The Corporation as Trinity

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CONTENTS

INTRODUCTION

Certain passages in Adolf Berle's essay on *Corporate Capitalism and "The City of God*" that once seemed musty and redolent of a bygone era are now eerily timely.[1] Like current critics, Berle chides corporate leaders who think they can simply mind their own business, oblivious to larger social concerns. "For the fact seems to be that the really great

* Thanks to Owen Alderson, Steve Bainbridge, Bill Bratton, Jill Fisch, John Inazu, Elizabeth Pollman, Russell Powell, Asaf Raz, and participants in the Berle XII symposium for their helpful comments and discussion; to David Wreesman for excellent research assistance; and to the University of Pennsylvania Carey Law School for generous summer funding. Special thanks to Curtis Chang, who inspired several of the key ideas of this Article.

1. ADOLF A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION 164 (1954). The essay, first delivered as a talk, is the final chapter of the book and its title is the name of this symposium.

corporat[e] managements have reached a position for the first time in their history in which they must consciously take account of philosophical considerations," Berle wrote nearly seventy years ago.[2] "They must consider the kind of community in which they have faith, and which they will serve, and which they intend to . . . construct and maintain."[3] To be sure, the argument could use some minor updating. Terms such as "philosophy" and "philosophical considerations" would need to go. But if we substituted the words "social justice" or "social responsibility" and updated his pronouns, Berle's essay could easily appear in today's papers.[4]

Berle's remarks on the social obligations of corporate managers are founded on a theory about the nature of publicly held corporations. The authority exercised by corporate leaders, Berle argues, is not just a matter of power; the "real control which guides or limits their economic and social action is the real, though undefined and tacit, philosophy of the [people] who compose them."[5] It is, in a sense, their moral compass. This moral compass, Berle suggests, is like the City of God in Augustine's theological masterpiece, which is the eternal, heavenly counterpart to the feckless and impermanent City of Man.[6]

The underlying "philosophy" animates, or should animate, not only the managers, but also the corporation as a whole and corporate America more generally. "Our grandfathers quarreled with corporations because, as the phrase went, they were 'soulless,'" according to Berle.[7] "But out of the common denominator of the decision-making machinery, some sort of consensus of mind is emerging, by compulsion as it were, which for good or ill is acting surprisingly like a collective soul."[8]

In this Article, I take Berle's cue in several respects. Most importantly, I will look to Augustine for guidance in developing insights into the nature of the corporation—in particular, corporate personhood.

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2. *Id.* at 166.

3. *Id.* at 166–67. Berle capped off this argument with his famous concession that E. Merrick Dodd's earlier contention that corporate powers are "held in trust for the entire community" had prevailed, "at least for the time being," over Berle's argument that the "powers [are] in trust for shareholders." *Id.* at 169.

4. *See, e.g.*, Justin Baer, *Amid Lower Returns, Investors Press Buffett on Social Issues*, WALL ST. J., May 1, 2021, at A1.

5. BERLE, *supra* note 1, at 180.

6. *Id.* at 178–79 (referencing Augustine and *The City of God*). Berle does not cite to a specific translation of *The City of God*. The translation on my desk, which could conceivably be the one he used, is SAINT AUGUSTINE, THE CITY OF GOD (Marcus Dods trans., 1950) [hereinafter SAINT AUGUSTINE, THE CITY OF GOD]. It should perhaps be mentioned that Berle's use of Augustine's concept of the "City of God" is idiosyncratic, as in his characterization of that eternal perspective as a "philosophy" that can be crafted by people. He alerts the reader that he will be taking liberties by putting City of God in quotes throughout. *See, e.g.*, BERLE, *supra* note 1, at 175.

7. BERLE, *supra* note 1, at 183.

8. *Id.*

Whereas Berle drew inspiration from *The City of God*,[9] however, I will look to a different Augustinian masterpiece, *The Trinity*, which has played a pivotal role in Christians' understanding of who God is.[10] Christian theology, as brilliantly explicated in *The Trinity,* states that God consists of three different persons—the Father, the Son, and the Holy Spirit—but is a single divine being.[11]

Drawing on recent work by the theologian Curtis Chang, I argue that corporate personhood has similar qualities, and that the analogy is not accidental. According to Christian scripture, the universe is a reflection of God. If this is true, the echoes—in particular, echoes of the Trinity—extend even to human institutions such as corporations.[12] Much as theologically orthodox Christians understand God to be both one and three, I argue that corporations are best seen as both a single entity and through the lens of their individual managers and shareholders. To frame my discussion of the Trinitarian nature of the corporation, I focus most extensively on the two recent Supreme Court cases that have drawn renewed attention to these issues: *Citizens United*, which struck down a campaign finance restraint on for-profit corporations,[13] and *Hobby Lobby*, which held that some for-profit corporations are entitled to religious liberty protections.[14] But the analysis extends beyond the cases and is intended to speak to the nature of corporate personhood more generally.

The Article proceeds as follows. Part I explores the debate over corporate personhood that was prompted by *Citizens United* and *Hobby Lobby*. Both sides in the debate work from implausible concepts of the corporation. Conservatives characterize corporations as having rights but few responsibilities, whereas liberals believe they have responsibilities but few rights.

Part II develops the Trinitarian concept of the corporation. As those who are familiar with the historical debate over corporate personhood will recognize, the Trinitarian concept of the corporation can be seen as combining attributes of each of the two most prominent traditional theories, one of which characterizes corporations as the aggregate of their individual shareholders, while the other sees them as a "real entity." The

9. *See generally* SAINT AUGUSTINE, THE CITY OF GOD, *supra* note 6.

10. *See generally* SAINT AUGUSTINE, THE TRINITY (Edmund Hill trans., 1991) [hereinafter SAINT AUGUSTINE, THE TRINITY].

11. As Augustine puts it, the Father, Son and Holy Spirit "in the inseparable equality of one substance present a divine unity; and therefore are not three gods but one God." *Id.* at 69. For more detailed discussion, see *infra* Section II(A).

12. The argument is developed in *infra* Part II.

13. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

14. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

distinction is that the Trinitarian concept insists that both theories are needed, rather than one or the other.

After outlining a Trinitarian conception of the corporation, Part III explores its implications for a variety of issues, including: the personhood of "closely held" corporations, whether noncorporate entities have personhood, and whether a corporation can have a religious identity. The final section returns to Berle's analysis to discuss the current debate over corporate political involvement.

I. THE POLARIZED CORPORATION

Although the status of corporations has been debated throughout America's history, the current controversy was triggered by the Supreme Court's *Citizens United* and *Hobby Lobby* decisions. In *Citizens United*, the Court held that free speech rights under the First Amendment extend to for-profit corporations and were violated by a campaign finance law prohibiting corporate expenditures made by a small advocacy corporation favoring a particular candidate on the eve of an election.[15] In *Hobby Lobby*, the Court ruled that for-profit corporations are covered by the Religious Freedom Restoration Act (RFRA), and that the contraception mandate in the Affordable Care Act (ACA) violated the religious freedom of religiously oriented for-profit corporations that objected to the mandate on religious grounds.[16]

Both sides in the polarized debate rely on highly selective assumptions about the nature of a corporation. Conservatives often portray corporations as having robust rights but few responsibilities; for liberals, they have few rights but abundant responsibilities.[17] The contrast can be seen both in the majority and dissenting opinions in *Citizens United* and *Hobby Lobby*, and in the scholarly literature. It is especially stark in the popular media.

The discussion that follows contrasts the polarized depictions of corporate personhood by evaluating the conservative and liberal perspectives in turn.

A. The Conservative Perspective: Rights Without Responsibilities

The most striking feature of the conservative Justices' majority opinions in *Citizens United* and *Hobby Lobby* is how little they have to say about the nature of corporate personhood. In each case, the Justices focus much of their attention on a particular type of corporation that all would

15. *Citizens United*, 558 U.S. at 371.
16. *Hobby Lobby*, 573 U.S. at 707–08, 730–31.
17. Thanks to Curtis Chang for suggesting this dichotomy.

agree is protected and reason from that to a conclusion that reaches all for-profit corporations.

Justice Kennedy's touchstone in his majority opinion in *Citizens United* is media corporations. "Under the Government's reasoning," he warned, which justified limits on corporate political expenditures on "antidistortion" grounds, "wealthy media corporations could have their voices diminished to put them on par with other media entities."[18] Since for-profit media corporations clearly should be and are protected under the First Amendment, he suggests here and elsewhere in the opinion, other for-profit corporations must also enjoy this protection.

In *Hobby Lobby*, the majority once again focused on an entity everyone agrees is protected to do much of its interpretive work. Here, the entities that RFRA clearly intended to protect were churches. Much as it seems obvious that media corporations must be covered by the First Amendment's speech protections, it is similarly evident that RFRA is intended to safeguard the religious freedom of churches and nonprofit religious organizations as well as individuals. The language of RFRA creates an apparent conundrum in this regard; it speaks of "persons," which does not call churches and other collective organizations immediately to mind.[19] But the Dictionary Act defines "person" to include corporations as well as natural persons.[20] Because churches are usually set up as corporations under state law,[21] it is quite clear that RFRA covers churches, as everyone assumed it did.

Unlike the corporations in *Hobby Lobby*, churches and other religious organizations are ordinarily non-profit corporations. In his majority opinion in *Hobby Lobby*, Justice Alito recognized the distinction, but swatted it away as irrelevant for RFRA purposes. If RFRA covers persons and a corporation is a person, he reasoned, RFRA must include both for-profit and non-profit corporations: "No known understanding of the term 'person' includes *some* but not all corporations."[22] Although "person" "sometimes is limited to natural persons[, . . .] no conceivable definition of the term includes natural persons and non-profit corporations, but not for-profit corporations."[23]

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18. *Citizens United*, 558 U.S. at 352.

19. *Hobby Lobby*, 573 U.S. at 705 (quoting RFRA prohibition on substantially burdening "*a person's* exercise of religion").

20. *Id.* at 707–08 (quoting the Dictionary Act definition of "person," which "include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals").

21. *See, e.g.*, David A. Skeel, Jr., *Avoiding Moral Bankruptcy*, 44 BOSTON COLL. L. REV. 1181, 1184 (2003) (noting that most churches are corporations).

22. *Hobby Lobby*, 573 U.S. at 708.

23. *Id.*

In the brief passages that do address the nature of the corporation, *Hobby Lobby* treats corporations simply as projections of the individuals who control them. Justice Alito wrote that "Congress provided protection for people like the Hahns and [the] Greens [the families who owned the businesses at issue] by employing a familiar legal fiction: It included corporations within RFRA's definition of 'persons.' But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings."[24] It is not clear what this concept of the corporation means for a publicly held corporation that is not associated with recognizable founders. *Hobby Lobby* acknowledges this issue but treats it as unimportant in practice. According to the Court, "the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable."[25]

The analyses in *Citizens United* and *Hobby Lobby* left the impression that corporations have the same kinds of rights as individuals, and that these rights cannot be denied to for-profit corporations unless there is a categorical basis for withholding the rights. The Court was not willing to carve out one group of corporations on pragmatic grounds in either case, for-profit media corporations in *Citizens United* and non-profit corporations in *Hobby Lobby*, in a fashion that would invite greater regulation of most for-profit corporations. The expansive vision of corporate rights that emerges from this approach suggests that for-profit corporations carry rights but are not burdened by similarly robust responsibilities.

Although the rights-without-responsibilities conception of corporations is implicit and qualified in the Supreme Court cases,[26] it often appears more directly in conservative commentary. For example, in responding to *New York Times* criticism of *Citizens United*, a *Wall Street Journal* editor characterized the "notion that only certain types of corporations are 'deserving of constitutional protection' [as] pernicious. It recasts freedom of expression as a privilege rather than a right."[27] Similarly, during Mitt Romney's campaign for President, he famously

24. *Id.* at 706.

25. *Id.* at 717.

26. In *Hobby Lobby*, for instance, the Court did not say that it would be impermissible for Congress to expand religious freedom protection for non-profits but not for for-profit corporations. The Court simply concluded that the term Congress used in RFRA—"person"— cannot be construed as applying to non-profit corporations but not for-profit corporations. *Id.* at 706–09.

27. James Taranto, *The Privilege to Speak*, WALL ST. J., Nov. 20, 2012, https://www.wsj.com/articles/SB10001424127887323713104578131200617146638 [https://perma.cc/6GUK-EZ3Q].

insisted that "corporations are people, my friend," in response to a heckler who had criticized corporations.[28]

Conservative, corporate law scholars have somewhat similar tendencies but in more nuanced forms. One such scholar has embraced a so-called "reverse veil piercing" perspective, which posits that a corporation's individual shareholders should be seen as projecting their individual rights into the corporate entity.[29] The same prominent commentator elsewhere (and earlier) criticized those who insist on corporate social responsibilities as statist and asserted that "the progressive project's basic flaw is its willingness to invoke the coercive power of the state in ways that deny the rights of [men and women] acting individually, or collectively through voluntary associations, to order society."[30] Overall, the conservative perspective tends to be long on corporate rights and comparatively short on corporate responsibilities. This is a tendency, not an iron law. Conservatives do acknowledge the need for some regulation—such as regulation intended to ensure that corporations internalize costs that they impose on third parties.[31] But conservatives are generally more enthusiastic about corporate rights.

B. The Liberal Perspective: Responsibilities Without Rights

The dissenting liberal Justices offered a starkly different vision of the corporation in *Citizens United* and *Hobby Lobby* than their conservative counterparts. In each case, they emphasized the difference between the corporate entity and the individuals who own and manage it, and the need for regulatory oversight.

After pointing out that early corporations were "authorized by grant of a special legislative charter," Justice Stevens, author of the principal dissent in *Citizens United*, concluded that the Framers "took it as a given that corporations could be comprehensively regulated in the service of the

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28. *See, e.g.*, Philip Rucker, *Mitt Romney Says "Corporations Are People,"* WASH. POST (Aug. 11, 2011), https://www.washingtonpost.com/politics/mitt-romney-says-corporations-are-people/2011/08/11/gIQABwZ38I_story.html [https://perma.cc/N9UA-MF26].

29. *See, e.g.*, Stephen M. Bainbridge, *A Critique of the Corporate Law Professors' Amicus Brief in Hobby Lobby and Conestoga Wood*, 100 VA. L. REV. ONLINE 1, 5 (2014). The principal objective of the "reverse veil piercing" approach is to justify a corporation's assertion of its shareholders' religious freedom rights. For a politically liberal argument that only associations, not other organizations, should be permitted to assert the rights of their members, see Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95 (2014).

30. Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 895 (1997).

31. *See, e.g.*, Stephen M. Bainbridge, *Corporate Social Responsibility in the Night-Watchman State,* 115 COLUM. L. REV. SIDEBAR 39, 45 (2015) (noting that it is uncontroversial, including among conservative corporate law scholars, that "in appropriate cases, society uses law to force corporations to internalize [costs]").

public welfare."[32] Although corporations no longer receive special charters like in the Framers' era, the principle endured, as reflected in the campaign finance regulation imposed on corporations throughout the twentieth century.[33] Justice Stevens also noted "that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. . . . [T]hey are not themselves members of 'We the People' by whom and for whom our Constitution was established."[34]

In her *Hobby Lobby* dissent, Justice Ginsburg sounded similar themes. The absence of earlier cases in which for-profit corporations were deemed to have religious freedom rights is "just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities."[35]

Liberal pundits make the case for limiting the rights of for-profit corporations in a less nuanced, more colorful fashion. One commentator wrote that *Hobby Lobby* reflected one of "the most dangerous right-wing civil rights obsessions of our times: . . . the ambition of large, for-profit corporations to see themselves as people, with faith, convictions, and consciences."[36] Another commentator wrote that "[i]t should not be controversial to believe that corporations owe some measure of accountability to the society that allows them to accumulate massive wealth."[37]

Liberal corporate law experts develop similar themes in more subtle ways. These scholars sometimes echo the dissenting Justices' contention that a corporation does not have beliefs or a conscience, and thus cannot have a religious identity, then go on to argue that a religious identity would be inconsistent with basic corporate law principles. The best-known Delaware jurist and scholar contends that, in Delaware, the leading state of incorporation, "the board of directors of a for-profit corporation . . . must, within the limits of its legal discretion, treat stockholder welfare as the only end, considering other interests only to the

32. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 428 (2010) (Stevens, J., dissenting).

33. *Id.* at 433 (noting that "the express distinction between corporate and individual political spending on elections stretches back to 1907, when Congress passed the Tillman Act").

34. *Id.* at 466.

35. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 752 (2014) (Ginsburg, J., dissenting). Justice Ginsburg also quotes Justice Stevens' statement that corporations "have no consciences, no beliefs, no feelings, no thoughts, no desires." *Id.* (quoting 558 U.S. at 466).

36. Dahlia Lithwick, *Un-People*, SLATE (Dec. 3, 2013), https://slate.com/news-and-politics/2013/12/hobby-lobby-and-corporate-personhood-the-alarming-conservative-crusade-to-declare-everything-except-people-a-legal-person.html [https://perma.cc/ZL9J-WQRJ].

37. Katrina vanden Heuvel, *Big Business Is Suddenly Showing a Conscience. But Is That Enough?*, WASH. POST (Aug. 27, 2019), https://www.washingtonpost.com/opinions/2019/08/27/big-business-is-suddenly-showing-conscience-is-that-enough/ [https://perma.cc/2QVJ-WUZU].

extent that doing so is rationally related to stockholder welfare."[38] According to this reasoning, pursuing a religious mission would divert a corporation from its profit-seeking mission, and thus is inherently problematic.[39]

A second liberal perspective starts with the conservative Justices' suggestion that the corporations in *Hobby Lobby* were a projection of individuals and suggests that corporations generally should not be entitled to exercise constitutional rights unless they fit this paradigm. One prominent corporate law scholar writes:

> When a corporation can credibly be understood as representing the interests of natural persons who, individually, have valid claims to First Amendment protections and who associated with the corporation for some expressive purpose, [then] the right of the corporation to carry out that expressive activity should be protected by the First Amendment.[40]

The only corporations that would qualify for protection are those with "an identifiable and relatively stable group of actual natural persons who are citizens or residents of the United States and who can credibly be said to be represented by the corporation in question."[41] Although a

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38. Leo E. Strine, Jr., *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71, 107 (2015). Chief Justice Strine does acknowledge that a charter provision could alter this. *Id.* at 109 (stating that "if a corporation wishes to have a religious purpose, the traditional method is to set forth that purpose in the corporation's certificate of incorporation").

39. Benefit corporations (B-corp), which the majority mentioned in *Hobby Lobby*, pose an obvious difficulty for this line of reasoning. *Hobby Lobby*, 573 U.S. at 712–13 ("Over half of the States, for instance, now recognize the 'benefit corporation,' a dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners."). B-corp provisions expressly invite for-profit corporations to pursue a social or religious mission. The usual response to this development is to characterize B-corps as a special case. Strine, *supra* note 38, at 107 (characterizing Benefit Corporations as "created by statute precisely to enable corporations to consider other constituencies without running afoul of the law"). But one of the principal critiques of B-corps has always been that the same objectives can be achieved with an ordinary for-profit corporation. *See* Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to A Non-Existent Problem*, 44 ST. MARY'S L.J. 617, 663–69 (2013) (arguing that existing mechanisms of corporate law, such as amendments to articles of incorporation, permit a corporation to pursue a social mission).

40. Margaret M. Blair, *Corporations and Expressive Rights: How the Lines Should be Drawn*, 65 DEPAUL L. REV. 253, 288 (2016). Professor Blair also suggests it may sometimes be appropriate for corporations to be accorded rights if this serves an "instrumental" purpose, such as giving listeners access to speech that qualifies as especially relevant. *Id.* In an earlier article, Professors Blair and Pollman made similar points but framed them more as descriptions of the existing Supreme Court caselaw than as normatively desirable tests. *See* Margaret Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM & MARY L. REV. 1673, 1735 (2015).

41. Blair, *supra* note 40, at 290.

family-owned business might qualify as a person under this standard, few other for-profit businesses would meet this stringent test.[42]

In contrast to their skepticism about corporate rights, liberal corporate law experts often are much more bullish about imposing new responsibilities on corporations. The same scholar-judge who worries that corporate rights would interfere with directors' obligations to pursue the interests of shareholders, expresses optimism (in work with two co-authors) that social objectives, such as concern for employees and the environment, that might compete with shareholder profitability can be imposed and regulated by corporate law.[43] Rather than being a "novel and enhanced" concept, the new emphasis on employee, environmental, social, and governance factors (EESG) should simply be viewed as a feature of "the pre-existing duty of corporations and their directors to implement and monitor compliance programs to ensure that the company honors its legal obligations."[44] Overall, the liberal perspective tends to be long on corporate oversight, and comparatively short on corporate rights.

II. THE CORPORATION AS A SPIRITUAL ENTITY

As those who are familiar with the history of corporate personhood will have noticed, the conservative and liberal concepts of the corporation bear a resemblance to two historical theories of the corporation that were debated in the nineteenth and early twentieth century. Conservatives tend to gravitate toward the "aggregate" or contract theory of the firm, while liberals tend to adopt a "real entity" view of the corporation (at least on some issues). A third theory, also congenial to a few liberals, but much less prominent today, characterizes the corporation as a concession or sovereign grant.

According to the aggregate theory, a corporation is the sum of the individuals who comprise it.[45] It does not have a separate existence. The majority opinion in *Hobby Lobby* seems to have adopted this view of the

42. Two prominent public law scholars make a similar argument in an article rejecting the separateness of religious institutions. *See* Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917 (2013). "Even if it turns out that religious groups are entitled to exemptions from [the Affordable Care Act's contraception] mandate, . . . the reason will be that the individuals composing those groups have been burdened in their free exercise of religion . . . . That an institution is implicated in that exercise does not alter the underlying claim." *Id.* at 984.

43. Leo E. Strine, Jr., Kirby M. Smith, & Reilly S. Steel, *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy*, 106 IOWA L. REV. 1885 (2021).

44. *Id.* at 1887.

45. *See, e.g.*, Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1641 (2011) (characterizing the aggregate theory as having "roots in a view of the corporation as a partnership or contract among the shareholders").

corporation,[46] perhaps unintentionally, and there are hints of this perspective in *Citizens United* as well.[47] Many of the nineteenth century corporate personhood cases and most of the Supreme Court's more recent cases use aggregate theory language.[48]

By contrast, the real entity theory insists that corporations have an existence separate and distinct from the individuals that comprise them. Echoing this perspective, liberal scholars generally assume corporations are more than the sum of the individuals that comprise them.[49]

The third theory of the corporation as a "concession" or "sovereign grant" was very important in the early nineteenth century when states exercised careful control over the corporate charters they granted, often using them for public purposes such as constructing bridges or turnpikes.[50] With the advent of general incorporation statutes, which made it easy for anyone to create a corporation, the sovereign grant theory declined in importance.[51]

The choice of perspective has had political implications from the beginning, but the politics have proven malleable. In early nineteenth century Germany, where the modern debate began, the real entity perspective was advocated by Otto Gierke, a conservative.[52] For Gierke, corporations were a bulwark against the state.[53] In the United States, by contrast, the real entity perspective has often proven congenial to liberals. In 1926, the philosopher John Dewey insisted in a famous article that any

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46. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 706–07 (2014) ("When rights, whether constitutional or statutory, are extended to corporations, the purpose [is] to protect the rights of [the people associated with them].").

47. As when Justice Kennedy characterized corporations as "associations" of individuals. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342–43 (2010).

48. For the history, see ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 66–68 (2018) (describing this approach in Bank of United States v. Deveaux, 9 U.S. 61 (1809), and referring to it as "veil piercing"); Pollman, *supra* note 45, at 1636–46.

49. I say "generally" because some liberal scholars employ aggregate language for specific purposes such as limiting corporate rights, *see generally* Blair, *supra* note 40, and at least one appears to gravitate toward the "concession" theory of the corporation described in the text that follows. *See infra* note 77 (discussing Leo Strine's perspective).

50. *See, e.g.*, Pollman*, supra* note 45, at 1634–35 (describing "concession" theory).

51. *Id.*

52. *See generally* Francis P. Sempa, *Conservative: The Fight for a Tradition*, N.Y.J. OF BOOKS (Oct. 20, 2020), https://www.nyjournalofbooks.com/book-review/conservatism-fight-tradition [https://perma.cc/AS4Q-C5JP] (describing Gierke's conservatism); *see also* Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1141, 1469 (1987) (arguing that Gierke wanted to legitimate intermediate institutions).

53. For an elegant summary and defense of Gierke's real entity theory by a contemporary conservative British philosopher, see Roger Scruton, *Gierke and the Corporate Person*, THE PHILOSOPHER ON DOVER BEACH: ESSAYS 56 (1990).

of the theories can be used to justify any conclusion.[54] Dewey did not explicitly say the debate was pointless, but this was the obvious implication of his analysis. At least in part as a result of Dewey's article and the legal realist perspective it reflected, American legal scholars lost interest in corporate personhood for decades.[55] It took the controversy spurred by *Citizens United* and *Hobby Lobby* to renew interest in this debate.

A century later, Dewey's critique still has bite. The aggregate theory might seem to suggest that a publicly held corporation cannot exercise religious freedom given that the numerous shareholders of these corporations are not likely to hold a single, coherent perspective on religion or any other issue. Yet, as several scholars who endorse the aggregate theory have pointed out, the incorporators of a corporation create a framework that has rules of decision for adopting policies on behalf of all shareholders.[56] It provides for the election of directors to represent the shareholders and for processes to amend the bylaws or charter.[57] Although a shareholder may disagree with the principles adopted by the corporation and the process may deviate from ideal voting in important respects,[58] shareholders are deemed to consent to the corporation's principles and voting process when they buy a stock in the corporation.

Given the shape-shifting quality of theories of corporate personhood and the limits to the explanatory power of any of the three, it has been persuasively argued that each of the theories is lacking. As one scholar puts it, "None of these conceptions fully explain why corporations should or should not receive constitutional rights and what the scope of those rights should be."[59] One sensible response to this conclusion is to focus

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54. *See generally* John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926).

55. *See, e.g.,* David A. Skeel Jr., *Corporate Anatomy Lessons*, 113 YALE L.J. 1519, 1527 (2004) (describing the impact of Dewey's article).

56. Alan J. Meese & Nathan B. Oman, Hobby Lobby, *Corporate Law, and the Theory of the Firm*, 127 HARV. L. REV. F. 273, 281-83 (2014) (describing ways that shareholders can implement their views, including charter and bylaw amendments).

57. *Id.* The Supreme Court majority in *Citizens United* also emphasized the role of corporate process as justifying the application of perspectives a particular shareholder might not agree with. *See, e.g.*, Citizens United v. Fed. Elections Comm'n, 558 U.S. 310, 370 (2010) (stating that "prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable").

58. As is often pointed out, retail investors often do not vote directly, given that large stakes are held by mutual funds and other institutions. Although these deviations are often cited as a reason to put little weight on voting, for-profit corporations seem, at least, as representative of their constituents as many other institutions. For instance, universities often take positions that many of their employees and students disagree with.

59. Pollman, *supra* note 45, at 1660.

less on the theories and more on the purpose of the constitutional right or other issue in question.[60] I adopt a different strategy in the discussion that follows, retaining aspects of the traditional theories but reconceptualizing them. The foundation for this approach comes from an unlikely place: Christian theology.[61] Theologian Curtis Chang recently proposed that corporations have the same characteristics as one of the most mysterious features of the Christian faith, the Trinity.[62] This Part of the Article explains and develops a Trinitarian conception of corporate personhood. The first section provides the theological context and the second develops the Trinitarian conception.

A. The Theological Context

The use of Christian theology to understand corporate personhood is in one sense quite fitting. The earliest corporations emerged in the Catholic Church. As one scholar explains:

> The recovery of Roman law of corporations in the 11th century revitalized the Church's use of the corporate form, which, after adaptation by canon lawyers, was deployed to reform, and create, a host of corporate bodies—monasteries, nunneries, cathedral chapters, bishoprics, confraternities, universities, and so on—which mushroomed across Europe.[63]

The first thing to note about corporations from a Christian perspective is that they are part of the created order. Creation usually calls to mind the creation of the physical universe—God's creation of light, the oceans, the earth, plants, and animals as recounted in the opening chapters of Genesis.[64] However, the created order also includes invisible entities such as institutions. The New Testament often speaks about principalities,

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60. *See, e.g.*, *id.* at 1675 ("Courts should grant corporations a particular constitutional right only when doing so would serve the purpose of that right."); *see also* Owen Alderson, *Abandoning Corporate Ontology: Original Economic Principles and the Constitutional Corporation*, 22 U. PA. J. CONST. L. 561, 584 (2020) (concluding that "business corporations ought to be granted a constitutional protection otherwise attributable to natural persons only if the purpose of the protection is economic liberty enhancing, in that it enhances the organization's free agency to obtain and hold property and enter into contracts in the way that it sees fit").

61. Others have offered theological accounts of other aspects of corporations. For example, see generally MICHAEL NOVAK, TOWARD A THEOLOGY OF THE CORPORATION (1981).

62. *See, e.g.*, Henry Kaestner, William Norvell, & Rusty Rueff, *Episode 91 – Can a Business Be Christian? With Curtis Chang*, FAITH DRIVEN ENTREPRENEUR (Feb. 4, 2020), https://www.faithdrivenentrepreneur.org/podcast-inventory/2020/2/4/curtis-chang [https://perma.cc/EPE6-PM4Z].

63. David Ciepley, *Corporate Directors as Purpose Fiduciaries: Reclaiming the Corporate Law We Need* 26 (unpublished manuscript) (on file with author). For a fascinating historical analysis of the evolution of the metaphor of the corporation as a "body," see generally Amanda Porterfield, *The Religious Roots of Corporate Organization*, 44 SEATTLE U.L. REV. 463 (2021).

64. *Genesis* 1:1–27 (describing creation).

thrones, and powers. A well-known passage in St. Paul's letter to the Colossians brings out these intangible features of creation. Paul writes that "by [Christ] all things were created, in heaven and on earth, visible and invisible, whether thrones or dominions or rulers or authorities—all things were created through him and for him."[65] The principal focus of the passage is Christ's role as the agent of creation. [66] But the passage makes clear that the creation includes the authority of political leaders, as well as other types of "thrones or dominions."[67]

Two features of the creation of things tangible and intangible are of particular relevance for my purposes. First, the Bible suggests that the creation is in some sense a reflection of God. The Bible says, for instance, in one of the most familiar of the Psalms, that "[t]he heavens declare the glory of God, and the sky above proclaims his handiwork."[68] According to another passage, it "is he who made the earth by his power, who established the world by his wisdom, and by his understanding stretched out the heavens."[69] These passages suggest that the universe was created by God as an expression of his wisdom and glory, and thus it is comprehensible. There is an order to the universe—not a simple order, but order nonetheless—and that order is an echo of God.

Second, human beings are made in the image of God: "So God created man in his own image, in the image of God he created him; male and female he created them."[70] One implication of being made in the image of God is that we too have a creative role, since creativity is central to the God in whose image we were made. We exercise these powers when we create tangible artifacts such as buildings or art and less tangible institutions such as corporations and other business enterprises. These creations too will in some way echo God, both because they are part of the universe God created and because their human creators are made in the image of God. The echo I propose to pursue is the echo in corporate personhood of the Trinitarian nature of God, as Christians understand him.

B. Trinitarian Corporate Personhood

To develop the Trinitarian account of corporate personhood, this section begins by describing the Trinity in slightly more detail, then briefly considers its relevance to tangible human creations, such as art, before turning to corporations. The discussion acknowledges the obvious

65. *Colossians* 1:16.
66. *Id.*
67. *Id.*
68. *Psalms* 19:1.
69. *Jeremiah* 10:12.
70. *Genesis* 1:27.

differences between the Trinity and the corporation but concludes that a Trinitarian account of the corporation better explains corporate personhood than the traditional theories of corporate personhood.

The Trinity is one of the most mysterious features of Christian belief. According to Christian scripture, God is a single being, but he consists of three persons: God the Father, God the Son (Jesus), and God the Holy Spirit. Augustine puts it this way in *The Trinity*:

> [A]ccording to the scriptures Father and Son and Holy Spirit in the inseparable equality of one substance present a divine unity; and therefore there are not three gods but one God; although indeed the Father has begotten the Son, and therefore he who is the Father is not the Son; and the Son is begotten by the Father; and the Holy Spirit is neither the Father nor the Son, but only the Spirit of the Father and of the Son, himself coequal to the Father and the Son, and belonging to the threefold unity."[71]

After explicating at length the distinctive roles and ultimate unity of the three persons of God in the first eight "books" of *The Trinity*, Augustine argues for much of the remainder of the work that, since human beings are made in the image of God, we too have Trinitarian qualities. As Augustine more elegantly puts it:

> [W]e indeed recognize in ourselves the image of God, that is, of the supreme Trinity, an image which, though it be not equal to God, or rather, though it be very far removed from Him . . . is yet nearer to him in nature than any other of his works.[72]

Although Augustine goes on to identify other Trinitarian features of human beings,[73] he identifies the core Trinitarian features of human beings as the facts that we have existence, which corresponds to God's role as Father in the Trinity; knowledge of our existence, the Son; and love, the Holy Spirit: "For, as I know that I am, so I know this also, that I know. And when I love these two things, I add to them a certain third thing, namely my love, which is of equal moment."[74]

When Augustine describes human beings as being "nearer [to God] in nature than any of his other works,"[75] he suggests that the echoes of the Trinity are strongest in human beings, since we are made in God's image. But he also implies—rightly, in my view—that there will also be echoes in other aspects of creation, and in those things created by human beings

71. SAINT AUGUSTINE, THE TRINITY, *supra* note 10, at 69.

72. *Id.* at 370 (Book XIV).

73. In Book XIV, for instance, he suggests there are Trinitarian features in both literal and internal sight. *Id.* at 304–11.

74. SAINT AUGUSTINE, THE CITY OF GOD, *supra* note 9, at 256.

75. SAINT AUGUSTINE, THE TRINITY, *supra* note 10, at 370.

as well. The echoes may be more attenuated, but they are intrinsic to the nature of creation.

Before we turn to corporations, consider a possible echo of Trinity in our creation of more tangible artifacts such as painting, poetry, and other forms of art. Although people experience beauty differently, many of us find art that has a tension between unity and separateness—just as the Trinity has—especially beautiful. This tension is central to many of the most famous lyric poems, John Keat's "Ode on a Grecian Urn," which explores the fleeting nature of life and permanence of the life depicted on the urn, and somehow brings both into the unity of the poem. This tension is also found in prominent theories of art such as Michelangelo's emphasis on figures that seem to strain in opposite directions ("contrapunto") and Hans Hofmann's "push-pull" theory of abstract art.[76] In both cases, seeming opposites coexist within a unified whole.

As Curtis Chang pointed out, corporations also have Trinitarian qualities. A corporation is "an image of God that, in reflection of the Trinity, has a distinct identity that is at one intimately related to but at the same time not collapsible into its constituent members."[77]

An obvious distinction between the Trinity and human institutions, such as corporations, is that a manager's or other constituency's role in the corporation is only one part of his or her life; it is not the entirety of the person's existence. A corporate manager may also be a director of one or more companies and have additional roles as well. The corporate manager may also be a parent, a child, and/or a spouse—each of which is separate from the corporate manager role. The corporation is not all encompassing in the same sense that God is all encompassing for the three persons of the Trinity. This is one way in which a corporation is only an echo of the Trinity. But the echo is central to what a corporation is.

The Trinitarian perspective suggests that none of the principal theories of corporate personhood is quite right. A corporation does in fact have a distinct, unified existence—it is a real entity—which means that the aggregate theory is incomplete.[78] However, it is not solely a unified

76. *See, e.g.*, DAVID SKEEL, TRUE PARADOX: HOW CHRISTIANITY MAKES SENSE OF OUR COMPLEX WORLD 80–82 (2014).

77. Email from Curtis Chang to David Skeel (Jan. 6, 2020). My use of the term "members" is deliberately ambiguous and designed to include shareholders, managers, and directors.

78. For a careful analysis of the features of the corporation that make its status as an entity both inevitable and essential, see Asaf Raz, *A Purpose-Based Theory of Corporate Law*, 65 VILLANOVA L. REV. 523, 539–48 (2020).

entity. A corporation also reflects the personalities and other characteristics of its constituent members.[79]

Recall that the sovereign grant theory has largely disappeared from American thinking about corporate personhood.[80] From a Trinitarian perspective, this shift has made corporations more Trinitarian than they once were. If the sovereign were to exercise strict control over a corporate entity, as American states once did, the corporation would function more as an extension of the state and less as an independent entity with robust Trinitarian qualities. For-profit corporations are thus more fully Trinitarian when they are less constrained by the state than they were in the early years of the Republic.

The decision whether to give corporations this flexibility has important implications for a nation's political system. In a world where corporations are distinct from the sovereign, as in the United States today, and are thus genuinely Trinitarian, they play a mediating role between the state and individual citizens. For-profit corporations serve as "intermediate institutions"— just as churches, universities, bowling leagues, charitable organizations, and labor unions do.[81] In both the Catholic and Protestant traditions, intermediate institutions are viewed as essential to a healthy modern society. Under the concept of "sphere sovereignty" advocated by Dutch theologian and politician Abraham Kuyper, the state generally should not interfere with the organic development of the business world, art world, and religious institutions, among others; each is a distinct "sphere" that serves as a check on the state.[82] Another corporate law scholar who shares this perspective has written that "[s]ocial institutions—including both the state and the corporation—are organized horizontally, none subordinated to the others, each having a sphere of authority governed by its own ordering

79. Note that this is analogous in some ways to the philosophical idea of the one and the many. *See, e.g.*, Gareth B. Matthews & S. Marc Cohen, *The One and the Many*, 4 REV. OF METAPHYSICS 630 (1968).

80. *See, e.g.*, Pollman, *supra* note 45, at 1661–62 (concluding that "the description of corporations as a concession from a particular state seems a poor fit in our modern, global environment"). This perspective has not disappeared altogether: Leo Strine's writing on corporate personhood has a sovereign grant dimension at times. *See, e.g.*, Jonathan Macey & Leo E. Strine, Jr., *Citizens United as Bad Corporate Law*, 2019 WIS. L. REV. 451, 521 (stating that "it may be the case that, as in Delaware, state law has made a definitive legal determination about the existential status of a particular form of legal entity, in which case, of course, no further inquiry would be required").

81. The decline of civic organizations, an important form of intermediate organization, was the subject of Robert Putnam's famous study. *See generally* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000).

82. *See, e.g.*, ABRAHAM KUYPER, A CENTENNIAL READER 461, 467 (James D. Bratt ed., 1998); ABRAHAM KUYPER, LECTURES ON CALVINISM. The Catholic doctrine of subsidiarity, which dates back to the 1891 encyclical Rerum Novarum and has significantly influenced recent European Union jurisprudence, has a similar and more fully developed emphasis on local institutions.

principles."[83] Embracing this emphasis on the virtues of robustly Trinitarian corporations adds a normative dimension to the descriptive claims of the Trinitarian perspective.

The descriptive claim is that corporations do in fact have the Trinitarian qualities I have described—on the one hand, they are real entities, entirely distinct from the state, and on the other hand, they are the individual persons of their managers, shareholders, and other members. My normative claim is that the regulation of corporations—including the extent to which they should enjoy constitutional protection—should be designed to foster their Trinitarian features.[84] This does not mean that corporations should be free from regulation. Indeed, protecting the Trinitarian nature of corporations sometimes requires aggressive regulation, for example, when a handful of companies threaten to dominate an industry.

I should note that one could reach many of the same conclusions through a secular analysis of the corporation.[85] The Trinitarian approach differs primarily in my contention that it is it is more than simply a metaphor; the Trinitarian perspective accurately describes reality.

III. THE IMPLICATIONS OF THE TRINITARIAN CORPORATION

Having developed the Trinitarian perspective on corporate personhood, this Part of the Article considers its implications for a variety of issues. The Trinitarian perspective does not provide simple answers to all of the vexed issues considered thus far, such as whether a corporation can have a religious identity. But it enables a clearer, and in my view, more compelling analysis of the underlying issues.

A. Close Corporation Personhood

The recent Supreme Court cases reflect a vision of the corporation as a projection of its individual members and having no existence beyond the

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83. Bainbridge, *supra* note 30, at 895. Paul Horwitz has provided a much more extensive Kuyperian analysis of institutions in his work advocating an institutional approach to the Religion Clauses of the First Amendment. *See also* Ronald J. Columbo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 85 (2013) (characterizing corporations as countering the government's homogeneity). *See generally* Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. CIV. RTS.-CIV. LIBERTY L. REV. 79 (2009).

84. The point here is analogous to the arguments religious institutionalists have made for construing the religion clauses of the First Amendment in institutional terms. For instance, Rick Garnett proposes that scholars "ask whether religious institutions—healthy, independent, free, diverse institutions—are not also among the necessary conditions *for* everyone else's religious freedom." Richard W. Garnett, *Do Churches Matter? Toward an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 293 (2008)*; see also* Horwitz, *supra* note 83, at 81–83.

85. *See generally* Matthews & Cohen, *supra* note 79 (noting the similarity to the idea of "the one and the many").

individual members. The purpose of corporate personhood is simply "to provide protection for human beings," as Justice Alito put it in *Hobby Lobby*.[86] It is worth pausing to speculate why a majority of the Court has repeatedly characterized corporations in such non-Trinitarian terms. The answers will lead us to a consideration of the personhood of close corporations.

One possibility is simply that conservative jurists have tended to adopt the aggregate concept of the corporation historically, and the justices in the *Citizens United* and *Hobby Lobby* majorities all hail from the conservative side of the spectrum. This is possible but seems unsatisfying, given the century-old lesson from philosopher John Dewey that the same outcomes can be reached from the real entity and aggregate perspectives.[87]

A more plausible explanation is that the rights at stake in these cases— free speech and religious freedom—are easier to conceptualize as rights of individuals rather than of groups. Indeed, in *Grosjean v. American Press Co.*, which struck down a tax imposed on big newspapers under Governor Huey Long of Louisiana and was the first case extending liberty rights to corporations, the Supreme Court almost entirely ignored the fact that the newspapers in question were corporations.[88] As Adam Winkler recounts, "in the [J]ustices' internal debate over how to view the tax, one of the central issues in the case was obscured: the newspapers were corporations claiming to have liberty rights."[89]

Subsequent developments in the Supreme Court's jurisprudence on free speech rights further encouraged the tendency to treat the corporate entity as if it does not exist. Starting with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[90] the Court began focusing less on the speaker's freedom of speech in corporate free speech cases, and more on the right of listeners to hear the messages that are being conveyed.[91] The emphasis on listeners' rights further deflects attention from the corporation as source of the speech.

A final explanation is that these cases have each involved corporations that are owned and operated by a small number of individuals—so-called "close corporations."[92] The corporation in *Citizens*

86. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 706 (2014).

87. *See supra* note 54 and accompanying text.

88. Grosjean v. Am. Press Co., 297 U.S. 233, 244–45 (1936).

89. WINKLER, *supra* note 48, at 253–54.

90. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

91. *See, e.g.*, WINKLER, *supra* note 48, at 294–95 (describing the listeners' rights theory of the First Amendment).

92. Although there is no precise definition of a close corporation, a close corporation is one that has a relatively small number of shareholders. The shareholders who hold a controlling stake in the business often are members of the same family. Delaware defines close corporations (for the purposes

United was created by a small group of political operatives. Although the businesses in *Hobby Lobby* are quite large, each is owned by a small number of family members. Close corporations like these are the type of entities that can most easily be visualized as a manifestation of their individual members.

Supreme Court Justices are not the only ones who are tempted to think of close corporations simply as an extension of their shareholder-managers. Close corporations have long been characterized as "incorporated partnerships."[93] The phrase is not inherently inaccurate because the equity holders are also the ones who manage the business, which is similar to a partnership.[94] However, it invites the mistaken assumption that close corporations are simply the sum of their members. The temptation is especially strong if the business is owned and managed by a single family.[95] Yet, even family businesses have a personality—a presence—distinct from the family members who run the business.[96] For instance, if two cousins with distinct personalities run a bakery or another small business, the business will have a personality that differs from either of the individual cousins. The separate personality of a small business whose owners are not related may be even more distinct.

The Trinity itself illustrates the consequences of seeing only the individual members and losing sight of the larger unity of the corporation. In the accounts of Jesus's ministry in the four Gospels, Jesus is often seen to the apparent exclusion of the other two persons of God. It is easy to imagine that Jesus's ministry stands or falls by itself, apart from the larger unity of which it is a part. And indeed, there have long been efforts to characterize his ministry in just these terms, as with suggestions by some theologians over the past century that Jesus is not divine, but that his

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of its special close corporation provisions) as corporations whose stock is "held of record by not more than a specified number of persons, not exceeding 30." DEL CODE ANN. tit. 8, § 342(a)(1).

93. *See* James D. Cox, *Corporate Law and the Limits of Private Ordering*, 93 WASH. U.L. REV. 257, 266 (2015) ("[S]cholars . . . have written persuasively that close corporations should be conceptualized as incorporated partnerships . . . ."); *see also* Meiselman v. Meiselman, 307 S.E.2d 551, 557 (N.C. 1983) ("[C]ommentators all appear to agree that '[c]lose corporations are often little more than incorporated partnerships.'") (citation omitted).

94. Moreover, even partnerships now are treated as separate entities for most legal purposes. *See* UPA § 201(a) (2013) ("A partnership is an entity distinct from its partners."). Taxation is an exception. *See* Victor Fleischer, *The Rational Exuberance of Structuring Venture Capital Start-Ups*, 57 TAX L. REV. 137, 164 n.111 (2003) ("The partnership tax rules take an aggregate approach rather than an entity approach . . . .").

95. The real reason for this may be that the family itself is an organic entity—one of Kuyper's sovereign spheres. *See* KUYPER, *supra* note 82.

96. For an effort to identify and describe the nature of the "spirit" of a corporation, see generally Russell Powell, *Spirit of the Corporation*, 44 SEATTLE U. L. REV. 371 (2021).

ethical teachings are compelling.[97] But the Gospels repeatedly make clear that it is a mistake to view Jesus solely in isolation. When Jesus is baptized, God, as Father, says, "this is my Son, with whom I am well pleased,"[98] keeping the larger unity of the Trinity clearly in view. Similarly, the description of Jesus calming the stormy waters when he and his disciples are sailing across the Sea of Galilee echoes the account of God bringing order out of chaos in Genesis 1, thus serving as a reminder that Jesus cannot be understood apart from God.[99] He is at this moment the most visible agent of the larger unity.

Close corporations and other human institutions have similar qualities. One or more individual members may be especially visible, and it is tempting to ignore the larger entity. At times individual members may be the relevant focus, as when an action against the corporation directly implicates individual rights.[100] But even with a close corporation, the corporation is more than its individual members.

B. Noncorporate Personhood

While the personhood of corporations is my principal focus, much of the logic of the Trinitarian model applies to other institutions, even if they are not formally incorporated. Even associations that do not have personhood for technical legal purposes are Trinitarian and do have a separate existence in the sense I have been describing.

Historically, noncorporate enterprises featured quite prominently in the debate over personhood and entity status. For instance, trade unions, which often were not incorporated, were a frequent subject of discussion and debate in the nineteenth century.[101] In a 1922 case, the Supreme Court suggested that the United Mine Workers (UMW) had entity status.[102] The Court further held that UMW could sue or be sued as an entity, even though the union at that time was an unincorporated association.[103] Chief Justice Taft writing for the majority stated: "in every way the union acts as a business entity . . . [n]o organized corporation has greater unity of

97. The classic twentieth century refutation of this view is J. Gresham Machen's *Christianity and Liberalism*, which contends that rejecting the divinity of Jesus is rejecting Christianity. *See generally* J. GRESHAM MACHEN, CHRISTIANITY AND LIBERALISM (1923).

98. Matthew 3:17.

99. Mark 4:35–39.

100. *See infra* Section II(D) (discussing *Hale v. Hempel*).

101. For an excellent overview of the early nineteenth century personhood debate in Germany and its transplant to England, see generally Ron Harris, *The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business*, 63 WASH. & LEE L. REV. 1421 (2006).

102. United Mine Workers of Am. v. Coronado Coal Co., 259 U.S. 344, 385 (1922).

103. *Id.* at 387–88.

action."[104] One can debate whether the outcome in the case was good or bad from a legal and policy perspective, but the conclusion that UMW had a separate existence beyond its individual members is undeniable.

To be sure, corporations are often more durable than other business organizations. The partners of a partnership historically could easily exit and force a dissolution, as members of an informal association can still do.[105] These noncorporate organizations may be fragile, and it is fair to say that the more fragile the organization the less robustly Trinitarian it will be. But every organization has a distinct personality to some extent and some informal entities may be quite robust, as unincorporated labor unions were in the early twentieth century. Perhaps the best current illustration of an association with robust Trinitarian features is the National Collegiate Athletic Association.[106]

The limited liability enjoyed by shareholders of a corporation makes it easier for corporations to raise large amounts of money, and thus to grow in size and influence, but it does not necessarily make a corporation more durable. Rather than limited liability, it is a corporation's legal entity status, which makes it more difficult to force a corporation to dissolve or liquidate, that most directly ensures its durability.[107]

C. Can Corporations Have a Religious Identity?

Critics of the *Hobby Lobby* decision insist that corporations cannot exercise religious belief—only individuals can—and that religious identity would conflict with for-profit corporations' responsibility to make profits for their shareholders.[108] Although critics acknowledge that churches and other non-profit religious organizations have a religious identity,[109] they distinguish churches from for-profit corporations by describing churches as "exist[ing] to foster the interests of persons

104. *See* Harris, *supra* note 101, at 1454 (quoting *United Mine Workers of Am*., 259 U.S. at 385).

105. This is a major theme of Henry Hansmann and Reinier Kraakman's work on the importance of entity status. *See generally* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000).

106. The NCAA qualifies as robust from a variety of perspectives, including its longevity, the breadth of the organization, and its authority over thousands of student athletes and their schools. The NCCA dates its origins back to 1906. *About the NCAA*, NCAA, https://web.archive.org/web/20110807060521/http://www.ncaa.org/wps/wcm/connect/public/ncaa/about%2Bthe%2Bncaa/who%2Bwe%2Bare/about%2Bthe%2Bncaa%2Bhistory [https://perma.cc/3BC8-F2X4].

107. Hansmann & Kraakman, *supra* note 105; *see also* Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387 (2003).

108. *See* discussion *supra* Section I.B.

109. *Id.*

subscribing to the same religious faith,"[110] whereas for-profit corporations are heterogeneous.

Viewed in isolation, this is an odd line of critique. The beliefs of members of religious organizations are often quite heterogenous, which suggests that the line between religious organizations and a religiously oriented for-profit corporation may not be sharp in this regard. Nor does the profit-making feature of for-profit corporations preclude religious identity in any obvious way. Corporations have always been able to incorporate religious or social objectives if their shareholders and directors desire it. As noted earlier, the principal critique of Benefit Corporations is that they are superfluous—their benefits can be achieved with an ordinary corporation.[111]

When *Hobby Lobby* was decided, some advocates of the Corporate Social Responsibility (CSR) movement, who contend that corporations should not focus solely on the interests of shareholders, argued that *Hobby Lobby* vindicated their vision of corporate governance.[112] Although others reject this interpretation of *Hobby Lobby* and insist that *Hobby Lobby* and CSR do not belong together,[113] one aspect of the enthusiasts' analogy is accurate: *Hobby Lobby* and CSR both call for deviations from a single-minded focus on maximizing profits for the benefit of shareholders.[114] For religiously-oriented corporations, religious principles take priority over profit maximization; similarly, CSR calls for greater attention to environmental or other social goals, even if this may reduce the corporation's profits.

Perhaps the response to *Hobby Lobby* would have been different if *Citizens United* had been decided more narrowly. By refusing to distinguish media and advocacy corporations from ordinary for-profit corporations, the *Citizens United* Court insulated every corporation's political engagement from meaningful regulatory oversight. The Court's

110. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 754 (2014) (Ginsburg, J., dissenting).

111. *See supra* note 39 and accompanying text.

112. *See, e.g.*, Lyman P.Q. Johnson & David K. Millon, *Corporate Law After* Hobby Lobby, 70 BUS. LAW. 1, 22–23 (2015); Brett H. McDonnell, *The Liberal Case for* Hobby Lobby, 57 ARIZ. L. REV. 777, 779–80 (2015).

113. Elizabeth Sepper and James Nelson reject the analogy between CSR and corporate religious identity and contend, among other things, that CSR advocates that corporations do more than the law requires, whereas firms with a religious identity seek exemptions that permit them to violate the law. This characterization strikes me as tendentious and inaccurate—religious freedom is in fact protected by law; it is not a deviation. However, Sepper and Nelson do rightly point out one salient difference between CSR and corporate religious identity: the protection of religious identity reflects a commitment to pluralism and difference, whereas CSR advocates principles that are aimed at all corporations rather than a subset of corporations. Elizabeth Sepper & James D. Nelson, *The Religious Conversion of Corporate Social Responsibility*, 71 EMORY L.J. 217 (2021).

114. For similar conclusions, see Johnson & Millon, *supra* note 112; McDonnell, *supra* note 112.

decision in *Hobby Lobby* might not have prompted such a vehement response if it had not come so soon after the Court's sweeping rejection of campaign finance regulation and had the Court's holding in *Citizens United* been limited to media-related corporations.

Although the claim that for-profit corporations cannot have a religious identity is unpersuasive, critics of *Hobby Lobby* rightly point out that it should not be enough that prominent shareholder-managers of the business are personally religious, as the Court seems to suggest.[115] The Court's reference to protections for "people like the Hahns and Greens"[116] obscured what should have been the real issue in the case: whether the corporation itself, not just individual members, is religiously oriented.

Corporate law provides considerable guidance on this issue.[117] The strongest evidence of corporate commitment to religious (or any other) principles is a provision in the certificate of incorporation because charter provisions are approved by both the directors and shareholders.[118] The next strongest evidence is the corporate bylaws, which can be adopted or removed by either the directors or the shareholders.[119] Thus, while bylaws are less permanent and foundational than charter provisions, bylaws can create a strong presumption that the corporation is religiously oriented. A directorial resolution adopting a religiously oriented mission statement would be similar to a bylaw because it would be weaker than a charter provision but relatively strong evidence of religious orientation.[120]

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115. As with the Court's statement that, through RFRA, "Congress provided protection for people like the Hahns and Greens." Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 706 (2014). As this comment reflects, I am skeptical of the "reverse veil piercing" idea that the values of the individual shareholders are infused to the corporation.

116. *Id.*

117. My colleague Elizabeth Pollman worries that treating for-profit corporations as religiously oriented puts state corporate law in the position of defining constitutional rights, because it "gives a quasi-constitutional dimension to governance rules that were developed in a different era and with a different focus." Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 639 (2016) (emphasis omitted). This is a serious and important concern; but, in my view, the tension is alleviated by the fact that the general rules for altering corporate charters and bylaws are well-settled. Additionally, federal courts are not required to defer to a state's interpretation of its corporate governance rules in applying the Constitution or a federal statute such as the RFRA.

118. *See, e.g.*, DEL. CODE ANN. tit. 8, § 242 (2014).

119. *See, e.g.*, DEL. CODE ANN. tit. 8, § 109 (2015). Although directors can amend the bylaws only if the charter gives them authority, charters regularly do.

120. Professor Catherine Hardee has argued that proper corporate adoption of a commitment to religious identity should not be treated as sufficient, due to concerns such as the possibility that a minority of shareholders may sometimes be able to secure adoption of a commitment that a majority of shareholders do not share. She proposes that courts use a balancing test that considers additional factors, such as the extent of the proponents' financial interests. *See generally* Catherine A. Hardee, *Schrodinger's Corporation: The Paradox of Religious Sincerity in Heterogeneous Corporations*, 61 B.C.L. REV. 1763 (2020). In my view, properly adopted commitments should be honored, and disgruntled shareholders should be protected with ordinary corporate law doctrines such as fiduciary

By contrast, the fact that the chief executive is a religious believer is much weaker evidence because the chief executive, acting alone, does not ordinarily have the authority to speak for the corporation on major issues, such as religious identity.[121] In Trinitarian terms, looking at individual members focuses on the wrong dimension of the corporation; the corporate entity, which acts through its board of directors, must be considered. There may be exceptions, even with publicly-held corporations, for example when the chief executive is so clearly the public face of the corporation that the chief executive's views have nearly the force of a directorial decision.[122] But ordinarily, the CEO's views are simply the views of a corporate officer—a powerful officer, to be sure, but one who lacks the authority to make major decisions unilaterally on behalf of the firm.

Applying this logic to the two main corporations in *Hobby Lobby*, neither had either a charter provision or a bylaw reflecting its religious principles. The most relevant evidence of the corporations' religious principles was not the controlling families' religious beliefs, as the majority suggests.[123] It was the firms' mission statements, reflecting their religious principles together with the fact that the companies were being run in accordance with the principles.[124]

In practice, courts tend to take individuals' claims of sincerity at face value, rather than conducting a searching inquiry.[125] A similar deference is appropriate for a corporation that can point to evidence of its religious

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duty and oppression remedies, if there were a case of abuse (such as a controlling shareholder adopting principles that destroy the value of the firm).

121. Under traditional corporate law doctrine, the chief executive has the authority to make ordinary decisions but more important issues require the approval of the board of directors. *See, e.g.*, Lee v. Jenkins Bros., 268 F.2d 357, 365–70 (2d Cir. 1959), *cert. denied*, 361 U.S. 913 (1959). *See also In re* Mulco Prods., Inc., 123 A.2d 95, 103–05 (Del. Super. Ct. 1956); Lucey v. Hero Int'l Corp., 281 N.E.2d 266, 268–70 (Mass. 1972).

122. Even Delaware courts have acknowledged this in the famous Disney case. Although the decision to fire a high-level executive would seem to be a Board decision as a matter of corporate authority, the Delaware Supreme Court held that Michael Eisner, Disney's imperial CEO at the time, had this authority himself. *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 68 (Del. 2006).

123. *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 706 (2014) ("Congress provided protection for people like the Hahns and Greens.").

124. Hobby Lobby has a statement of purpose committing those who hold shares and manage the business to "[honor] the Lord in all [they] do by operating the company in a manner consistent with Biblical principles." *Id.* at 703.

125. *See* Vita Nuova, Inc. v. Azar, No. 4:19-CV-00532-O, 2020 WL 8271942, at *7 (N.D. Tex. Dec. 2, 2020) (collecting quotations highlighting this low standard for showing sincerity); Danville Christian Acad., Inc. v. Beshear, 503 F. Supp. 3d 516, 523 (E.D. Ky. 2020) (finding that a religious school held a sincere belief that its instruction must be conducted in person, despite the fact that it had briefly suspended in-person instruction when a student tested positive for COVID); *see also* On Fire Christian Ctr., Inc. v. Fischer, 453 F. Supp. 3d 901, 911–12 (W.D. Ky. 2020) (conducting a non-searching evaluation of the sincerity of a church's belief that it must hold its Easter services in-person during the pandemic).

identity.[126] Although critics of *Hobby Lobby* often worry about the difficulty of determining the sincerity of a corporation's religious identity,[127] the assessment is easier with a corporation than an individual given the likelihood that there will be objective evidence (e.g. from charter provisions, bylaws, or mission statements) of the corporation's religious identity.

This does not mean the behavior of the corporation and its stakeholders is irrelevant when the corporation purports to have adopted a religious identity. If the corporation acts inconsistently with its religious identity, a rejection might be appropriate in some cases. One factor that can confirm a corporation's religious identity, despite inconsistent behavior, is the strength and enforceability of its commitment to the religious identity. If the commitment is strongly binding, deviations should not be seen as negating the religious identity, because the deviations can be corrected by shareholders who are unhappy with the shift. Suppose, for example, that a corporation commits to closing on Sundays in furtherance of its Christian principles but begins opening on Sundays. If the commitment to Sunday closing is in the certificate of incorporation, shareholders could take legal action to enforce the certificate.[128] Although a bylaw is more easily removable, a violation of a specific bylaw provision could also be challenged through litigation. Less formal mission statements would be more difficult to police. A court should therefore be more skeptical of a firm's purported religious identity if it fails to adhere to an informal mission statement.

Another possible complication is whether the exemption that a corporation wishes to claim is consistent with its religious identity. Consider the contraception mandate in the ACA. A corporation's claim

126. For an argument that courts can determine whether religious claims are genuine or pretextual by focusing on factors such as the potential benefits of the claims to the claimant and whether the individual's behavior is consistent with the claim, see generally Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After* Hobby Lobby, 67 STAN. L. REV. ONLINE 59 (2014).

127. A group of law professors raised the ominous specter of corporations having "Road to Damascus" conversions—that is, purporting to have a religious identity when the opportunity to take advantage of a beneficial religious exemption arose—if the *Hobby Lobby* Court held, as it later did, that religiously oriented corporations are protected by RFRA. *See Amicus Curiae* Brief of Corp. & Crim. L. Professors in Support of Petitioners at 26–27, Sebelius v. Hobby Lobby, 571 U.S. 1067 (2013) (Nos. 13-354 & 13-356).

128. *See, e.g.*, Telcom-SNI Invs., L.L.C. v. Sorrento Networks, Inc., No. CIV.A. 19038-NC, 2001 WL 1117505 at *4, *11 (Del. Ch. Sept. 7, 2001), *aff'd*, 790 A.2d 477 (Del. 2002) (enjoining a corporation from incurring additional debt and from issuing additional preferred stock because these actions would violate the corporation's certificate of incorporation); Mariner LDC v. Stone Container Corp., 729 A.2d 267, 269, 279–80 (Del. Ch. 1998) (plaintiffs sought declaratory and injunctive relief, claiming that a proposed merger violated the corporation's certificate of incorporation; court entertained the suit but ultimately denied relief on the merits).

that it should not be required to include any contraceptives in its insurance coverage would be more consistent with a Catholic than a Protestant evangelical identity, given that most Protestant evangelicals view abortions, but not contraceptives, as inconsistent with Christian principles.[129] In many cases, any ambiguity is easily resolved. If the firm clearly identified as Catholic, the objection to contraceptives would be consistent with its values. If its values were evangelical, on the other hand, the objection would be more debatable. In this case, a court should assess the sincerity of the objection using the same metrics and deference as when individuals assert religious objections elsewhere.[130]

It is important to remember that any assertion of religious identity is also subject to laws such as the RFRA. Suppose, for instance, that a religiously-oriented business insisted that a federal mask mandate at the height of a pandemic violated its religious principles. Even if the business could show that its religious principles precluded it from requiring its employees to wear masks, the government could probably demonstrate that the mandate satisfied RFRA's requirement that any substantial burden on religious exercise be justified by a compelling governmental interest achieved through the least restrictive means.[131] If the mandate came from a state rather than Congress, it would be even more likely to be upheld. Because RFRA does not apply to states, neutral state laws can be applied to churches and other religious organizations.[132] It also bears noting that the worries of *Hobby Lobby*'s critics that the case would prompt large numbers of "for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith" have not materialized.[133]

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129. In *Hobby Lobby*, the corporations (Hobby Lobby was evangelical, Conestoga Wood was Mennonite) challenged only four drugs that were required as part of the contraception mandate, based on the view that the drugs were a form of abortion. They did not challenge the broader mandate, as some Catholic organizations did. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 700–01 (2014) (Hahns, the owners of Conestoga, are Mennonite and they challenged "four FDA-approved contraceptives that may operate after the fertilization of an egg"); *id.* at 703 (Greens are "Christians" who buy "ads inviting people to 'know Jesus as Lord and Savior'").

130. Nathan Chapman has argued that a fraud or misrepresentation standard should be used. Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 WASH. L. REV. 1185, 1209–12, 1228–29 (2017).

131. For a discussion of the RFRA requirements, see *Hobby Lobby*, 573 U.S. at 705 (stating that the government is prohibited from "substantially burdening" religious exercise absent a "compelling governmental interest" pursued through the "least restrictive means").

132. By its original terms, RFRA applied to both state and federal laws, but the Supreme Court struck it down as applied to states. City of Boerne v. Flores, 521 U.S. 507, 534–36 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *as recognized in* Holt v. Hobbs, 574 U.S. 352 (2015) (holding that RFRA exceeded Congress's Fourteenth Amendment enforcement powers as applied to states).

133. *Hobby Lobby*, 573 U.S. at 757 (Ginsburg, J., dissenting).

Questions about for-profit corporations' religious identities have thus far been more hypothetical than real.

D. Varieties of Corporate Rights

The Trinitarian perspective, with its emphasis on pluralism and diversity among corporations, endorses the view that some types of corporations should be entitled to different rights than others. Given the solicitude the Constitution shows for media and the press, the majority in *Citizens United* could have easily construed the First Amendment to provide greater protection of the speech of press organizations than non-press organizations. A prominent constitutional law scholar has argued that the Press Clause of the First Amendment provides a basis for such a distinction.[134] If the Court had struck down the campaign finance regulation as it applied to Citizens United under the Press Clause, the decision might have been far less controversial.

It is important to be careful when handling these distinctions, however. Some scholars have suggested that the key issue in *Citizens United* and *Hobby Lobby* is expressive rights, and that a corporation's speech or religious freedom should be protected only if it was created for expressive purposes.[135] *Citizens United* would qualify under this test, *Hobby Lobby* would not. The problem with this approach is that it treats the corporation simply as a vehicle for its members' speech or expression of belief, and it ignores the corporation as a separate entity.[136] The Trinitarian perspective underscores that both need to be taken into account.

In some contexts, focusing on the corporate entity may justify giving a corporation less constitutional protection than an individual would enjoy. A good illustration is an early twentieth century Supreme Court case called *Hale v. Henkel*.[137] Hale, the secretary and treasurer of MacAndrews & Forbes Company, refused to produce documents sought in an antitrust investigation of the tobacco industry, invoking the Fourth and Fifth Amendment rights against unreasonable searches and seizures and to avoid self-incrimination.[138] Characterizing the corporation differently in different parts of the opinion, the Supreme Court held that corporations do

134. Michael W. McConnell, *Reconsidering* Citizens United *as a Press Clause Case,* 123 YALE L.J. 412, 416–19 (2013).

135. *See, e.g.*, Blair, *supra* note 40, at 254–65.

136. The Supreme Court unfortunately has invited this tendency by overvaluing expressive rights and undervaluing the rights of assembly and association. John Inazu has emphasized this point in his work. *See, e.g.*, JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (2012); John D. Inazu, *The Unsettling* "*Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149 (2010).

137. Hale v. Henkel, 201 U.S. 43 (1906).

138. *Id.* at 45–46.

have Fourth Amendment protection against unreasonable searches,[139] but that they do not have Fifth Amendment protection against self-incrimination.[140] Given that the corporation was the focus of the investigation, and a corporation does not face the risk of incarceration, the reduced scope of protection was sensible in a case like *Hale*.

But a more nuanced analysis of the dual nature of the corporation—as both entity and individuals—would recognize that more robust protections are appropriate if the real target of an investigation is the individual managers or the shareholders and not the corporation itself.[141] The distinction can be framed in evidentiary terms. If a corporation is the subject of an investigation, it should presumptively have more limited Fourth Amendment rights and no Fifth Amendment rights. But the presumption should give way if individuals are the principal target of the investigation.

E. Corporate Political Engagement

The *Citizens United* decision prompted a spirited debate about whether corporations should be required to disclose their political expenditures or submit them to shareholders for approval, so that their political involvement would be more open to scrutiny.[142] More recently, Coca Cola and other prominent corporations have spoken out about racism and voting rights, spurred by the renewed focus on social justice since the murder of George Floyd. James Quincey, the chairman and chief executive officer of Coca Cola, released a statement saying, "We want to be crystal clear and state unambiguously that we are disappointed in the outcome of the Georgia voting legislation," and that "our focus is now on supporting federal legislation that protects voting access and addresses voter suppression across the country."[143] Some of those who criticized measures

139. *Id.* at 76. In subsequent cases, the Court made it clear that the Fourth Amendment rights of corporations are more limited than the Fourth Amendment rights of individuals. *See, e.g.*, William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 428–35 (1995).

140. *Hale*, 201 U.S. at 70.

141. For an extensive, and compelling, defense of this view and criticism of the Supreme Court's "artificial entity" exception to the Fifth Amendment, see Tracey Maclin, *Long Overdue: Fifth Amendment Protection for Corporate Officers*, 101 B.U.L. REV. 1523, 1527 (2021) (stating that "the fact that a corporation cannot invoke the Fifth does not explain why a person who works for a corporation cannot").

142. Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 84–85 (2010); *see generally* John C. Coates, IV, *Corporate Politics, Governance, and Value Before and After* Citizens United, 9 J. EMPIRICAL LEGAL STUD. 657, 659 (2012).

143. Statement from James Quincey on Georgia Voting Legislation, THE COCA-COLA CO. (Apr. 1, 2021), https://www.coca-colacompany.com/media-center/georgia-voting-legislation [https://perma.cc/XSL2-9SG2].

that would chill political expenditures were unhappy about the recent corporate statements, and vice versa.[144]

A frequent argument for constraints on political spending by publicly held for-profit corporations is that the spending inevitability conflicts with the views of many of the corporation's heterogenous shareholders.[145] In my view, this critique is not compelling. Corporations are a form of representative democracy, not a direct democracy with shareholder veto power over speech or decisions they do not approve of. The voting and decision-making process is imperfect, to be sure, but shareholders are bound by the results. If additional controls are needed, it is not because shareholders are heterogeneous.[146]

A similar response also holds true for complaints about the recent social activism by prominent corporations. In 2021, many shareholders were unhappy, while others rejoiced, when Coca Cola's chief executive criticized the voting legislation in Georgia.[147] But making public statements is a director's prerogative, absent a charter provision, bylaw, or commitment precluding a director from commenting on social issues.

From a Trinitarian perspective, the principal problem is not that political engagement may conflict with some shareholders' values. The danger is that political engagement can tie corporations too closely with the state, compromising their role as truly Trinitarian intermediate institutions. The risk increases when businesses have a dominant industry position. These corporations have an incentive to support the government's candidates and channel government policy in exchange for protection from potential competition.

The best response to this Trinitarian problem—excessively close ties between large corporations and the state, which undermines a corporation's separateness—is effective antitrust enforcement. From the Trinitarian perspective, recent efforts to police corporate concentration more aggressively and to ensure competition within a given industry,

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144. *See, e.g.*, Philip Elliott, *Mitch McConnell Tries to Have it Both Ways on Corporate Cash*, TIME (Apr. 7, 2021), https://time.com/5953044/mitch-mcconnell-mlb-georgia/ [https://perma.cc/X4YP-43B9] (stating that "[Senate Minority Leader Mitch] McConnell, a steadfast critic of limits on campaign finance systems and one of the biggest boosters of corporate money in politics, told reporters yesterday that corporations should stay out of political fights if they [do not] want to incur the wrath of consumers").

145. Victor Brudney was one of the first to make this argument in the scholarly literature. Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 237 (1981).

146. For an argument that the political speech of publicly held corporations is inevitably that of their top managers, and thus warrants regulation, see Charles R.T. O'Kelley, Jr., *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation After* First National Bank v. Bellotti, 67 GEO. L.J. 1347, 1372 (1979).

147. *See supra* note 141 and accompanying text.

rather than dominance by one or a few corporations, are more promising than targeting corporate political engagement. President Biden recently signed an executive order designed to achieve precisely this objective, vowing that there would be "[n]o more tolerance of abusive actions by monopolies. No more bad mergers that lead to massive layoffs, higher prices[,] and fewer options for workers and consumers alike."[148]

Effectively policing corporate concentration would not make corporate political engagement concerns go away altogether. One can imagine reforms that might prove beneficial, such as requiring that a corporation disclose major political contributions. But if one envisions the business world as a counterbalance to the state, as I do, it is less troubling that corporations make political expenditures or speak on social issues when antitrust enforcement is robust than if publicly held corporations were essentially an extension of the state.

Those who are familiar with Adolf Berle's work will recognize that this vision of the corporation is quite different than his,[149] and is much closer to the view Louis Brandeis and his followers advocated during the New Deal, with its emphasis on promoting competition in every industry.[150] Berle was more comfortable with corporate concentration and viewed it as inevitable. Whether or not he was right about that—and it is quite possible he was—he was both prescient and right to insist that corporations have a much greater moral role than is commonly recognized.

CONCLUSION

In this Article, I looked to an unlikely source, the fourth century theologian Augustine of Hippo, for insight into the nature of the corporation. I have followed a lead provided by Adolf Berle nearly seventy years ago, although I took it in a different direction by focusing on *The*

148. Nandita Bose & Jarrett Renshaw, *Biden Signs Order to Tackle Corporate Abuses Across U.S. Economy*, REUTERS (July 10, 2021), https://www.reuters.com/business/bidens-executive-order-promote-competition-us-economy-includes-over-70-2021-07-09/ [https://perma.cc/Z973-MSTL]. The executive order is titled Executive Order on Promoting Competition in the American Economy. Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021).

149. At least his mature view. For an argument that Berle's views evolved and that he shifted to a corporatist perspective in his middle period, see William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 104 (2008).

150. For a discussion of the New Deal debate between Brandeisians and Berle's more sanguine view of corporate concentration, see DAVID SKEEL, ICARUS IN THE BOARDROOM: THE FUNDAMENTAL FLAWS IN CORPORATE AMERICA AND WHERE THEY CAME FROM (2004). Lina Khan and Tim Wu, among others, have brought renewed attention to the Brandeisian perspective. For discussion, see generally Jacob M. Schlesinger, *The Return of the Trustbusters*, WALL ST. J., Aug. 28/29, 2021, at C1; TIM WU, THE CURSE OF BIGNESS: HOW CORPORATE GIANTS CAME TO RULE THE WORLD (2020).

Trinity rather than *The City of God* and using it to explore the nature of corporate personhood.

In contrast to the two leading traditional conceptions of the corporation—the aggregate and real entity theories[151]—which are framed as alternative accounts, the Trinitarian perspective has aspects of each. It insists that corporations are real entities, but it also recognizes that the managers and other constituencies of a corporation have independent significance. I have also argued that corporations can be more Trinitarian or less, depending on factors such as the extent of state control over the scope of the corporation or the vigorousness of antitrust enforcement.

On some issues, the Trinitarian theory of corporate personhood does not deviate significantly from other theories of the corporation, while the insights are more novel on other issues. By providing a more three-dimensional perspective on the nature of a corporation than any traditional account, the Trinitarian perspective is truer to what a corporation actually is.

151. As noted earlier, the third traditional theory—concession or sovereign grant—has declined in importance. *See supra* notes 50–51 and accompanying text. The Trinitarian account applauds this decline.