

Corporations, Persons and the Natural Law: A Response to Professor McLeod

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[Professor McLeod says](#) that the question before us is “whether churches and other associations of people have an existence of their own, prior to their recognition in positive law, or are instead mere creations of a political sovereign, entirely constituted by positive law as legal fictions.” He answers resoundingly in favor of the former view. I think the dichotomy in the question is a false one. The truth lies somewhere in the middle: associations of human beings, whether churches, clubs, or business corporations, do not exist as real things in the world over and above the interrelated human beings involved in them, but that does not mean that such associations are mere creatures of the state that it may do with as it pleases.

Let me begin by indicating where I agree with Professor McLeod. I agree with him that many important human goods can be attained, if at all, only when people work together. I agree that, for this reason, people have a right to associate with one another for any morally good purpose, and I agree that it would be wrong for other people, including the state, to prohibit people from associating with each other for good purposes or to interfere unreasonably with their doing so. I agree with Professor McLeod, in other words, on all the moral issues. Indeed, I would go further than he does and say that, in some cases, the state has a positive moral duty to facilitate the creation of free associations among its citizens.

I disagree with Professor McLeod only when it comes to the ontological issue. That is, in Professor McLeod’s view, when two or more individuals agree to work together towards

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some goal or otherwise agree to associate with each other, there comes into existence a new reality, something over and above these individuals, something that is properly itself called a person, because it has beliefs and intentions, rights and responsibilities. Indeed, if I am reading him correctly, Professor McLeod thinks that one of the moral propositions on which he and I agree—that it would be wrong for the state to interfere with free associations of individuals in certain ways—presupposes the existence of such a corporate person over and above the individual human beings choosing to associate with each other. For Professor McLeod, if it were not for the existence of this real corporate person existing before the state recognizes that person in positive law, the corporation as created by positive law would be a mere creature of the state, with the result that the state could do with it whatever it pleased. It is this step in the argument—the move from the moral propositions to a supposed ontological ground for them—that I think is a mistake.

In my view, corporations, churches, chess clubs and even families not real things in the world. Rather, when human beings are organized into such associations, what really exists—what exists independent of how we talk about reality—are the human beings who are related to each other in certain particular ways. To talk about such situations conveniently, however, we reify: that is, we introduce collective nouns that refer to the human beings involved as if there were somehow just one thing. Thus, when George marries Martha, we start speaking of George and Martha as a “couple,” but this does not mean that there has sprung into being a third person besides George and Martha who is the “couple” comprising George and Martha. The word “couple” does not refer to an existing thing in the world the way the words “George” and “Martha” do. As the medievals would have said, the word “couple” does not posit anything *in re*, at least nothing beyond two individual human beings who are related by being married to each other.

The word “couple” is handy to have around, however, for it greatly simplifies discourse. It’s a quite a mouthful to say, “I invited four individuals and their respective spouses to my dinner party, but of these only three individuals and their respective spouses were able to attend,” when it is clearer and easier to say, “I invited four couples, but only three could attend.” Still, paraphrasing away talk about couples is easy compared doing the same with talk about more complicated associations, for there are always exactly two persons in a couple and there is only one relation between them—being married—that counts. Try paraphrasing away the word “family” in “My family is coming for Thanksgiving” in favor of talk about human beings related as parents to children, children to parents, siblings to siblings, or spouses to spouses, and you’ll see how difficult and cumbersome such paraphrases quickly become.²

Professor McLeod says that recent work in analytic philosophy supports his view that organized groups of human beings are really persons over and above the individual human beings involved, and he mentions the work of Michael Bratman. But there are few analytic philosophers working in [shared agency](#) theory (I can’t think of any, actually) who share Professor McLeod’s view here, and certainly Professor Bratman does not. In a [summary](#) of his 2014 book on [*Shared Agency: A Planning Theory of Acting Together*](#), he writes, “Our capacity for shared intentional activity is grounded in our individual planning capacities” in the sense that “those planning capacities, given relevant special contents of the plans, and inter-relations among the participating planning agents, would constitute a basic case of shared intentional activity.” In other words, the intentional activity of the group is, in the end, nothing more than the individuals

² Not that it can’t be done, at least with a little set theory. Thus, if Pxy means x is a parent of y , Sxy means x is a sibling of y , and Mxy means x is married to y , then a person is a member of person a ’s family if and only if the person is a member of the intersection of all sets F such that $a \in F$ and for every $x \in F$ and every person y , if Pxy or Pyx or Sxy or Syx or Mxy or Myx , then $y \in F$. Readers who know a little philosophical logic will recognize this as Frege’s ancestral.

involved having certain special kinds of individual intentions. Hence, Professor Bratman expressly says that his “approach is reductive in spirit, since it aims to understand central cases of shared intentionality in terms of the resources broadly available within the planning theory of individual planning agents with the capacity to know about each other’s minds and actions.” For Professor Bratman (and I of course agree with him here), there is no metaphysical reality in shared intentional activity beyond the individual human beings involved, their intentions, and certain relations among them.

Professor McLeod also thinks that his view is the obvious and commonsensical one, and I would agree that people *commonly speak* as if churches, corporations, charitable foundations, clubs, and even teams of kindergarteners playing soccer are persons with their own proper intentions and actions. For that matter, however, people also speak about herds of buffalo grazing on the prairie and flocks of birds flying south for the winter, and surely no one thinks that herds or flocks are real things over and above the animals composing them. Regardless of how we speak, positing extra persons coming into existence every time two or more human beings agree to work together towards some goal is ontologically extravagant, even fantastical. It runs counter to Ockham’s Razor and offends the aesthetic sense of those of us who, [as Quine once said](#), have a taste for desert landscapes. The only justification for such a profusive ontology would be that we absolutely need to posit such corporate persons to account for known phenomena, and the truth is we don’t. It is surely cumbersome, but anything we want to say about associations of human beings we can say in terms of the individual human beings involved and the relations among them.

But recall that Professor McLeod thinks that, if associations of human beings are not real persons over and above the individual human beings who join together to form them, then the state could treat associations any way it pleases. It is this concern that underwrites Professor

McLeod's lush ontology, and the idea has some initial plausibility: after all, how can associations have moral rights if they don't really exist?

The answer, however, is that although an association is nothing more than the interrelated human beings who comprise it, nevertheless these human beings have moral rights, and wrongs against the association violate the moral rights of the human beings who have joined together to form the association. If the members of the chess club pay dues to the club and the club treasurer embezzles the club's funds, then although the embezzler does not steal from any particular human being (the money he steals is not the personal property of any member of the club), nevertheless he certainly commits a wrong against all the members of the club. The reason is that, although none of the members has a moral right to the money of the kind the member has with respect to his own property (lawyers would say that no member has a fee simple in the money), the member nevertheless has certain other kinds of moral rights related to that money: a right that the treasurer take due care of the money, a right that the money be expended only for the benefit of the club, a right to receive back a proportionate share of the money if the club dissolves with unspent funds in its treasury, and so on. The thief who steals the club's money invades these rights and so commits a moral wrong against the members of the club. The same is true if the government expropriates the money.

This then explains why we talk about associations as themselves having moral rights. That is, once we adopt the convenience of reifying associations and start talking about them as existing things that do this or that, we also adopt the convenience of talking about associations as having their own moral rights. But just talk about what the association intends or does reduces to talk about what the human beings involved in the association intend or do, so too does talk about the rights of the association reduce to talk about the moral rights of the human beings involved in

the association. The existence of an association is derivative of the existence of the human beings forming it, and the rights of associations are derivative of the rights of these human beings.

So how does the positive law of the state fit into all this? The answer begins with the observation that the state exists to protect and promote the common good, and one way the state protects and promotes the common good is by facilitating practical implementation of natural rights through the positive law. For example, every human being has a natural right to decide who will have his property after his death. To facilitate the implementation of this right, states typically have a statute—a positive law—of the kind lawyers call an *enabling statute*. This statute provides that anyone may make a will mandating how his property shall be distributed at his death and that the state will enforce any will in accordance with its terms, provided that the will meets certain easily-satisfied criteria set out in the statute: the will must be in writing, must be dated and signed by the testator, must be made before two witnesses, and so on. This positive law thus provides everyone with convenient means to implement a natural right, and it tends to forestall disputes.

Now, state corporate laws are also enabling statutes. Under these laws, anyone may create a corporation by doing a simple filing with a government official and paying a nominal fee. At this point, things start to get complicated, because most states actually have several such statutes which allow for the creation of legal entities with different legal characteristics. For example, in Delaware, the leading corporate law jurisdiction, there are two main enabling statutes: the [Delaware General Corporation Law](#), which provides a largely standardized form of organization well-adapted to the needs of public companies (more than half of the public companies in the United States are Delaware corporations), and the [Delaware Limited Liability Company Act](#), which provides an amazingly flexible form of organization that allows people to arrange the internal affairs of their company pretty much any way they agree among themselves to do so. The

thing to grasp here is that such enabling statutes do not recognize pre-existing associations of human beings anymore than the law about wills recognizes a pre-existing decision by someone about how his property will be distributed at his death. Rather, just as an individual makes a legally-effective choice about the distribution of his property at his death by the very act of executing a will conforming to the statute, so too do one or more human beings form an association with the legal characteristics provided for in the corporate enabling statute by the very act of filing an appropriate document with the appropriate governmental official as provided in the statute.

Now, just as the statute about wills could, in its particulars, violate the natural rights of human beings, so too could a corporate enabling statute violate those rights. Thus, if some state had a statute that allowed people to make wills but required that 25% of everyone's estate go to the Democratic Party, that statute would be unjust as in derogation of the natural right of the individual to control the distribution of his property at his death. Similarly, if a state corporate statute provided that the board of directors of every corporation organized under the statute reserve two seats for individuals selected by the Democratic Party, that statute too would be unjust, but this time the injustice would arise from the statute's being in derogation of the natural rights of the individuals forming the corporation to associate in their corporation with only those whom with whom they choose to associate. Enabling statutes can be criticized from the point of view of the natural law just as any other positive law can.

Furthermore, when we shift from the moral realm to the legal realm, we find that, just as the moral rights of associations derive from the moral rights of the human beings who have joined together to form them, so too do the legal rights of corporations and other legal entities derive from the legal rights of the human beings involved in them. As Justice Alito explained in [*Burwell v. Hobby Lobby*](#),

A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being.

To take a more extreme example, corporations are clearly not members of any particular race, but if the government began awarding government contracts based on the race of a corporation's shareholders, then this would violate the right of the corporation under Equal Protection Clause to be free from racial discrimination. The corporation has a such a right because it is necessary to protect the equal protection rights of its shareholders.

I said above that corporate enabling statutes facilitate the implementation of the natural right of human beings to form associations, but there is another, even more important reason, that we need such statutes, a reason that Professor McLeod never mentions. That reason concerns the relation of the association to outsiders, people who are not members of the association and who have not entered into any agreements with the association or its members. Under the common law, two or more individuals could agree to form a partnership, and they could organize the internal affairs of the partnership largely as they pleased; as to outsiders, however, each partner was personally liable for all the debts and obligations of the partnership. This makes it difficult—generally impossible—to form organizations with large numbers of members, for most people will not risk liability for the actions of people they do not know and trust. Enterprises requiring immense amounts of capital, amounts that can be raised only from very large number of investors (think railroads), simply cannot be organized as common-law partnerships. To solve this problem, corporate enabling statutes do something that would be impossible under the common law: they

change the legal relationship between the insiders of the association and the outsiders, that is, the relation between the corporation and people with whom neither the corporation nor anyone associated with it have any contractual relationship. In particular, the corporate laws grant the shareholders of a corporation *limited liability*, which means that when an outsider becomes a creditor of the corporation, the outsider may collect from the assets of the corporation, including any money the shareholders have contributed to the corporation, but not from the personal assets of the shareholders themselves. This form of organization, which is crucial to the creation of large business enterprises, could not exist under the common law and exists today only by statute.

Here's a final question: is it right under the natural law that the state limit the remedies of outsiders in this way, preventing them from recovering damages from shareholders when the corporation itself lacks funds to pay an outsider's legitimate claim? The answer, in my view, is yes. As Justice Douglas said almost a century ago, "It is legitimate for a man or a group of men to stake only a part of their fortune on an enterprise."³ But the reason that this is legitimate lies at least in large part in the fact that, without corporations—without this way of organizing human economic activity—we would all be immensely poorer. As Professor Jonathan Macey has pointed out, without the corporate form, large-scale economic projects could be undertaken only by the government. Corporations are thus the only thing that stands between us and socialism, and we all know how socialism always works out. Hence, the common good of society requires corporations or at least legal associations very much like them. This makes positive laws allowing for the creation of corporations just under the natural law.

³ William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193, 193-94 (1929).