# Corporations, Compelled Speech, and the Common Good

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*Most of the current literature on the subject of corporations and compelled speech focuses almost entirely on the extent to which corporations are or should be regulated by laws that compel them to conduct themselves in a certain way. In this paper, I explore the mostly uncharted territory of situations in which corporations compel the speech of their own employees through policies which require employees to speak or act in a way that may be contrary to the form of life prescribed by their faith. I argue that philosophical defences against corporate compelled speech for religious employees on the basis that religious belief sits within a generally inviolate private sphere of autonomy are misguided because they do not take sufficient account of the nature of corporations as moral agents which can legitimately pursue moral and political ends in the public sphere. I argue that corporations necessarily rely on a conception of the common good when they do this. The permissibility of corporate compelled speech therefore comes down to whether or not it is conducive to the common good.*

## INTRODUCTION

Most of the current literature on the subject of corporations and compelled speech has focussed almost entirely on whether, under what conditions, and to what extent, corporations themselves are, can, or should be regulated by laws that compel those corporations to 'speak' (whether by word or by deed) in a certain way.[1] This paper explores the mostly uncharted territory of situations in which corporations compel the speech of their own employees through policies or directives which require employees to speak or act in a way that may be contrary to the doctrines, tenets, or form of life prescribed by their faith. Perhaps the most well-known Australian example of this kind of situation was the dispute which began in 2019 between Rugby Australia and Israel Folau over an Instagram post in which Folau expressed a view that Hell awaited homosexuals, adulterers, fornicators, and other sinners if they did not repent. The post concluded with the words 'only Jesus saves'. More recently, seven players of the Manly Sea Eagles Rugby League Club refused to play in a match against the Sydney Roosters on 28 July 2022 on the basis that the Sea Eagles Club required them to wear jerseys emblazoned with an LGBT-pride theme of rainbow colours. Even more recently, Andrew Thorburn, a former

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[1] Most of this literature is US-based and deals with the issue of the extent to which First Amendment protections (should) apply to corporations. See, eg, cases like *Burwell v Hobby Lobby Stores Inc,* (2014) 573 US 682 and *National Institute of Family Life Advocates v Becerra,* (2018) 585 US __. See also James Nelson, 'Corporate Disestablishment' (2019) 105(3) *Virginia Law Review* 595, 595–694; James Nelson, 'The Trouble with Corporate Conscience' (2018) 71(5) *Vanderbilt Law Review* 1655, 1655–1702. The Australian literature and cases tend to address only the question of whether or not corporations themselves can avail themselves of statutory protections against religious discrimination, in part because Australia does not have a First Amendment-style clause in its constitution. See, eg, Shawn Rajanayagam and Carolyn Evans, 'Corporations and Religious Freedom: Australia and the United States Compared' (2015) 37(3) *Sydney Law Review* 329; *Christian Youth Camps Ltd v Cobaw Community Health Service Ltd* (2014) 50 VR 256.


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CEO of National Australia Bank, was forced to resign his position as CEO of the Essendon AFL Club after it was discovered that he served on the board of an Anglican church named City on a Hill, a pastor of which had preached a sermon in 2013 that compared abortion to concentration camps and another sermon in which he averred that homosexuality was a sin.[2]

A number of salient and related questions arise from these situations. First, to what extent should corporations be permitted to compel the speech of their employees, and in particular, their religious employees? Second, to what extent does the answer to the first question depend on the status of corporations as moral agents with interests and responsibilities in the formation and maintenance of a certain kind of public morality? Third, to what extent are legal protections against religious discrimination appropriate as mechanisms by which the proper boundaries of corporate compelled speech can be determined? Fourth, what are the proper philosophical bases upon which a determination ought to be made in respect of the first three questions?

This paper argues that efforts to locate a defence for employees against corporate compelled speech in the liberal idea that the (negative) freedom to practice one's religious faith is a subset of the broader class of actions (usually invoked in accounts of freedom of expression) which form a private and impassable sphere of individual autonomy necessarily fail, because such accounts do not take sufficient account of the fact that corporations, like individuals, are moral agents with corresponding moral interests and responsibilities in the public sphere.[3] To say that corporations are moral agents is to say that corporations, *qua* moral agents, may legitimately pursue certain moral ends in the public sphere, and that these pursuits, like the public pursuit of any moral end, necessarily involve a commitment to a certain conception of the common good. On this basis, I claim that it is possible to conceive of a set of situations within which it is permissible for corporations to compel the speech of their employees, but that current attempts of corporations to compel the speech of their religious employees do not fall within that set.

Of course, this argument relies on the assumption that it is meaningful to speak of *the* common good — that is, that what constitutes the common good is objectively determinable, notwithstanding widespread (though, as I will mention, not particularly well-formed) disagreement about its content and its nature. This claim is not as controversial as it may first appear, however. It is quite obvious that when corporations compel the speech of their employees in the service of various political causes and agendas, they do not do so under a cloud of scepticism about whether or not those political causes and agendas are objectively good. The problem faced by religious employees whose speech is compelled by their employer is not mere relativism or nihilism about what is the good for human beings as such; the problem is that there is deep and enduring disagreement about the content of that good and the bases upon which we can come to know it. In this sense, I argue that the main problem (if there is any) with corporations compelling the speech of their religious employees is substantial not

[2] Of course, corporate compelled speech goes both ways. Religious corporations can and do compel the speech of their employees (for example, a Catholic school may require its teachers to uphold Catholic teaching on sexuality in the classroom, whatever their personal views). In this paper I mostly confine my discussion to situations in which corporations compel the speech of their religious employees, though the argument of the paper applies to both scenarios.

[3] This is not to be taken as saying that corporations are moral *persons*. As I will explain below, it is sufficient for the argument I make in this paper that corporations are moral agents without having the additional and peculiar features of moral personhood. In this sense, the account of corporate moral agency I give in this paper is consistent with the view of theorists like Edward A David, who wish to move away from the idea that corporations are moral persons: Edward A David, *A Christian Approach to Corporate Religious Liberty* (Palgrave Macmillan, 2020).

procedural, and that it is therefore necessary for legal responses to corporate compelled speech to engage deeply with the question of what is the common good for human beings as such.

## CORPORATIONS ARE MORAL AGENTS

First, some definitions. I take it that 'corporate compelled speech' is that situation in which a corporation directs an employee to speak or act in a certain way, such that if the employee does not speak or act in that way, the corporation will sanction them (usually by terminating their employment). In light of this definition, my argument below relies on two claims: (i) that corporations are moral agents; and (ii) that corporate compelled speech involves a kind of moral claim by a corporation on its employees. Clearly, (ii) does not necessarily follow from (i), because not every claim made by a moral agent need be a moral claim, so I will establish both of these claims separately.

I take a 'moral agent' to be an agent capable of making moral claims and being held morally accountable for those claims. A moral agent is an agent whose speech and actions display or are capable of being ascribed a moral point of view which is referrable to that agent. An agent M is a moral agent if we can talk meaningfully of M's moral view about some matter and hold M morally accountable for having that view about that matter.[4]

Various accounts of corporate agency exist in the literature. One way to think of corporate agents is in the sense defined by Philip Pettit and Christian List in their well-known book *Group Agency*: corporate agents are groups which 'aggregate the intentional attitudes of their members into a single system of such attitudes held by the group as a whole'.[5] Another (and consistent) account is Stephanie Collins': group agents are agents which unite their members under 'a group-level, rationally operated, distinct decision-making procedure' which 'takes in reasons, beliefs, and preferences, and processes them to produce decisions'.[6] For the purposes of this paper, I will steer clear of more detailed discussion regarding whether these are necessary and sufficient conditions for an agent to be a group agent.[7] My claim here is that, whatever our theory of how a corporation comes to be a group agent, the particular ways in which corporations act in the public sphere (including compelling the speech of their

[4] Here I pass over the distinction between holding M morally accountable and holding M morally responsible for an action or view as the argument I make in this paper does not turn on it.

[5] Christian List and Philip Pettit, *Group Agency* (Oxford University Press, 2011) 59.

[6] Stephanie Collins, 'Are Organisations' Religious Exemptions Democratically Defensible?' (2020) 149(3) *Daedalus* 105, 106–7 ('Organisations' Religious Exemptions'). In a slightly different vein, David Runciman argued some time ago that '[c]orporations exist in order to allow notions of agency to hold even when there are no readily identifiable individuals to whom responsibility can attach: corporations may be said to act, to assume responsibilities, to sue and to be sued, but this is only because the individuals or groups of individuals who actually perform the actions in question are distinct from the corporation itself, and are merely representing it': David Runciman, 'Moral Responsibility and the Problem of Representing the State' in Toni Erskine (ed), *Can Institutions Have Responsibilities?* (Palgrave MacMillan, 2003) 43.

[7] For example, queries may arise regarding accounts of corporate agency arising from a group structure which 'embodies a rational point of view'. A 'rational point of view', here, is defined as a 'logically coherent set of commitments about fact and value — about how the world is and what matters in it — that reliably guides action'. The main reason for this is that I do not think an account of corporate agency (or corporate moral agency) requires that corporations, or any other moral agents, for that matter, adopt rational points of view defined in this particular way. Most of our moral life is not logically coherent in a strict sense, but it does not follow from this that our agency or our moral agency are somehow compromised. Cf Carol Rovane, *The Bounds of Agency: An Essay in Revisionary Metaphysics* (Princeton University Press, 1998); Kendy Hess, 'Does the Machine Need a Ghost: Corporate Agents as Nonconscious Kantian Moral Agents' (2018) 4(1) *Journal of the American Philosophical Association* 67, 69.

employees) should lead us to think that they are a special kind of group agent, viz. a moral group agent.[8]

A corporate moral agent, then, is an agent which has certain moral views and acts in morally significant ways *as a group*. Importantly, as moral agents, corporations can make moral claims on their individual employees in much the same way as any moral agent can make claims on those individuals.[9] One kind of moral claim a corporation *qua* moral agent can make on its employees is that they speak or act (or do not speak or act) in a certain way in light of a moral purpose to which the corporation has directed its activities more generally. Corporate compelled speech, then, involves a moral claim made by a corporate moral agent on one or more of its members.

Legally speaking, a corporation is of course an artificial 'person' to which can be assigned certain rights, responsibilities, and liabilities separate to those of its shareholders.[10] However, while this legal definition is a sufficient description of the sense in which we might consider corporations to be agents, in the general sense of that term, the literature is scarce on the question of whether corporations are *moral* agents.[11] Moreover, there is a threshold problem to be overcome in the ascription of moral agency to corporations, and that is the tension between our intuition that corporations can be held accountable for their actions (for example, polluting a river as a result of a mining operation) and our intuition that corporations do not (cannot) have a will of their own because they are not conscious entities.[12] In other words, how can we say *both* that a corporation is responsible for the pollution of the river *and* that the corporation

[8] The (now) classic treatment of corporate moral *responsibility* is Philip Pettit's 2007 *Ethics* article in which he outlines three conditions for an agent to be held morally responsible for an act, modelled on the three catechetical conditions for mortal sin: value relevance (the agent faces a morally significant choice), value judgment (the agent is in a position to see what is at stake in the choice), and value sensitivity (the choice is truly within the control of the agent). In that article, Pettit argues that corporations fulfil all three of these conditions and can therefore be legitimately held morally responsible for what they do. It is of course a strong implication of Pettit's argument that corporations are moral group agents. My argument in this paper runs parallel to Pettit's, in the sense that I want to say there are *prima facie* reasons for thinking corporations are moral agents anyway, and if they are moral agents, then holding them responsible is not the only thing we need to do in respect of their (morally dubious) claims and actions — we also need to take their (possibly morally indubious) claims seriously: Philip Pettit, 'Responsibility Incorporated' (2007) 117(2) *Ethics* 171.

[9] We might think that the compulsion involved in corporate compelled speech renders the moral claim made by the corporation on its employees substantially different from a moral claim made by, say, an ordinary member of the public on those employees because claims made by ordinary members of the public do not (and could not) typically involve threats of termination. However, while threats of sanction may mean we take a moral claim more seriously, they do not affect the claim's status as a moral one.

[10] See *The King v Portus; ex parte Federated Clerks Union of Australia* (1949) 79 CLR 42, 435 (Latham CJ); *Peate v Federal Commissioner of Taxation* (1964) 111 CLR 443, 478 (Windeyer J). For an English antecedent, see *Salomon v Salomon & Co Ltd* [1897] AC 22.

[11] A few articles have been written on this specific topic, but most of them by one author. See Kendy Hess, 'The Modern Corporation as Moral Agent' (2010) 26(1) *Southwest Philosophy Review* 61; Kendy Hess, 'The Free Will of Corporations (and Other Collectives)' (2014) 168(1) *Philosophical Studies* 241; Kendy Hess, 'Does the Machine Need a Ghost: Corporate Agents as Nonconscious Kantian Moral Agents' (2018) 4(1) *Journal of the American Philosophical Association* 67. Stephanie Collins, citing Philip Pettit's abovementioned *Ethics* article, speaks very briefly on the idea of corporations as moral agents but simply adopts Pettit's argument: Stephanie Collins, '"The Government Should be Ashamed": On the Possibility of Organisations' Emotional Duties' (2018) 66(4) *Political Studies* 813, 815.

[12] They are, as one writer put it, 'a collective noun for the web of contracts that link the various participants': Ross Grantham, 'The Doctrinal Basis of the Rights of Company Shareholders' (1998) 57(3) *Cambridge Law Journal* 554, 579. On the idea of the lack of corporate phenomenal consciousness, see Collins, 'Organisations' Religious Exemptions' (n 6) 105, 111; Christian List, 'What Is It Like to Be a Group Agent?' (2018) 52(2) *Nous* 295.

could not have willed the pollution of the river? To head off an immediate reply, what is at stake here is not the question of whether the corporation is legally *liable* for the pollution. At law, the notion of corporate liability is non-controversial. What is at stake rather is the question of what kind of moral responsibility is possible for an agent with no independent will. To present the problem another way: to say that Rugby Australia *should not have* terminated Israel Folau's contract is not merely to say that, as a matter of law, Rugby Australia is or ought to have been held liable for that termination. It is rather to make the stronger moral claim that Rugby Australia was *wrong* to terminate Folau's contract, whatever its legal status, and that Rugby Australia is morally responsible for the termination.[13] If Rugby Australia is not a moral agent, however, this claim appears to make very little sense.

There are essentially two ways to respond to this threshold problem. The first is to assert that our ascriptions of responsibility, approbation, and disapprobation, and other expressions of moral accountability towards corporations, are merely figures of speech. We do not *really* mean the corporation *itself* is to blame for polluting the river, or that Rugby Australia *itself* should not have terminated Folau's contract. What we really mean is that the CEOs or individuals who make up the Boards of these corporations and who direct the corporation's activities are to blame for making the decision to mine so close to the river, to terminate the contract, and so on.[14]

This response is initially plausible but does not withstand closer scrutiny. The main problem is twofold. First, it is not so easy to translate the kinds of decisions and actions we typically attribute to corporations to the decision and actions of influential individuals within those corporations. The actions (let alone intentions) of a large and complex corporation like Rugby Australia are not easily reduced to actions and intentions of even its Board members, because not all of those actions and intentions may be necessary to the corporation acting in the way it does in relation to a particular matter, and even if they are, not all of them will be equally significant in the way the corporation comes to act in the way it does on that matter. These complexities cannot be simplified even if we think that whatever a corporation intends or does is reducible to whatever the majority of its Board members intend or do, because this just shifts the problem of complexity to the level of majority intention. As Christian List and Philip Pettit note, 'a relatively simple set of group attitudes can result from a vast and complex variety of individual sets of attitudes.'[15]

Second, this reductive response does not account for situations in which (say) the Board members of a corporation have attitudes and make inferences about and on the basis of what they think the corporation wants, needs, or does. That is, the response does not account for situations in which Board members *themselves* treat the corporation as an agent which acts in the world and takes positions on certain moral or political issues which in turn affect the kinds of actions and intentions formed by the Board members in respect of its operations. These Board members also form opinions and attitudes about what the corporation *should be*

[13] On the idea that holding group agents responsible for their views and actions is a coherent idea, see Pettit above n 8. Another interesting historical treatment of this idea is provided by Roger Scruton: Roger Scruton and John Finnis, 'Corporate Persons' (1989) 63(1) *Proceedings of the Aristotelian Society* 239, 239–66.

[14] For more formal examples of this kind of 'eliminativism' about group agency, see Anthony Quinton, 'The Presidential Address: Social Objects' (1975) 76(1) *Proceedings of the Aristotelian Society* 1; Margaret Gilbert, *On Social Facts* (Princeton University Press, 1989). Historical antecedents can be found in the utilitarian tradition associated with Jeremy Bentham and John Austin.

[15] List and Pettit (n 5) 77. Of course, it does not follow from this that the actions and intentions of Board members are irrelevant or even unnecessary to a corporation having an intention or engaging in some action.

*perceived to be doing* by others in the public sphere, including by other corporations. This situation is just a special case of the more general phenomenon in which the 'intention' or 'action' of a corporation is something to which we can and do respond independently of whatever (the majority of) its Board members happened to intend or do at a particular time because we (like the Board members) recognise corporations as distinct agents in our moral and political worlds. This is akin to the way in which we talk about the 'intention' of Parliament. We do so in a way that recognises the sense in which that 'intention' pursues its own life within the language of the law quite apart from whatever the intentions of individual MPs might have been at the time they voted to pass particular laws. This is in part (though not exhaustively) because we recognise that, like the Ship of Theseus, Parliament (and therefore its intention on a given matter) survives its individual members, and it is not difficult to extend this same recognition to corporations which also tend to survive the coming and going of individual Board members.[16]

The second way to respond to the threshold problem is to double down on the intuition that corporations can be held morally responsible for what they do by saying that self-conscious individual moral persons are not the only agents to whom we can meaningfully ascribe moral character. That is, while corporations are not human beings (they are not moral *persons* in the full sense of that term) they can still be considered moral agents because they are clearly capable of formulating policies and pursuing agendas with obvious moral significance.

My arguments against the reductionist account above should point to the reasonable possibility that corporations are agents in their own right, and not merely a set of inert legal relationships through which their directors and Board members exercise their wills.[17] The *moral* agency of corporations can be established in the following way.

Assuming a corporation like Rugby Australia is an agent in its own right, it is easy to notice that it acts deliberately in accordance with certain policies and standards which are discernible to varying degrees. Some of these policies and standards are legal, others are found in written documents which outline the aims and purposes of Rugby Australia, and others — those which most concern us here — are more general and amorphous like 'inclusivity', 'diversity', 'equality', and so on. It is generally with reference to these kinds of policies and purposes that corporations like Rugby Australia justify their decisions to compel the speech of their employees. Statements like 'inclusiveness is one of Rugby [Australia]'s core values' and 'Israel Folau fails the NRL's inclusiveness culture' are representative. These values are then used more specifically in relation to an employee to justify the termination of their employment contract. In Folau's case, for example, in a statement by Rugby Australia and NSW Rugby we find the following: 'Whilst Israel is entitled to his religious beliefs, the way he has expressed these beliefs is inconsistent with the values of the sport … Israel has failed to understand that the expectation of him as a Rugby Australia and NSW Waratahs employee is that he cannot share material on social media that condemns, vilifies or discriminates against people on the

[16] As Stephanie Collins has noted, this can lead to an interesting situation in which a group can have an intention that none of its members have (at a particular time): Collins, 'Organisations' Religious Exemptions' (n 6) 107.
[17] For a more technical solution to the problem of how a group agent can exercise reason-sensitive control over its actions, see Pettit (n 8) 187–92. As I said above, I do not think it is necessary to engage in such technicalities to see how corporations can be thought of as moral group agents. That said, Pettit ends up basing his argument on an analogy involving boiling water, so perhaps his solution is not so technical after all.

basis of their sexuality.'[18] Clause 4 of the Rugby Australia Code of Conduct outlines a number of directions to employees; cl 4.1(n) states that employees must:

> [N]ot engage in behaviour, including contact via social media or other electronic means, that negatively affects the experience, safety or wellbeing of any Relevant Organisation's representatives, members, or other patrons, including behaviour that is:
> (i) critical, offensive or discriminatory;
> (ii) bullying or harassing;
> (iii) sexist, racist or homophobic/transphobic;
> (iv) intimidating, threatening or aggressive;
> (v) drunk and disorderly;
> (vi) unwelcome or uninvited physical contact;
> (vii) continued or unreasonable disruption of any Relevant Organisation's representatives performing their duties; or
> (viii) unlawful or unsafe.[19]

This is undoubtedly moral language. That is, it would stretch plausibility to suggest that Rugby Australia's Code of Conduct is merely procedural, morally neutral, or involves no particular moral purpose. We cannot help but understand (at least) cl 4.1(n) of the Code of Conduct as taking a moral position on the kind of behaviour it prohibits. One significant feature of understanding the Code of Conduct this way in light of the idea that Rugby Australia is an agent in its own right is that it is legitimate to speak of *Rugby Australia* as taking a moral position on the kinds of behaviours *it* prohibits for its employees. The Code of Conduct is therefore not merely an expression of the personal views of the Board members or directors of Rugby Australia; it is an expression of the view of the corporation Rugby Australia itself. Straightforwardly, this makes Rugby Australia a moral agent in the public sphere. Rugby Australia can be seen to be taking a moral position on certain kinds of behaviour to which it objects, and it presents itself in public as the kind of corporation (that is, the kind of moral agent) that adopts this particular moral position on those kinds of behaviour. Moreover, when Rugby Australia directs its employees to speak and act in certain ways and threatens to terminate the contract of an employee on the basis of its Code of Conduct (ie, when it engages in compelled speech), it makes good on its commitment to the moral position it takes in the Code of Conduct and its other public statements. Obviously, the example of Rugby Australia is representative of a more general phenomenon in which many corporations adopt moral positions on certain kinds of behaviour through codes of conduct, workplace policies, corporate strategies, and so on, and then use these as moral bases upon which to compel the speech of their employees.[20]

Corporations with diversity and inclusion policies are therefore moral agents in the public sphere, and corporate compelled speech is a manifestation of corporate moral agency. What is now required is a conceptual framework within which we can talk intelligibly of the

[18] NSW Rugby 'Updates: Israel Folau Statements', (Waratah's Media, Media Release, 11 April 2019) <https://nsw.rugby/news/2019/10/31/rugby-australia-and-nsw-rugby-union-statement-regarding-israel-folau>.
[19] Rugby Australia, 'Code of Conduct' (September 2022) 8–9 <https://australia.rugby/about/codes-and-policies/integrity/code-of-conduct>.
[20] See, eg, the facts in *EEOC v Abercrombie & Fitch Stores Inc,* (2015) 575 US 768; *Cloutier v Costco Wholesale Corp,* 390 F 3d 126 (1st Cir, 2004); *Lorenz v Wal-Mart Stores Inc,* 225 F App'x 302 (5th Cir, 2007); Complaint, *Boudlal v Walt Disney Corp,* (CD Cal, No 12-01306, 2012).

permissibility (or not) of corporate compelled speech in light of corporations' status as moral agents. As I will show below, a common candidate for this framework — one based on liberal conceptions of the person as centres of spheres of autonomy which corporations should not breach — is unsatisfactory. What I propose instead is a framework based on the idea that when moral agents in the public sphere make moral claims, they do so in light of and in service to a conception of the common good which they wish to promulgate. On this view, the permissibility of corporate compelled speech in a given situation is tied to the legitimacy of the conception of the common good promulgated by the corporation.

## THE LIBERAL FRAMEWORK IS UNSATISFACTORY

Recognising corporations as moral agents in their own right involves several important implications for the way in which we think about the conditions under which corporate compelled speech is permissible. In particular, to recognise corporations as moral agents is to disturb those accounts of the relationship between employer and employee which rely on a liberal framework in which religious expression and corporate public image are treated as competing rights claims that require 'balancing' in the courts.[21] On these accounts, corporations which issue codes of conduct, workplace policies, etc., do so in order to cultivate a certain public image, and are possessed of legal rights to do so. Religious employees similarly have legal rights to express their faith, but in cases where expressions of faith by employees conflict with the workplace policies of their corporate employers, both sets of rights must then be 'balanced', either by the corporation or by the courts, in such a way as will resolve the conflict either in favour of the corporation or in favour of the religious employee. However, this 'balancing' exercise seldom works out well for the religious employee,[22] especially in situations involving purported discrimination in a commercial context,[23] notwithstanding some vaulted language from the High Court of Australia regarding the importance of religious freedom.[24] In Australia, a literature has developed on the issue of religious discrimination, as

[21] See, eg, Dallan Flake, 'Image is Everything: Corporate Branding and Religious Accommodation in the Workplace' (2015) 163(3) *University of Pennsylvania Law Review* 699. Of course, it would not be implausible to suggest that part of Rugby Australia's irate response to Israel Folau was spurred on by threats of its sponsors to withdraw their support. See, eg, Max Mason, 'Rugby Australia Does the Right Thing by Sponsors', *Financial Review* (online, 8 May 2019) <https://www.afr.com/companies/media-and-marketing/israel-folau-rugby-australiadoes-the-right-thing-by-sponsors-20190508-p51lbk>.

[22] This is so because what tends to be dispositive in workplace dismissal cases is whether the employer subjectively determined that the employee has breached an applicable code of conduct, not whether the employer dismissed the employee for a prohibited reason under the *Fair Work Act 2009* (Cth). See, eg, *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243. As Joellen Munton and Therese MacDermott note, '[o]n the whole, the General Protections [in the *Fair Work Act*] have proven to be a considerable disappointment for employee advocates hoping to see some genuine protection for employee's workplace rights, including claimed rights to express unpopular religious and political views': Joellen Munton and Therese MacDermott, 'Religious Freedom and Job Security' (2022) 45(1) *UNSW Law Journal* 312, 320–1.

[23] See, eg, *Christian Youth Camps Ltd v Cobaw Community Health Service Ltd* [2014] VSCA 75, [430] (Neave JA). That case was of course not about corporate compelled speech in the sense I refer to in this paper, but the general principle articulated by Justice Neave is nevertheless indicative of the way in which Australian courts have tended to approach the issue of religious freedom in the workplace. Her Honour says: 'Where the act claimed to be discriminatory arises out of a commercial activity, it is less likely to be regarded as an interference with the right to hold or manifest a religious belief than where the act prevents a person from manifesting their beliefs in the context of worship or other religious ceremony. That is because a person engaged in commercial activities can continue to manifest their beliefs in the religious sphere.'

[24] See *Church of the New Faith v Commissioner for Pay-Roll Tax* (1983) 154 CLR 120. 'Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint': at 130 (Mason ACJ and Brennan J).

this is typically the legal mechanism by which religious employees attempt to vindicate their religious expression against discrimination by their employers as well as the mechanism by which religious bodies attempt to defend their rights to hire and fire according to the tenets of their faith. In 2019, the Australian government made an ill-fated attempt to legislate to protect religious individuals and bodies from discrimination which generated more commentary. On the whole, however, the structure of the debate is not particularly complicated. It would not be an oversimplification to suggest that the majority of positions taken in the debate over religious freedom tend to be determined by how much weight or importance is assigned to religious expression in relation to other competing rights, claims, and interests.

The language of freedom and discrimination proceeds naturally from a deeper political framework in which religious employees are regarded as individual rights-bearers acting within spheres of autonomy which should not be violated by others (that is, other rights-bearers) unless there is a sufficient reason to allow the violation.[25] What constitutes a 'sufficient reason' is the subject of some debate among liberal scholars, but in general all agree that a 'sufficient reason' must be a public reason: a reason that any 'reasonable' person in the community can accept.[26] As has been frequently noted, however, reasons which refer to or make sense within religious forms of life are not considered to be appropriately 'public'.[27] The justification for excluding religious reasons from the 'balancing' exercise of courts (for example) is that doing so 'translates religious claims into the apparently shared and accessible language of interests — interests like competing autonomies.'[28]

For those who pursue questions of religious liberty and the relative importance of claims to religious liberty in the public sphere from within this liberal framework, however, the acceptance of corporate compelled speech by courts ought to seem unjustified because corporate compelled speech is assumed to involve the prioritisation of morally neutral commercial interests over morally significant religious ones. That is, part of what is grating about the prioritisation of corporate commercial interests over individual religious ones within a liberal framework is that corporations engaging in corporate compelled speech may appear to do so in order to cultivate or protect their public image (something which is clearly a *commercial* interest), but the religious employee whose speech is being compelled is endeavouring to exercise a fundamental *moral* right.[29] It seems obvious that moral rights should prevail over commercial interests, and yet the acceptance of corporate compelled speech through the mechanism of 'balancing' appears to affirm precisely the opposite relation of

[25] This basic presentation of political liberalism should be familiar. See John Rawls, *A Theory of Justice* (Harvard University Press, rev ed, 1999) 12–15, 112–18; John Rawls, *Political Liberalism* (Columbia University Press, rev ed, 2005) 30–5.

[26] The language of 'reasonable' persons is of course Rawlsian: see John Rawls, *Political Liberalism* (n 25) xlix, 137, 212, 481.

[27] Collins, 'Organisations' Religious Exemptions' (n 6) 112; *McFarlane v Relate Avon Ltd* [2010] IRLR 872 [21] (CA).

[28] Joel Harrison, 'Towards Re-Thinking "Balancing" in the Courts and the Legislature's Role in Protecting Religious Liberty' (2019) 93(9) *Australian Law Journal* 734, 740. It should be noted that Harrison is critical of this kind of translation.

[29] The problem for the (religious) employee is that the contractual relationship between them and the corporation is taken to bind them to the corporation's moral views, *whatever they happen to be*. This puts a dent in the further objection that employees are taken to have agreed to the terms of their contracts, such that if they do not like or otherwise disagreed with the moral position of a given corporation, they are free not to sign a contract with it. The logical extension of this view is the perverse situation in which some religious employees may make themselves unemployable by any corporation with a diversity and inclusion policy. In this way, the liberal ideal of 'freedom of contract' becomes the basis of an illiberal regime.

priority. It is also unclear, however, whether political liberalism has much more to say by way of a solution to this problem other than a rehearsal of its pragmatic appeal to procedural rules as a way of avoiding substantive moral (and potentially political) conflict.[30] Part of what we might find unsatisfactory about this appeal is that it suggests as a solution to this problem a strategy of avoidance — one which necessarily undermines efforts by liberal-minded religious scholars to make sense of and defend expressions of religious forms of life in the public sphere because these expressions are generally related to questions of truth, the avoidance of commitments to which is one of the primary reasons for the liberal appeal to procedure.[31]

There is a further problem with this way of thinking about corporate compelled speech. To begin, it simply accepts the liberal presupposition that religion and religious expression is essentially a matter of private conviction.[32] Under this conception, when an individual employee makes a religious claim, what he does is make a private claim against a corporation in such a way as confirms his idiosyncrasy within the public sphere occupied by both him and the corporation.[33] He is a 'lone voice, crying in the wilderness', and because he is a lone voice, the strength of his claim is determined solely by the extent to which the corporation and the general law of the land is prepared to accept that claim as important or valid enough to warrant accommodation or toleration. That is usually determined by the extent to which the individual employee is able to convince a sufficient number of other individuals (either within the corporation or in the general public) that his claim is legitimate, but even when such support is forthcoming, all that has happened (according to this theory) is that a number of individuals have concurred in an opinion about an individual employee's right to express or act in accordance with a religious belief. This may make it more likely that the employee will succeed in having his claim accommodated by the corporation, but this merely repeats the triviality that numbers matter in a political contest, and that the corporation decided that not accommodating the employee's religious claim would do more harm than good to its public image. It makes the legitimacy of the right to express or act in accordance with that religious belief a matter of agreement as between individuals — an agreement formed not on the basis of the resolution of a substantive debate, but rather as the temporary conclusion of a bargain.[34] The fundamental moral question invoked by the religious claim remains unresolved (and in fact, irrelevant) from this point of view.

But this is clearly in tension with any view for which the prioritisation of commercial over religious interests is generally unjustified on account of the priority of moral interests over commercial ones. To think that moral interests are, or even ought to be, prior to commercial interests, one has to think that there is a constitutive difference between these kinds of interests. There must be some difference in the nature of the interest one has when one has a moral interest and the interest one has when has a commercial interest. The same is true of moral and

[30] This much is certainly indicated by Rawls in his extended discussion of the matter in *Political Liberalism*: Rawls, *Political Liberalism* (n 25) 134–140.
[31] Rawls, for example, thinks that reasonable citizens affirming reasonable comprehensive doctrines are the kinds of people who are prepared to bracket questions of truth in their political disagreements: ibid 94, 126–7.
[32] See Cécile Laborde, *Liberalism's Religion* (Harvard University Press, 2017) 28; Ronald Dworkin, *Religion Without God* (Harvard University Press, 2013) 132–3; Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011) 376 (grounding the right to religious freedom in a broader right to 'ethical independence'); John Rawls, *A Theory of Justice* (n 25) 181 (grounding the right to religious freedom in the notion of 'equal liberty of conscience').
[33] See *MacFarlane v Relate Avon Ltd* (n 27), for an example of this.
[34] See generally Alasdair MacIntyre, *Whose Justice? Which Rationality?* (University of Notre Dame Press, 1988) 338.

commercial claims. For the former to be (normatively) prior to the latter, there must be a discernible difference in the nature of the two claims. However, to determine the legitimacy of a religious claim by an employee on the basis of a bargain struck between that employee and a corporation (or between the set of individuals who support the employee's claim and the corporation, and so on) is to treat the moral claim of the religious employee and the commercial claim of the corporation as *functionally* identical, because the result of the bargain (that is, the result which signifies which claim is given greater weight) is not determined by the nature of the claims themselves, but rather by the relative success of each party's public rhetoric in respect of those claims.[35] The result is determined, in other words, by what kind of public support each party is capable of raising in respect of its claim and what each party is prepared to pay to have the negotiation benefit their side in the end.

When these claims are considered within the legal system, the situation is no different. As Joel Harrison has noted, courts adjudicate the relative value of claims to religious liberty on the basis of a 'balancing' exercise which treats religious claims as interests which compete with other (non-religious) interests for priority in particular circumstances.[36] On this kind of analysis, there is nothing particular about a religious interest that gives it an *a priori* value greater than a commercial interest. Again, these claims and interests are treated as functionally equivalent, with the relative importance or 'weight' of each determined not by the nature of the claims themselves (or what they are directed towards),[37] but rather by the harm or the kind of imposition on another's rights those claims are taken to involve. Part of the reason 'balancing' exercises by courts in these situations are so unsatisfactory is that in employing a liberal conception of public reason as a mechanism for resolving disputes, courts must cast the conflict as one of competing (but essentially equivalent) rights, and in doing so they must set aside the fact that there is a categorical difference between a moral claim and a commercial interest.[38]

However, by considering corporations as group moral agents in the public sphere, we are afforded an alternative way of characterising what is at stake when corporations engage in compelled speech. If, as we saw above, a corporation's diversity and inclusion policies constitute public moral claims on employees, and the religious claims of employees also constitute public moral claims, then the conflict occasioned by corporate compelled speech is not one in which a moral claim or interest is pitted against a commercial claim or interest. The conflict is truly between two competing moral claims. Moreover, these claims are necessarily, not incidentally, moral. That is, it is not possible to take proper account of the kind of claim a diversity and inclusion policy is without recognising its moral valence. This is because a diversity and inclusion policy is a moral claim that is made by a corporation on its employees:

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[35] I am not suggesting here that the participants in the bargaining process have to see these claims as identical in nature. Clearly that is not necessary. After all, it would be odd for a religious employee to think of the nature of his *own* claim as commercial, or of the nature of the corporation's claim as religious. What I am suggesting is that the natures of the two claims are irrelevant to the bargaining process — both claims are reduced to mere bargaining chips and are in this sense functionally identical.

[36] Harrison, 'Towards Re-Thinking "Balancing" in the Courts and the Legislature's Role in Protecting Religious Liberty' (n 28) 737.

[37] See *McFarlane v Relate Avon Ltd* (n 27) (Laws LJ).

[38] In *Eweida v The United Kingdom*, the European Court of Human Rights decided in favour of Ms Eweida because 'There was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways' brand or image' but this does not belie the fact that the Court still treated Ms Eweida's religious claim and British Airways' commercial interest as functionally equivalent in the sense described above. If the Court had found that Ms Eweida's religious claim had had a 'negative impact' on British Airways' brand or image, she may not have been successful. *Eweida v The United Kingdom* [2013] I Eur Court HR 215, 94.

it directs them to act in a certain way which the corporation considers is *morally good* not merely for the employees but also for the corporation and community in general. In promulgating the diversity and inclusion policy, the corporation says that a community in which corporations and their employees abide by the policy is *morally better* than a community in which corporations and their employees do not abide by that policy. In this sense the policy is moral in principle, not merely in effect. Likewise for religious claims. What the religious employee does by making a claim about the value of pursuing a certain religious form of life or making a claim from within the framework of a religious form of life is make a moral claim both about what they (the employee) ought to do or say in certain situations *and* what the corporation ought to do or say in those situations. In this way, the religious employee also makes a moral claim about what is good for them and the community in which they live. The religious employee also says that a community in which corporations and their employees act in accordance with the doctrines and tenets of their religion is *morally better* than a community in which corporations and their employees do not do so.

Thus, it turns out that the claim made by the employee and that made by the corporation in these kinds of situations *are* equivalent, but that equivalence is not to be found in the idea that both are expressions of individual preference such that they can be made the instruments of a bargain, but rather in the idea that they are both substantive moral claims such that any conflict between them must be determined by a debate.[39] Crucially, as moral claims made in the public sphere about the public conduct of corporations and employees, these are claims which implicate (competing) conceptions of the common good. They are claims about how we should live rightly *together*. To recognise this is to abandon the liberal idea that religion is essentially a private matter, because the claims of religious employees are claims about the purpose(s) to which a given community should be directed, and are therefore not claims whose legitimacy can be assessed in terms of discussions about what rights individuals require to defend their private spheres of autonomy against incursions by others.[40]

## COMPELLED SPEECH IN LIGHT OF THE COMMON GOOD

Harrison provides a helpful summary of the traditional conception of the common good as follows: 'Traditionally, the common good has meant the orientation of an entire community towards a common end, living well, with persons playing specific roles conducive to achieving that end.'[41] My contention here is that the publicly promulgated diversity and inclusion policies

[39] Of course, I use the term 'debate' here loosely. Obviously, moral conflict need not be settled by formal debate. Depending on the circumstances, conversation or instruction may be far more appropriate. The kind of understanding required for the resolution of a moral conflict need not arise as the result of formal intellectual capitulation. On the idea of conversation as a mode or artefact of politics, Michael Oakeshott's essay 'The Voice of Poetry in the Conversation of Mankind' in Michael Oakeshott, *Rationalism in Politics and Other Essays* (Liberty Fund, 1991) 488–541.

[40] One objection here might be that there is no necessary inconsistency between these two notions. For example, a possible purpose for a community could just be the cultivation of a political and legal system in which private spheres of autonomy are maximised subject to the caveat that every individual's sphere is of equal 'radius'. But this is just the famous first axiom of Rawls' liberalism — 'that each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others': Rawls, *A Theory of Justice* (n 25) 53. One source of inconsistency between liberal conceptions of politics and the common good conception I am invoking here is that systems involving unequal individual *liberty* are categorically excluded from liberal conceptions of politics. No such exclusions are necessarily required by common good conceptions of politics.

[41] Joel Harrison, *Post-Liberal Religious Liberty: Forming Communities of Charity* (Cambridge University Press, 2020) 110.

of corporations constitute claims about the common good by which they expect their employees to abide and in respect of which they can be held morally accountable as moral agents. To see how this is so, consider again cl 4.1(n) of Rugby Australia's Code of Conduct. The paragraph antecedent to its *placita* refers to behaviour (including contact on social media), that 'negatively affects the experience, safety or wellbeing of any Relevant Organisation's representatives, members, or other patrons ...' The *placita* then set out a list of such behaviours, only the eighth of which refers to 'unlawful' behaviour. Moreover, in its public statements, Rugby Australia also promulgates the expectation that its employees 'cannot share material on social media that condemns, vilifies or discriminates against people on the basis of their sexuality.' Presumably, 'people' here refers to 'people more generally' (that is, not merely the set of people comprised of the representatives, members, or other patrons of Relevant Organisations). Above, I mentioned that the content of cl 4.1(n) and Rugby Australia's other public statements was clearly moral. It should also be clear, however, that this content is moral in a particular way: that is, it constitutes a series of claims about what employees ought to do with respect to others in the community. In other words, it sets out a series of moral directives which are meant to delineate, at least in a broad fashion, how the employees of Rugby Australia are expected to behave, not just as employees of Rugby Australia, but also as members of a community the moral character of which Rugby Australia takes itself to be serving in promulgating this particular series of moral directives. It is clearly not a mere reminder to act within the bounds of the law.

Recalling Harrison's summary of the traditional conception of the common good, it is not hard to see how policies like that of cl 4.1(n) can be taken as claims about the common good. To say that employees 'cannot share material on social media that condemns, vilifies or discriminates against people on the basis of their sexuality' is to adopt a particular conceptual framework about what it means to discriminate against someone and what it means to do so on a 'basis'.[42] It is also to adopt a certain view regarding the moral nature of condemnation, vilification, and discrimination, which are not all morally equivalent. (Unlike condemnation and vilification, discrimination gets another mention in cl 4.1(n)(i) as part of the prohibition on 'critical' and 'offensive' behaviour). It is also to say that what it means for Rugby Australia's employees to live well with others in the community is (at least) for them not to condemn, vilify, or discriminate against those others on the basis of their sexuality.[43] Of course, one 'end' of that community is a situation in which no member of it is discriminated against on the basis of their sexuality, but having this as an end of the community only makes sense if sexuality itself is assigned a certain kind of moral valence within the context of the conception of the common good being pursued here. In fact, to say that sexuality should *never* form the basis of discrimination is possibly to condemn sexuality to a kind of moral irrelevance.[44] Now, we might think that a community in which sexuality is morally irrelevant is just straightforwardly better than one for which that is not the case, but either way we must hold that this requires us

[42] For example, it is not clear whether, on this view, discrimination that was thought or found to lack a 'basis' would be wrong. Perhaps our fate in these situations is to be placed in the position of Iago's questioners, who, when they asked of him the reason for his jealousy and destruction of Othello, received only silence.

[43] There is an ambiguity here, in the sense that it is possible that the 'end' of the community being pursued by Rugby Australia is one in which no one is condemned, vilified, or discriminated against on any basis whatsoever, but this is obviously self-defeating as it is difficult to see how such a community would respond to dissenters.

[44] Irrelevant either because one's sexuality is seen as merely a special case of a larger category of 'ethical freedom' (see above n 32) or because it is thought not to warrant any more moral attention than, say, the length of one's fingers or the width of one's forehead. Of course, we might also think that sexuality should never form the basis of discrimination because it is morally hyper-important as a category for the expression of individual ethical freedom, but an exploration of this idea is beyond the scope of this paper.

to hold certain views about the nature of sexuality and the social role it plays in our understanding of the common good, because this claim about sexuality is a claim for *all* members of the community, not just employees of corporations or even corporations themselves. In other words, the kind of moral vision entailed by cl 4.1(n) and similar clauses is one which extends beyond the (legal) bounds of the corporations which promulgate them. It is a moral vision for the whole community of which these corporations are members, and is therefore and necessarily at odds with any other conception of the common good which does not entail or support these claims about sexuality, discrimination, and the like.

One objection here is to claim that corporations, even if they are moral agents making moral claims in the public sphere, do so *only* in respect of themselves and their employees. This is because it is not necessary to make a claim about the common good to make a moral claim in the public sphere. For example, if I go out into the street or write an opinion piece for a newspaper claiming that 'abortion is morally wrong', I am simply making a personal statement about what I hold to be morally right, and that is not belied by the fact that I make that statement publicly. I might say 'abortion is morally wrong', but in doing so I do not necessarily make a statement about a common end to which the whole community should be directed or about what it means to live well together. All I am doing in making such a statement is saying that I personally find abortion morally repugnant, and that this implies nothing in particular about the moral status of the community in which I live (a community in which many people express and act on the opposite view to mine about abortion).[45] Likewise, when corporations adopt and promulgate diversity and inclusion policies on the basis of which they compel the speech of their employees, they merely express what is essentially a 'personal' moral view — a view they prefer to other views, of course, but a view in respect of which they no more than invite others to adopt as part of the general social bargaining process that attends any expression of moral preference in the public sphere.

This is not a realistic response to the primary contention above that the kinds of moral claims corporations make when they promulgate diversity and inclusion policies are claims for the whole community. They *are* claims about what it means to live well together because they are claims that affect the relationships between their employees and the broader community. They *are* claims about a common end to which the community is (or ought to be) directed because they express a certain moral vision about a community without discrimination on the basis of sexuality. To put it another way, it would be very odd for Rugby Australia to adopt a policy like that contained in cl 4.1(n) but also maintain that it had no view whatsoever on the question of whether or not a community whose corporations adopted clauses like cl 4.1(n) was better than a community whose corporations did not adopt such clauses. At the very least, Rugby Australia would have to maintain that *our* community is better off because Rugby Australia and other corporations adopt such policies, as there would be little point in adopting them otherwise.[46] The moral view expressed by corporations in their adoption of diversity and inclusion policies is therefore a view which they invite others to adopt because they hold it to be a *good* view, that is, a view they hold to be good for the community of which they are a part.

[45] I may feel some relief that I happen to live in a community which allows its members to express opposite views on abortion because at least that means *I* get to express *my* view about it. It seems to me that this sentiment lies close to the heart of the appeal of liberal politics.

[46] Note that we have already rejected the idea that these policies reflect merely commercial interests, so it is no objection here to say that there could be a purely commercial reason for adopting these policies (ie, to generate profit for shareholders).

What, then, is actually wrong with corporate compelled speech? It is true that corporations do not merely invite their employees to behave in accordance with diversity and inclusion policies — they compel their employees to do so. However, as mentioned above, the problem here is not that in compelling the speech of their employees, corporations impermissibly breach those employees' private spheres of autonomy or undermine their natural freedom of expression. As the preceding material shows, a corporation compelling the speech of an employee in respect of a diversity and inclusion policy does so on the basis of a moral claim about the common good, a claim in respect of which some compulsion may well be justified. What justifies corporate compelled speech is (i) that the corporation pursues a legitimate conception of the common good; and (ii) that the means by which the corporation pursues that conception of the common good are conducive to that conception.

It follows that the problem with a corporation compelling the speech of its employees in respect of a diversity and inclusion policy is not the compulsion *per se*, but rather that the conception of the common good being pursued through that policy is wrong. This puts cl 4.1(n) of Rugby Australia's Code of Conduct in something of a new light. The kinds of questions we ought to ask of that Code have less to do with the extent to which it curtails an employee's freedom to express their religious belief as a matter of natural or legal right and a lot more to do with what kind of conception of the common good it promulgates. That is, is the conception of the common good invoked by the Code *right*? These considerations are admittedly quite far from the balancing and bargaining done within the legal and political discourse typically associated with corporate compelled speech, but this is perhaps something to be welcomed. It is not necessarily a point of failure to have arrived at genuine disagreement.

There are at least two implications of this view for the way in which we think about corporate compelled speech. First, corporate compelled speech may well be justified if it is conducive to a legitimate (that is, philosophically justified) conception of the common good. Second, however, corporate compelled speech will not be justified if it is not conducive to such a conception of the common good. Not surprisingly, to think of corporate compelled speech in this way is to take on considerably more responsibility for our views about it than is typically done by both its defenders and detractors, because now we are called upon to nest these views within philosophically justified conceptions of the common good. The principal advantage of thinking this way about corporate compelled speech is that it avoids the 'balancing' exercise inevitably undertaken when individual rights to free expression seem to run up against the commercial rights of corporations to determine the way they conduct business. The unsatisfactory impasse created by treating corporations and their religious employees as rights bearers bargaining their way through the public sphere is in part a matter of the refusal by courts and commentators alike to engage seriously with the question of which of these rights should take priority over the others. On my account, the impasse is resolved by thinking of both corporations and religious employees as moral agents who make claims about the common good which orders and justifies their conduct in the public sphere. Judgements about the relative priority of these claims can be made in light of the intellectual resources and forms of life given to us by the traditions of philosophical inquiry they (can be seen to) invoke.

Does this way of treating common good claims not simply shift the problem of disagreement to the level of philosophical tradition? That is, the original problem with trying to resolve conflicts between corporations and their religious employees seemed to be that any purported resolution appears to fly in the face of deep and enduring disagreement about the relative priority of moral rights to free expression and commercial rights to determine business policy,

such that the losing side is always left wanting for a justification of the resolution that will satisfy *their own* criteria of judgement. The view defended in this paper is that because both corporations and their religious employees should be taken to be making claims about the common good which involve deep philosophical commitments, judgements about the relative priority of these claims should be made in light of the philosophical traditions they invoke. This seems to result in a similar situation for the party whose claim is not given priority: are they not left wanting for a justification in terms of *their own* philosophical criteria? After all, philosophical traditions are no less prone to conflict than rights and interests.[47]

There is, however, a crucial difference between the two situations described above. In the former situation, 'balancing', which appears as a principled judgement about the relative priority of one legal right or interest over another, is in reality the conclusion of a bargaining process in which a pragmatic decision is made (usually, but not exclusively, by a court) about which right ought to prevail in a given circumstance. In this kind of situation, *both* parties are left wanting for a justification of the decision to prioritise one right over another in terms of their own criteria of judgement, because the whole point of thinking about (say) the permissibility of corporate compelled speech within a liberal political framework is to *avoid* doing so in terms of the comprehensive doctrines of either the corporation or the religious employee.[48] In fact, at least as a matter of theory, the success of political liberalism as a framework for the resolution of disputes within the public sphere can be measured by the extent to which comprehensive doctrines *do not* feature as reasons in any given resolution.[49] On the liberal view, moral and political disagreements between people holding to incompatible comprehensive doctrines are *in principle* unresolvable on the terms provided by those doctrines, and this necessitates the imposition of 'neutral' (that is, apparently purely procedural) terms which function as the common ground on which these disagreements can be *set aside* before they lead to violence.[50]

On the common good view I present here, however, moral and political disagreements between people holding apparently incompatible comprehensive doctrines are *not* in principle unresolvable, because these disagreements arise as part of debates in the public sphere about the nature of the common good. The different philosophical traditions invoked in these debates are similarly concerned with common questions in relation to the nature and purpose of human beings as such, what it means for them to live well together, and so on. Disagreements between these traditions and (the forms of) the answers they give to these kinds of questions are a matter of real debate in which the philosophical criteria of judgement employed by each side are actively involved and not set aside. If one side is defeated, there is no want of justification of

[47] This is also in a certain sense a historical claim: it is a significant feature of the historical justification of liberalism that it is a necessary response to conditions of conflict created by philosophical (and religious) disagreement: Rawls, *Political Liberalism* (n 25) xiii-xxxiv.
[48] See ibid 13, 174–6.
[49] See, eg, ibid 169.
[50] Rawls' view, of course, is that the overlapping consensus is generated from comprehensive doctrines in the sense that it can be justified from within the set of principles constitutive of those doctrines, but the resulting consensus is still distinct from those doctrines. It is only because it is distinct that the overlapping consensus can hope to form the locus of agreement between citizens affirming mutually incompatible comprehensive doctrines. See generally ibid 138.

the result of the debate in terms of their own philosophical criteria, because it is a significant feature of that defeat that those criteria will have been shown to be themselves wanting.[51]

One implication of this difference is that corporate compelled speech, involving as it does philosophically nested claims about the common good, *matters* in a way that it cannot within a liberal political framework. For example, the answer to the question of whether the common good is constituted, at least in part, by the idea that human sexuality is morally irrelevant cannot, on this view, be characterised as the result of a bargain struck between a mere preference expressed by corporations in relation to their business practices and another, perhaps contrary, mere preference expressed by their religious employees in relation to their faith. On the contrary, the answer necessarily implicates the full sense in which our life together in the world involves a philosophically grounded moral order which can be known and thus about which it is possible to be in error. It is only within or in relation to this kind of order that diversity and inclusion policies can hope to acquire something of the moral significance claimed for them by corporations, but it is perhaps also only within this order (or within debates about its nature) that their religious employees can find the resources required to meaningfully challenge corporate policies in respect of which their speech is compelled.

[51] Of course, the defeated party may simply refuse to give in, sticking obstinately to their view. However, the liberal framework I discussed above fares no better in this regard. A defeated party to a legal contest whose preferences have not won out on the day may also simply refuse to believe they have lost.