Adolf Berle's Corporate Conscience

Elizabeth Sepper & James D. Nelson***

In this contribution to the symposium on "Corporate Capitalism and the City of God," we bring Adolf Berle's distinctive views of morality in corporate life into contemporary conversations about corporate religion. Today's debates over corporate religious exemptions tend to gravitate toward an entity view of conscience focused on the moral integrity of institutions or an associational view keyed to shareholders' deep commitments. The foremost corporate law scholar of his day, Berle instead conceived of corporate conscience as a "public consensus" guiding and bounding managerial decision-making. Although he would have sympathized with efforts to integrate faith and business, he would have rejected the conclusion that faith at work requires religious exemptions for corporations. Berle instead would structure analysis around corporate power and its potential to threaten individual personality. His corporate conscience, we argue, offers fresh insights to debates in corporate law, constitutional law, and beyond.

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* Professor of Law, Texas Law School.
** Vinson & Elkins Professor, University of Houston Law Center.

Our ancestors feared that corporations had no conscience. We are treated to the colder, more modern fear that, perhaps, they do.

—Adolf Berle[†]

INTRODUCTION

Few lawyers were as provocative and influential as Professor Adolf Berle.[1] For much of the twentieth century, Berle was in the thick of raging debates about the purpose of corporations, which constituencies they should serve, and their broader role in society. These questions now capture the attention of a new generation on terms largely familiar to Berle.

What is novel, however, is the context: for-profit businesses claiming religious exemptions from general laws. A growing "faith at work movement" counsels corporate managers not to leave their religious beliefs at the office door.[2] Meanwhile, notions of corporate conscience have played a role in transforming the law of religious liberty. In 1968, the Supreme Court regarded a business's claim for religious exemption as "patently frivolous."[3] In the intervening decades, courts rejected the rare request of a for-profit business to be exempt from law for religious reasons.[4] But in 2014, for the first time, the Court held that for-profit corporations can claim religious exemptions from general laws.[5] Since then, demands to throw off the constraints of state and federal law to preserve corporate conscience have proliferated.

What would Berle have made of the twenty-first-century corporate conscience? In this Article for the symposium on Berle's "Corporate Capitalism and the City of God," we explore Berle's corporate conscience—both in its historical context and as applied to today's controversies. In doing so, we find that Berle's view of corporate conscience is incongruent—perhaps even radically so—from the leading views currently on offer.

[†] ADOLF A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION 184 (1954).

1. Henry G. Manne, *Berle: The American Economic Republic*, 62 MICH. L. REV. 547, 547 (1964).

2. *See, e.g.*, LAKE LAMBERT III, SPIRITUALITY, INC.: RELIGION IN THE AMERICAN WORKPLACE 51–52 (2009); DAVID W. MILLER, GOD AT WORK: THE HISTORY AND PROMISE OF THE FAITH AT WORK MOVEMENT 3–8 (2007); HELEN J. ALFORD & MICHAEL J. NAUGHTON, MANAGING AS IF FAITH MATTERED: CHRISTIAN SOCIAL PRINCIPLES IN THE MODERN ORGANIZATION 1–3 (2001).

3. Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 403 n.5 (1968).

4. *See, e.g.*, United States v. Lee, 455 U.S. 252, 261 (1982).

5. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 718 (2014).

Part I marshals evidence, primarily drawn from his "City of God" chapter, that Berle would have been initially sympathetic to today's claims of corporate conscience. He would have welcomed the idea of integrating religious faith and corporate management. From his point of view, corporate managers needed to look beyond the financial bottom line and to consider the "ancient problem of the 'good life.'"[6] Berle advanced the idea of the corporation as "conscience-carrier of the twentieth-century American society."[7] This call for moral leadership in business seems in accord with visions of the conscientious corporation today.

Part II puts this initial evidence to the test by elaborating on Berle's conception of corporate conscience and comparing it with the two conceptions commonly employed by contemporary proponents. For Berle, a conscientious corporation was one that tracked the value system of the community—or to use his favored term, the "public consensus."[8] By contrast, current debates either construct an institutional conscience around the mission of a particular corporation or draw conscientious commitments from individuals within the firm. And so, Berle would have parted ways with contemporary proponents of corporate conscience at the conceptual level. While an associational view of the corporation would have held some appeal, shareholders could not serve as the font of corporate morality in Berle's view. Above all, his conception of corporate conscience foregrounded the interests of the community rather than the interests of private individuals.

Part III argues that while the ideal of religious managers in the C-suite would have held some attraction, Berle nonetheless would have rejected expansive claims for corporate religious exemptions. Claims to corporate religious exemption cast the state as the villain and assert a need for corporate autonomy from democratic reach. By contrast, in Berle's political economy, corporate power was a threat to the democratic state and to vulnerable members of society, including employees, customers, and the communities in which business operated. Drawing on these deeper normative commitments, Berle would make power the central category for analysis of corporate religious exemptions.

We conclude by considering what lessons Berle's corporate conscience might yet hold for today. In doing so, we find an alternative vision of corporate conscience missing in twenty-first-century scholarship

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6. ADOLF A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION 167 (1954) [hereinafter BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION].

7. *Id.* at 182.

8. *See id.* at 182–83; ADOLF A. BERLE, JR., POWER WITHOUT PROPERTY: A NEW DEVELOPMENT IN AMERICAN POLITICAL ECONOMY 90–91 (1959) [hereinafter BERLE, POWER WITHOUT PROPERTY].

and unearth a middle way in controversies over corporate religious exemptions.

I. CORPORATIONS IN "THE CITY OF GOD"

"[T]he corporation, almost against its will, has been compelled to assume in appreciable part the role of conscience-carrier of twentieth-century . . . society," Adolf Berle concluded in "Corporate Capitalism and 'the City of God,'" the final chapter of *The 20th Century Capitalist Revolution*.[9] On Berle's account, corporate managers could no longer pretend that their activities were politically or morally neutral. For the first time in their history, corporations had "reached a position" of power and influence such that they needed a governing political philosophy.[10] As we show, Berle's work indicates an affinity for the infusion of morality, and arguably religion, into corporate life. He admired ethical managers and hoped for them to take steps toward the good.

The idea that managers should stay in their narrow financial lane had once been quite attractive to Berle.[11] Indeed, *The 20th Century Capitalist Revolution* is often described as a reversal of the position that Berle took in his famous 1930s debate with E. Merrick Dodd.[12] There, in a major conceptual advance toward what we now call corporate social responsibility, Dodd made the case that business corporations had a "social service" function in addition to their economic function.[13] He argued that corporate managers held their powers in trust for the community and had to make public-spirited decisions.[14] At that time, Berle adhered to the more traditional view that managers should stick to promoting shareholder interests. Dodd's claim that managers thought of themselves as public servants was, Berle said, "theory, not practice."[15] No conservative contractarian, Berle appreciated Dodd's project, but thought that the business world was not yet ready for its innovations.[16] By 1954, however,

9. *Id.* at 182.

10. *Id.* at 166–67.

11. *See* A. A. Berle, Jr., *For Whom Corporate Managers are Trustees: A Note*, 45 HARV. L. REV. 1365, 1366–67 (1932).

12. William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 134–35 (2008) (noting that *The 20th Century Capitalist Revolution* represented an explicit reversal of his Berle-Dodd position but explaining that by the time of the debate with Dodd, Berle already had moved away from his support of shareholder primacy).

13. *See* E. Merrick Dodd, *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932).

14. *Id.* at 1160–61.

15. *See* Berle, *supra* note 11, at 1367.

16. *See* Adolf A. Berle, *Modern Functions of the Corporate System*, 62 COLUM. L. REV. 433, 443 (1962) (responding to Henry Manne, *The "Higher Criticism" of the Modern Corporation*, 62 COLUM. L. REV. 399 (1962)); *see also* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN

he admitted that "[t]he argument has been settled (at least for the time being) squarely in favor of Professor Dodd's contention."[17]

So, what had changed? To begin with, Berle had become convinced that the purely private conception of the business corporation was outmoded. When he surveyed the corporate landscape, Berle observed the concentration of power in the hands of relatively few firms, which in turn dominated different sectors of the economy.[18] As a result, market prices were no longer discovered through vigorous competition, as proponents of the neoclassical model claimed,[19] but were instead administered by corporate managers.[20] This concentration of power, Berle argued, justified the study of corporations and corporate law through the lens of political science.[21] Managers wielded tremendous power over community affairs, and any action they took would involve a political decision with an impact on the community. Although society had grown accustomed to thinking of corporations as neutral parties pursuing only material goods, corporate neutrality was impossible.

Not only had the corporate world changed, but so too had corporate law, Berle thought. As proof of concept, Berle pointed to the then-evolving law of corporate philanthropy.[22] An older view took corporations to be prohibited from donating money to charities. The purpose of the for-profit corporation was to make money for shareholders, and gifts to charitable causes exceeded the authority of corporate fiduciaries. That view, Berle claimed, had been definitively cast aside by the New Jersey Supreme Court's decision in *A.P. Smith Manufacturing Co. v. Barlow*.[23] Relying on Dodd's 1932 article, the court wrote that "[d]evelopments since [Dodd]

CORPORATION AND PRIVATE PROPERTY 356 (1932) ("It is conceivable—indeed it seems almost essential if the corporate system is to survive,—that the 'control' of the great corporations should develop into a purely neutral technocracy, balancing a variety of claims by various groups in the community and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity."); Harwell Wells, *Cycles of Corporate Social Responsibility*, 51 U. KAN. L. REV. 77, 97 (2002) (citing ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932)).

17. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 6, at 169.

18. *See id.* at 25.

19. *See* F.A. HAYEK, 3 LAW, LEGISLATION AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE 67–70 (1979).

20. *See* BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 6, at 39.

21. *See id.* at 5, 18, 32.

22. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 6, at 168–69 (citing A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953)). The legacy of *Barlow* is contested. While its sweeping language can be read as a full-throated endorsement of corporate social responsibility, the opinion contains passages more supportive of the traditional shareholder primacy norm. A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 586 (N.J. 1953) (Charitable giving "may likewise readily be justified as being for the benefit of the corporation; indeed, if need be the matter may be viewed strictly in terms of actual survival of the corporation in a free enterprise system.").

23. 98 A.2d 581 (1953).

wrote leave no doubts" that corporations could take on responsibilities for public welfare through corporate philanthropy.[24] Among these developments were sustained state-corporate alliances during the Depression and World War II, and the rise of public opinion in favor of the corporation's public responsibilities.[25] Having once endorsed shareholder primacy, Berle's mature work warmly embraced a concept of the corporation that transcended private profit and strived for social responsibility.[26]

In *The 20th Century Capitalist Revolution*, Berle argued that although corporate managers might feel discomfort thinking in these terms, they needed to draw on values deeper and more sustaining than financial wealth. Indeed, he thought the best corporate leaders already understood that they had a duty to manage corporations as "citizens of the community," not as immoral institutions.[27] In Berle's view, the boardroom had to embrace ethical values—a philosophy of what constitutes "the good life"—and make decisions accordingly.[28] In this sense, he sought what one of us has called a "moral marketplace."[29]

So where would managers find their philosophy of the good life? In Augustine's *The City of God*, from which Berle drew his inspiration and chapter title, the source of moral authority was clear.[30] To live in the city of God meant subordinating love of self to love of God. Berle remarked that Augustine had offered "a striking and simple statement of a hypothesis of political science."[31] All institutions needed "philosophical content" to guide and sustain their affairs, even if that philosophical content operated only in the background.[32] On this analogy to the city of God, however, corporations lacked a discernible faith.[33] The business judgment rule substantially shielded managers from accountability, leaving the only real control to the "philosophy of the men who compose them."[34] "[T]he community ha[d] not created any acknowledged referent of responsibility"

24. *Barlow*, 98 A.2d at 585.

25. *See id.* at 585–86.

26. *See* Wells, *supra* note 16, at 103.

27. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 6, at 167.

28. *Id.* (internal quotation marks omitted).

29. James D. Nelson, *Conscience, Incorporated*, 2013 MICH. ST. L. REV. 1565, 1613–15 (2013).

30. *See generally* SAINT AUGUSTINE, THE CITY OF GOD (Marcus Dods trans., Random House 2000) (426).

31. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 6, at 178.

32. *Id.*

33. *See id.* at 181 ("As yet the community has not created any acknowledged referent of responsibility, no group from which they take their power mandate. . . . There is no recognized body of doctrine by which they themselves must test their choice as they act from day to day.").

34. *Id.* at 180.

or "recognized body of doctrine" against which managers could test their decisions.[35]

Nevertheless, the corporations once thought "soulless," Berle argued, had begun to manifest a consensus that acted "surprisingly like a collective soul."[36] A higher law—he argued—was emerging in the corporate field, a development that simultaneously held "splendor and terror."[37] Managers would have to conform their decisions to a system of higher values.

These remarks initially indicate that Berle would have been friendly to the "faith at work" movement. In recent years, participants in this movement have criticized the view that business is a secular matter and have called for welcoming religion in the workplace.[38] Much of the energy behind this movement seems to come from the conviction that people should be allowed to live fully integrated lives, drawing on their faith in making everyday business decisions.[39] Faith at work, the argument goes, helps overcome the pernicious effects of corporate monoculture, providing a more diverse and distinctive array of corporate communities. With his concern over the growing power of corporations, not only over the economy but also over the lives and personalities of the people who worked in them, Berle might have been attracted to the idea of workplaces animated by religious values.[40]

Certainly, the fact of religious businesspeople would not have surprised him.[41] Corporate power in Berle's lifetime lay largely with Protestant businessmen. Progressive Protestant circles and management theorists advanced managerial philosophies of social service, drawn from

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35. *Id.* at 181.

36. *Id.* at 183. Some of his contemporaries observed a similar shift. Carl Kaysen, for example, noted that as management assumed community obligations, business corporations had become "soulful." Carl Kaysen, *The Social Significance of the Modern Corporation*, 47 AM. ECON. REV. 311, 314 (1957).

37. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 6, at 182; *see also id.* at 69–70 (arguing that this inchoate law is emerging for managers).

38. *See* sources cited *supra* note 2.

39. *See, e.g.*, ALLIANCE DEFENDING FREEDOM, *Introduction* to AN EMPLOYER'S GUIDE TO FAITH IN THE WORKPLACE: LEGAL PROTECTIONS FOR CHRISTIANS WHO OWN A BUSINESS (2016) ("[W]hile some business owners are cheered and commended when they blend certain beliefs and work, Christian business owners are often derided and denigrated, and sometimes face legal challenges, when they do the same.").

40. For additional sources on the faith at work movement, see *Princeton University Faith & Work Initiative*, https://faithandwork.princeton.edu/ [https://perma.cc/EZ2P-DEYP]; HANDBOOK OF FAITH AND SPIRITUALITY IN THE WORKPLACE: EMERGING RESEARCH AND PRACTICE (Judi Neal ed., 2013).

41. For historical accounts of religion in corporate life, see the following contributions to this symposium: Russell Powell, *Spirit of the Corporation*, 44 SEATTLE U. L. REV. 371 (2021); Joseph P. Slaughter, *The Virginia Company to Chick-fil-A: Christian Business in America, 1600–2000*, 44 SEATTLE U. L. REV. 421 (2021).

their faith.[42] And beginning in the 1930s, conservative businesspeople began to use religion to oppose the New Deal, itself supported by adherents of the Social Gospel.[43] Business lobbies and executives of some of largest U.S. corporations joined cause with evangelical leaders to link Christianity and free enterprise through advocacy and massively popular advertising campaigns.[44] While Berle, a staunch New Dealer, would have opposed such efforts, he would have been aware of the religious disposition of the corporate elite.

Berle's own biography also seems to suggest a favorable disposition toward corporate religion. The son of a Congregationalist minister, he frequently claimed to elevate spiritual matters above material wealth.[45] With Louis Brandeis as his model, Berle thought that it was folly to study economics without attention to human values.[46] One could not understand economic life, he wrote, without recognizing that spiritual forces have a profound influence on what people value and that corporations are merely a tool for living full human lives.[47]

The "City of God," moreover, suggests that Berle may have embraced corporate religion for reasons of institutional pluralism. Like his contemporary John Kenneth Galbraith, Berle looked favorably upon institutional designs that provided countervailing forces to the problem of concentrated power.[48] He saw safety in numbers. In a consolidated modern industrial economy, the existence of a plurality of corporations could disperse the threat posed by any one economic institution.[49] Attributing

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42. *See* DARREN E. GREM, THE BLESSINGS OF BUSINESS: HOW CORPORATIONS SHAPED CONSERVATIVE CHRISTIANITY 6 (2016) ("From as early as the 1930s, evangelical businessmen argued for the freedom to run their enterprises as they wished, based in a managerial philosophy of executive purpose, corporate responsibility, or social 'service' borrowed, in part, from more progressive Protestant circles and management theorists.").

43. *See* KEVIN M. KRUSE, ONE NATION UNDER GOD: HOW CORPORATE AMERICA INVENTED CHRISTIAN AMERICA 3–34 (2015); *see also* GREM, *supra* note 42, at 6.

44. *See, e.g.*, KRUSE, *supra* note 43; BETHANY MORETON, TO SERVE GOD AND WAL-MART: THE MAKING OF CHRISTIAN FREE ENTERPRISE 125–72 (2009); DARREN DOCHUK, FROM BIBLE BELT TO SUNBELT: PLAIN-FOLK RELIGION, GRASSROOTS POLITICS, AND THE RISE OF EVANGELICAL CONSERVATISM 51–76 (2011).

45. *See* JORDAN A. SCHWARZ, LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA 89, 205–06 (1987).

46. *See id.* at 104.

47. *Id.*; *see also id.* at 89 (recounting Berle's remark in a conversation with Brandeis that "life is dominantly spiritual and not economic").

48. *See* BERLE, POWER WITHOUT PROPERTY, *supra* note 8, at 6–7 (discussing Galbraith's work); *see also* BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 6, at 57 (noting American suspicion of the concentration of power in great corporations and centralized government alike).

49. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 6, at 184 (describing as a safeguard that "in America there are a few hundred powerful units, each of which has a limited capacity to disagree with its fellow giants and to do something different . . . "and no "central group which proclaims orthodox doctrine").

social responsibilities to corporations would also avoid nationalization and maintain a vibrant capitalist economy.[50]

Berle's support for pluralism extended to definitions of the good life. As corporations followed conscience, he said, "We have reason to hope there will be enough disagreement so that the nuclei of power and of social organization will not only agree, but differ as well."[51] Some corporate managers might fund engineering and medical research, favoring a society that prioritizes science over humanities.[52] Others might advance the arts, indicating a different vision of the city of God.[53] Berle spoke enthusiastically about the value of having a multiplicity of corporations with managers holding an assortment of different opinions so that no single opinion would dominate.[54] Such institutional pluralism, Berle thought, would protect individuals from domination by the concentrated power of any one corporation.[55] To the extent that religious businesses have added a distinctive perspective to the corporate landscape today, perhaps Berle would have applauded the resulting plurality of opinion.

In sum, Berle's "City of God" indicates an openness to religion in corporate life and an affinity for corporate conscience. This story, however, is incomplete, as the next Part shows.

II. CONCEPTIONS OF "CORPORATE CONSCIENCE"

Berle had a distinctive vision of the conscientious corporation. As we describe in Part A, "corporate conscience" in Berle's usage represented the public's check on managerial discretion. In exercising their enormous power over institutional resources, corporate managers owed significant responsibilities to society. The public consensus would frame the scope of acceptable corporate acts.

Contemporary uses of the term "corporate conscience" instead downplay these social responsibilities in favor of the entity or individual, as we explain in Part B. On one view, corporate conscience is a function of an entity's particular mission statement and organizational structure. On another view, corporate conscience is an aggregation of individual constituents' conscientious commitments.

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50. *See id.* at 165–66 (describing risks of nationalization); *id.* at 184–88 (expressing optimism that social responsibilities could avoid those risks).

51. *Id.* at 185.

52. *See id.* at 176.

53. *See id.*

54. *See id.* at 185.

55. *See id.*; *see also* Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th Century American Legal Thought*, 30 L. & SOC. INQUIRY 179, 181–82 (2005) (discussing legal pluralist views in Berle's earlier work).

We argue in Part C that as a realist and managerialist, Berle would have found much to critique in both the entity and aggregate views of conscience. More fundamentally, he would have rejected their focus on individual integrity and self-preservation, because it sells short the public interest and values at stake in corporate decisions.

A. Berle's Conscience as Public Consensus

The central organizing idea in Berle's account of corporate conscience was "public consensus"—a widely shared set of values adopted by the public.[56] The public consensus provided the "frame of surrounding conceptions which in time impose themselves" as constraints on corporate managers.[57] So how did the public consensus manifest as corporate conscience?

To answer this question, we turn to an earlier chapter in *The 20th Century Capitalist Revolution*, entitled "The Conscience of the King and of the Corporation."[58] In these pages, Berle wrote of conscience as a "higher law" that curbs the power of corporate managers and corrects for its failures.[59] That higher law, however, was "inchoate—there, but not explicit, to be apprehended and worked out as you went along."[60] Over time, Berle thought, the force of corporate conscience could "modify in certain areas the absolute power of business discretion."[61]

In elaborating this notion of conscience, Berle drew explicitly on the historical distinction between law and equity. In running a corporation, managers are entrusted with enormous discretionary power and only loosely constrained by formal legal restrictions in their use of institutional authority. As a consequence, they typically can choose from among many strategic options without running afoul of the law. But formal legal rules are not the only constraint on corporate managers. Equitable principles also limit managerial power and discretion. For example, even if corporate statutes and organizational documents would otherwise permit certain managerial actions, courts may draw on deeper principles of corporate accountability and legitimacy to police against entrenchment, self-dealing, and other forms of opportunism.[62]

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56. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 6, at 182–83.

57. *Id.* at 188.

58. *Id.* at 61–115.

59. *Id.* at 69.

60. *Id.*

61. *Id.* at 70.

62. *See, e.g.*, Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971) ("[I]nequitable action does not become permissible simply because it is legal possible . . . .").

For Berle, corporate conscience similarly functioned as a higher source of authority to hold management accountable.[63] Managerial discretion could be wide—indeed, the well-known efficiency benefits of centralized management provided good reasons for this to be so. But it was not unlimited. As he summed up, "we cannot grant either to government or to private corporations the individual and arbitrary power thought proper and necessary to the small private entrepreneurs of yesterday."[64] Even kings—at least if they were wise—made room for public appeals to conscience.[65] Like the leaders of political institutions subject to public influence, corporate managers required an inchoate higher law to hem in their power.[66]

In a major work published later in the decade, *Power without Property*, Berle cemented this view of corporate conscience.[67] In a section entitled *The "Public Consensus"—The "Corporate Conscience*," Berle grounded his notion of conscience in the "value system of the community."[68] The corporate conscience, he wrote, is "a set of ideas, widely held by the community, and often by the organization itself and the men who direct it, that certain uses of power are 'wrong.'"[69] To act with integrity required aligning one's behavior with the higher authority of public consensus. That consensus was "the final arbiter of legitimacy—both of the use of power and of the right of any individual or group to hold it."[70] When corporate managers violate these social norms, Berle claimed, they put at risk the entire system of private enterprise.

Reflecting his general comfort with spirituality, Berle entertained the prospect that public consensus could coalesce around thinly religious ideas. Modern statecraft of corporations depended, he said, on "a publicly accepted body of philosophical premises derived from or through religion or its equivalent."[71] This sort of thin religious consensus would seem to track the common conception of a "civic religion"—a set of religious commitments or attitudes that are generic or abstracted enough to bind a people together.[72] To fight against corporate tyranny, Berle thought that corporate conscience—that is, the judgments of the community—had to

63. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 6, at 72–73.

64. *Id.* at 112.

65. *Id.* at 67.

66. *Id.* at 69 (giving as an example the Catholic Church's doctrines and natural law as a check on King Henry II).

67. *See generally* BERLE, POWER WITHOUT PROPERTY, *supra* note 8.

68. *Id.* at 90–91.

69. *Id.* at 90.

70. *Id.* at 110.

71. A. A. Berle, Jr., *Religion and Health in Modern Statecraft*, 1 J. RELIGION & HEALTH 55, 60 (1961).

72. *Id.* at 62.

penetrate the walls of corporations.[73] For community judgments to operate as they should, corporate conscience had to be "built into institutions so that it can be invoked as a right by the individuals and interests subject to the corporate power."[74] Corporate conscience needed keys to the C-suite.

One way to build conscience into a corporation was to have a "keeper of conscience." When a corporation fails to meet its obligations, that failure affects the lives of real people. Those real people, in turn, must be able to voice their objections to someone with institutional power. They must be able to state the grounds on which they think the corporation has violated their individual rights and interests. The keeper of corporate conscience would meet that need, making sure that the claims of the aggrieved did not fall on deaf ears.[75] But if the corporation provided no means or mechanism for individuals to protect their fundamental interests, Berle predicted "revolt whose results are unforeseeable."[76]

Indeed, one lesson Berle seemed to take from the Great Depression was that when our social values deteriorate, so too will our economic institutions. Writing in the 1930s, he said that laws, finance, and commerce "are nothing save in the hands of men and women of vision, of courage, of faith, proceeding from an inner spiritual strength and discipline."[77] Without a wide and inclusive public philosophy, economic institutions—no less than political institutions—would perish.

Though it would draw on what he saw as timeless values, Berle's corporate conscience would also be dynamic. As society's standards for acceptable corporate behavior evolved, so too would corporate conscience. It would be "in constant state of gradual development."[78] Corporate practices once regarded as appropriate might become morally unacceptable. These social conventions would track society's evolving needs and standards.

B. Conscience in Contemporary Debates

Contemporary proponents of corporate religion employ the same language of "corporate conscience," but they locate that conscience in different corporate mechanisms and stakeholders. For them, exercising corporate conscience means adhering to values determined by private individuals and associations. Whereas corporate conscience for Berle was the voice of the public, today's debates employ an inward-facing use of

73. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 6, at 114.
74. *Id.*
75. *Id.* at 76–77.
76. *Id.* at 114.
77. SCHWARZ, *supra* note 45, at 89.
78. BERLE, POWER WITHOUT PROPERTY, *supra* note 8, at 110.

the term. To act with integrity is to follow personal values even when they do not match the public consensus. And if the state prevents religious businesses from acting in accord with conscience, it puts those businesses at risk of complicity with what they regard as evil.

With this background understanding, contemporary theorists advance two opposing theories. An entity approach derives the conscience of the corporation from internal governance structures and analogizes to religious non-profits. An associational approach instead attributes individual beliefs to the corporation and analogizes to voluntary associations.[79]

On the entity account, a corporation has independent life, personality, and conscience. Rather than being reducible to the acts of individuals associated with it, "the corporation is a product of organizational structures and purposes and is therefore an autonomous being in its own right."[80] Walmart is Walmart, even as employees, managers, and shareholders come and go. The corporation itself is the bearer of rights to free exercise and conscience.

This account does not equate corporate conscience—and related rights determinations—with the beliefs of any particular individual(s). Instead, the overarching moral identity of an institution finds expression through its mission statement, articles of incorporation, and ongoing processes (such as budgeting and strategic planning). By harmonizing its decisions with these aspects of corporate identity, an institution makes moral judgments and strives to maintain its integrity like a human being.

Proponents of the entity view, in turn, say that forcing an entity to be complicit in the projects of employees or customers that it perceives to be wrongful undermines the central commitments of the institution.[81] Requirements to provide contraceptive insurance coverage or to serve same-sex weddings, for example, risk the very integrity of the institutional actor. Entity theorists often point to non-profits as a model. Churches and charities typically take the corporate form yet are considered standard-bearers for free exercise rights claims. If a non-profit corporation can exercise religion, why not a for-profit corporation? And in his opinion for

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79. *See* Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1447–55 (1987); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 205–11.

80. Nelson, *supra* note 29, at 1571–72.

81. *See* James D. Nelson, *Corporations, Unions, and the Illusion of Symmetry*, 102 VA. L. REV. 1969, 2008–09 (2016) (exploring the logic of complicity); *see also* Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L.J. 703, 727–30 (2014) (arguing that under various ethical and religious traditions, to determine whether one has become complicit in another's wrongdoing, "[t]he necessity and proximity of one's assistance to the wrongful act and the seriousness of that act are balanced against one's role and the gravity of one's reason for cooperation.").

the Court in *Burwell v. Hobby Lobby Stores, Inc.*, Justice Alito found this line of argument persuasive, remarking that "no conceivable definition of the term [person] includes natural persons and nonprofit corporations, but not for-profit corporations."[82]

On the associational account, by contrast, the corporation is a means by which individuals come together to express their collective moral judgments.[83] In a business corporation, this means that people voluntarily join a common enterprise that reflects their moral values. The corporate entity, on this view, is a misleading reification that distracts focus from the individual members of the corporation.

This account takes a traditional definition of conscience as a phenomenon closely related to an individual's moral integrity or sense of self.[84] Conscience represents a process whereby individuals identify moral principles, assess context, and determine how to act. Acting according to conscience has real importance less because it is about being (morally or politically) right than because it is central to being a whole person. Although individuals disagree over right and wrong, each person has an interest in self-authorship—the ability to act consistent with deep religious, moral, and ethical commitments constitutive of their identity.[85] To act against conscience, theorists agree, threatens "a psychological schism that violates the integrity of the person as a unity of body, soul, and psyche."[86]

This associational conception of corporate conscience invites the question: Whose conscience counts for the corporate form? Answers have varied. Some have argued that it should consider the interests of various corporate constituencies, including shareholders, managers, employees, and customers.[87] Thus far, however, driven in no small part by the type of corporations from which claims have come, courts have drawn moral beliefs of the corporation from its shareholders.[88] Some have emphasized

82. 573 U.S. 682, 708 (2014).

83. *See* Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501, 1540–45 (2012) (criticizing this view as not describing conscience at all but arguing that it may usefully describe the societal value attached to the phrase "institutional conscience").

84. *See* Nelson, *supra* note 81, at 2005–09; Sepper, *supra* note 83, at 1526–32; *see also* Cécile Laborde, *Religion in the Law: The Disaggregation Approach*, 34 L. & PHIL. 581, 596–99 (2015); Micah Schwartzman, *Conscience, Speech, and Money*, 97 VA. L. REV. 317, 352–54 (2011).

85. *See* MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 52 (2008).

86. Edmund D. Pellegrino, *The Physician's Conscience, Conscience Clauses, and Religious Belief: A Catholic Perspective*, 30 FORDHAM URB. L.J. 221, 240 (2002).

87. *See* Nelson, *supra* note 29, at 1586–1610.

88. For a more comprehensive list of cases brought by for-profit businesses, see *HHS Case Database: For-Profit*, BECKET, https://www.becketlaw.org/research-central/hhs-info-central/hhs-case-database/?fwp_database_profit=d45359f6b46b548f0f4b64a61cfe828f [https://perma.cc/S6KC-WPUA].

the freedom that corporate law affords shareholders to craft corporate charters and bylaws in accordance with their own religious commitments.[89] Others have argued that shareholder conscience deserves special attention because their responsibility for corporate decisions makes them especially vulnerable to harms of complicity.[90]

C. A Fundamental Disconnect

Today's claims of corporate conscience—whether they sound in corporate moral agency or in personal identity—do not channel society's demands through corporate managers. Instead, they leverage claims of institutional and individual freedom. Berle would have rejected each of these contemporary conceptions of corporate conscience.

Let's begin with the real entity view of corporate conscience. Berle would have had little sympathy for the notion of an emergent group personality that exists independent of the individuals who compose the group.[91] To the extent that an institution could be said to have a conscience, and he believed it could, Berle took the position that it had to operate through specific individuals who provided a process by which the public could plead their case.[92] He instructed his readers that in studying the corporation, "one must not forget that the organization itself is composed of men."[93]

Likewise, he would have rejected the formalism of looking to corporate documents and mission statements rather than to the interests of real human beings who interact through the corporate form. "Paper organization"—as he put it—might often reflect the enterprise (or goals) of the people in a corporation, but it did not inevitably do so.[94] The reality of enterprise administration and the relationships people have with the firm should govern, not its documents or legal form.

Berle also would have been skeptical of the analogy between business corporations and nonprofits. At the time he wrote, a "fiscal triangle" separated the state, the economy, and civil society into distinct

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89. *See, e.g.*, Alan J. Meese & Nathan B. Oman, Hobby Lobby*, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 HARV. L. REV. F. 273 (2014).

90. *See, e.g.*, Amy J. Sepinwall, *Corporate Piety and Impropriety:* Hobby Lobby*'s Extension of RFRA Rights to the For-Profit Corporation*, 5 HARV. BUS. L. REV. 173 (2015).

91. Berle's pragmatism is evident throughout his writing. *See, e.g*, BERLE, POWER WITHOUT PROPERTY, *supra* note 8, at 14 ("[T]he best thing we can do is to understand the business we do have, to know the results we want from it, and to do our best to 16assure that these results are produced."). On pragmatist and legal realist opposition to group ontology more generally, see James D. Nelson, *Some Realism about Corporate Crime*, 83 L. & CONTEMP. PROBS. 113 (2020).

92. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 6, at 61–115.

93. *Id.* at 187.

94. Adolf A. Berle, Jr., *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343, 344 (1947).

sectors.[95] The government's role was to regulate—an ever-present risk if business did not conform to social expectations. The for-profit sector would produce. Non-profit entities, separate both from government and revenue generation, would advance educational and philanthropic goals.[96]

Importantly, during Berle's lifetime, non-profit corporations were considered "institutions for carrying out public tasks"—not the vehicles for private individual rights they subsequently became.[97] Although their numbers were rapidly increasing, they were still fairly constrained in their purposes, with universities, foundations, and art and cultural institutions serving as the exemplars.[98] With authorization from the state, there had emerged a symbiotic relationship between the non-profit and for-profit—with businesses offering financial support and nonprofits reciprocating with knowledge and advice on the novel obligations of the corporation.[99] For Berle and his contemporaries, business corporations and charitable organizations played different social roles.[100]

Ironically, Berle himself repeatedly deployed analogies involving the business corporation and the medieval Church. On an initial read, his uses of an analogy to the Church seem conflicting. Sometimes, corporations played the role of early city-states locked in a struggle with "the Church," represented in Berle's account by the political state.[101] At others, corporations had compiled authority "comparable to the religious power in the mediaeval church."[102] In both instances, however, Berle used the Church as a marker for concentrated power. As the political state became an economic state, it competed for influence with corporations. As corporations consolidated power, they became, like the Church, law-making and law-applying entities that affected a wide array of individuals

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95. Jonathan Levy, *From Fiscal Triangle to Passing Through: Rise of the Nonprofit Corporation*, *in* CORPORATIONS AND AMERICAN DEMOCRACY 213, 213 (Naomi R. Lamoureux & William J. Novak eds., 2017).

96. *Id.* at 215.

97. *Id.* at 216.

98. *Id.* at 229. From 1940 to 1970, with the liberalization of granting nonprofit charters, the number of nonprofits rose from 12,500 to 309,000. *Id.* The examples Berle gives of corporate social enterprise—Princeton University, the United Negro College Fund, American College in Beirut, and artistic enterprises—track these categories. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 6, at 175–76.

99. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 6, at 169 ("[T]he state has authorized corporations to withhold from their shareholders a portion of their profits, channeling it to schools, colleges, hospitals, research, and other good causes.").

100. *Id.* at 168 (describing donations to "non-governmental philanthropic and educational institutions which have played so stately a role in the development of twentieth-century America.").

101. Adolf A. Berle, Jr., *The Organization of the Law of Corporation Finance*, 9 TENN. L. REV. 125, 144–45 (1931) ("The corporation struggles today with the government as in older days political governments struggled with the Catholic Church.").

102. BERLE & MEANS, *supra* note 16, at 352; *see also* Schwarz, *supra* note 45, at 56 ("The corporations were becoming the absolutists the church had been centuries before.").

and weakened the political state. Although Berle claimed to admire the Catholic Church of the Middle Ages,[103] his writing was constant in assigning the Church the role of totalitarian. He would not have found analogies between church and business to support corporate conscience.

By contrast to the real entity view, the associational view of corporate conscience likely would have held some appeal to Berle. In *Corporate Capitalism and the 'City of God*,*'* Berle repeatedly discussed the individual people whose decisions structure the firms' engagement on issues of moral significance.[104] By his lights, the associational view would carry the advantage of recognizing these individuals.

But he would have thought that it too fell far short of describing the modern corporation. Scholars like Berle gravitated toward a pragmatic view of the firm, focused on its social facts and purposes rather than its ontology.[105] Early in Berle's career, John Dewey's 1926 article had essentially put an end to the fever-pitch debate over corporate personality.[106] And in 1932, Berle and Means described large corporations as "the organized activity of vast bodies of individuals, workers, consumers and suppliers of capital under the leadership of the dictators of industry, 'control.'"[107] Corporations, in their view, were no mere association of people or arrangement of private contract, but comparable to a nation state.[108]

Moreover, Berle would have been flummoxed to find that contemporary accounts of corporate conscience locate conscientious beliefs in shareholders. Berle saw little involvement of the shareholder in firm decisions.[109] The publicly traded corporations that were the focus of his lifetime of work involved large numbers of distant shareholders and granted managers power over shareholder money with little accountability. His early work with Gardiner Means is best known for showing the degree to which shareholder investments had been separated

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103. *See* Schwarz, *supra* note 45, at 206 (explaining that Berle was quite taken with the Middle Ages, applauding them for their "social harmony, discipline, and spiritualism, all of which were enhanced by a strong Church").

104. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 6, at 186–87.

105. Levy, *supra* note 95, at 223 ("What replaced natural theories of corporate personality in the United States was a more pragmatic, less philosophical and abstract notion of corporate personhood.").

106. John Dewey, *The Historical Background of Corporate Legal Personality*, 35 YALE L.J. 655, 672–73 (1926). *See* Brian R. Cheffins, *The Trajectory of (Corporate Law) Scholarship*, 63 CAMBRIDGE L.J. 456, 479 (2004) ("By 1930 the dialogue had largely run its course, with the general consensus being that a corporation was an important legal form which was more than a mere contractual aggregation but which could not truly be equated with a natural person.").

107. BERLE & MEANS, *supra* note 16, at 349.

108. Tsuk, *supra* note 55, at 193–94.

109. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 6, at 39.

from the professionalized management of industrial firms.[110] For Berle, this separation of ownership and control meant that the "capitalist" had all but vanished from the picture of capitalism—his capital remained, but he was "no longer a decisive force."[111]

Berle saw shareholders as apathetic, passive, and detached.[112] In later work, he anticipated what is now known as the "separation of ownership from ownership," which refers to the rise of institutional investors as intermediaries between ordinary investors and public companies.[113] With this shift, ordinary investors were "completely separated in fact and almost equally separated in law from any connection with the corporation."[114] In their place were "an unrecognized group of professional administrators distributing the fruits of the American industrial system, directing its present activities, and selecting the path of its future growth."[115]

As a result, Berle would be unconvinced that corporate rights—including religious liberty rights—traced to individual shareholders. We think it likely that he would have sided with the group of corporate law professors who argue that shareholders and corporations are fundamentally separate entities for purposes of religious exercise.[116] For Berle, the attenuated connection of shareholder to corporation signaled the lack of spiritual and expressive value in stock ownership. Whereas the owner of a horse—Berle and Means wrote—was responsible for his horse, the owner of shares of stock had no such responsibility toward the firm. "[T]he spiritual values that formerly went with ownership" no longer existed, they concluded.[117] Ownership of shares did "not express an individual."[118]

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110. Tsuk, *supra* note 55, at 180 ("[I]n the collective imagination of corporate law scholars, *The Modern Corporation and Private Property*, which remains one of the most cited works in recent decades, is remembered not as the book that called attention to corporate power, but as the book that called attention to the separation of ownership from control in large public corporations.").

111. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 6, at 39.

112. Adolph A. Berle, *Property, Production and Revolution*, 65 COLUM. L. REV. 1, 13 (1965).

113. *See* Leo E. Strine, Jr., *Toward Common Sense and Common Ground—Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 6–7 (2007) (discussing the "separation of ownership from ownership").

114. BERLE, POWER WITHOUT PROPERTY, *supra* note 8, at 18.

115. *Id.*

116. *See* Brief for Corporate and Criminal Law Professors as Amici Curiae Supporting Petitioners, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (Nos. 13-354 and 13-356); Brief for Corporate Law Professors as Amici Curiae Supporting Respondents, Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

117. BERLE & MEANS, *supra* note 16, at 66, 68.

118. Jerome Christensen, *Neo-Corporate Star-Making: The Band Wagon and the Charismatic Margin*, 20 L. & LIT. 213, 215 (2008) (quoting Adolf A. Berle, Jr., *in* WILBUR HUGH FERRY, THE ECONOMY UNDER LAW (1960)).

To the extent corporate conscience derived from any participant in the firm, Berle would have insisted that moral values flowed through corporate managers. After all, it was the managers who were in charge of making day-to-day decisions, and it would be their sense of right and wrong that would channel or constrain corporate behavior.[119] In this way, Berle reflects the "heroic managerialism" that came to prominence over the course of his career.[120] As Lynn Stout has explored, at mid-century managers sought to act as faithful servants to their employees, customers, and nation as well as their investors.[121] Corporate executives and theorists of the corporation carried Berle's managerialist views into the 1970s.[122]

A contemporary proponent of corporate conscience might concede this point with regard to public companies, but nonetheless argue that closely held corporations advance shareholder conscience. These firms by definition involve a smaller number of investors and far less passive investment. Moreover, in these businesses, the distinction between shareholder ownership and managerial control tends to collapse. The controlling shareholders of Hobby Lobby, for example, are also officers and directors of the firm.[123] As a result, Berle's preoccupation with shareholder separation, and the corresponding attenuation of their moral relationship with the firm, might diminish in the context of close corporations.

Nevertheless, the individualized nature of *Hobby Lobby*'s corporate conscience represents a stark contrast with the public orientation of Berle's corporate conscience. The source of conscientious objection in that case—like the many others that were litigated alongside it—were the personal identities of the controlling shareholders. On the question of whose

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119. *Id.*

120. Gregory Mark, *The Corporate Economy: Ideologies of Regulation and Antitrust, 1920-2000, in* 3 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 613, 635–44 (Michael Grossberg & Christopher Tomlins eds., 2008). *See also* Alfred D. Chandler, *The United States: Seedbed of Managerial Capitalism*, *in* MANAGERIAL HIERARCHIES: COMPARATIVE PERSPECTIVES ON THE RISE OF THE MODERN INDUSTRIAL ENTERPRISE 35 (Alfred D. Chandler & Herman Daems eds., 1980) (showing that by the 1950s, "managerial capitalism had triumphed"); A. A. Berle, Jr., *Foreword*, *in* THE CORPORATION IN MODERN SOCIETY ix, xiii (Edward S. Mason ed., 1959) ("The principles and practice of big business in 1959 seem to me considerably more responsible, more perceptive, and (in plain English) more honest than they were in 1929.").

121. Lynn A. Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)*, 36 SEATTLE U. L. REV. 1169, 1171 (2013).

122. *See* Brian R. Cheffins, *The Team Production Model as a Paradigm*, 38 SEATTLE U. L. REV. 397, 403–05 (2015) (summarizing executive views); Margaret M. Blair, *Boards of Directors as Mediating Hierarchs*, 38 SEATTLE U. L. REV. 297, 315–16 (2015); *see generally* Harwell Wells, *"Corporation Law Is Dead": Heroic Managerialism, Legal Change, and the Puzzle of Corporation Law at the Height of the American Century*, 15 U. PA. J. BUS. L. 305 (2013) (exploring the ubiquity of managerial views and its effect on corporate law theory and practice).

123. On the law of close corporations, see generally DOUGLAS K. MOLL & ROBERT A. RAGAZZO, CLOSELY HELD CORPORATIONS (2019).

conscience mattered, the Court focused exclusively on the religious beliefs of the Green family.[124] And their objections to facilitating contraceptive coverage for their employees were not made in the name of "public consensus"—indeed, the right they claimed was to be exempt from the public's judgment that employees were entitled to cost-free coverage of such preventive healthcare services.[125]

Berle also seems to have held a dim view of controlling shareholders—a common feature of close corporations. When ownership was dispersed in public companies, he thought it more likely that corporate managers would "pay greater attention to the unwritten, uncrystallized, but very real, standards set up by the public consensus than do the holders of undisputed control."[126] By contrast, controlling shareholders were apt to be consumed by their own interests and plans.[127] They would—and could—overlook the opinion of the broader community. For Berle, this was no conscience at all.

In sum, Berle's corporate conscience assumed an external orientation. The inchoate rules of behavior came from the broader public and told corporate managers something about how they must behave toward others. They had to look beyond their interests and those of their shareholders to serve the wider society.

Today's theories of corporate conscience instead take an inward turn. They either look to the corporation's own (sometimes non-public) governing documents and arrangements or seek to advance the individual interests of controlling shareholders. A dramatically narrower set of corporate interests prevails over the public.

III. THE QUESTION OF CORPORATE RELIGIOUS EXEMPTIONS

Despite his obvious sympathies for bringing ethical, moral, and religious values into corporate governance, Berle would not have embraced religious exemptions for corporations. To begin with, he would have been generally skeptical of exemptions that affirm or augment corporate power over individual freedom. As Section A describes, for Berle, escalating corporate power called for enhanced duties to the public, not increased autonomy for corporations to act as they pleased. The campaign for corporate religious liberty, which Section B briefly sketches, would have caught him by surprise. He understood the law to be trending toward recognizing constitutional responsibilities, not rights, for large corporations.

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124. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 720–26 (2014).

125. *See id.* at 704.

126. BERLE, POWER WITHOUT PROPERTY, *supra* note 8, at 109–10.

127. *Id.*

So how might Berle have approached the economic and legal arguments for exemption? Section C argues that his lifelong preoccupation with power would have led him to worry about exemptions that strengthen corporations at the expense of vulnerable constituencies. He would have been attentive to the dynamics of corporate power in markets for labor, products and services, and beyond.

A. Berle's Preoccupation with Power

A constant throughout Berle's work was a preoccupation with corporate power. Concentration of industrial control in the hands of corporate managers raised persistent worries for a democratic political economy. Managers could leverage that control to dominate vulnerable members of society, including employees, customers, and the communities in which those businesses operated. They wielded particularly totalizing authority in internal relations over employees. Berle was convinced that this corporate power had to be tamed, whether it was through the force of public consensus—his corporate conscience—or the force of the law.[128]

So what was the nature of this corporate power? Berle offered a strikingly simple definition: Power "is capacity to induce or require action by others in certain areas of activity."[129] Corporate power could manifest in two distinct ways. First, corporate managers had authority over those within the firm—that is, over corporate employees.[130] Second, by virtue of their size, wealth, technological capacities, and lack of market competition, corporations held significant sway over the broader society and might overtake the democratic state.[131] Influenced by John Kenneth Galbraith's work, Berle thought that both forms of corporate power posed a threat to the freedom and wellbeing of ordinary individuals that called for accountability.[132]

To maintain the legitimacy of the modern corporate system, states would need to protect various constituencies from these threats of corporate abuse.[133] Gone was Adam Smith's world of small entrepreneurs competing in highly competitive markets. In its place was a corporate world populated by small groups of men with effective control of the

128. *See* BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 6, at 61–115; *see also* Elizabeth Sepper & James D. Nelson, *The Religious Conversion of Corporate Social Responsibility*, 71 EMORY L.J. 217 (2021).

129. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 6, at 32.

130. *See id.*

131. *See* SCOTT R. BOWMAN, THE MODERN CORPORATION AND AMERICAN POLITICAL THOUGHT: LAW, POWER, AND IDEOLOGY 207 (1996).

132. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 6, at 25, 47.

133. *See* Sepper & Nelson, *supra* note 128.

largest companies in the economy.[134] Rather than forces of production moving in response to fluctuating prices, Berle saw corporate managers—or what Alfred Chandler would call "visible hands"—running the show.[135] The old methods that regulated small businesses in competitive markets would need to be reconsidered.[136] On Berle's view, the state could serve as an ally of individuals seeking to hold back coercive corporate authority.

Once the state took the lead in protecting vulnerable constituencies, Berle thought that corporations could follow in its footsteps. Through democratic lawmaking, the state could identify the public priorities that corporations were to advance. And in turn corporations would cooperate with the state and direct their power toward not only economic wellbeing but also wider social and political goals.[137]

Berle thus did not resist all uses of corporate power. From his experiences during the Great Depression and its aftermath, Berle knew full well the terrors that accompanied an uncoordinated market. Big corporations, in his view, were here to stay—and society needed to make the best use of them. His approach deemed corporate power permissible so long as it was deployed in service of economic coordination.[138] But use of corporate power beyond its legitimate scope—for example, to dominate individual personality or to engage in invidious discrimination—was beyond the pale.[139]

As one important check on illegitimate uses of power, Berle argued for legal and quasi-legal limitations on corporations. In his view, just as it was necessary to limit the arbitrary power of states over their citizens, it was also wise—at least in some circumstances—to limit the arbitrary power of corporations over their constituencies.[140] In *The 20th Century Capitalist Revolution*, Berle argued, for example, that corporate employees were entitled to adequate justifications for any employment "interruption," and that those justifications had to appeal to a "legitimate public purpose."[141] In doing so, he challenged the social foundations of at-will employment, claiming that the economic conditions for such a

134. *See* Thomas K. McCraw, Review, *The Modern Corporation and Private Property by Adolf A. Berle, Jr. & Gardiner C. Means*, 18 REVS. IN AM. HISTORY 578, 590 (1990).

135. *See* ALFRED CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977).

136. *See* McCraw, *supra* note 134, at 582.

137. *See* ADOLF A. BERLE, JR., THE AMERICAN ECONOMIC REPUBLIC 115–16 (1963).

138. *See* BERLE, POWER WITHOUT PROPERTY, *supra* note 8, at 98–110 (discussing the concept of "legitimacy").

139. *See id.* at 98–110; BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 6, at 61–115.

140. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 6, at 81–86.

141. *Id.* at 100.

doctrine had long passed.[142] Through growth and concentration of industry, corporations had "invaded the political sphere," taking on the role of "quasi-governing agency" in their employment relationships.[143]

In earlier work as well, Berle contended that the dependence of individuals on corporations had to be paired with the ability to assert certain rights against them. Those rights included not only due process in employment, but also "equal protection of the laws" and a host of other constitutional constraints.[144] Like some of his scholarly contemporaries, Berle thought he saw a "quiet translation of constitutional law" to protect "individuals in their dealings with private units wielding great economic power."[145] He even cited with approval the Supreme Court's 1946 decision in *Marsh v. Alabama*, which he thought came within a "biscuit-toss" of directly applying constitutional due process requirements to private corporations.[146]

At the time he wrote, Berle likely could not have imagined corporate claims for religious liberty. To be sure, the history of corporate constitutional rights goes back to the nineteenth century.[147] But in 1954, the types of corporate rights that were recognized by the Supreme Court bore a close relation to corporate property.[148] Two decades would pass before the Supreme Court embraced corporate liberty rights, including the right of free speech.[149]

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142. *Id.* at 103.

143. *Id.* at 105.

144. *See* Adolf A. Berle, *Constitutional Limits on Corporate Activity: Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 942–43 (1952) [hereinafter Berle, *Constitutional Limits*]; Adolf A. Berle, *The Developing Law of Corporate Concentration*, 19 U. CHI. L. REV. 639, 643 (1952) (describing the firm as "an arm of the state, held to certain of the limitations imposed on the state itself by the Bill of Rights requiring the concentrate to respect certain individual rights and to assure a measure of equal protection of the laws within the scope of its power").

145. Berle, *Constitutional Limits*, *supra* note 144, at 942.

146. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION, *supra* note 6, at 105. For contemporary work arguing that *Marsh v. Alabama* should be revived to contain the authority of social media conglomerates, see Genevieve Lakier & Nelson Tebbe, *After the "Great Deplatforming": Reconsidering the Shape of the First Amendment*, LPE BLOG (Mar. 1, 2021), https://lpeproject.org/blog/after-the-great-deplatforming-reconsidering-the-shape-of-the-first-amendment/ [https://perma.cc/QKK4-ZR6U].

147. *See generally* ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018); Margaret M. Blair & Elizabeth Pollman, *The Supreme Court's View of Corporate Rights: Two Centuries of Evolution and Controversy in* CORPORATIONS AND AMERICAN DEMOCRACY 245 (Naomi R. Lamoreaux & William J. Novak eds., 2017).

148. *See* Ruth H. Bloch & Naomi R. Lamoureux, *Corporations and the Fourteenth Amendment*, *in* CORPORATIONS AND AMERICAN DEMOCRACY 286 (Naomi R. Lamoureux & William J. Novak eds., 2017).

149. Berle died in 1971, five years before the seeds of modern corporate rights were planted. Albin Krebs, *Adolf A. Berle Jr. Dies at Age of 76*, N.Y. TIMES (Feb. 19, 1971), https://www.nytimes.com/1971/02/19/archives/adolf-a-berle-jr-dies-at-age-of-76-lawyer-economist-

Nor was there a well-developed mandatory religious exemption regime in U.S. constitutional law.[150] No doubt Berle was familiar with permissive religious exemptions—legislative accommodations for churches and religious institutions were common at the time. Most notably, Title VII of the landmark Civil Rights Act of 1964 allowed religious employers to favor their co-religionists in employment decisions.[151] But he would have seen these efforts as particular to the social function of religious non-profit organizations and largely outside the realm of constitutional adjudication. Exemptions for business corporations on the basis of religious liberty were virtually nonexistent. Like the Supreme Court, Berle would likely have thought "patently frivolous" the argument that for-profit businesses could assert religious objections to the federal civil rights act.[152]

B. Contemporary Claims for Corporate Religious Exemption

Given the time in which he studied corporations, Berle simply could not have foreseen the twenty-first century campaign for corporate religious exemptions. Although in the past business corporations had claimed free exercise rights on rare occasion,[153] beginning in 2013 hundreds of corporations filed suit in response to the requirement that their employees' health insurance coverage include contraceptives. Because the law only applied to large employers with fifty or more full-time employees, the businesses were not mom-and-pop shops. Instead, Hobby Lobby, a craft chain with $3 billion in annual revenue, became the standard bearer and named plaintiff when the issue reached the Supreme Court.[154]

Proponents of these corporate religious exemptions leaned heavily on a libertarian vision. In a line of argument sounding in the Lochnerian premises of a century ago, courts, litigants, and scholars described employers and employees as equals in bargaining over the conditions of employment.[155] The state, they claimed, burdened religious exercise by seeking to change the terms of that bargain and to bar the business from contracting consistent with its faith. Whereas the market preserved liberty

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liberal-leader.html [https://perma.cc/MCT9-VSA2]. *See, e.g.*, Virginia State Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

150. *Sherbert v. Verner*, considered the origin of the exemption regime in place before *Employment Division v. Smith*, was decided in 1963. 374 U.S. 398 (1963).

151. 42 U.S.C. § 2000e–1 (a).

152. *See* Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 403 n.5 (1968).

153. *See, e.g.*, *infra* cases cited in n.157.

154. Scott Wilson, *What You Need to Know About the Hobby Lobby Billionaires*, ABC NEWS (June 30, 2014), https://abcnews.go.com/blogs/politics/2014/06/what-you-need-to-know-about-the-hobby-lobby-billionaires [https://perma.cc/AGS3-JHXE].

155. *See* Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1457 (2015).

and served as the natural baseline, business regulation instead infringed on free exercise and sought to redistribute—unjustly in the claimants' view—from the market. The government, exemption proponents said, need not take from business to give to employees or customers. It could achieve its goals by letting the market work, whether to facilitate employees' access to contraceptives or same-sex couples' purchases of wedding cakes. On this view, economic activity is determined by the voluntary actions of individuals, and competition among private businesses ensures that these private relationships do not become coercive.[156]

Before the contraceptive mandate litigation, employers—religiously affiliated or not—lost these suits for judicial religious exemptions from employment and consumer protection laws under both the First Amendment and the Religious Freedom Restoration Act.[157] Courts rebuffed infrequent claims from for-profit corporations.[158]

In *Burwell v. Hobby Lobby*, however, the Supreme Court moved to grant business corporations a right to free exercise.[159] It first found that for-profit corporations were "persons" under RFRA and were therefore eligible for religious exemptions under the statute.[160] It then held that the contraceptive mandate substantially burdened the companies' sincere exercise of religion and did so in a manner that was not narrowly tailored to achieve a compelling government interest.[161] Having found that the mandate failed strict scrutiny as applied to certain closely held companies, the Court concluded that the law must cede to their religious liberty claims.[162]

Four years later, a retail business also successfully advanced a free exercise claim—this time under the Constitution—against a state law requiring nondiscrimination toward patrons. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, a bakery challenged the application of Colorado's Anti-Discrimination Act, which prohibited discrimination on the basis of sexual orientation, arguing that it forced the business to

156. *See id.*

157 *See, e.g.*, United States v. Lee, 455 U.S. 252 (1982) (social security); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985) (federal wage requirements); Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378 (1990) (state sales and use taxes); United States v. Indianapolis Baptist Temple, 224 F.3d 627 (7th Cir. 2000) (unemployment insurance); Victory Baptist Temple, Inc. v. Indus. Comm'n of Ohio, 442 N.E.2d 819 (Ohio Ct. App. 1982) (workers' compensation); St. John's Lutheran Church v. State Comp. Ins. Fund, 830 P.2d 1271 (Mont. 1992) (workers' compensation).

158. *See, e.g.*, Newman v. Piggie Park Enters., Inc., 390 U.S. 400 (1968); State by McClure v. Sports & Health Club, Inc., 370 N.W.2d 844 (Minn. 1985); E.E.O.C. v. Townley Eng'g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988).

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

160. *See id.* at 705–09.

161. *See id.* at 719–35.

162. *See id.* at 736.

participate in same-sex weddings in violation of its owner's sincere religious beliefs. In a 7-2 decision, the Court ruled for the bakery, finding that the Colorado Civil Rights Commission violated its right to free exercise under the First Amendment.[163]

In the wake of *Hobby Lobby* and *Masterpiece Cakeshop*, business corporations have mounted constitutional arguments against several employment and consumer protection laws. Wedding vendors have scored recent successes, winning exemptions from public accommodations laws that might require them to serve customers equally.[164] Some employers now argue that Title VII's protections against discrimination should not cover their employees.[165] Others contend that they must be exempted from covering a variety of health services to which they object.[166]

Across these claims, corporations advance a political economy that describes the state as a growing threat to private moral and market ordering. They paint the Affordable Care Act, for example, as a product of extraordinary governmental overreach.[167] Long-standing public accommodations antidiscrimination laws newly intrude upon business liberty. Democratic decision-making, on this account, is more likely to overreach into associational life than to protect those within it.[168] Corporate power, from this perspective, serves as a welcome constraint on the state. It ensures alternative spheres of authority and existence that can protect plural communities from the dangers of state-imposed orthodoxy.[169]

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163. *See* Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n, 138 S. Ct. 1719 (2018).

164. *See, e.g.*, Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019); Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 895 (Ariz. 2019).

165. Harris Funeral Homes was successful on its RFRA claim in the district court, see EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 841–42 (E.D. Mich. 2016), but that decision was reversed by the Sixth Circuit, see 884 F.3d 560 (6th Cir. 2018), and the company did not seek review of that RFRA holding in its certiorari petition. *See Bostock*, 140 S. Ct. at 1754 ("Harris Funeral Homes did unsuccessfully pursue a RFRA-based defense in the proceedings below. In its certiorari petition, however, the company declined to seek review of that adverse decision, and no other religious liberty claim is now before us.").

166. Order for Defendants' Motion to Dismiss at 3, Kelley v. Azar, No. 4:20-cv-00283-O, 2021 WL 4025804 (N.D. Tex. Feb. 25, 2021) (involving employers and individual health insurance purchasers who object to covering preventive services including PrEP drugs); Franciscan All., Inc. v. Azar, 414 F. Supp. 3d 928 (N.D. Tex. 2019) (concluding that healthcare providers and insurers must be exempted from sex nondiscrimination rule related to providing gender affirming care to transgender people).

167. *See* Elizabeth Sepper, *Reports of Accommodation's Death Have Been Greatly Exaggerated*, 128 HARV. L. REV. F. 24, 28–29 (2014) (describing economic libertarian ethos of the religious liberty claims).

168. *See* Robin West, *Freedom of the Church and Our Endangered Civil Rights: Exiting the Social Contract*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 399 (Micah Schwartzman, Chad Flanders & Zoe Robinson eds., 2016) (summarizing corporate religion claims).

169. *See* Sepper & Nelson, *supra* note 128.

C. Corporate Religious Exercise Structured by Corporate Power

How might Berle evaluate today's claims of corporate religious exemption? Here, we argue that his approach would have been built around the analytical category of power and its effects on individual personality. Drawing on his deeper normative commitments and political economy, Berle would have been attracted to the idea that facts about economic power should be central in analyzing claims for corporate religious exemptions.

Berle's views on corporate exemption claims, then, would have likely resembled the Supreme Court's pre-*Hobby Lobby* analysis of religious exemptions in commerce. In employment in particular, the Court had taken a realist view of power imbalances between employer and employee and emphasized the risk of abuse.[170] In earlier decisions, it saw a business's entry into the marketplace as a choice. As the Supreme Court said in *United States v. Lee*, "[w]hen followers of a particular sect enter into commercial activity *as a matter of choice*, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity."[171] Other precedent instructed that the regulation of commerce did not burden free exercise in a constitutionally significant way insofar as it simply made "the practice of … religious beliefs more expensive."[172] From this point of view, business religious exemptions were not neutral, but rather required a subsidy from the state (and/or third parties) to objectors.

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170. Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 292, 300–03 (1985) (coming to this conclusion despite undisputed evidence that "associates" saw their work as a "ministry").

171. United States v. Lee, 455 U.S. 252, 261 (1982) (emphasis added); *see also* Donovan v. Tony & Susan Alamo Found., 722 F.2d 397, 399 (8th Cir. 1983), *aff'd sub nom.* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 294 (1985) ("By entering the economic arena and trafficking in the marketplace, the foundation has subjected itself to the standards Congress has prescribed for the benefit of employees."); Swanner v. Anchorage Equal Rts. Comm'n, 874 P.2d 274, 283 (Ak. 1994) (noting that "the economic burden, or 'Hobson's choice,' of which [the landlord] complains, is caused by his choice to enter into a commercial activity that is regulated by anti-discrimination laws."); Smith v. Fair Emp't & Hous. Com., 12 Cal. 4th 1143, 1170 (1996) (landlord objecting to antidiscrimination laws can "avoid the conflict, without threatening her livelihood, by selling her units and redeploying the capital in other investments").

172. Braunfeld v. Brown, 366 U.S. 599, 605–07 (1961) ("[I]t cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions."); *see also* Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 391 (1990) ("[T]o the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant."); Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 694–700 (1989) (disallowing tax exemption for religious "auditing" sessions reduced objectors' income, but did not burden religious activity).

Likewise, Berle would have been unimpressed by blanket claims that competitive markets will resolve the harms generated by exempting businesses. He was well-versed in the ideas of laissez-faire economists.[173] And near the end of his career, he feared that the reemergence of this style of thinking would lead society to forget the hard-earned lessons of the Depression and the New Deal.[174] From close study of corporations and capital markets over decades, Berle knew that markets did not function as the neoclassical economists insisted. Market concentration and corporate power were simple *facts* about the world—facts that anybody concerned with the interests of real people could not ignore.

To the degree that corporate religious exemption claims rest on the idea of the free market as a natural and neutral baseline, Berle would have soundly rejected such claims.[175] Berle thought that we should not, and could not, divorce economic study of business from deliberation about moral values. The purported value neutrality of neoclassical economics was to him a sham that masked its own ideology.[176] Removing the neoclassical mask, however, need not be frightening—it could be empowering. Berle wrote, "If we have lost the nineteenth-century comfort of thinking that the voice of the open market is regnant and is the voice of God, we have at least gained the twentieth-century comfort of believing that inadequacies and inequities can be remedied, and that we know where to go to get relief."[177]

Now, given his focus on concentration, perhaps Berle would have been more supportive of the contraceptive challengers because they were closely held, rather than public corporations. Berle spent the bulk of his time writing about public companies. Because of their size, public corporations were assumed to have power to impact both people inside the firm and broader society, power that called for restraining. These public companies might seem a far cry from the closely held family businesses involved in the contraceptive mandate litigation.

Nevertheless, Berle was not oblivious to power relationships in closely held corporations. Family businesses, for example, present their own issues of domination. As Benjamin Means has noted, the hierarchical

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173. *See* Adolf A. Berle, *Modern Functions of the Corporate System*, 62 COLUM. L. REV. 433 (1962) (responding to Henry Manne, *The "Higher Criticism" of the Modern Corporation*, 62 COLUM. L. REV. 399 (1962)).

174. *See id.* at 433 ("Professor Manne and his contemporaries did not live through World War I and the decade of the twenties, and the crash of 1929, culminating in the breakdown of the American economic system in 1933. They have not experienced a corporate and financial world without the safeguards of the Securities and Exchange Commission . . . .").

175. *See* BERLE, POWER WITHOUT PROPERTY, *supra* note 8, at 85–86 (rejecting classical assumption that markets are natural and always beneficial).

176. *See id.* at 21.

177. *Id.* at 87.

norms of family are often reproduced within the corporate form.[178] Those who traditionally lack power within the family often become minority shareholders, without the power to replace company managers or to sell their shares for fair value.

Moreover, Berle likely would have rejected any corporate claims to exemption from worker protections. These claims tend to adopt the assumption that corporate employment is voluntary, that workers consent to the terms of their compensation, and that they are free to leave if they don't like their bargain. But Berle knew that internal authority relations—that is, those that exist within firms—can be at least as coercive as external relationships found in the wider marketplace. Indeed, he thought that the notions of hierarchy and authority embedded in employment contracts posed distinctive threats to employee personality and wellbeing. And so, he would have seen little appeal in exempting employers that refuse to contribute to social security, pay fair wages, or cover employee health needs to advance their own religious beliefs. The power they wielded over their workers required taming.

By contrast, Berle's preoccupation with power and concentrated markets suggests that he might have favored small retail stores like Masterpiece. Their objections might be distinguished from workplace-related objections on two grounds. They tend to involve truly small businesses, sometimes individual proprietorships. And they do not involve the internal relation of employer to employee, but rather the external relation of retailer to customer. Both of these distinctions would have carried significance for Berle.

Although Berle was not smitten with small businesses, a distinction between small, private businesses and large, public corporations runs throughout his work. In *The American Economic Republic*, he wrote, most economic activity is carried out by "nonstatist enterprise, commonly called 'private.'"[179] But Berle doubted that the giant corporations of his age could legitimately be thought private. Their numbers of shareholders, consumers, and employees transformed them into "institutions of public account and responsibility."[180] By contrast, he wrote, "[a]n individually owned retail shop or farm or small plant is undoubtedly 'private.'"[181]

As always, power was the unifying concept for the distinction. In Berle's view, businesses drew much of their power from economic

178. Benjamin Means, *Nonmarket Values in Family Businesses*, 54 WM. & MARY L. REV. 1185, 1209–10 (2013) ("To the extent the social roles are incompatible, family business has a built-in conflict.").

179. BERLE, *supra* note 137, at 115.

180. *Id.* at 116.

181. *Id.* at 115.

concentration.[182] From his perspective, small businesses usually did not "attain a power-position capable of invading personality."[183] Thus, he opined, "[t]he corporation operating the single store would not have power sufficient to affect seriously the life of any individual. On the other hand, if substantially all these stores were controlled by the same corporation, the power would be obvious."[184]

This analysis suggests that Berle might have been tempted by the Amicus Brief for Law and Economics Scholars submitted in *Masterpiece Cakeshop*.[185] The brief acknowledged that in concentrated markets with coordinated discrimination against consumers, the law may need to police against discrimination. But the brief also argued that in the absence of consolidation and coordination, market forces would ensure that same-sex couples had full access to goods and services to celebrate their marriages notwithstanding religious objectors. Under this approach, a bakery in rural Alabama might have to serve a same-sex couple, while those in the thriving lower Manhattan market would be free to discriminate. Given competition and the absence of employer-employee authority relations, Berle too might have been less concerned about these instances of discrimination.

Fundamentally, however, Berle's view of the political economy would have led him to part ways with proponents of exemptions for corporations of any size. As we have explored in other writing, Berle was centrally committed to the primacy of state leadership in economic matters.[186] By following public consensus, business corporations might escape direct governmental regulation. But it was for the political state to decide. A real threat of state regulation was necessary to right the power imbalances between corporation and community, employer and employee. Corporate power—not democracy—was the hovering threat to freedom inside and out of associations.

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182. *See* Berle, *Constitutional Limits*, *supra* note 144, at, 952 ("If there are fifty stores in the vicinity from which an individual can satisfy his needs, discriminatory practice by any one of them has little or no effect on the individual.").

183. *Id.* at 946. For a modern take, see ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 1–36 (2017) (arguing that market freedom used to function in the interests of liberty and equality, but industrialization changed the economic world, such that economic power became concentrated, and the principles of a "free market" became oppressive).

184. Berle, *Constitutional Limits*, *supra* note 144, at 953. For an exploration of the ways in which public accommodations—including a single retail store—exercise power over customers, see Elizabeth Sepper, *The 'Unique Evils' of Public Accommodations Discrimination*, 2020 U. CHI. LEGAL F. 271 (2020).

185. *See* Brief for Law and Economics Scholars as Amici Curiae Supporting Petitioners, Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

186. Sepper & Nelson, *supra* note 128.

And so, while Berle likely would have treated the regulation of small retailers as less pressing, he would not have wanted courts to inhibit the state from advancing public consensus on equality. Property devoted to commercial or productive—as opposed to personal—use had rightly, in Berle's view, been subject to state and federal statutes requiring nondiscriminatory service.[187] These statutes, he explained, reflected "the political ideal invested in the Constitution" that individual "personality was not to be invaded."[188] He cited Title II of the Civil Rights Act of 1964 and state public accommodations laws as examples of the wider realm of appropriate regulation.[189] Unlike the Law and Economics Scholars in *Masterpiece*, Berle saw discriminatory denial of service as an affront to personality and equal protection.[190] The state had to oversee businesses open to the public, especially in aggregate, lest people be left "at the mercy of blind open-market results."[191]

Berle's account thus assumed a functional political process that determined the ultimate result for corporate regulation. His vision of industrial democracy did not make room for judges second-guessing legislative compromises over business regulation. As part of these compromises, legislatures might choose to exempt small retailers at some cost to would-be consumers. But where authority relations existed as between employers and employees, corporate power had to be checked. Corporate First Amendment rights throw this vision into disarray.

CONCLUSION

Contemporary debates over corporate religious exemptions seem locked into a binary conception of corporate conscience. It is either a product of a particular organization's mission and structure, or else it springs from the deep personal commitments of its individual participants. Each view foregrounds private moral ordering and submerges public obligations.

Adolf Berle's corporate conscience provides a third way. His enduring insight is that corporate managers make decisions that are political to their core, even if dressed up in the technical language of financial economics. On his view, corporate conscience put the public's

187. Berle, *supra* note 112, at 9 (noting that legislation represented "an evolving social concept of what American civilization should look like" and rightly limited management discretion).

188. *Id.* at 10–11.

189. *Id.* at 12.

190. Berle, *Constitutional Limits*, *supra* note 144, at 951–52.

191. BERLE, AMERICAN ECONOMIC REPUBLIC, *supra* note 137, at 116; *see also* BERLE, POWER WITHOUT PROPERTY, *supra* note 8, at 13 (noting bad behavior by small businesses and that "it was absurd for liberals to swallow the fiction that all virtue lay in smallness, and that all vice inhered in size").

voice in the C-suite, with decision-makers who might otherwise be insulated from its expectations and demands subject to a social standard of public consensus.

Various social developments since Berle's time call into question the very idea of a public consensus—especially one coalescing, as he suggested, around a thin set of mainline Protestant views. Today, religious pluralism has exploded in the United States, including the rise of the "nones," who identify as atheist, agnostic, or otherwise religiously unaffiliated.[192] At the same time, political polarization among the American electorate has increased dramatically. The social organizations that once gave voice to low- and middle-income populations have all but vanished.[193] And the "great exception" of postwar prosperity no longer holds in the extreme inequality of our new Gilded Age.[194]

Nevertheless, if we see corporate conscience as Berle did, as a social standard against which corporations can be measured, we might begin to identify mechanisms to insert the public into the soul of the corporation.[195] As Berle wrote, "[i]n creating, maintaining, and expanding [public] consensus all of us have a part. It is a sort of continuing election in which there are no nonvoters."[196] Although the passage of time may alter the "public consensus" in fundamental ways, the present generation remains free to reconstitute and shape our economic system.[197] If public consensus forms—perhaps around wildly popular initiatives like economic stimulus, worker relief, and corporate transparency—then Berle's corporate conscience may still hold insights for corporate law, regulatory, and constitutional reforms. Likewise, we might begin to transform debates

192. Pew Rsch. Ctr., *America's Changing Religious Landscape* (May 12, 2015), https://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/ [https://perma.cc/6G8B-6DV6].

193. *See* Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546 (2021).

194. Historian Jefferson Cowie writes, "The postwar era, the period of the 'great exception' in action, was an extraordinarily good time to be a worker." JEFFERSON COWIE, THE GREAT EXCEPTION: THE NEW DEAL AND THE LIMITS OF AMERICAN POLITICS 153 (2017). Berle saw the political economy as trending in the direction of giving all Americans enough wealth "by which the opportunity to develop individuality becomes fully actualized." Berle, *supra* note 112, at 17.

195. *See, e.g.*, Danielle D'Onfro, *Corporate Stewardship*, 44 J. CORP. L. 439, 443 (2019) (proposing that corporations have stewards who bear oversight and reporting duties "to protect the public interest by looking after the internal workings of their employers"); Veronica Root Martinez, *More Meaningful Ethics*, 2020 U. CHI. L. REV. ONLINE 53, 62 (2020) (arguing that firms should adopt "specific and explicit ethical infrastructures within their compliance programs" and explaining the contours of such mechanisms). For discussion of more potential reforms, see Sepper & Nelson, *supra* note 128.

196. BERLE, POWER WITHOUT PROPERTY, *supra* note 8, at 26.

197. *See* Sanjukta Paul, *On Socializing the Constitution of Economic Coordination*, LPE BLOG (June 29, 2020), https://lpeproject.org/blog/on-socializing-the-constitution-of-economic-coordination/ [https://perma.cc/G8F9-HWAC].

about corporate rights into ones about corporate responsibilities to the public in ways that inform new efforts to forge—as Berle once aspired to do—a constitutional "economic republic" to regulate America's corporate actors.[198]

Just as Berle offers a third conception of corporate conscience, his frame of power also offers a fresh approach to debates over corporate religious exemption. His analysis structures itself around concentrated market power and authority relations. From this perspective, where there is competition and a lack of coordinated discrimination, perhaps retail businesses can be treated as relatively powerless and exempted from duties of nondiscrimination. There will be dignitary costs but without, in Berle's view, the power that so concerned him. By contrast, employers and other actors on the power side of an authority relationship (perhaps, for example, hospitals) could not claim a right to dominate those on the other side. Instead, Berle would say, constitutional interpretation should recognize their responsibilities and constrain them from intruding on individual personality.

Perhaps more than anything, Berle would caution any contemporary readers not to take his own conclusions as gospel. This caution would not come from a deep sense of humility—a quality Berle sorely lacked.[199] Instead, Berle thought that our approach to corporations had to take account of current social conditions. Any reforms had to be keyed to the actual social problems of a given time. He would not have been drawn to arguments that start with the inherent nature of corporate personality or with the historical origins of the corporate form.[200] Corporations like any social institution, he would have reminded us, are embedded within particular historical contexts. And while historical arguments might be illuminating, ultimately, to borrow from Oliver Wendell Holmes, Jr., "the present has a right to govern itself so far as it can."[201]

198. BERLE, *supra* note 137, at 100.

199. *See* SCHWARZ, *supra* note 45, at 114–17 (discussing Berle's arrogance).

200. *See, e.g.*, David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 AM. POL. SCI. REV. 139 (2013) (discussing the corporation's "provenance").

201. Oliver Wendell Holmes, Jr., *Learning and Science*, *in* OLIVER WENDELL HOLMES, JR., COLLECTED LEGAL PAPERS 139; *see also* Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 807 (1989) (discussing the realist view that law is "a functional instrument meant to meet present and future human needs").