsurprisingly, continually points to the violent persecution of Christians and others in various countries, and especially in the Middle East.¹⁵⁴ Before the United

148 BENEDICT XVI, *CARITAS IN VERITATE*, *supra* note 112, at § 6.

149 *Id.* at § 5.

150 *Id.* at § 1. See, e.g., FRANCIS, *EVANGELII GAUDIUM*, *supra* note 95, at § 205.

151 FRANCIS, *LUMEN FIDELI*, *supra* note 3, at § 13.

152 Francis, Message for the Celebration of the World Day of Peace, *supra* note 109, at § 1.

153 See *supra* text accompanying notes 104–10.

154 See, e.g., Francis, Meeting with the Members of the General Assembly of the United Nations Organization [Address of the Holy Father] (Sept. 25, 2015), <http://w2.vatican.va/content/francesco/en/speeches/2015/>

Nations General Assembly, he referred to “the destruction of [Christian and other groups’] places of worship, their cultural and religious heritage, their houses and property” and how they “have faced the alternative either of fleeing or of paying for their adhesion to good and to peace by their own lives, or by enslavement.”¹⁵⁵ He continued, “[T]he most basic understanding of human dignity compels the international community, particularly through the norms and mechanisms of international law, to do all that it can to stop and to prevent further systematic violence against ethnic and religious minorities.”¹⁵⁶

However, Francis has also made strong statements in favor of respecting conscience beyond instances of violent persecution. In his welcoming ceremony address when visiting the United States, he stated, “[A]s my brothers, the United States Bishops, have reminded us, all are called to be vigilant, precisely as good citizens, to preserve and defend that freedom [of religion] from everything that would threaten or compromise it.”¹⁵⁷ The U.S. Bishops have raised a number of areas of concern, including laws prohibiting assisting undocumented immigrants; the closure of foster care and adoption agencies unable to comply with sexual orientation nondiscrimination duties; attempts to regulate church governance; and attempts to limit religious liberty claims to the context of worshipping communities.¹⁵⁸ However, some took Francis’s statement as directed at recent conflicts between the United States Conference of Catholic Bishops and the Obama administration over, in particular, the Affordable Care Act’s “contraceptive mandate” and the administration’s support for same-sex marriage.¹⁵⁹ Francis had visited the Little Sisters of the Poor, who were then objecting to what they saw as a requirement making them complicit in providing contraception under the Affordable Care Act.¹⁶⁰ Moreover, Kim Davis visited Francis.¹⁶¹ Davis, an Apostolic Christian, was a county clerk in Kentucky who decided (unsuccessfully) that her office would not

[september/documents/papa-francesco_20150925_onu-visita.html](http://www.vatican.va/press/documents/papa-francesco_20150925_onu-visita.html) [hereinafter Francis, Meeting with the General Assembly of the United Nations]; FRANCIS, EVANGELII GAUDIUM, *supra* note 95, at § 61; Francis, Address of Pope Francis to Participants in the Conference on International Religious Freedom and the Global Clash of Values (June 20, 2014), http://w2.vatican.va/content/francesco/en/speeches/2014/june/documents/papa-francesco_20140620_liberta-religiosa.html [hereinafter Francis, Address to the Conference on International Religious Freedom and the Global Clash of Values] (“Persecution against Christians today is actually worse than in the first centuries of the Church, and there are more Christian martyrs today than in that era.”); Francis, Letter of His Holiness Pope Francis to the Christians in the Middle East (Dec. 21, 2014), https://w2.vatican.va/content/francesco/en/letters/2014/documents/papa-francesco_20141221_lettera-cristiani-medio-oriente.html.

155 Francis, Meeting with the General Assembly of the United Nations, *supra* note 154.

156 *Id.*

157 Francis, Welcoming Ceremony [Address of the Holy Father] (Sept. 23, 2015), http://w2.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco_20150923_usa-benvenuto.html [hereinafter Francis, Welcoming Ceremony].

158 AD HOC COMMITTEE FOR RELIGIOUS LIBERTY, OUR FIRST, MOST CHERISHED LIBERTY [A STATEMENT ON RELIGIOUS LIBERTY] (March, 2012), http://www.usccb.org/issues-and-action/religious-liberty/our-first-most-cherished-liberty.cfm#_ftn2.

159 See Harriet Sherwood, *Obama and the Pope Defend “Religious Liberty”—But Where and for Whom?*, GUARDIAN, September 24, 2015, <http://www.theguardian.com/world/2015/sep/23/obama-pope-francis-religious-liberty-american-catholics>.

160 *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (vacating and remanding to the Court of Appeals after the parties agreed to find an alternative procedure for providing contraception to insured persons).

161 See Jim Yardley & Laurie Goodman, *Pope Francis Met with Kim Davis, Kentucky County Clerk, in Washington*, NEW YORK TIMES, September 30, 2015, http://www.nytimes.com/2015/09/30/us/county-clerk-kim-davis-who-denied-gay-couples-visited-pope.html?_r=0 (discussing both meetings).

issue marriage licenses following the Supreme Court's decision holding that same-sex couples could not be excluded from marriage.¹⁶²

When Pope Francis was asked about these cases, he replied, "I can't have in mind all cases that can exist about conscience objection."¹⁶³ In other words, he did not advance a view on what the *outcome* of such cases should be. However, he continued by affirming strongly conscientious objection as a fundamental right that "must enter into every juridical structure," including applying to government workers.¹⁶⁴ In a later interview, he advocated for "a strong law guaranteeing religious freedom." The Muslim woman should be able to wear the veil, he said; the Catholic the cross. And if the state passes laws on matters like same-sex marriage or euthanasia, Francis says it "must also respect [people's] consciences."¹⁶⁵ Not doing so is part of what he calls "polite persecution." While Francis emphasizes the cause of those whose persecution ends in martyrdom, he has also spoken of "persecution that is disguised as culture, modernity and progress, and which ends up taking away man's freedom and even the right to conscientious objection."¹⁶⁶

Conscience is often appealed to in religious liberty literature, but with an emphasis on the personal autonomy of the individual. For some, conscience concerns pursuing one's own ethical convictions, perhaps as these convictions relate to issues considered important in our contemporary culture—marriage, abortion, euthanasia, worship.¹⁶⁷ Conscience is said to encompass a person's "deep" or "ultimate" concerns, finding one's identity, or shaping one's values.¹⁶⁸ Typically, it is uncoupled from a specific theistic or transcendental goal; rather, what matters is the capacity for pursuing one's ethical convictions or authenticity. Thus Martha Nussbaum argues that we value conscience without judging "the question whether there is meaning to be found."¹⁶⁹ Personal autonomy, the capacity for choice, or cultivating authenticity and self-respect are now appealed to in leading judicial decisions as the underlying value when considering questions of privacy, marriage, and religious liberty.¹⁷⁰

However, the Catholic tradition is different. In *Dignitatis Humanae*, the Second Vatican Council also appealed to conscience for the claim "that the human person has a right to religious

162 See Sandhya Somashekhar, *Judge: Kim Davis May Keep Her Name off Marriage Licenses*, WASHINGTON POST, February 10, 2016, https://www.washingtonpost.com/news/post-nation/wp/2016/02/10/judge-kim-davis-may-keep-her-name-off-marriage-licenses/?utm_term=.234b60875ca3.

163 Linda Bordoni, *Pope Francis: I'm Not a Star, but the Servant of Servants of God* (Sept. 28, 2015, 11:53 AM), http://www.archivioradiovaticana.va/storico/2015/09/28/pope_francis_i_m_not_a_star_but_the_servant_of_servants_of_god/en-1175317.

164 *Id.*

165 Goubert & Maillard, *supra* note 77.

166 Francis, "Two Kinds of Persecution": Morning Meditation in the Chapel of the Domus Sanctae Marthae (April 12, 2016), http://w2.vatican.va/content/francesco/en/cotidie/2016/documents/papa-francesco-cotidie_20160412_two-kinds-of-persecution.html [hereinafter Francis, "Two Kinds of Persecution"].

167 RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE 73 (2006) ("identifying these areas as matters of ethical conviction, a category more abstract [and therefore more congruent with his version of political morality] than religious liberty.").

168 Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 UNIVERSITY OF CHICAGO LAW REVIEW 1245, 1266 (1994).

169 MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 169 (2008).

170 This is perhaps more prominent in the United States: see *Obergefell v. Hodges*, 134 S. Ct. 2584, 2599 (2015) (Kennedy J.) (linking the person's capacity for choice with his or her dignity); *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (joint opinion of O'Connor, Kennedy, Souter JJ.). However, the emphasis on personal autonomy is seen, for example, in U.K. religious liberty jurisprudence. See *R (Williamson) v. Secretary of State for Education and Employment*, [2005] 2 A.C. 246, § 22 (U.K.H.L.) (Lord Nicholson of Birkenhead).

freedom.”¹⁷¹ But, as Russell Hittinger argues, “[*Dignitatus Humanae*] does not proffer a merely anthropocentric doctrine of conscience.”¹⁷² Indeed, *Dignitatis Humanae* explicitly states that conscience is not rooted in the “subjective disposition of the person.”¹⁷³ Instead, it grounds conscience in a claim that the person has a natural desire or inclination to know the truth about God, and that God reaches down to all persons, revealing himself through invitation as their end.¹⁷⁴ Pope Francis states, “Faith is our response to a word which engages us personally.”¹⁷⁵ Conscience is thus said to be directed toward the truth, which finally concerns the worship of God, “the end and purpose of life.”¹⁷⁶ This gives rise to a natural duty to pursue God and to render what is his due in worship. Doing so entails a principle of subjectivity, although not autonomy uncoupled from a specific goal. A person cannot come to know and enjoy God as that person’s true end unless God is accepted as the subject of one’s own love. Truth, to be authentic as truth, must be accepted; that is, it must be given free assent.¹⁷⁷ Coercion is accordingly a wrong because it is contrary to seeking truth or the “reasonable and free submission of faith.”¹⁷⁸ Schindler puts it in this way: “I have a right to be free from coercion because I am made for truth and God, for the purpose of seeking the truth and God.”¹⁷⁹

Francis also emphasizes this principle of subjectivity. As discussed, he rejects conceptualizing freedom in abstract terms—that is, focused on the individual’s capacity for freedom without specified ends. In referring to polite persecution, he does not nominate specific examples; rather, he claims this happens when a person (or even a nation) attempts to defend “the truth about man and its ethical consequences.”¹⁸⁰ On his flight out of the United States, he offered a comparison for failing to respect conscientious objections: compelling a person to the baptismal font.¹⁸¹ For Francis, then, consistent with *Dignitatis Humanae*, conscience may be coerced when compelled to accept a truth (as in forced baptism), or else when compelled to renounce a truth accepted (the person conscientiously objecting to same-sex marriage, for example). This violates the proper subjectivity of religious belief, that is, that truth must be freely accepted by the person. Of course,

171 SECOND VATICAN COUNCIL, *DIGNITATIS HUMANAЕ*, *supra* note 26, at § 2.
 172 Russell Hittinger, *Dignitatis Humanae, Religious Liberty, and Ecclesiastical Self-Government*, 68 *GEORGE WASHINGTON LAW REVIEW* 1035, 1046 (2000).
 173 SECOND VATICAN COUNCIL, *DIGNITATIS HUMANAЕ*, *supra* note 26, at § 2.
 174 Speaking to a conference on religious freedom, Francis stated, “[E]very human being is a ‘seeker’ of the truth of his own origin and of his own destiny . . . thoughts and questions arise, which cannot be smothered.” Francis, Address of Pope Francis to the Conference on International Religious Freedom and the Global Clash of Values, *supra* note 154.
 175 FRANCIS, *LUMEN FIDEI*, *supra* note 3, at § 8.
 176 SECOND VATICAN COUNCIL, *DIGNITATIS HUMANAЕ*, *supra* note 26, at § 3.
 177 *Id.* at § 1 (“The truth cannot impose itself except by virtue of its own truth.”).
 178 *Id.* at § 10 (footnotes omitted). See also John Finnis, *Religion and Public Life in a Pluralist Society* [2004], in 5 *RELIGION & PUBLIC REASONS* 42, 49 (2011); Joseph H.H. Weiler, *A Christian Europe? Europe and Christianity: Rules of Commitment*, 6 *EUROPEAN VIEW* 143, 148 (2007) (discussing this view of noncoerced truth).
 179 Schindler, *supra* note 39, at 287 (emphasis in original). Schindler claims a necessary relationship between freedom and truth. In this way, he arguably raises a critical question in response to Thomas Pink’s thesis: namely, that *Dignitatis Humanae* addressed only noncoercion in respect of the state, leaving untouched the coercive authority of the church. See Thomas Pink, *The Right to Religious Liberty and the Coercion of Belief: A Note on Dignitatis Humanae*, in *REASON, MORALITY, AND LAW: THE PHILOSOPHY OF JOHN FINNIS* 427 (John Keown & Robert P. George eds., 2013). However, Pink distinguishes coercing the baptized—through sanctions like excommunication or loss of title—with a clear prohibition on coercing the unbaptized to enter into Catholic faith.
 180 Francis, Address to the Conference on International Religious Freedom and the Global Clash of Values, *supra* note 154; Francis, “Two Kinds of Persecution,” *supra* note 166.
 181 Bordoni, *supra* note 163.

such an argument relies on accepting that the truth is at stake—either that the person should not be coerced to accept the truth or else that the conscientious objector is himself or herself raising a claim that bears a relationship to the truth and so should not be disturbed.

Moreover, this argument for conscience, because it claims God as one's end, is fundamentally not about simply serving the individual's own development. In Catholic thought, developing one's conscience is said to take place within a community, one that communicates its understanding of God and develops the individual's knowledge through what Pope John Paul II called "the deeper capacity to entrust oneself to others."¹⁸² For Francis, conscience directed toward God is social. As discussed, he argues a blunted conscience is one that is turned wholly inward.¹⁸³ He further warns against reducing the religious life to the "quiet obscurity of the individual's conscience."¹⁸⁴ And his ontology—his understanding of the ground of all life—means that when a person is directed toward God, he or she is participating in a life marked by solidarity and fraternity.

Healthy Pluralism

Francis combines a strong claim for permitting conscientious objection with an additional claim: the feasibility of plural beliefs in public life and the desirability of not enforcing a uniform rule. In his speech on religious liberty while in the United States, he called this "healthy pluralism."¹⁸⁵

Political and legal theorists have recently reenergized discussion of pluralism, in different ways. Some have emphasized a structural, political, or legal pluralism.¹⁸⁶ For example, Victor Muñoz-Fraticelli points to the coexistence of "several sources of (putatively) legitimate authority within a territory ... among which the authority of the state is but one among such sources."¹⁸⁷ Francis, I suspect, would find much to agree with in these accounts. His speeches and writing are consistent with an enduring Catholic emphasis on parallel authorities and the church's autonomy. Moreover, he has emphasized the need to break-free of the alternative between "the liberal-individualist vision of the world" and the "state-centric vision of society."¹⁸⁸ But there are arguably differences also, although these may not be clearly stated.

For Francis, political and legal pluralism of this kind may be understood as supporting the cooperative relationship between different authorities, spiritual and temporal, aimed at securing human dignity. This means that he would arguably give more attention to harmony between different sites, seeking a common aim, even if this may be partially occluded or difficult to discern. In contrast, recent pluralist scholarship sometimes sounds a more agonistic note. Jacob Levy writes, "There is a friction between group life and the state, even the liberal democratic state, a friction that

182 See JOHN PAUL II, *FIDES ET RATIO* [Encyclical on the relationship between faith and reason] (1998), § 32, http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_14091998_fides-et-ratio.html (discussed in Hittinger, *supra* note 30, at 472); SECOND VATICAN COUNCIL, *DIGNITATIS HUMANAE*, *supra* note 26, at § 3 ("The inquiry is to be free, carried on with the aid of teaching or instruction, communication and dialogue.").

183 See *supra* text accompanying note 116.

184 FRANCIS, *EVANGELII GAUDIUM*, *supra* note 95, at § 255.

185 Francis, Meeting for Religious Liberty with the Hispanic Community and Other Immigrants (Sept. 26, 2015), http://w2.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco_20150926_usa-liberta-religiosa.html [hereinafter Francis, Meeting for Religious Liberty with the Hispanic Community and Other Immigrants]. See also FRANCIS, *EVANGELII GAUDIUM*, *supra* note 95, at § 255.

186 See VICTOR M. MUÑOZ-FRATICELLI, *THE STRUCTURE OF PLURALISM* (2014); JACOB T. LEVY, *RATIONALISM, PLURALISM, AND FREEDOM* (2015); PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* (2013).

187 MUÑOZ-FRATICELLI, *supra* note 186, at 1.

188 Francis, Message to the Plenary Session of the Pontifical Academy of Social Sciences, *supra* note 135.

does not admit of any stable resolution and does not admit of resolution at all without moral loss.”¹⁸⁹ He continues by arguing that we must live “with a degree of disharmony in our social lives, our moral psychologies, and our political theory,” and that there cannot be a synthesis between the ethos of intermediate groups and the state.¹⁹⁰ Muñiz-Fraticelli extends on this by claiming a central hallmark of pluralism is tragedy. In what he identifies as the three spheres of pluralism—meta-ethics (which for Muñiz-Fraticelli means value pluralism), political pluralism, and legal pluralism—we are faced, necessarily it would seem, with incommensurability of different kinds. In meta-ethics, persons seek ends that are equally good, but are incommensurable because they do not possess a common quality of, say, “goodness.”¹⁹¹ In political and legal pluralism, we see conflicting claims of sovereignty not subsumed under a single authority.¹⁹² These forms of pluralism give rise to tragedy: we must choose between equally good reasons for action, and between the claims of rival sovereigns, resulting in a tragic loss of some good or some claim.¹⁹³

In part, this is a matter of emphasis. Structural pluralist claims tend to understand associations as primarily a check on the state; by exercising their own authority, they question any monistic or absolutist claims to sovereignty.¹⁹⁴ Francis, I suspect, would agree in part. However, his invoking of pluralism, as we will see, also points to a unity. This follows from a more explicitly theological construal of politics and society. Much as Benedict recast secularity as “healthy” when in relationship with the Divine, Francis understands pluralism as “healthy” when understood in theological terms. He appears to be suggesting that our differences, although real, can nevertheless be understood as participating in or reaching after the Divine, however partially and however incomplete, and that we are accordingly engaged in a shared project of solidarity, fraternity, and charity.

Arguably, Francis’s invoking of healthy pluralism is more focused on understanding disagreement itself within society, rather than a complete structural or institutional account. It is consequently perhaps more directed to the concerns that animate John Inazu’s 2016 *Confident Pluralism*.¹⁹⁵ Again, we find differences. Inazu does emphasize a certain unity amidst our “many-ness.” However, this is largely based on a minimal agreement on the importance of limiting state power, of engaging in persuasion, and of supporting a civil society that is found in a common commitment to, most importantly, freedom of expression and association.¹⁹⁶ Inazu recognizes that we may engage in shared interests,¹⁹⁷ but his arguments are primarily directed toward ensuring the capacity to coexist—“a kind of mutual nonaggression pact.”¹⁹⁸

Francis arguably goes further.

First, he continually argues that the church is not limited to “the sphere of the private and personal.” It must, he contends, always act in a public manner: forming a community and offering its argument and presence as an exhortation to the civil community.¹⁹⁹ For Francis, reducing the

189 LEVY, *supra* note 186, at 284–85.

190 *Id.* at 295.

191 MUÑIZ-FRATICELLI, *supra* note 186, at 13–16.

192 *Id.* at 18–28.

193 *Id.* at 16, 28.

194 *See, e.g.*, LEVY, *supra* note 186, at 4 (discussing ancient constitutionalism as liberalism’s precursor).

195 JOHN D. INAZU, *CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE* (2016).

196 *Id.* at chapter 1.

197 *Id.* at 119–20.

198 *Id.* at 17.

199 *See* FRANCIS, *EVANGELI GAUDIUM*, *supra* note 95, at §§ 64 and 183–82. *See also* Francis, Press Conference of His Holiness Pope Francis Onboard the Flight from Colombo to Manila (Jan. 15, 2015), http://w2.vatican.va/content/francesco/en/speeches/2015/january/documents/papa-francesco_20150115_srilanka-philippine-incontro-giornalisti.html (warning

church to private expression entails subverting its call to elevate the transcendent dignity of the person in all social endeavors. Privatization, reducing the church to a subculture or a limited sphere of religion concerning private or personal preferences, is one way of blunting the church's exhortations against the "collective sin[s]" of market idolatry, neglect for the poor, and environmental degradation.²⁰⁰

Second, in a line of thought that can sit well with Inazu's confident pluralism, he argues that attempts to demand a person's public actions be uncoupled from their beliefs jeopardizes "true relationships," "respectful coexistence," and the attempt to cultivate a "common home."²⁰¹ The person, he states, cannot divide himself from "an intimate part of his very being."²⁰² This is a claim about the reality of religion—it encompasses all of one's life. However, it also supports a contention that we must take seriously a person's religion, in all its public dimensions. Pope Benedict raised a similar argument in *Caritas in Veritate*.²⁰³ Reducing religion down to a series of lifestyle choices, he argued, gives rise to an eclecticism that does not permit true dialogue; rather than engaging with the particularity of that religion, including its presence and possible claims for influencing public life, we characterize it as personal belief, potentially (as Laws LJ put it) a "subjective opinion . . . incommunicable by any kind of proof or evidence."²⁰⁴ This amounts to disrespect.

Third, he arguably couples this need for genuine respect with the claim that difference can be understood as contributing to our common good.

Francis is strikingly critical of enforcing uniformity, or what he calls attempting to make people cohere through "a single theoretically neutral way of thought."²⁰⁵ On several occasions, he has invoked an image of society as a polyhedron, rather than a sphere.²⁰⁶ The sphere reflects uniformity. Every point on its surface is exactly the same as any other, and must therefore cohere to the center in precisely the same manner. In contrast, the polyhedron is messier. Its multiple planes reflect difference and even relative independence, *but also combine into a perhaps rougher unity*. The image is apt for describing what Luke Bretherton calls our "post-secularist space": "multiple modernities, each with their respective relationship to religious belief and practice, are overlapping and interacting within the same shared, predominantly urban spaces." As Bretherton continues, this means different faith communities exist together in public spaces pursuing "goods in common" like health, education, or labor conditions.²⁰⁷ The different religious group is never *wholly* different, but rather shares (however partly) in a common pursuit. Moreover, Francis emphasizes that such difference can at least echo the true religion he points toward. For example, while acknowledging distinctions, he encourages dialogue with non-Christian religions as channels that "liberate non-Christians from atheistic immanentism or from purely individual religious experience."²⁰⁸

against treating "religions or expressions of religion [as] a sort of subculture which are tolerated but insignificant; they are not part of our enlightened culture").

200 See FRANCIS, *EVANGELII GAUDIUM*, *supra* note 95, at § 64.

201 Francis, Address of Pope Francis to Participants in the Plenary Assembly of the Pontifical Council for Interreligious Dialogue (Nov. 28, 2013), http://w2.vatican.va/content/francesco/en/speeches/2013/november/documents/papa-francesco_20131128_pc-dialogo-interreligioso.html [hereinafter, Francis, Address to the Plenary Assembly of the Pontifical Council for Interreligious Dialogue].

202 *Id.*

203 BENEDICT XVI, *CARITAS IN VERITATE*, *supra* note 112, at § 26.

204 *McFarlane v. Relate Avon Ltd* [2010] E.W.C.A. Civ. 880, [2010] I.R.L.R. 872, § 21.

205 Francis, Address to the Plenary Assembly of the Pontifical Council for Interreligious Dialogue, *supra* note 201.

206 FRANCIS, *EVANGELII GAUDIUM*, *supra* note 95, at § 236; Francis, Meeting for Religious Liberty with the Hispanic Community and Other Immigrants, *supra* note 185.

207 BREThERTON, *supra* note 8, at 15.

208 FRANCIS, *EVANGELII GAUDIUM*, *supra* note 95, at § 254.

This polyhedron mindset then furthers Francis's emphasis on conscientious objection. The objector is likewise never wholly a rebel or at odds with society's claim on what is required to further the common good. If she is, then accommodating such an objection is unlikely. As Jeremy Waldron argues, if, for example, the Sikh's kirpan is simply one possible violent weapon, then including it within a general ban in schools is the most likely, if not necessary, course of action.²⁰⁹ In contrast, the act of conscience may be like one plane helping to form the still present unity of the polyhedron. For example, the civil community has concluded that same-sex parents adopting children furthers the common good. Catholic and other religious agencies object to this, but their objection is not wholly against the aim pursued by the civil authority. Rather, such agencies can be understood as contributing to a profoundly important good: rearing children in a loving, stable home (and one that may further the end of solidarity and fraternity discussed above).²¹⁰ Conscientious difference and unity can, on perhaps many occasions, operate together.²¹¹

Instead, Francis notes in his speech on religious liberty in Philadelphia, "We live in an age subject to the 'globalization of the technocratic paradigm,' which consciously aims at a one-dimensional uniformity and seeks to eliminate all differences and traditions in a superficial quest for unity."²¹² This is arguably a good description of some strands of argument in religious liberty discourse. A number of scholars now argue that religious liberty should be understood as a species of, or else collapsed into, a broader category of ethical freedom, ultimate concerns, or authenticity.²¹³ This abstraction leads to homogenization in two ways. First, legally. If religion is an expanded category of personal depth or ethical freedom, then accommodating religious expression when it conflicts with a general law potentially promotes anarchy—the specter of multiple exceptions for multiple individual eccentricities undermining laws said to reflect already the general welfare or else the rights and interests of individuals.²¹⁴ Second, conceptually. Religious traditions on this emerging account are reduced to instances of identity, or perhaps even acts of interchangeable consumption. Just as in the marketplace, what matters is not the good or the particular end pursued, but the availability of options or goods, consumed to satisfy personal quests for depth or authenticity.²¹⁵

209 Jeremy Waldron, *One Law for All? The Logic of Cultural Accommodation*, 59 WASHINGTON AND LEE LAW REVIEW 3, 4, 7–8 (2002). In contrast, see *Multani v. Commission scolaire Marguerite-Bourgeoys and A-G of Quebec* [2006] 1 S.C.R. 256, § 36 (Charron J) (emphasizing the kirpan's relationship to pacifism).

210 See John Milbank, *Shari'a and the True Basis of Group Rights: Islam, the West, and Liberalism*, in SHARI'A IN THE WEST 135, 144 (Rex Ahdar & Nicholas Aroney eds., 2010).

211 *Contra Catholic Care (Diocese of Leeds) v. Charity Commission for England and Wales* [2010] E.W.H.C. 520, [2010] P.T.S.R. 1074 (Ch) (The United Kingdom's Blair government determined that all adoptions services must comply with the sexual orientation non-discrimination duty. Catholic Care's attempt to continue its practice of serving only married couples was rejected.).

212 Francis, Meeting for Religious Liberty with the Hispanic Community and Other Immigrants, *supra* note 185; FRANCIS, LAUDATO SI', *supra* note 12, at § 106.

213 See *supra* note 13.

214 DWORKIN, *supra* note 14, at chapter 3.

215 Notable scholars emphasize the importance of making available a range of options. See, e.g., JOSEPH RAZ, THE MORALITY OF FREEDOM 410 (1986). Ronald Dworkin also sometimes draws an analogy between ethics and the free market fixed by individual decisions. See RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 214 (2000); DWORKIN, *supra* note 167, at 75–77. If we follow the logic of consumer markets, being satisfied with a "good" is not the goal. Rather, to stimulate investment and produce new goods, what matters is constantly deferring satisfaction in favor of continual shopping. See WILLIAM T. CAVANAUGH, BEING CONSUMED: ECONOMICS AND CHRISTIAN DESIRE 47 (2008).

Religious Liberty's End

I have argued that Francis understands that the civil authority is tasked with ordering the life of the community toward the end of solidarity and fraternity. It does so on all matters of political concern, including (to continue Francis's two most prominent lines of argument) with respect to the economy and the care of the environment. But this pursuit of solidarity also means that civil authority is consequently tasked with paying special solicitude to those bodies that specifically seek to reflect the worship and honoring of God; bodies that are committed directly to pursuing the life of charity that brings forth solidarity.²¹⁶ Conscience, "the free embrace of God in love,"²¹⁷ is directed toward this end. And, as Francis's discussion of healthy pluralism indicates, while this understanding may fundamentally reflect Christian claims, and so be found in Christian contexts, it nevertheless includes analogous groups. Moreover, such concern would not be limited to church or temple. Rather, religious liberty can be manifested in numerous contexts. Francis's speeches and writing point to the importance of religious ends in all areas of life. This starkly contrasts with theorists and judges who, as I discuss below, attempt to demarcate a specific religious sphere from spheres of (for example) commerce, employment, education, or charitable endeavors.²¹⁸

In Philadelphia, speaking to immigrant communities on religious liberty, he stated that religious liberty is exercised to realize the potential of individuals and communities to apply their talents toward "the welfare and enrichment of society as a whole."²¹⁹ Religious liberty, he continued, concerns claims to "freedom in the face of any claim to absolute power."²²⁰ But, in keeping with his emphasis on the need to reject limitless freedom, he argued that such freedom is manifested in the "call to conversion, reconciliation, concern for the future of society, self-sacrifice in the service of the common good, and compassion for those in need."²²¹ Such matters are integral to the "spiritual mission" proclaiming the dignity of the human person.²²²

These were not solitary references for a particular audience.²²³ In his Welcoming Ceremony Address to President Obama, he linked religious liberty to building "a just and wisely ordered

216 Civil authority consequently cultivates what Schindler calls an "originally positive sense of community." Schindler, *supra* note 39, at 313. To this extent, Thomas Pink's claim that the state cannot "coerce or direct anyone in any way in religious matters" would need further unpacking. See Pink, *supra* note 179, at 437. I understand Pink to be arguing that state coercion into the Catholic faith or state requirements that citizens engage in specific acts of Catholic worship are impermissible (a claim Francis reiterates). However, the terms "direct" and "religious matters" are ambiguous. In this article, I am claiming that Francis does in fact consider civil authority must be engaged in directing toward religious matters if we understand religious matters—of an openness to the transcendent, manifesting as solidarity and charity, for example—are interwoven into matters of politics. The economy, the environment, and support for communities, all matters in which civil authority exercises authority, are religious. Arguably, this fits with Pink's claim that the state must "recognise and promote the religious life of its citizens." *Id.* at 438.

217 Zachary R. Calo, *Catholic Social Thought, Political Liberalism and the Idea of Human Rights*, 1 JOURNAL OF CHRISTIAN LEGAL THOUGHT 1, 9 (2011).

218 See *infra* text accompanying note 255.

219 Francis, Meeting for Religious Liberty with the Hispanic Community and Other Immigrants, *supra* note 185.

220 *Id.*

221 *Id.*

222 *Id.*

223 Francis also contrasts these statements with exercises of religion that "must be firmly refuted as false since they are unworthy of God or humanity" (noting violence and unjustified discrimination). Vatican Radio, *Pope to Albania's Faith Leaders: Religion is a Source of Peace* (Sept. 23, 2014, 4:31 PM), http://www.archivioradiocana.va/storico/2014/09/21/pope_to_albanias_faith_leaders_religion_is_source_of_peace/en-1107025.

society.”²²⁴ Before the United States Congress, he characterized the voice of faith as a “voice of fraternity and love” and at the service of the human person.²²⁵ Speaking to the United Nations General Assembly, he argued that cultivating spiritual and material goods needed for integral human flourishing (linking care for housing, labor, and land and water with religious liberty) requires recognizing “natural ethical limits” that would tell against “abuse and corruption” and tell in favor of “selfless service to others.”²²⁶ Addressing Albanian religious leaders, he again emphasized religious liberty affords the opportunity to offer “a positive contribution” to both “moral reconstruction” and “economic reconstruction.”²²⁷ Quoting Pope John Paul II, Francis emphasized religious liberty “contributes decisively to human fraternity.”²²⁸ Explicitly contrasting merely defending one’s own autonomy, he considered that an “authentic and mature living out of religious freedom” entails “generosity and concern for the whole society without making distinctions.”²²⁹ In 2013, writing before the 10th General Assembly of the World Council of Churches, Francis again linked the “untrammeled exercise of religious liberty” with showing “particular solidarity with the most vulnerable of our brothers and sisters.”²³⁰

We could understand these statements as pointing to the happy consequences of religious liberty. On this view, supporting religious liberty happens to lead to solidarity or fellow-feeling in communities, on the whole, but perhaps it is nevertheless directed to something else—a person’s ultimate concerns or individual sense of depth, for example. However, Francis’s ontology means that religious liberty’s relationship to solidarity cannot be instrumental in this way. For Francis, religion concerns the person freely embracing a God who first plants in us a desire to be known and reaches out in love, a love that then must necessarily overflow to one’s neighbor. Religious liberty is the tool used to prevent coercion of belief by civic bodies and to support communities in cultivating a relationship with God, a self-transcendence that brings about solidarity or “beings in relation.”²³¹ This may be expressed through a healthy pluralism: groups may not fully follow this love, they may be directed to this end partially; nevertheless, their actions, although different, may offer a positive contribution or be understood as pursuing ends comparable to what Francis raises. Recall that, for Francis, freedom without such an end is not neutral, but rather the basis upon which the ego is captured by idols.

Would this claim affect religious liberty jurisprudence? Certainly, it may offer a surer foundation for religious liberty than arguments focused on the pursuit of an individual’s ultimate concerns, conscience, or ethical independence. The latter claims have led scholars to suggest that civil

224 Francis, Welcoming Ceremony, *supra* note 157.

225 Francis, Visit to the Joint Session of the United States Congress: Address of the Holy Father (Sept. 24, 2015), http://w2.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco_20150924_usa-us-congress.html.

226 Francis, Meeting with the General Assembly of the United Nations, *supra* note 154.

227 Francis, Meeting with the Leaders of Other Religions and Other Christian Denominations (Sept. 21, 2014), http://m2.vatican.va/content/francesco/en/speeches/2014/september/documents/papa-francesco_20140921_albania-leaders-altre-religioni.html.

228 *Id.* (quoting John Paul II).

229 *Id.*

230 Francis, Message of Pope Francis to Cardinal Kurt Koch on the Occasion of the 10th General Assembly of the World Council of Churches (Busan, Korea, 30 October–8 November 2013) (Oct. 4, 2013), http://w2.vatican.va/content/francesco/en/messages/pont-messages/2013/documents/papa-francesco_20131004_world-council-churches.html. See also Francis, Meeting with the President, Prime Minister and Civil Authorities (Ankara) (Nov. 28, 2014), http://w2.vatican.va/content/francesco/en/speeches/2014/november/documents/papa-francesco_20141128_turchia-incontro-autorita.html.

231 Francis, Address to the European Parliament, *supra* note 130.

authorities should not give religious liberty any special solicitude. Thus, Francis's arguments may point to a firmer basis for supporting many claims—for example, the independence of churches and religious bodies, the role of churches and religious organizations in serving asylum seekers, or the ongoing service of religious adoption agencies.

However, we may also be faced with a potential “limits” question. If the civil authority is tasked with giving special solicitude to groups that directly pursue the love of God and of neighbor, then this arguably also raises a basis for judging religious liberty claims. Can a religious liberty claim be rejected as outside of the purpose of the right if it fails to participate in or contribute toward the ends of solidarity, fraternity, and charity? Catholic thought has consistently emphasized that rights are accorded to persons “so that in this way everyone may more easily carry out their duties” toward a common good or end.²³² For example, *Pacem in Terris* speaks of the “right to a decent standard of living,” but pairs this with “the duty to live in a becoming fashion.”²³³ Similarly, a right to marriage only exists for the purpose of undertaking reciprocal duties of care, love, fidelity, and family life.²³⁴ Francis himself argues that a free act, to be genuinely free, entails not simply voluntariness of choice, which may be dominated by passions or misdirected toward the wrong end by others. True freedom, he states, is “limited and conditioned.”²³⁵ In other words, freedom is the condition of a person orientated toward a good end that enhances human well-being. If religious liberty entails supporting the duty to form a community based in solidarity and charity, then if an act can be characterized as a failure with respect to this end, does this vitiate any claim-right?

I can think of two points of contact where this question would be relevant in at least some jurisdictions: first, compatibility with human dignity in the claimed religious act; and second, identifying a “religious” organization.

The European Court of Human Rights has held that any claimed exercise of religious liberty must be compatible with human dignity before the Court considers if it has been unjustly limited.²³⁶ This restriction has never been applied,²³⁷ but the point arguably echoes Francis, who nevertheless takes it a step further. In the latter's case, exercising religious liberty must be *for* human dignity, rather than simply not being against human dignity. However, the Strasbourg institutions *have* recognized that a claimed exercise of religion may in fact manifest more “a desire to market goods for profit” and thus fall outside of the protection afforded under Article 9 of the European Convention on Human Rights.²³⁸ In this case, the Church of Scientology had been enjoined from advertising its Hubbard Electrometer in terms that indicated it could measure a person's mental state. The Swedish court had considered this misleading. Whether this case, decided by

232 See Christopher McCrudden, *Legal and Roman Catholic Conceptions of Human Rights: Convergence, Divergence and Dialogue?*, 1 OXFORD JOURNAL OF LAW AND RELIGION 185, 195 (2012), quoting JOHN XXIII, *PACEM IN TERRIS* [Encyclical on establishing universal peace in truth, justice, charity, and liberty] (1963), § 60, http://w2.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem.html [hereinafter JOHN XXIII, *PACEM IN TERRIS*].

233 JOHN XXIII, *PACEM IN TERRIS*, *supra* note 232, at § 29. See also Christopher McCrudden, *supra* note 232, at 193.

234 See Joel Harrison, *Debating Rights and Same-Gender Relationships*, 4 JOURNAL OF LAW, RELIGION AND STATE 194, 213–17 (2016) (discussing the right to marriage within this frame).

235 FRANCIS, *AMORIS LAETITIA*, *supra* note 111, at 205–06.

236 *Campbell and Cosans v. United Kingdom*, 4 Eur. Ct. H.R. 4, § 36 (1982).

237 *Williamson*, [2005] 2 A.C. 246, § 60 (Lord Walker of Gestingthorpe) (cautioning against extending “liberal tolerance” only to “tolerant liberals”).

238 *X and Church of Scientology v. Sweden* 16 Eur. Comm'n H.R. Dec. & Rep. 68, 72 (1976).

the European Commission on Human Rights in 1976, remains good authority is debatable.²³⁹ Nevertheless, I suggest it reflects at least an inchoate shared understanding that the religious act, to be religious, should be seeking something other than profit.

Francis's linkage between solidarity and exercising religion may also echo attempts to determine when an organization is religious. This question is raised notably in antidiscrimination legislation, when religious organizations or organizations with a religious ethos are given certain exemptions. For example, in England and Wales, an "organised religion" may be able to discriminate on the grounds of sex, marital status, or sexual orientation when employing.²⁴⁰ In one significant decision from Victoria, Australia, the Court held that a Christian Brethren-affiliated campsite was not a "body established for religious purposes," and therefore could not be exempt from a sexual orientation nondiscrimination duty.²⁴¹ It relied on the commerciality of the campsite's endeavor, rather than its stated purpose to "establish campsites in a Christian milieu."²⁴² As I discuss below, relying on a commercial-religious distinction is problematic.²⁴³ However, avoiding this distinction does not preclude asking what the ends of an organization are. Some commercial organizations may claim an exemption on the grounds of religion, but still be entirely directed toward profit-making. Others may engage in commercial endeavors while nevertheless seeking after true religion, the end that entails "fraternal love capable of seeing the sacred grandeur of our neighbor."²⁴⁴

HOBBY LOBBY

I have argued that Pope Francis at least echoes a traditional Catholic claim. He does not discuss formally recognizing the Catholic Church. However, he does continue an argument as old as Augustine: civil authority is tasked with cultivating true religion, responding to the church's exhortations. For Francis, this takes place within all spheres of conduct—for example, the economy and environmental care, but also in affording a proper role for conscientious objection and healthy pluralism, fundamental planks for religious liberty. To think further on what kind of impact these claims would have if taken seriously, one recent controversy seems particularly apt for a brief discussion: claims of religious conscience in a commercial context, raised by the United States Supreme Court's decision in *Burwell v. Hobby Lobby*.

Hobby Lobby is a closed for-profit corporation in the United States owned entirely by the Green family. It has more than five hundred stores and 13,000 employees, and it sells general homewares, hobby products, and decorative goods.²⁴⁵ In the United States, it is what is called a "big-box store"—a large chain of stores that are typically placed in nonresidential zones with a sizeable parking lot. In 2010, the Patient Protection and Affordable Care Act was passed. Employers with fifty or

239 The Church of Scientology has been successful in more recent cases concerning group personality (*Church of Scientology Moscow v. Russia*, 46 Eur. Ct. H.R. 16 (2008)) and having its chapels recognized as a place of worship (*R (Hodkin) v. Registrar General of Births, Deaths and Marriages*, [2014] A.C. 610 (U.K.S.C.)).

240 Equality Act, 2010, sch. 2, Part 1, cl. 2 (Eng. and Wales).

241 *Christian Youth Camps Ltd v. Cobaw Community Health Services Ltd*, 308 A.L.R. 615 (2014), *leave to appeal denied*, [2014] H.C.A. Trans. 289 (21 December 2014); *Equal Opportunity Act 1995* (Vic) s 75(2) (Austl.).

242 *Christian Youth Camps Ltd*, 308 A.L.R. 615, §§ 230, 244.

243 See *infra*, the section titled "Hobby Lobby." See further Nicholas Aroney, Joel Harrison & Paul Babie, *Religious Freedom under the Victorian Charter of Rights*, in AUSTRALIAN CHARTERS OF RIGHTS A DECADE ON 120 (Matthew Groves & Colin Campbell eds., 2017).

244 See *supra* note 146.

245 *Burwell*, 134 S. Ct., at 2765–66.

more full-time employees were required to offer a group health plan or health insurance coverage. If this was not done, the employer faced significant daily fines. The health plan or insurance coverage was to include all U.S. Food and Drug Administration approved contraceptive methods and sterilization procedures.²⁴⁶ The Greens objected to this. In their view, the contraceptive methods included abortifacients. They argued that requiring they include such products in their insurance plan for employees would substantially burden their sincerely held religious beliefs.

The majority of the Supreme Court agreed with the Greens. Under the Religious Freedom Restoration Act, or RFRA, Congress may only substantially burden a person's exercise of religion where the burden furthers a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.²⁴⁷ The case was arguably a straightforward issue of statutory interpretation. Hobby Lobby was a "person" under RFRA, given the presumption that legal personhood includes corporations (profit and nonprofit) had not been displaced and that, in any event, behind the legal fiction was the Green family.²⁴⁸ The government did put forward a compelling interest: "guaranteeing cost-free access to the four challenged contraceptive methods."²⁴⁹ However, it had alternative means of achieving this interest that would not substantially burden the Green's religious beliefs. Nonprofits had been provided exemptions that required insurers to supply contraceptives without imposing on the organization. The majority determined this approach could easily apply to objecting for-profit corporations, and that the effect on women accessing U.S. Food and Drug Administration-approved contraceptives would be "precisely zero."²⁵⁰

My point is not to criticize the result, which I assume to be correct. Rather, I am interested only in briefly considering how the case raises themes discussed by Francis: first, problematic claims of market autonomy in the dissenting judgment; and second, potential disquiet over Hobby Lobby itself, if we are concerned for true religion or solidarity understood in Francis's terms. As to this second theme, the case points to the reality that religious liberty claims, as legally framed, are limited in nature. The end of such a claim may be truth, cultivating solidarity, fraternity, and charity as Francis has contended. Nevertheless, the claim arises in a very limited context—examining typically a discrete act. This means that it is difficult to claim that Hobby Lobby exercised its *religious liberty* wrongly in this particular instance. The Green family's objection, in itself, may be entirely consistent with Francis's framing of religious liberty. Nevertheless, following Francis, we may still consider whether Hobby Lobby has failed to cultivate solidarity, fraternity, and charity in its commercial practices. Religious liberty, legally framed for a discrete question, may not be at issue, but is Hobby Lobby more broadly exercising its freedom well?

Secularization and Market Autonomy

In dissent, Ginsburg J objected to a for-profit corporation, however closely held, being able to bring this religious liberty claim. Her judgment drew a sharp distinction between religious groups and entities in "the commercial, profit-making world."²⁵¹ She considered the former exist to "foster

246 *Id.* at 2762–63.

247 Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4.

248 *Burwell*, 134 S. Ct., at 2768–69.

249 *Id.* at 2780.

250 *Id.* at 2760.

251 *Id.* at 2794–95 (Ginsburg J., dissenting).

the interests of persons subscribing to the same religious faith.”²⁵² In contrast, she continued, for-profit corporations do not draw employees from one religious community.²⁵³ Following from this, Ginsburg J argued, while a religious organization serves the community of believers, perpetuating its values, a for-profit corporation “use[s] labor to make a profit.”²⁵⁴

Here we find a crystallized statement of the market’s autonomy, supported by a clear invoking of a secularization thesis. According to Ginsburg J on this account, religious groups only exist as the aggregate of individuals pursuing religion. Her framing is arguably the dominant approach in religious liberty scholarship.²⁵⁵ For example, Lucy Vickers claims that a religious group may be exempted from general laws when it forms an “island of exclusivity,” onto which coreligionists may permissibly “[retreat from] mainstream society.”²⁵⁶ But, if the group turns outward, if it crosses a boundary beyond inwardly catering to coreligionists then the aggregate of interests shifts.²⁵⁷

The market is then differentiated from this internally focused sphere of religion. It entails plural interests. But, importantly, Ginsburg J’s comment makes it clear that within the market, such plural interests are reconciled, subsumed, or find their unity under a general principle: the pursuit of profit. Secularization entails the claim that different spheres of life are governed by an autonomous logic or principles: labor to make profit.

Perhaps simply for the reason that it offers a challenge to this line of thought, *Hobby Lobby* was in principle correctly decided. To draw in Pope Francis again, Ginsburg J’s neutral or autonomous view of the market is the sphere captured by the idol of profit. Commercial transactions on this view do not *necessarily* exist to pursue a social good: furthering the creativity and talents of persons in meaningful work, coordinating the production of particular goods and crafts with communal need or the common good, the reciprocity of fair wages and price for the gift of someone’s genius in the product. This may happen, but it is not the fundamental logic of the market. Rather, the commercial sphere is characterized by using labor for profit. The majority was right to reject this logic of differentiation.²⁵⁸

And yet, if we follow Pope Francis’s argument, we may have some disquiet with a big-box store successfully claiming religious liberty. What is the specific target of this disquiet?

Religious Liberty and Freedom

Below, I suggest that *Hobby Lobby* as a corporation does not fully embrace or advance the end of solidarity or fraternity. If we follow Francis’s argument, *Hobby Lobby* should reconsider its practices *and* the civil community should consider whether more can be done to advance the right end. But questions of *religious liberty* are often narrower than assessing the claimant’s actions or identity

252 *Id.* at 2795 (Ginsburg J., dissenting).

253 *Id.*

254 *Id.* at 2797 (quoting *Gilardi v. United States Dept of Health and Human Services*, 733 F. 3d 1208, 1242 (2013) (Edwards J., concurring in part and dissenting in part)).

255 *See, e.g.*, Lucy Vickers, *Twin Approaches to Secularism: Organized Religion and Society*, 32 OXFORD JOURNAL OF LEGAL STUDIES 197, 201 (2012); RAZ, *supra* note 215, at 209 (arguing a collective right is recognized when the cumulative weight of individual interests requires it).

256 LUCY VICKERS, RELIGIOUS FREEDOM, RELIGIOUS DISCRIMINATION AND THE WORKPLACE 225–26 (2008).

257 Strangely, this claim would apply to a typical parish church.

258 The majority stated, “Some lower court judges have suggested that RFRA does not protect for-profit corporations because the purpose of such corporations is simply to make money. This argument flies in the face of modern corporate law.” *Burwell*, 134 S. Ct., at 2770 (Alito J.) (footnotes omitted).

as a whole. Rather, as in *Hobby Lobby*, religious liberty is raised in the context of a particular decision.

For example, a prisoner could be failing to pursue fully a life of charity and solidarity, but nevertheless object as a matter of religious liberty to a prison code or requirement that prevents fasting. We simply do not inquire into the person's life to that extent, or require complete saintliness, although this may be relevant to considering the claimant's sincerity. Perhaps a more radical reevaluation in line with Francis's thoughts would mean assessing whether the claimant is pursuing true religion, not simply in this particular act, but generally, in order to raise a religious claim. This would be akin to asking whether the claimant is "religious," in the manner I discuss above for the category of religious organizations seeking exemptions from antidiscrimination law.

However, if we follow the current and more limited analysis, *Hobby Lobby* was conscientiously objecting to participating in an insurance scheme that would, on the Greens' view, lead to ending life. The Greens themselves have created a corporation committed to "[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles."²⁵⁹ *Hobby Lobby* stores are closed on Sundays, they engage in evangelistic messaging, and part of the company's profits is directed toward Christian organizations—typically missionary groups and Oral Roberts University.²⁶⁰ There is no issue of sincerity, conventionally understood. Rather, for religious liberty purposes, the case focuses on the Greens' specific objection to the contraceptive mandate. And, importantly, the objection itself can be cast as a concern for solidarity with the (vulnerable) neighbor; the Greens understand this to include life from conception.

However, I do not think Francis would be satisfied to leave the analysis there. Perhaps ironically, the particular exercise of religious liberty may be unproblematic, but the corporation itself could still be criticized for failings Francis highlights. In Francis's terms, it has not allied its freedom with the pursuit of truth: a relationship with the source of all being, orientated to solidarity, fraternity, and charity.

As Patrick Deneen has argued, amidst narrower discussion of religious liberty, "[l]argely ignored is the fact *Hobby Lobby* is a significant player in a global economy that has separated markets from morality."²⁶¹ He continues:

It is almost wholly disembedded from any particular community; its model, like that of all major box stores, is to benefit from economies of scale through standardization and aggressive price-cutting, relying on cheap overseas producers and retail settings that are devoid of any particular cultural or local distinction . . . [Upon entering a store,] I am hardly moved to a state of piety, prayer, and thanksgiving. I am, like everyone else, looking for the least chintzy item at the cheapest price.

"Disembedding" appeals to Karl Polyani's claim that the rise of capitalism orientated by profit relied on a fundamental shift. Previously, "man's economy, as a rule [was] submerged in his social relationships"—producing and trading entailed reciprocal obligations serving a communal

²⁵⁹ *Id.* at 2766.

²⁶⁰ See *Hobby Lobby, Donations & Ministry Projects*, HOBBY LOBBY, <http://www.hobbylobby.com/about-us/donations-ministry> (last visited March 7, 2017). *Hobby Lobby* is also the primary donor (along with the Green family) for the Museum of the Bible. The company recently paid a \$3 million fine for illegally purchasing more than 5,500 objects, 4,000 of which were smuggled into the country. See Sashia Ingber, *Hobby Lobby's Smuggled Artifacts Will Be Returned to Iraq*, NPR, May 1, 2018, <https://www.npr.org/sections/thetwo-way/2018/05/01/607582135/hobby-lobbys-smuggled-artifacts-will-be-returned-to-iraq>.

²⁶¹ Patrick Deneen, *Even if Hobby Lobby Wins, We Lose*, AMERICAN CONSERVATIVE, March 24, 2014, <http://www.theamericanconservative.com/2014/03/25/hobbylobby/>.

relationship.²⁶² But Polynai argues this changed to “the running of society as an adjunct to the market,” with social relationships determined by their positioning in an economic system.²⁶³ This affects both persons and our relationship to places.

Hobby Lobby’s products, prices, and standardization relies on what Cavanaugh calls “shop[ping] for wage environments” in an international market.²⁶⁴ Selling cheap products rests on finding a market that involves paltry wages, possible child labor, and extreme hardship.²⁶⁵ This then has further impacts on how labor at home is understood. Hobby Lobby is rightly lauded for granting a minimum full-time wage that greatly exceeds legal requirements; in this way, it is certainly much better than many competitors.²⁶⁶ However, the goods Hobby Lobby sells and their reliance on mass production indicate the company participates in an understanding of labor as a fungible commodity.²⁶⁷ In contrast, an understanding of labor focused on dignity in the tradition Francis develops may care more for cultivating personality or talents.

Here we also see a second relationship affected beyond a concern for labor or employees. Deneen points to standardization of “chintzy” products removed from any particular community. We might ask: What character does this product convey? Does it convey something desirable for the community, something that is needed, something that reflects the joys and character of this particular community’s traditions, something that conveys the talents of its maker?²⁶⁸ Of course, the maker in this instance is entirely removed from any particular community. Even more, the box-store seller itself is removed from the community. Deneen notes that Hobby Lobby’s stores are located in “the middle of nowhere.” The anthropologist Marc Augé calls this a non-place: an area removed from local community living, transient in population, and bearing no aesthetic differences from its carbon copy down the road.²⁶⁹ For Francis, this would be the territory of idols—an alternative temple that is orientated toward cultivating a desire to consume more and more goods, in which solidarity only exists in the shared practice of shopping, and which therefore “blunts” conscience or “the cry of the poor.”²⁷⁰

Hobby Lobby is a corporation that pursues profit to engage in private donations for religious groups. Charity is here perhaps more benevolence, rather than the love described by Francis and his predecessors. Francis argues that our lives, if they are to be illuminated by God, must present

262 KARL POLYANI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 48 (2d. ed. 2001 [1944]).

263 *Id.* at 60.

264 CAVANAUGH, *supra* note 215, at 21.

265 For a criticism of Hobby Lobby on these points, see Jonathan Merritt, *Stop Calling Hobby Lobby a Christian Business*, WEEK, June 17, 2014, <http://theweek.com/articles/446097/stop-calling-hobby-lobby-christian-business>.

266 See Ross Douthat, *A Company Liberals Could Love*, NEW YORK TIMES, July 5, 2014, <https://www.nytimes.com/2014/07/06/opinion/sunday/ross-douthat-a-company-liberals-could-love.html>.

267 See POLYANI, *supra* note 262, at 44.

268 See also John Milbank, *Politics: Socialism by Grace*, in *BEING RECONCILED: ONTOLOGY AND PARDON* 162, 185 (2003) (discussing labor’s fruits as “primarily a gift to the community which will relate to community values in crucially important ways”). I am grateful to one reviewer for raising a possible response: someone sympathetic to Hobby Lobby may see this line of argument as simply an aesthetic judgment against middlebrow tastes. It is, of course, an aesthetic judgment—a claim that one’s aesthetic can have a better or worse relationship to justice and, indeed, beauty. But, more than this, Hobby Lobby and like stores are not simply responding to such middlebrow tastes (if they are indeed characterizable as such). Rather, they have cultivated or colonized, through cost-cutting, expansion, and marketing that inculcates desires, what is now taken to be middle or working-class taste.

269 MARC AUGÉ, *NON-PLACES: INTRODUCTION TO AN ANTHROPOLOGY OF SUPERMODERNITY* (2d ed. 1995).

270 See *supra* text accompanying note 119.

“a path and praxis leading to the fullness of love.”²⁷¹ This must be more than “sporadic acts of generosity.”²⁷² Instead, what is needed is “a new mindset which thinks in terms of community and the priority of the life of all over the appropriation of goods by a few.”²⁷³ He is clear in his condemnation: “The culture of prosperity deadens us; we are thrilled if the market offers us something new to purchase. In the meantime all those lives stunted for lack of opportunity seem a mere spectacle; they fail to move us.”²⁷⁴ Consistent with cultivating true religion, this must mean exploring and encouraging through legal means other corporate forms and practices that promote solidarity—for labor, the consumer community, and owners. While beyond this article, such forms and practices do exist.²⁷⁵ In the case of Hobby Lobby, it made an entirely valid claim for religious liberty, seeking an exemption from a particular act, while continuing to operate in much the same manner as any other market operator—in what Polyani called the “secular perdition.”²⁷⁶

CONCLUSION

Francis rejects the autonomy of the market, the claim that it rests on its own logic: “us[ing] labor to make a profit.” Indeed, he argues that this leads to an idolatry that renders the person incapable of hearing the cry of the poor and seeing the degrading of our common home. But this means that Francis is also suggesting that the political community is already involved in caring for true religion. The response to idolatry cannot be neutrality of ends or merely affirming the value of freedom. Rather, Francis proposes the need for true religion to shape all of life, including our market practices, care for the environment, and the purpose of religious liberty. This challenges those who claim the Catholic Church has accepted a logic of differentiation post-Vatican II or else claim that the state now must concern itself with freedom rather than true religion. He is arguably reclaiming a traditional argument in new guise: “[t]here was once a time when States were governed by the philosophy of the Gospel.”²⁷⁷ But Francis also challenges some currents in rights and religious liberty discourse. Christopher McCrudden notes, “It would be a mistake to think that we now have anything close to a settled interpretation of human rights in the legal sphere. Indeed, in some ways, it is difficult to speak of *the* legal understanding of human rights.”²⁷⁸ Rather than a unified discourse, we have competing (sometimes overlapping) views. Strong affirmations of abstract freedom contrast the ongoing Catholic emphasis on duty and role exercised to pursue a shared end. In the specific context of religious liberty, some scholars have developed the case for abstract freedom, focused on the capacity of the individual to pursue individual depth or ultimate concerns, and argue it leads to the need to apply state law uniformly—all instances of “ethical independence” must be treated equally. In contrast, Francis presents an alternative option. He argues the civil

271 FRANCIS, *LUMEN FIDEI*, *supra* note 3, at § 51.

272 FRANCIS, *EVANGELII GAUDIUM*, *supra* note 95, at § 188.

273 *Id.*

274 *Id.* at § 54.

275 See, e.g., LUKE BRETHERTON, *RESURRECTING DEMOCRACY: FAITH, CITIZENSHIP, AND THE POLITICS OF A COMMON LIFE* chapter 8 (2016); JOHN MILBANK & ADRIAN PABST, *THE POLITICS OF VIRTUE: POST-LIBERALISM AND THE HUMAN FUTURE* chapter 4 (2016) (both discussing “civil economy”).

276 POLYANI, *supra* note 262, at 103. See also Max Weber’s description of the spotless “bourgeois business man” who pursues profit as a sign of God’s favor. MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM*, 177 (1971 [1930]).

277 LEO XIII, *IMMORTALE DEI*, *supra* note 22, at § 25.

278 McCrudden, *supra* note 230, at 189.

community must protect conscience and healthy pluralism because both are directed to pursuing true religion, that is, the love of God that is experienced as solidarity and fraternity.

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