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Abstract: Cécile Laborde's Liberalism's Religion contains an original theory of collective religious exemptions, which emphasises two morally significant interests that religious and other groups have in free association. Here I argue that Laborde's theory of collective exemptions is less frugal in its allocation of rights than its author claims. In particular, I suggest that the theory lacks the grounds to restrict special treatment to voluntary and identificatory associations, and that by its lights loose, diffuse communities and even ascriptive groups are also entitled to special treatment.

Susan Little served as an elementary school teacher in Pennsylvania from 1977 until 1986. A Protestant, she was employed by a Catholic school, without direct responsibility for religious education. In August 1986 she entered a second marriage, having previously divorced in 1979, and took a year-long leave of absence. Upon returning, the school refused to renew her contract, because her second marriage - although legally-valid - did not satisfy the requirements of canon law. Eileen Flynn taught Irish and History in a convent school from 1978 to 1982 in County Wexford, Ireland. She too was dismissed from her post, in her case after giving birth outside of marriage and deciding to raise her child with her unmarried partner.

Both Little and Flynn challenged their treatment, unsuccessfully, and in both cases the courts upheld a right for schools with a religious ethos to discriminate on grounds that would otherwise be illegal.[1] On the face of things this is puzzling, since other employers would not have been permitted to dismiss workers on the same basis. So for what reason, or reasons, might a liberal and secular state, otherwise committed to civic equality, defer to religious sensibilities and permit religious associations extensive discretionary powers that are not granted to other employers?

One answer to this question, found in a vein of legal scholarship that has recently become prominent, is that the liberal state lacks the competence to interfere in the affairs of religious bodies.[2] According to this view, churches and other religious associations have - or ought to have - jurisdictional autonomy. The appeal of this theory is that it succinctly explains and justifies the reticence of courts to interfere in church affairs, as manifested, for example, in the doctrine of the 'ministerial exception', affirmed on a number of occasions by the US Supreme Court. This doctrine exempts religious employers from anti-discrimination laws, thereby permitting, for example, churches to insist on an all-male priesthood. Since 2012 its scope has enlarged considerably, after the courts ruled – in two separate cases - that neither a teacher with narcolepsy employed in a religious school nor a church pianist were entitled to the protection of anti-discrimination laws.[3]

From the perspective of jurisdictional autonomy thesis, the rationale for a blanket ministerial exception is that the secular state lacks the authority to trespass on the church's jurisdictional domain. It is not so much that the liberal state is epistemically incapable of judging whether a pianist or a teacher is relevantly like a minister, within the context of the relevant belief system, but rather that it has no right to regulate the internal affairs of religious associations. Thus, if a state were to enforce age- or disability-discrimination laws within a religious association, it would be acting *ultra vires*.

The popularity of the jurisdictional autonomy thesis is unsettling for many legal and political theorists, since it effectively treats religious associations as if they were foreign states, sovereign within their own spheres, endowed with unilateral authority over members.[4] Cécile Laborde is one such theorist, and her *Liberalism's Religion* both presents a powerful critique of jurisdictional autonomy and develops a rival – and expressly liberal - explanation of the rights of religious associations.[5] Laborde's primary critique of the jurisdictional autonomy thesis is that despite the exuberant rhetoric of its proponents, once the theory is worked out in detail it tends to be considerably less radical than one has been led to believe. For one thing, no one believes that churches should be immune from prosecution when it comes to most matters of criminal law, or that the state is not the proper venue for resolving civil laws of tort, contract and property. Likewise, no one really thinks that the relationship between church and state is strictly analogous to the one between different states, since the members of religious associations are always also citizens.

Furthermore, since proponents of jurisdictional autonomy do not believe that the civil state lacks legitimacy full stop, or that its authority is arbitrary, Laborde demonstrates that they mostly end up rolling back on the claim that the state lacks jurisdictional authority over religious affairs, retreating to the more modest principle that the state must negotiate and discuss with religious associations the limits to one another's powers. Moreover, even in this respect they are typically willing to accept the supremacy of civil law, acknowledging that in the end the state must have 'jurisdiction over jurisdiction'.[6] That is to say, they accept that it is the state which must settle the question as to whether and when to defer to religious associations, as in cases like Little and Flynn's.

So the jurisdictional autonomy thesis turns out to be a red herring, and the real issue is not whether church and state operate under separate jurisdictional domains. Rather, it concerns establishing how much normative weight should be allocated to the claims of religious associations over their own governance. Laborde provides the most comprehensive and plausible answer to this puzzle I am aware of, which applies her 'disaggregation strategy' to the special problem of 'collective religious exemptions'. The disaggregation strategy arises from the idea that religious freedom, properly understood, protects a plurality of distinctive normative values. When it comes to the rights of religious associations, Laborde argues that the principle of freedom of association likewise protects a variety of different values, and she highlights two morally significant interests that some religious associations have, each of which is sufficient to justify special treatment. Before I discuss these and the role they play in her argument, allow me a brief digression to note some ambiguities in Laborde's terminology.

Laborde sets herself the task of addressing 'the general puzzle of collective religious exemptions', and she goes on to explain that this puzzle concerns 'whether, and when, religious associations should be exempted from the application of laws against discrimination on the grounds of gender, sexuality, or race'.[7] Although this is a better way to frame the issue than focussing on the controversy over jurisdictional autonomy, it is still potentially misleading, for two reasons.

First, this formulation is narrow and excludes tax exemptions, the exemption in English law which allows Jewish and Muslim schools to opt-out of the requirement to hold a daily act of Christian collective worship, and the exemptions in the US allowing religious healthcare providers to refuse to provide abortion services or services related to contraception.[8] Further, Laborde's formulation also excludes Burwell v Hobby Lobby (2014), a case she discusses at length and presents as if it were a collective religious exemption.[9] In this case the Christian

owners of a large arts and crafts company sought an exemption from certain requirements of the 2010 Affordable Care Act, asserting a conscientious objection against providing employees with insurance coverage for emergency contraception. The courts controversially decided to grant this exemption, and in doing so perhaps indirectly discriminated against women. However, since Hobby Lobby themselves had not sought an exemption from anti-discrimination laws, their exemption does not seem to qualify as a collective religious exemption by Laborde's own standards.

Second, this formulation also obscures the important fact that exemptions from anti-discrimination laws are not exercised by collectives but rather by institutions with which they are associated, such as schools, hospitals or firms. Of course, if an institution is entitled, as a matter of liberal political morality, to opt-out of a particular anti-discrimination law, then it may well be the case that an associated collective holds the right in question. However, describing this right as a 'collective religious exemption' risks disguising something which Laborde herself emphasises, namely that the exemptions she has in mind always involve allocating Hohfeldian powers to particular institutions.[10] Such powers may render individuals vulnerable to domination, including both people who belong to the collective in question and those who do not.[11]

Notwithstanding these quibbles, let me now turn to Laborde's two grounds for 'collective religious exemptions'. The first arises from an interest that associations have in maintaining 'a structure through which their members can pursue the purpose for which they have associated'.[12] Laborde labels these 'coherence interests' and argues that they justify 'narrow but deep associational rights',[13] such as the rights 'to prohibit apostasy and blasphemy from their members, to excommunicate heretics and dissidents, and to refuse entry to nonbelievers'.[14]

The rationale for these rights begins from the observation that it is relatively uncontroversial for organisations to refuse membership for the sake of achieving their purposes, such as when rape crisis centres and political parties discriminate on grounds of gender or political opinions when appointing staff. Likewise, organisations are sometimes empowered to enforce an ethos or standards upon their members, as when universities are permitted to discipline academics who plagiarise.[15] Laborde believes that religious associations have morally weighty interests in being able to do similar things, since their 'collective integrity' is bound up with being able 'to live by their expressed standards, purposes and commitments'.[16] Accordingly, she argues that achieving associational coherence must sometimes entitle religious groups to refuse or rescind membership, or to impose an ethos or standards upon their members.[17]

Laborde believes that 'coherence interests' justify significant institutional powers. For example, she argues that white supremacist churches are entitled to refuse entry to non-whites, and that the Jewish Free School in London was entitled to refuse admission to pupils whose mothers had converted to Judaism.[18] At the same time, she is also keen to place limits on the kinds of groups that may exercise these powers, insisting that only identificatory groups which are formally constituted as voluntary associations should benefit from them. So, for example, she says that 'diffuse, loose religious communities – such as "the Hindu community" or "the Muslim community" – cannot *qua* communities be candidates for exemptions', since they lack 'formal structures of authority'.[19]

It is not clear whether Laborde's grounds for denying exemptions to 'diffuse, loose religious communities' can avoid the charge of arbitrariness. On the one hand, she defines coherence interests narrowly, as 'interests that *associations* have in sustaining their integrity'.[20] So perhaps the thought is that only associations, and not communities, have these interests. However, this is not

self-evident, since integrity – by Laborde's account – is threatened when there is a lack of 'fit' between 'purpose, structure and ethos', and it seems perfectly possible for the members of a loose, diffuse community to have an interest in this, provided that 'structure' is understood to refer to both formal and informal rules.[21] For example, consider sex segregation, which is a 'structure' that might 'fit' with a particular 'ethos'. If it is possible for an association to have coherence interests in being able to segregate by gender, then surely it is also possible for the members of a community to have the same kind of interest.

On the other hand, perhaps Laborde has a more practical point in mind, which is that special legal treatment can only be extended to groups with a formal legal structure. For example, consider the right to refuse or rescind membership on grounds of race, gender or sexuality. This power can only be exercised by groups with a formal structure through which membership is established, and this is something that only associations, and not 'loose, diffuse communities', have. But this too does not seem quite right, since the members of loose, diffuse communities are capable of imposing sanctions upon one another in order to maintain their 'standards and ethos'. So at least some of the powers that Laborde thinks can be justified by coherence interests are ones that can be exercised by communities as well as by associations.

As well as excluding 'loose, diffuse communities', Laborde also stipulates that only associations which are identificatory can have normatively significant coherence interests. She illustrates this point by discussing Hobby Lobby, which she believes did not meet this standard. On Laborde's reading, the reason why Hobby Lobby was not entitled to special treatment was *not* because it is a for-profit corporation, as some commentators have suggested, since she thinks that religious firms can have morally significant coherence interests, such as kosher butchers and Bible sellers.[22] Rather, it was because it serves the general public rather than a niche customer base of coreligionists, and because with over 13000 employees and 500 stores, it is too large an organisation to infer that its members share the religious ethos of its owners.

I think that Laborde gets Hobby Lobby basically right, and that it is much more plausible to suggest, as she does, that it is a group's 'mode of association' which is relevant to determining whether it has the correct 'standing' to qualify for special treatment rather than the simple fact that it is religious, as proponents of jurisdictional autonomy sometimes suggest.[23] However, it is not clear why Laborde thinks that only bodies which exhibit her favoured mode of association have morally significant coherence interests. For example, consider her stipulation that associations which serve the general public cannot have a 'relevant coherence interest' that would justify discrimination since 'as soon as an organisation claims to serve the public, it is not "religious" in the sense that matters'.[24] This means that organisations serving the general public must neither discriminate externally, such as by refusing to supply particular goods or services to particular people, nor internally, as when religious hospitals, schools, charities and other bodies consider religious beliefs when appointing or promoting staff. Laborde expressly denies that the coherence interests of such associations are overridden by some other, and more weighty, moral consideration (such as equal access or equality of opportunity), but since it cannot be the case that such associations lack coherence interests entirely, her view must be that their coherence interests are not morally relevant, and I cannot see why this should be the case. Consider a school with a religious ethos, which initially admits pupils only from one faith community, but later decides to offer places to all children. It seems at least possible that after widening its admissions criteria the school could retain coherence interests in preferring to appoint co-religionists onto its teaching staff, so why should Laborde think that they are now morally irrelevant, when they were not so before?

In addition to saying that associations which serve the general public cannot have relevant coherence interests, Laborde also stipulates that two further conditions must be satisfied in order for an association's coherence interests to generate a *pro tanto* exemption claim: the form of discrimination in question must be tied to the association's main purpose, and that purpose must 'fit' with the main purpose its members have in associating.[25] The latter condition captures something else which arguably went wrong in the Hobby Lobby decision, since most of the company's employees presumably did not have religion in mind when they decided to join its ranks. Meanwhile, the former condition invokes a distinction between 'core and peripheral religious activities' and has the effect of ruling out a blanket ministerial exception. This is because Laborde argues that religious employers 'cannot subject all of their employees – regardless of their duties – to the tenets of their doctrine' and they 'cannot discriminate on religious grounds – or any other impermissible ground – in relation to employees not doing religious work'.[26] She illustrates this by discussing a janitor who was dismissed from a gymnasium owned by the Mormon Church because he was not a member in good standing of the church.[27] Laborde argues that extending the ministerial exception to cover cases like this is 'far too permissive' because running a gymnasium is not a core activity of the Mormon Church.[28]

The distinction between core and peripheral activities was also at stake in the Little and Flynn cases, and Laborde is rather equivocal about whether a religious school could have a morally relevant coherence interest in terminating the employment of teaching staff who engage in ethos undermining conduct outside the workplace. On the one hand, many religious schools lack Laborde's required mode of association to qualify for special treatment in the first place. In some cases because they do not – or are not legally permitted to - admit pupils on a religiously selective basis, and in other cases because 'the natural persons that are involved in the workings of the collective entity' are not 'in the right (identificatory) relationship with the association'.[29] Just as Hobby Lobby was not entitled to special treatment because neither its employees nor customers shared the religious convictions of the firm's owners, so too might a number of schools with a formal religious ethos lack the correct mode of association, if parents and teachers are motivated by geographical, academic or other non-religious reasons.

On the other hand, Laborde cites 'teachers of religion' as an exemplar of a role with a core religious function, suggesting that religious schools with the correct mode of association should be granted extensive discretionary powers when appointing and disciplining such staff.[30] Although neither Little nor Flynn provided religious instruction, they were both responsible for upholding and imparting the religious ethos of their schools, and the schools in question could credibly argue that the conduct of teachers in general – and not just teachers of religion – is relevant for achieving a core collective religious purpose. Unlike Seana Shriffrin, Laborde insists that an association making such a claim must publicly articulate and justify its preference for discrimination, explaining why it is essential to its doctrine or mission.[31] So to qualify for an exemption the school must publicly explain why continuing to employ teachers who have violated church doctrine would prevent its (other) members from being able to 'live by their professed standards, purposes and commitments'.[32]

Something like what is described above occurred in Susan Little's case, whose employer claimed that she was unfit to impart Catholic values because she had publicly rejected Church law and doctrine.[33] In what may seem to be a surprising partial concession to the jurisdictional autonomy thesis, Laborde argues that the state ought to accept judgments like this at face value, since religious associations are entitled to deference over theological matters. This expectation arises from the second type of interest that she attributes to associations and which she labels

'competence interests'. These refer to the ability of an association to interpret its own standards, purposes and commitments.

Laborde justifiably emphasises the originality of this part of her theory, noting that '[l]egal commentators and political theorists have generally eschewed reference to this epistemic dimension of freedom of association'.[34] She also seeks to limit what might be claimed in the name of associational competence, distinguishing the minimum judicial deference she favours from the 'prophylactic' immunity called for by proponents of jurisdictional autonomy.[35] So, for example, she thinks that although courts should not overrule religious associations when it comes to establishing whether a priest has 'the requisite spiritual qualities' or 'preached an inaccurate interpretation of the Gospels', they must nevertheless be empowered to establish whether discrimination really has been motivated by religious reasons, as opposed to being a pretext.[36] Furthermore, because the rights justified by competence interests are 'shallow', they must be balanced against individual rights, including employment rights.[37]

Notwithstanding this, Laborde's theory of competence interests potentially has a very broad scope of application, covering not only her favoured example of the spiritual qualities of a priest but also cases like Little and Flynn's, which concern religious education rather than religion simpliciter. This may be sufficient to give some liberals pause for thought.

An equally serious difficulty, in my view, is that Laborde's explanation about *why* secular courts ought to defer over matters of competence is ambiguous, since she offers two explanations for the 'basic intuition' that the secular state is 'distinctively ill-suited' for resolving certain questions.[38] First, she writes that judicial deference articulates 'a crucial sense in which the state must avoid entanglement with religion'. [39] Here, and elsewhere, Laborde's view seems to be that the secular state must defer to the judgments of religious associations over specifically theological questions, in order to avoid taking a side in a contentious religious dispute. The rationale she gives for this is that since assessments of religious beliefs are inaccessible to public reason they should not form the basis for interference in the internal life of religious associations. Second, in another passage she argues that non-religious bodies like universities and law firms also have competence interests and should accordingly expect deference from courts when making decisions about things like promotion and tenure.[40] However, the first (anti-entanglement) explanation does not explain why courts should refrain from second-guessing judgments about academic scholarship or legal ability, since the reasons used by academics and lawyers ought to be accessible to public reason. Instead, the grounds for deference is simply that the state's officials lack the expertise to make informed judgments.

Laborde expressly rules out the possibility that deference might be justified for different reasons in different settings, describing the difference between the competence interests of churches and universities as one of 'degree' rather than 'nature'.[41] This suggests that the second (expertise) explanation is the real one, since it applies to all the different cases she discusses. However, this cannot explain why churches have stronger competence interests than universities and law firms, or why they are owed more deference than other kinds of association, as Laborde seems to believe. Furthermore, the second explanation also implies that many kinds of groups – and not only voluntary associations – have competence interests, if they are specially qualified to make certain kinds of judgment, as when women and ethnic minorities are said to be especially qualified to identify sexism or racism. However, even if the liberal state ought sometimes to defer to the judgments of ascriptive groups, this is surely not for the same reason as it ought to refrain from assessing the spiritual qualities of ministers.

In sum, although I sympathise with Laborde's view that a group's 'mode of association' is relevant for determining whether it qualifies for special treatment, I am not convinced that only voluntary identificatory associations have competence or coherence interests. Indeed, I have suggested that 'loose, diffuse communities', associations which provide services to the general public and ascriptive groups could all have one or both of these kinds of interest. Laborde does not explain why those interests are not morally relevant and I fear that any such explanation is likely to be arbitrary.

Her stated position is that 'only groups that are voluntary and identificatory have *pro tanto* rights to discriminate', and this raises two separate difficulties.[42] On the one hand, she suggests that voluntariness is a necessary condition since we can 'presume' that members 'consent' to the 'formal authority structures' of their associations.[43] However, collective religious exemptions also affect the dignity and standing of non-members, as when religious associations discriminate when providing goods and services. So either Laborde must severely restrict the kinds of rights justified by coherence and competence interests – so that exercising them affects only those who consent – or she must explain why the coherence and competence interests of members justify powers over non-members. On the other hand, Laborde's account of what constitutes an identificatory association is highly restrictive, excluding not only firms like Hobby Lobby but also many religious schools. As a result, her theory would prohibit such schools from discriminating even when appointing teachers of religion. Accordingly, although Laborde's theory is a significant improvement on the jurisdictional autonomy thesis, it nevertheless contains ambiguities in need of resolution.

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[1] Little v. Wuerl (1991); Flynn v. Power (1985).
[2] Stephen D. Smith, 'The Jurisdictional Conception of Church Autonomy' in Micah Schwartzman, Chad Flanders and Zoe Robinson (eds.) *The Rise of Corporate Religious Liberty* (Oxford: Oxford University Press, 2016), pp. 19-37; Richard Garnett, 'The Freedom of the Church: (Towards) an Exposition, Translation and Defence' in Micah Schwartzman, Chad Flanders and Zoe Robinson (eds.) *The Rise of Corporate Religious Liberty* (Oxford: Oxford University Press, 2016), pp. 39-62; Victor Muniz-Fraticelli, *The Structure of Pluralism: On the Authority of Associations* (Oxford: Oxford University Press, 2014).
[3] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C. (2012); Cannata v. Catholic Diocese of Austin (2012).
[4] Richard Schragger and Micah Schwartzman, 'Against Religious Institutionalism', *Virginia Law Review*, 99, 5 (2013): 917-85; Jean Cohen, 'Freedom of Religion Inc.: Whose Sovereignty?', *Netherlands Journal of Philosophy*, 3 (2015): 169-210.
[5] Cécile Laborde, *Liberalism's Religion* (Harvard University Press: Cambridge Mass., 2017), pp. 160-96.
[6] Steven D. Smith, quoted in Laborde op. cit., p. 169.
[7] Laborde op. cit., p. 171.
[8] Education Act (1996) s. 394 (see also the School Standards and Framework Act (1998) Sch. 19-20); Guttmacher Institute (2018) 'Refusing to Provide Health Services' retrieved July 31 2018 from https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services
[9] Laborde op. cit., p. 182-5.
[10] Laborde op. cit., p. 173; Andrew Shorten, 'Are there rights to institutional exemptions?', *Journal of Social Philosophy*, 46, 2 (2015): 242-63; Sune Lægaard, 'Disaggregating Corporate Freedom of Religion', *Netherlands Journal of Legal Philosophy*, 3, (2015): 221-230.

[11] Andrew Shorten, 'Accommodating religious institutions: freedom versus domination?', *Ethnicities*, 17/2 (2017): 242-58.
[12] Laborde op. cit., p. 178.
[13] Laborde op. cit., p. 175.
[14] Laborde op. cit., p. 179.
[15] Laborde op. cit., p. 179.
[16] Laborde op. cit., p. 178.
[17] Laborde op. cit., p. 179.
[18] R(E) v. Governing Body of JFS (2009).
[19] Laborde op. cit., p. 181.
[20] Laborde op. cit., p. 178, *emphasis added.*
[21] Laborde op. cit., p. 178.
[22] Laborde op. cit., p. 183.
[23] Laborde op. cit., p. 187.
[24] Laborde op. cit., p. 185.
[25] Laborde op. cit., p. 184-6.
[26] Laborde op. cit., p. 185-6.
[27] Corporation of the Presiding Bishop v. Amos (1987).
[28] Laborde op. cit., p. 186.
[29] Laborde op. cit., p. 184.
[30] Laborde op. cit., p. 186-7.
[31] Seana Shiffrin, 'What is really wrong with compelled association?', *Northwestern University Law Review*, 99, 2 (2005): 839-88; Laborde op. cit., p. 188-9.
[32] Laborde op. cit., p. 190.
[33] Little v. Wuerl (1991).
[34] Laborde op. cit., p. 191.
[35] Laborde op. cit., p. 193.
[36] Laborde op. cit., p. 192 & 194.
[37] Laborde op. cit., p. 174 & 194.
[38] Laborde op. cit., p. 191.
[39] Laborde op. cit., p. 191.
[40] Laborde op. cit., p. 194-5.
[41] Laborde op. cit., p. 195.
[42] Laborde op. cit., p. 174.
[43] Laborde op. cit., p. 174.