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NOTES

FROM PUBLIC SQUARE TO MARKET SQUARE: THEORETICAL FOUNDATIONS OF FIRST AND FOURTEENTH AMENDMENT PROTECTION OF CORPORATE RELIGIOUS SPEECH

*Julie Marie Baworowsky**

INTRODUCTION

In an era of globalization, an accurate model of the corporation should recognize corporations' social roles and responsibilities. Consumers who appreciate the potential effects of their spending choices are more likely to patronize companies in line with their moral sentiments.¹ Many consumers desire that trade be both free and fair, that prices be low, and that manufacturers be socially responsible actors.² Recognizing that their business success depends upon building sound communal relationships, corporations are seeking new ways to make social responsibility part of their identities.³

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1 See Stefano Zamagni, Professor, Univ. of Bologna, Keynote Address at the Fordham Journal of Corporate and Financial Law Symposium: Religious Values and Corporate Decision Making: An Economist's Perspective (Feb. 23, 2004), in 11 FORDHAM J. CORP. & FIN. L. 573, 577-78 (2006).

2 See *id.* at 581. See generally Anthony Scaperlanda, *John Paul II's Vision of the Role of Multinational Enterprise Expansion in Building the Social Economy*, 25 INT'L J. SOC. ECON. 1764, 1768 (1998) (explaining different ways business choices can affect the public welfare).

3 Cf. Leo L. Clarke et al., *The Practical Soul of Business Ethics: The Corporate Manager's Dilemma and the Social Teaching of the Catholic Church*, 29 SEATTLE U. L. REV. 139, 163 (2005) (discussing models for corporate executives willing to introduce ethical change); Jennifer J. Griffin & John F. Mahon, *The Corporate Social Performance and Corporate Financial Performance Debate: Twenty-Five Years of Incomparable Research*, 36 BUS. &

One way for corporations to increase their corporate social responsibility is through the adoption of a religious identity.⁴ Pros and cons attach to this proposal.⁵ But, given the existing regulations of corporations, is corporate religious identity a realistic or desirable possibility?⁶ This issue has gained new importance with recent legislation that silences corporations' religious expression and prevents the

Soc'y 5, 26 (1997) (arguing that financial performance positively correlates with social and moral responsibility); Zamagni, *supra* note 1, at 577-78 (claiming that "businesses succeed in as much as they are able to respond to multiple secondary objectives not limited to the profit motive").

4 See, e.g., Lyman P.Q. Johnson, *Faith and Faithfulness in Corporate Theory*, 56 CATH. U. L. REV. 1, 31-44 (2006) (arguing that welcoming religious discourse within the corporation can encourage corporations to act "beyond" their own self-interest, along with other benefits to the corporation and society); Michael Naughton, *The Corporation as a Community of Work: Understanding the Firm Within the Catholic Social Tradition*, 4 AVE MARIA L. REV. 33, 42 (2006) (arguing that conscientious business leadership stems from theology and philosophy); Susan J. Stabile, *Using Religion to Promote Corporate Responsibility*, 39 WAKE FOREST L. REV. 839, 873-78 (2004) (describing how different religions urge businesses to consider the common good); Tim M. Lowder, *New Dimensions of Corporate Culture: A Construct for Stakeholder Ethics in a Spiritual Workplace* 20 (Capella Univ., Paper No. 0M7050, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=916740 (considering how spiritual workplaces incorporate community stakeholders in decisionmaking); David A. Skeel, Jr., *Christianity and the Large Scale Corporation* 18 (Univ. of Pa. Law Sch., Pub. Law & Legal Theory Series, Research Paper No. 07-45, 2007), available at <http://papers.ssrn.com/abstract=1025959> ("[I]t took more than the law to create large scale corporations, and it will take a lot more than law to sustain them.").

5 See, e.g., Luigino Bruni & Amelia J. Uelmen, *Religious Values and Corporate Decision Making: The Economy of Communion Project*, 11 FORDHAM J. CORP. & FIN. L. 645, 651-57 (2006) (concluding that "business endeavors may express religious commitments" to serve the poor by way of a case study of more than seven hundred spiritually based "Economy of Communion" businesses in America and the world's poorest cities); Timothy L. Fort, *Religious Belief, Corporate Leadership, and Business Ethics*, 33 AM. BUS. L.J. 451, 452 (1996) (summarizing business literature to show "[r]eligious convictions provide some business leaders with a strong motivation for conducting business ethically even when their profit motive might not"); Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6 (Magazine), at 32 (believing that the only "social responsibility of business" is "'to increase its profits'").

6 See Posting of Rob Vischer to Mirror of Justice, http://www.mirrorofjustice.blogspot.com/mirrorofjustice/2004/02/conference_on_r_1.html (Feb. 23, 2004, 15:59) ("Provided that religious values are brought to bear in a transparent fashion, what is the objection to their entry? I can see why religious values may be inefficient or otherwise ill-suited to the corporate context, but is there any good-faith basis for precluding them categorically?").

use of religion to increase corporate social responsibility,⁷ like the New Jersey Workers' Freedom from Employer Intimidation Act (WFEIA).⁸

This Note aims to explain how corporate religious expression fits into new regulations, traditional corporate theories, and constitutional law, a convergence that scholars have not yet considered.⁹ It examines whether corporate religious expression should receive constitutional protection under the Fourteenth Amendment's Due Process Clause¹⁰ and under the First Amendment's Speech Clause.¹¹ This Note argues that corporate religious expression, be it verbal or conduct-based, is protected under overlooked free speech doctrines. In contrast, Free Exercise Clause¹² claims and the more complicated Speech Clause claims for expressive association rights¹³ are fraught with difficulty for the commercial entity.¹⁴ Therefore, civil rights attorneys litigating corporations' religious claims should consider bringing more Speech Clause claims.

To advance the debate surrounding corporate religious expression, Part I begins by summarizing current regulations affecting corporate religious speech and by describing the benefits of exploring constitutional protection for corporate religious speech. Part II examines whether the three main theoretical explanations of the corporation encourage legal protection of corporate religious speech. This Note rejects two theories denying corporate religious speech rights

7 This Note uses the term "corporation" to refer to an association incorporated for the purpose—among other possible purposes—of deriving profit from its activities.

8 N.J. STAT. ANN. §§ 34:19-9 to -14 (West Supp. 2007); *see infra* notes 22–39 and accompanying text.

9 *See* Johnson, *supra* note 4, at 2, 23 (commenting on the lack of consideration given to religion in corporate law scholarship).

10 U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .").

11 U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

12 *Id.* ("Congress shall make no law . . . prohibiting the free exercise [of religion].").

13 *See, e.g.,* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655–57 (2000) (delineating the extent of expressive association rights).

14 *See* *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634–35 (1984) (O'Connor, J., concurring) (arguing that a commercial entity has minimal, if any, freedom of association rights); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619–20 (9th Cir. 1988) (finding no free exercise defense to a religious discrimination lawsuit against a Christian company requiring employees to attend Bible study meetings). The uncertainty of legal protection in these controversial areas makes a Speech Clause avenue more valuable. *See infra* Parts I.B, III.B–D.

(artificial entity and contractarian) as outmoded conceptions no longer applicable to modern corporations. It finds that the natural entity is the only theory accurately describing modern corporations and supporting corporate religious speech rights. Part III discusses how the First and Fourteenth Amendments may protect corporate religious speech. It illustrates how corporate theories have affected Supreme Court speech cases, draws analogies from precedents protecting corporate political speech, and shows how a variety of free speech theories justify corporate religious speech protection. It then urges society to act on its commitment to religious pluralism by making room in the marketplace for groups who want to conduct business without shedding their religious identities.

This Note ultimately concludes that the First and Fourteenth Amendments should protect corporate religious speech from statutory regulation.

I. THE NEW IMPORTANCE OF CORPORATE RELIGIOUS SPEECH

Corporate religious speech is poised to assume a new importance in Speech Clause jurisprudence because government regulation is increasingly likely to impinge on corporate religious identity. Understanding how regulations threaten corporate religious speech and examining available defenses to regulations will promote greater clarity in the law. Such certainty will lessen the risk that an unconstitutional statute will discourage religious corporations from the exercise of their rights.

A. *Corporate Religious Speech Regulations Today*

Corporate religious Speech Clause violations arise from both direct and indirect regulations of speech. Indirect regulation of religious speech occurs when a form of expressive religious conduct conflicts with a statutory scheme.¹⁵ Compliance with laws requiring corporations to act in a certain way can force corporations to express lawmakers' moral and religious stances. This happens in many cases also involving the violation of the right to exercise one's religion freely. In contrast, a direct regulation of corporate religious speech occurs when a legislature singles out corporate religious speech for special restrictions, like WFEIA does.¹⁶

15 See *infra* Part III.B–D (discussing First Amendment protections for expressive religious conduct).

16 New Jersey Worker Freedom from Employer Intimidation Act, N.J. STAT. ANN. §§ 34:19-9 to -14 (West Supp. 2007).

For example, California's current requirement that an unwilling party, Catholic Charities, must provide employee insurance coverage for contraception indirectly forces the charity to communicate the state's religious message.¹⁷ Catholic Charities maintained in litigation challenging California's law that the requirement interferes with Catholic Charities' religious exercise "because the [Roman Catholic] Church considers contraception a sin, and because Catholic Charities believes it cannot offer insurance for prescription contraceptives without improperly facilitating that sin."¹⁸ However, the charity overlooked its potential Speech Clause claims in its lawsuit. A state-compelled communication of moral support for contraceptive use was forced upon the charity by California when the state required the charity to provide contraceptive insurance coverage.¹⁹ The law also silenced the charity's previous message of protest and opposition to contraceptives. Before the new law, the charity's objections were conveyed symbolically by its refusal to provide coverage.

Another example of a regulation that can both compel and silence expressive religious corporate conduct is a law that requires pharmacies to dispense contraceptives and abortifacients.²⁰ Dispensing a prescription involves the pharmacy's communication of its professional judgment that the product will benefit the patient. Pharmaceutical professionals must offer written advice and oral counseling about the benefits and safe use of their prescriptions.²¹ Statutes

17 See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 91 (Cal. 2004) ("We do not doubt Catholic Charities' assertion that to offer insurance coverage for prescription contraceptives to its employees would be religiously unacceptable."); Richard W. Garnett, *Confine & Conquer: The California Supreme Court and Religious Freedom*, NAT'L REV. ONLINE, Mar. 3, 2004, <http://www.nationalreview.com/comment/garnett200403030850.asp> ("The *Catholic Charities* case . . . involves an effort to define—and thereby confine—the nature and scope of religious belief, obligation, and faith."). California law considers Catholic Charities a corporation. See *Catholic Charities*, 85 P.3d at 75.

18 *Catholic Charities*, 85 P.3d at 75.

19 See *id.* at 102 (Brown, J., dissenting) (calling the regulation "an intentional, purposeful intrusion into a religious organization's expression of its religious tenets and sense of mission").

20 See *Morr-Fitz, Inc. v. Blagojevich*, 867 N.E.2d 1164, 1171 (Ill. App. Ct. 2007) (dismissing for want of ripeness a pharmacy's state free exercise clause claim for relief from a regulation requiring the dispensing of contraceptive products); see also *Stormans, Inc. v. Selecky*, No. C07-5374RBL, 2007 WL 3358121, at *4-6, *10 (W.D. Wash. Nov. 8, 2007) (presenting a successful federal Free Exercise Clause claim based upon similar facts and describing the public boycott of a plaintiff pharmacy refusing to give patients the abortifacient "Plan B").

21 See *Stormans*, 2007 WL 3358121, at *4-6 (describing a pharmacy's professional and legal obligations).

that require contraceptive sales compel a pharmacy to send a symbolic message to patients that the pharmacy has no concerns that the contraceptives will harm patients—even if in fact the pharmacy finds moral or religious grounds to think contraceptive use is harmful. Imposition of these sales statutes additionally can censor the symbolic message of religious objection a pharmacy may previously have made through a historical refusal to stock contraceptives. What is more, by forcing sales, the state compels the pharmacy's verbal or written endorsement of contraceptives through the advice a pharmacy must provide to a patient about benefits and safe use (even if the pharmacy considers contraceptive use harmful to the patient in a holistic sense). On top of this, a conscientiously objecting pharmacy, which in the past may have wished to be verbally silent on the issue of contraceptives, now could be placed in the position of being forced to speak and explain its refusal to comply with the law to patients.

In contrast to these indirect regulations of corporate religious speech, New Jersey's WFEIA adopts the direct regulatory route.²² Originally model legislation drafted by the AFL-CIO,²³ WFEIA's concern is to protect workers from intimidation, indoctrination, and confinement. As enacted in New Jersey, WFEIA forbids employers from requiring their employees to hear the employer's religious opinions at meetings or in any other form of communication.²⁴ Under WFEIA, an employer may only communicate its religious opinions if it proffers

22 See N.J. STAT. ANN. §§ 34:19-9 to -14 (West Supp. 2007). The Act does not limit the regulation to corporations but instead restricts the speech of any entity that pays an employee. See *id.* § 34:19-9. This definition applies more to corporations than to any other kind of employer. For a discussion of the federal labor law preemption issues involved in this legislation, see Paul M. Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL'Y J. 209, 211 (2008) ("[C]ourts should find that such state laws are not preempted by the NLRA.").

23 See AFL-CIO, *Fighting for Workers' Rights*, <http://www.aflcio.org/issues/legislativealert/stateissues/workersrights.cfm> (last visited Apr. 12, 2008).

24 See N.J. STAT. ANN. §§ 34:19-10 to -12. It is important to note that this legislation targets the religious speech of businesses and corporations who hire and pay employees, not the corporations' officials or supervisors expressing personal views. See Letter from Charles Wowkanech, President, N.J. State AFL-CIO, and Laurel Brennan, Sec'y-Treasurer, N.J. State AFL-CIO, to Members of the New Jersey State Senate Labor Committee (Feb. 6, 2006), *available at* <http://www.njaficio.org/files/njaficio/File/legislation/S-1123.pdf> (implying that the statute only prohibits the opinions of the corporation). *But see* Janice Dubler, *More Protections for Employees in NJ: "Worker Freedom from Employer Intimidation Act,"* BARRISTER, Oct. 2006, at 8, *available at* http://www.mmwr.com/Uploads/FileManager/more_protection_for_nj_employees.pdf (construing statute to include supervisor speech). The statute also regulates corporate political speech. See N.J. STAT. ANN. § 34:19-10.

a waiver informing employees of their right to refuse to attend each such meeting or listen to each such communication—and if the employee then consents to each communication or meeting.²⁵ Since a corporation can hardly act or speak without the involvement of its employees, WFEIA places all corporate religious expression under the veto power of each employee.²⁶

Title VII, a federal civil rights-era statute, already directly bans many of the less socially valuable religious communications prohibited under WFEIA.²⁷ Rather than targeting all corporate religious expression as WFEIA does, Title VII prohibits direct or indirect religious discrimination by an employer in the workplace.²⁸ As a result, when a corporation discriminates on the basis of religion, for example, by requiring employees to sign a “corporate prayer,” the corporation violates both Title VII and WFEIA.²⁹ Likewise, Title VII and WFEIA could block a religious corporation that prefers faith healing from dis-

25 See N.J. STAT. ANN. § 34:19-10. When New Jersey Governor Jon Corzine signed WFEIA on July 26, 2006, his signing statement indicated he understood the bill’s application more narrowly, as concerning only interactive communications, and not e-mail communications. See Statement of Governor Jon Corzine upon Signing the Worker Freedom from Employer Intimidation Act (July 26, 2006), available at <http://www.njbia.org/bills/072706a.pdf>. The proper construction is open to debate because this statute has never been litigated. But cf. *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 313–16 (6th Cir. 1998) (striking down a state campaign statute requiring that corporations who want to discuss political donations with employees must offer a waiver informing their employees that refusal to contribute to the corporation’s political fund would not adversely affect their employment).

26 WFEIA achieves its ends by permitting penalties for violations of the Act, including injunctions, compensatory and punitive damages, civil fines, attorney’s fees, and court costs. See N.J. STAT. ANN. § 34:19-13.

27 With narrow exceptions, Title VII gives employees the right to be free from religious discrimination, the right to reasonable religious accommodation, and the right to be free from a religiously hostile work environment. See 42 U.S.C. § 2000e-2(a) (2000). Some commentators have suggested that Title VII may unconstitutionally restrict general speech. See, e.g., Wayne Lindsey Robbins, Jr., *When Two Liberal Values Collide in an Era of “Political Correctness”: First Amendment Protections as a Check on Speech-Based Title VII Hostile Environment Claims*, 47 BAYLOR L. REV. 789, 793–94 (1995) (discussing the overlap between free speech and employer action). Under that analysis, Title VII may be unconstitutional as specifically applied to corporate religious speech.

28 See 42 U.S.C. § 2000e.

29 See N.J. STAT. ANN. § 34:19-10 (prohibiting employees from being required “to participate in any communications with the employer or its agents or representatives, the purpose of which is to communicate the employer’s opinion about religious or political matter”); *Millazzo v. Universal Traffic Serv., Inc.*, 289 F. Supp. 2d 1251, 1253–54 (D. Colo. 2003) (finding a Title VII violation for employer’s “corporate prayer”).

couraging its employees who desire medical treatment.³⁰ Under these laws, a corporation may not issue a corporate mission statement with religious overtones and require its employees to believe in it.³¹ A religious business may not require employees to attend a scripture reading.³²

However, WFEIA goes beyond Title VII to restrict all corporate religious expression³³ and will make it impossible for religious corporations to operate. Far from only preventing coercion or intimidation, WFEIA frustrates the intracompany communications necessary for religious corporations. Religious corporations need the right to communicate the nature of religiously expressive task to an employee, and the right to demand performance, upon compulsion of employment sanctions.³⁴ No religious corporation can come into being or exist if every employee, from the CEO to the night shift worker, may veto talking about the corporation's religion.³⁵

Even if clever corporations get enough employee waivers to skirt some of the Act's impact, enforcement of WFEIA's pre-speech waiver requirement will muzzle many common forms of religious corporate expression. The impracticalities of ubiquitous waivers could drive out of business faith-based social service providers that spiritually mentor employees.³⁶ WFEIA could even censor religious images from the workplace if employees must sign a waiver before seeing them every time. For example, Christian bookstores in New Jersey may not put scripture posters or a painting of Leonardo da Vinci's *The Last Supper* on the cafeteria wall. Nor can an international religious peace corporation, headquartered in New Jersey, use a dove representing the Holy

30 See *Millazzo*, 289 F. Supp. 2d at 1257 (finding a Title VII violation from employer pressure to rely on faith healing).

31 See *id.* at 1254 (finding a Title VII violation for requesting participation in a religious corporate mission statement).

32 See N.J. STAT. ANN. § 34:19-10 (prohibiting employees from being required "to participate in any communications with the employer or its agents or representatives, the purpose of which is to communicate the employer's opinion about religious or political matter"); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619-20, 621 (9th Cir. 1988) (finding that Title VII prohibits a Christian corporation from mandating employee presence, though not attendance, at a Bible study meeting).

33 See N.J. STAT. ANN. §§ 34:19-10 to -12.

34 For discussions of how a religious identity fits with the business of a corporation, see *infra* Part II.

35 This goes against traditional understandings of the corporation as a separate entity, in which an employee may act without necessarily being identified with corporate action. See *infra* Part II.

36 For one example of such religious businesses, see Bruni & Uelmen, *supra* note 5, at 647-56 (explaining the spiritual mentoring given to employees by businesses involved in the Economy of Communion project).

Spirit as its business logo for letterhead, emails, and brochures.³⁷ Corporations may no longer donate funds to religious charities, since a corporate message about religion would inevitably get out to its corporate accountants.³⁸ The waiver requirement could also conceivably block Muslim businesses from issuing calls to voluntary prayer, Jewish butchers from training new recruits about Kosher laws, and Hindu corporations from instructing their catering manager not to order beef. Moreover, WFEIA's strict liability leaves no room for error. As one commentator asked, "What if . . . a presenter makes off-hand comments about God during a mandatory meeting about employee benefits?"³⁹ Unless a constitutional defense stops them, WFEIA and statutes like it have a license to drive religion out of the market square.

B. The Benefits of an Early Constitutional Defense of Corporate Religious Speech

Exploring constitutional protections of corporate religious speech brings much-needed clarity to the law and will result in social benefits. Because no case addresses these legal questions, and because corporations have (spectacularly) lost legal challenges in related areas, ignorance and uncertainty may be chilling corporate religious expression. Timely legal analysis can inform affected corporations of their rights and can guide lawmakers away from unconstitutional policy proposals. This in turn will promote religious pluralism in the marketplace.

No one corporate speech case gives corporate religious speech hard and clear protection. Instead, constitutional corporate speech litigation considers a variety of highly specific forms of political speech. That corporations are eager to weigh in on politics around election time, and that legislators have a surpassing enthusiasm to halt them, are testaments to the vitality of American democracy. Yet political speech cases are factually circumscribed so as to give little assistance to religious corporations. A quick substitution of the word "religious" for the word "political" in corporate political speech cases

37 *But see* Statement of Governor Jon Corzine, *supra* note 25 (disputing WFEIA's applicability to e-mail).

38 *See* N.J. STAT. ANN. § 34:19-10 (prohibiting employees from being required "to participate in any communications with the employer or its agents or representatives, the purpose of which is to communicate the employer's opinion about religious or political matter").

39 Walt Williams, 'Captive Speech' Legislation Has National Roots, *Str. J.* (Charleston, W. Va.), Dec. 6, 2007, <http://www.statejournal.com/story.cfm?func=viewstory&storyid=32270>.

would gloss over innumerable theoretical, legal, and factual issues unique to the electoral process. Moreover, the hints gleaned from tortuously extracting political speech cases' dicta and fleeting theoretical claims have yet to establish any clarity for religious speech rights. What is more, many litigators do not articulate the critical differences between individual and corporate rights in framing their complaints.⁴⁰ The clear legal analysis needed now must focus on corporate religious speech, specifically and aside from political or individual speech.

The legal void for corporate religious speech is accompanied by staggeringly unfavorable results in recent high-profile constitutional cases considering corporate claims.⁴¹ More than individuals, risk-averse corporations are particularly likely to be intimidated by the success of powerful state and federal regulatory schemes currently controlling campaign finances and religion in employment.⁴² While the judgment of Congress and the courts is that these intrusions on speech are justified, the normal inability of corporations to counter them with a Speech Clause challenge may lead corporations to be despondent about the Speech Clause's chances to vindicate them in future litigation. A simple inquiry into the question can show that this fear is unfounded.

Unfortunately, corporate and constitutional law scholars have not filled this information gap. Corporate legal scholarship is a near-universally secular enterprise.⁴³ The relative infrequency of religious corporations litigating claims may account for the scholarly oversight of their potential litigation problems. Such silence and secularism can hardly encourage religious corporations' pluralistic participation.

Moreover, new regulations affecting corporate religious speech have given urgency to the need for legal attention. Regulations' subject matters are expanding to police more forms of conduct motivated

40 See, e.g., *Stormans, Inc. v. Selecky*, No. C07-5374RBL, 2007 WL 3358121, at *1, *6 (W.D. Wash. Nov. 8, 2007) (considering together the rights of "two pharmacists and one corporate pharmacy").

41 See, e.g., *infra* Part III.D (discussing some adverse corporate political speech precedents).

42 Title VII, the federal civil rights statute that broadly prohibits religious discrimination by employers arguably encroaches upon corporate religious identity and expression. See 42 U.S.C. § 2000e-2(a) (2000); *id.* § 2000e(j); *supra* note 27 (discussing the relationship between Title VII and the First Amendment).

43 See Johnson, *supra* note 4, at 2 ("[V]irtually all [corporate] scholarship shares a common feature: it is a secular discourse . . . notwithstanding that the larger society in which the corporate institution is situated continues to be a very religious society.").

by or about religion.⁴⁴ New Jersey's WFEIA is the first to directly raise the issue.⁴⁵ Lawmakers need to be able to identify improper legislation and the risk-averse corporate speaker needs to know what its rights are.

In a larger sense, engaging the theoretical questions of corporations' religion beneficially challenges the widespread legal stereotype that corporations must be secular. Because corporations are *usually* secular, it is a small step to assume that corporations *can only be* secular. Creating law on these presumptions can only have disastrous results for corporate religious speech. Examination of corporate theory plays an important role in dispelling this myth and showing exactly how corporations may be religious, with significant social advantages.⁴⁶ The religious minority of corporations should be protected from overbearing legal stereotypes.

The law must awake from its past slumber on corporate religious speech, lest the damage to religion in the commercial sphere erode the nation's commitment to pluralism. Religious pluralism demands that religious actors be free to engage the market on the same terms as anyone else. The early and explicit examination of an unexplored issue critical to marketplace equality can aid all those who might be unaware of the issues at stake.

II. THEORETICAL PERSPECTIVES ON CORPORATIONS AND THE RIGHT TO RELIGIOUS SPEECH

Determining whether the Constitution protects corporate religious speech depends upon understanding what a corporation is, how it speaks, and if it can be religious.⁴⁷ Three major corporate theo-

44 See, e.g., *Stormans*, 2007 WL 3358121, at *10 (litigating a free exercise claim against a state mandate of pharmacist action, where a colorable free speech claim could be found); Bradley C. Johnson, Note, *By Its Fruits Shall Ye Know*; *Axson-Flynn v. Johnson: More Rotted Fruit from Employment Division v. Smith*, 80 CHI.-KENT L. REV. 1287, 1316 (2005) ("[T]he Free Speech Clause seems the ideal constitutional provision to protect against what the Free Exercise Clause does not."); *infra* notes 206–17 and accompanying text (discussing First Amendment doctrine protecting expressive conduct).

45 See *supra* Part I.A.

46 See *infra* Part II.

47 Some social critics suggest that corporate theory does not matter because politicians and litigators use various theories indiscriminately in the service of predetermined policy preferences. See, e.g., William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1491 n.96, 1511–12 (1989) (claiming that policy and economic exigencies drove the development of corporate law, not "out of touch" theory); John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 669–70 (1926) (despairing of corporate theory's

ries—artificial entity, contractarian, and natural entity—provide different conceptions of the corporation and its role in society.⁴⁸ Understanding corporations through the lens of one model or another will determine whether a corporation can or should have the right to religious expression.

Only a natural entity theory of the corporation supports protecting a corporation's religious speech. If corporations are naturally occurring groups created by individuals, corporations have the same expressive rights as other groups.⁴⁹ In contrast, artificial entity and contractarian theories fail to justify protecting corporate religious speech. If the state creates corporations as artificial entities, the corporation can have no identity or rights separate from the state.⁵⁰ If the corporation is not an entity, but merely a set of related contracts, there is no corporate entity to have a right to religious speech.⁵¹ As a result, choice of corporate theory will produce different answers to

practical relevance because “[e]ach theory has been used to serve the same [political] ends, and each has been used to serve opposing ends”); Charles D. Watts, Jr., *Corporate Legal Theory Under the First Amendment*: Bellotti and Austin, 46 U. MIAMI L. REV. 317, 319–20 (1991) (“In the First Amendment context, questions of corporate law doctrine and practice are fairly remote, and normative concerns involving the appropriate role of the corporation in society arise.”). In response to these arguments, Professor Morton J. Horwitz has convincingly argued that choice of theory had and has real bearings on corporate legal rights. See Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 175–76 (1985) (“We have spent too much effort repeating the demonstrations of the indeterminacy of concepts in a logical vacuum; but not enough time trying to show that in particular contexts the choice of one theory over another is not random or accidental because history and usage have limited their deepest meanings and applications.”).

48 American theories on the corporation are indebted to European corporate theory. See, e.g., Arthur W. Machen, *Corporate Personality*, 24 HARV. L. REV. 253, 255–57 (1911) (summarizing competing French and German theories of the corporation in the nineteenth century); Miriam Theresa Rooney, *Maitland and the Corporate Revolution*, 26 N.Y.U. L. REV. 24, 32 (1951) (identifying corporate law's roots in medieval canon law and the means of its popularization in American legal thought). Corporate law scholars have framed theories of the corporation under other terms, such as property, managerialist, institutionalist, and social entity theories. See William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264–72 (1992). However, these categories reduce to the three main theories identified here. A property conception reflects a contractarian view. See *id.* at 264–65. The institutionalist, managerialist, and social entity views are entity theories. See *id.* at 265–66.

49 See *infra* Part II.C.

50 See *infra* Part II.A.

51 See *infra* Part II.B.

whether corporations can or should enjoy First and Fourteenth Amendment rights.⁵²

A. *The Artificial Entity Theory of a Corporation*

The artificial entity theory holds that the corporation is an artificial entity created and controlled by the state to serve public purposes.⁵³ This theory reflects the system existing in early American law, where incorporation occurred when a legislature granted a corporate charter to individuals pledged to bring about the state's purposes via a new artificial corporate person.⁵⁴ Incorporation functioned as a special concession bestowed upon politically elite groups because nineteenth-century contract and partnership law prevented individuals from creating or enforcing limited liability on their own.⁵⁵

Adopting this mindset, the artificial entity theory claims that because the state creates corporations, the state has a special right and duty to control corporate purposes and actions.⁵⁶ States grant incorporation in order for corporations to serve public purposes, and they bind corporations to the state's ends by placing corresponding limits

52 See *infra* Part III (explaining how choice of corporate theory impacts constitutional law). These three main models of the corporation are so ingrained in American jurisprudence that notes have critiqued them over the course of three centuries. See, e.g., John C. Coates IV, Note, *State Takeover Statutes and Corporate Theory: The Revival of an Old Debate*, 64 N.Y.U. L. REV. 806, 835–44 (1989); Note, *Constitutional Rights of the Corporate Person*, 91 YALE L.J. 1641, 1645–51 (1982) [hereinafter *Constitutional Rights*]; Note, *The Legal Idea of a Corporation*, 19 AM. L. REV. 114, 115–16 (1885); Katie J. Thoennes, Note, *Frankenstein Incorporated: The Rise of Corporate Power and Personhood in the United States*, 28 HAMLINE L. REV. 204, 204 illus., 225–29 (2005).

53 Hence, corporations were called the “*persona ficta*, the artificial person.” Francis Helminski, *Canon Law and Mystical Body: Religious Corporations in Minnesota*, 22 HAMLINE L. REV. 689, 689, 692 (1999).

54 See Horwitz, *supra* note 47, at 181.

55 See Larry E. Ribstein, *The Constitutional Conception of the Corporation*, 4 SUP. CT. ECON. REV. 95, 100 (1995) (stating the proposition that the law hinges limited liability upon state involvement, but critiquing its truth value from a contractarian perspective). But see Dewey, *supra* note 47, at 668 (disputing that a fictional entity conception and a concession theory should be conflated as one theory). The artificial entity theorist would find a state obligation to regulate for the good of the corporation, even if the state “allowed” the corporate form through bestowal of the power to contract individually for limited liability.

56 See Horwitz, *supra* note 47, at 181; Larry E. Ribstein, *Corporate Political Speech*, 49 WASH. & LEE L. REV. 109, 122 (1992) (“This could be described as the ‘Frankenstein’ theory of corporate speech: The state should be able to build limits into its creatures to prevent them from destroying its creators.”).

in corporate charters.⁵⁷ When today's legislatures allow incorporation for unspecified or general purposes, the artificial entity theorist understands that this wide-open permission is a matter of ongoing legislative grace—the corporation remains legally bound to any legislative directions.⁵⁸ Because corporations seen in this light are legal fictions, there is no role for individuals in their design. Therefore, corporations have no autonomy or identity apart from the state that created them. As a result, artificial entity theory places the duty of ensuring corporate social responsibility on the state in its ongoing supervision.

Because the state may control corporations, the artificial entity theorist would not understand an ability of corporations to assert rights against the state. Rights that could limit the state's power to regulate corporations would inhibit the state from directing the actions of corporations to the best interests of society.⁵⁹ Moreover, because a corporation is an artificial entity, it is not endowed with, nor may it possess, the rights of natural persons. Any rights the corporation has rely upon the same foundation as its charter does: the will of the legislature and its power to legislate for the common good.⁶⁰

Artificial entity theory indicates that because corporations lack rights or independent identities, they cannot assert rights to religious speech against an unwilling state.⁶¹ If the creator is master of the creature, then the state may dictate the corporation's permissible speech and religious actions (if any).⁶² The permissible purposes specified in the corporate charter might be read to implicitly exclude

57 See Horwitz, *supra* note 47, at 186–87. Limited liability was negated when the corporation acted ultra vires, or “beyond the scope of power allowed or granted by a corporate charter or by law.” BLACK’S LAW DICTIONARY 1559 (8th ed. 2004).

58 See Horwitz, *supra* note 47, at 186–87.

59 See Mark M. Hager, *Bodies Politic: The Progressive History of Organizational “Real Entity” Theory*, 50 U. PITT. L. REV. 575, 584–85 (1989); Horwitz, *supra* note 47, at 184.

60 See David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 210–11.

61 Cf. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 804 (1978) (White, J., dissenting) (believing that individual rights are not fungible with corporate rights because the state must be able to control the greater “threat to the functioning of a free society” posed by corporate expression); *Constitutional Rights*, *supra* note 52, at 1651 (“The notion that soulless, inarticulate corporations could even hold a political view, let alone insist on the right to express it, would be incomprehensible to the scholastic philosophers and classical economists who provided the conceptual ground for earlier explanations of corporate personality.”).

62 But see Clarke et al., *supra* note 3, at 153 (arguing that states should not require corporations to limit their purposes to profit maximization but instead should accommodate investors’ “baskets” of wants—investors’ varied and broad corporate purposes).

religion or independent speech.⁶³ A state might support prohibitions on religious corporations if it felt that profit-making in the marketplace required shared rules and or if it felt that religious practices would hinder the marketplace's efficient functioning.

Regardless of what any particular legislature says on the matter, artificial entity theory has defined every corporation to be incapable of having a religious identity. If religious identity requires a conscience and free will, an artificial creature controlled by the state cannot be religious.⁶⁴ An unreal creature only empowered to fulfill other, specified purposes lacks the spontaneous power to convert to a given religion. Moreover, corporate free will does not exist if a corporation is the empty receptacle of state regulatory decisions.⁶⁵ As Justice Rehnquist argued, "Extension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point. To ascribe to such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality."⁶⁶

This view leaves corporations no direct shield against state regulation of their religious expression. By understanding corporations to be created exclusively by the state for its ends, corporations cannot hold rights against the state or possess a religious identity. Above all, artificial entity theory denies that individuals may join together to create a religious corporation.

B. *The Contractarian Theory of a Corporation*

Artificial entity theory's support for heavy-handed state corporate regulation disregarded the role of individuals in creating and running corporations. Over time, the fiction that the state created corporations gave rise to a popular backlash. Many citizens resented the ine-

63 See DEL. CODE ANN. tit. 3, § 8502(b) (2001) ("Notice of an intention to apply for a charter or articles of association shall . . . set[] forth briefly the character and purpose of the corporation and the kind of service to be performed by it."). *But cf.* MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS 104 (1986) (arguing that the public has the right to hear all communications).

64 See *Blanding v. Sports & Health Club, Inc.*, 373 N.W.2d 784, 789–90 (Minn. Ct. App. 1985); see also *infra* Part II.C.

65 That is why many corporate political speech cases discount the value of corporate political expression. *Cf.* *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990) (permitting regulation of expressive political contributions because of the "unique *state-conferred* corporate structure that facilitates the amassing of large treasuries" (emphasis added)); *infra* Part III.D.

66 *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 33 (1986) (Rehnquist, J., dissenting).

quality of reserving incorporation as a privilege for the few, and corporations wanted the rights citizens had against excessive or injurious state regulations.⁶⁷

As a result, democratic movements secured laws guaranteeing the right of free incorporation.⁶⁸ Instead of needing a special legislative grant to start a corporation, individuals could incorporate by filing a record of the incorporation with a state office.⁶⁹ Individuals exploited this technique during the boom in corporations caused by the Industrial Revolution.

Over time, scholars also recognized that the old idea of the corporation as the state's special creature was outdated.⁷⁰ They saw the need for a model that limited state control, empowered individual incorporation, and defended corporate rights.⁷¹ Therefore the academy turned to a contractarian model that denies that the corporation is a separate entity—a model that ultimately limits the rights of individual, instead of protecting them.

1. Contractarian Considerations of the Corporation

The appeal of a contractarian model lies in its assertion that because individuals create and control corporations exclusively through contracts, the state has no special ability to regulate corporations.⁷² Hence, corporations have rights against the state.⁷³ Contractarians achieved this “rights” coup by denying that the corporation is an entity separate from individuals and contracts. The logic is simple: if there is no corporate entity, there is no corporation to regulate.⁷⁴

When contractarians deny that corporate entities exist, they deconstruct the term “corporation” to its component members. “Corporation,” for the contractarian, is just a convenient label for a series

67 See Horwitz, *supra* note 47, at 181, 204.

68 See *id.* at 181. For a history of the movement from special to general incorporation, see Henry N. Butler, *Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 J. LEGAL STUD. 129, 138–42, 152–54 (1985).

69 See, e.g., JEFFREY D. BAUMAN ET AL., CORPORATIONS 149 (6th ed. 2007).

70 See Horwitz, *supra* note 47, at 181, 183.

71 See *id.* at 183 (“By rendering the corporate form normal and regular, late nineteenth century corporate theory shifted the presumption of corporate regulation against the state.”).

72 See Ribstein, *supra* note 55, at 101 (“[S]ince the government cannot wholly prevent firms from contracting for limited liability, it is not in a position to grant a ‘privilege’ of limited liability by accepting a corporate filing.”).

73 See Horwitz, *supra* note 47, at 178, 185.

74 See Ribstein, *supra* note 55, at 107.

of specific individual contracts between autonomous individuals, rubber-stamped for enforcement by the state.⁷⁵ Corporations are neither inevitable nor natural groups, but temporary choices of individuals who could pursue other contractual means to achieve economic efficiency.⁷⁶

Because individual corporate members should not lose their other natural rights if they exercise their natural right to contract, contractarians believe that individual members ought to be able to assert these personal rights in the corporate name, including their right to free speech.⁷⁷ Strict adherence to contract means that neither the state nor other individuals in the corporate contract can strip individuals of their rights without their consent.⁷⁸ Contractarians therefore believe they prevent the state from singling out corporations' speech for regulation.⁷⁹

75 See Horwitz, *supra* note 47, at 181; Ribstein, *supra* note 55, at 100–01 (“In other words, rather than ‘creating’ limited liability by accepting filings, the state merely decides whether to enforce a particular contract—in this case, informal limited liability.”); *supra* note 55. Contractarians point out that corporate actors are governed for the good of the corporation by market forces and the other parties to the contract, removing the need for state regulation. See, e.g., Ribstein, *supra* note 55, at 103–04. Denying the managers’ rights to speak denies stockholder speech rights by blocking stockholders from “contractually [empowering] managers to speak” for them. See *id.* at 135; see also *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 686 (1990) (Scalia, J., dissenting) (“[A] shareholder knows that management may take any action that is ultimately in accord with what the majority (or a specified supermajority) of the shareholders wishes, so long as that action is designed to make a profit. That is the deal.”).

76 See Watts, *supra* note 47, at 373.

77 Contractarianism became the mainstream of Supreme Court opinion in *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394 (1886) under Justice Stephen Field and attorney John Norton Pomeroy. See *id.* at 396; Horwitz, *supra* note 47, at 177. The case was pivotal, recognizing (without benefit of counsel’s argument) that corporations are persons for the purpose of equal protection under the Fourteenth Amendment—but only because individuals in corporations are persons. See *Santa Clara*, 118 U.S. at 396; Horwitz, *supra* note 47, at 177–79.

78 See Horwitz, *supra* note 47, at 178, 185 (citing *County of San Mateo v. S. Pac. R.R. Co.*, 13 F. 722, 743–44 (C.C.D. Cal. 1882)) (stating that the original grant of Fourteenth Amendment protections stemmed from a contractarian-like position that found it unfair to make the price of incorporation individuals’ equal protection rights). But see RICHARD EPSTEIN, *BARGAINING WITH THE STATE* 17 (1993) (attempting to synthesize artificial entity theory and contractarian theory in support of a doctrine that state requirements of the surrender of corporate constitutional rights are unconstitutional conditions preceding incorporation).

79 See Watts, *supra* note 47, at 124 (“[G]overnment should be required to provide as much justification for compromising the constitutional rights of corporations as it must for compromising the rights of individuals.”).

But apart from these individuals and their right to free speech, there is no corporate entity to have or assert a corporate right, and that means there is no corporate entity to bear collective responsibility. Denying that society has groups like corporations existing between individual and the states necessarily leaves liabilities and rights only for the individual or the state.⁸⁰ This result is desired by some contractarians because it places the responsibility for corporate activities squarely on each individual.⁸¹

2. Contractarianism, Corporate Rights, and Religious Identity

While contractarianism allows protection for *some* corporate speech, contractarianism will not support a right to *religious* corporate speech. When there is no corporate group entity, there is no *corporate* right to speech and no religious identity apart from the personal rights of individual members.⁸² These individuals may spread contractually agreed-upon ideas through constitutionally protected means of individual expression. But unlike all other corporate speech, expression of a *corporate* religious identity is uniquely impossible to spread by

80 Larry Ribstein elaborates:

No, a corporation is not a person. It's a piece of paper sitting in a secretary of state's office. Pieces of paper can't be discriminated against, vote, or have political ideas.

But corporations are people—the owners and others the corporation represents in litigation. These people have speech rights, rights not to be discriminated against, and so forth. . . .

. . . .

So the African-American owners of this SBA-certified minority-owned contractor shouldn't lose their civil rights because they chose to do business in the corporate form. They might be required to sue as a corporation, as in this case, because that's a convenient way to handle litigation, but that doesn't determine their individual rights.

Ideoblog, http://busmovie.typepad.com/ideoblog/2004/05/is_a_corporatio.html (May 22, 2004, 08:56) (commenting on *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1060 (9th Cir. 2004), which held that a corporation may sue for racial discrimination). For an associational theorist's response to this post, see Posting of Rob Vischer to Mirror of Justice, http://www.mirrorofjustice.blogs.com/mirrorofjustice/2004/07/corporations_as.html (July 29, 2004, 14:50) [hereinafter Vischer, *Mirror*].

81 See William Quigley, *Catholic Social Thought and the Amoralism of Large Corporations: Time to Abolish Corporate Personhood*, 5 LOY. J. PUB. INT. L. 109, 125–28 (2004). Because scholars like Quigley doubt that the corporate person may ever be moral, policies encouraging corporate social responsibility become even more important. See *infra* Part II.C.2.

82 See Watts, *supra* note 47, at 375.

contract.⁸³ We can see this result by examining individually how contractarianism is a poor form of collective identity and how contractarianism legally prevents religious identity.

First, contract law is a poor vehicle to enforce collective identity. In a general sense, envisioning contract as the basis for action creates an impression that corporations only exist to further profit-seeking, and that they have no role in fostering communal relationships or religious identity.⁸⁴ Like artificial entity theory, contractarian theory limits corporate activity to chartered purposes and narrowly construes them. While individuals could theoretically contract to achieve ends unrelated to profit-seeking, reducing their interaction to contract law implies that corporations are only designed for commercial purposes. Contract law generally does not focus on enforcing nonbusiness ends. Therefore, the corporation, as a series of contracts, is not a vehicle for communal identity or expression.

Considering a corporation as an entity separate from individuals explains how a corporation can be contractually made to adopt religious views as its own. Employees acting in conformity with the corporation's religion act for the corporation, not for themselves. For the corporation to have an identity does not require that its employees actually believe the corporation's creed.

For example, this entity theory would allow a Catholic church to lease property to a development corporation on the condition that the land be used in conformity with its moral beliefs (for example, a covenant not to develop the land for contraceptive sales) or that any further businesses located on the site become Catholic.⁸⁵ Either con-

83 Since the theory's founding principles ultimately mean that corporations cannot have a religious identity, contractarian corporate lawyers unsurprisingly do not have the merits of corporate religion or constitutional protection of corporate religious expression on their radar. See *supra* notes 9, 43 and accompanying text (commenting on the secular nature of corporate scholarship).

84 Cf. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 686 (1990) (Scalia, J., dissenting) (arguing that corporate directors are limited to profit-seeking purposes); Scott Fitzgibbon, "True Human Community": *Catholic Social Thought, Aristotelean Ethics, and the Moral Order of the Business Community*, 45 St. Louis U. L.J. 1243, 1252 (2001) (arguing that the utilitarian anthropological underpinnings of the contractarian model lead to nonreligious and nonmoral business ethics). *Contra* Clarke et al., *supra* note 3, at 154–60 ("The conclusion that a corporation does not exist solely for the purpose of wealth maximization follows even if the corporation is understood not as a separate legal person but as a web of contractual relationships."). Despite Professors Clarke, Frohnen, and Lyons' attempt to show that contractarianism *could* lead to other results, they seem to agree that a contractarian model does not satisfactorily account for the moral and social components of the corporation.

85 See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 75 (2004) (stating the Church's position).

tract appears to bind a business to some kind of a religious identity. When a business is thought to be a separate entity from its members, the business may act in conformity with Catholic morality, without needing contracts requiring its employees to be Catholic, or it may adopt the identity as its own. Either way, its employees need only structure their acts on behalf of the corporation in conformity with the belief; employees maintain their own private moral beliefs.⁸⁶ However, a contractarian forbids this very notion of a separate entity.

But assuming, as contractarians do, that the corporation is not a separate entity creates practical, consent-based obstacles to a corporate religious identity. In that case, the corporate identity is merely the identity of its contracting members—nothing more and nothing less. Individuals act in no corporate capacity or aspect other than in their personal capacity. Each individual must consent to each contractual term. Moreover, the nature of contracts limits how they may be used to bind anyone to action. For a contractarian, a religious corporation must be understood as the simultaneous, consented, personal religious identity of each member.

Second, no contract may compel an individual's religious beliefs, and so no contract between corporate members or with outside parties can bind the corporate members to a personal religious identity.⁸⁷ Individuals may contract to *act* on certain terms, terms that were chosen by a contractee motivated by religion. But individuals may not contract to bind themselves personally to adopt a religion as their own beliefs. Individuals may bargain away their right to use land to sell contraceptives, but no court can or should force an individual developer to be Catholic. If the individual may not be forced to adopt a creed, then the corporation, which is nothing more or less than individuals, cannot as a group be bound to believe in a religious creed.

However, a contractarian conception suggests that the corporation may equivocate as to its moral stances or acts—agreeing to act according to a precept (no contraceptive sales on this land), motivated by the other contracting party's religion (the Catholic seller). There is no necessary legal identity as Catholic, because many nonreligious reasons could induce a company to consent to such a contract. It is therefore possible to assert similarities between contracting mem-

86 Insofar as artificial entity theory and natural entity theory adopt an entity-based view of the corporation, this analysis reflects those positions. See *supra* Part II.A; *infra* Part II.C. As discussed above, artificial entity theory will frustrate the existence of religious corporations on other grounds. See *infra* Part II.A.

87 Whether or not a nation respects religious freedom or the rights of conscientious objectors, individuals' consciences and beliefs are beyond the coercive power of the state. See *infra* note 153 (describing how conscience is a personal judgment).

bers on other, nonreligious, nonconscience-based, nonpersonal matters—an equivocal corporate identity.

But a corporate religious identity is excluded by contractarian theory. Equivocations justifying the suggestion of a corporate morality cannot blur the legal entity/individual line for the personal religious beliefs forming a corporate religious identity. There is no equivocal sense in which the law is allowed to bind an individual conscience *personally* and *individually* to represent a belief with which he disagrees.⁸⁸ One simply cannot contract one's individual religious *identity* away, even if one can contract to speak on other topics. And contractarians think that attributing religious opinions or identities to corporations as an entity or group is impossible anyway, because attributing anything to something that does not exist is a fraud.⁸⁹

As a result, neither contractarian nor artificial entity theory can fully allow religious individuals the use of the corporate form without sacrificing their group and religious identities.⁹⁰ Neither theory will provide for corporate rights to religious speech. In fact, the use of these theories in a world operating on the assumptions of a natural entity theory will limit individual rights even more.

3. Practical Problems for Contractarianism and Corporate Religious Rights

Contractarians' hope for the protection of individual rights in the corporate context is illusory as a practical matter.⁹¹ Contractarians

88 Cf. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 805 (1978) (White, J., dissenting) (making an analogous argument about political identity).

89 See Ribstein, *supra* note 56, at 125 ("The corporation, as a nexus of contracts, cannot be 'speaking.'"). In reality, the very idea of a number of people who have an identical religious view—and come together to express it through contract—*does* imply they are an association or group, some entity with an identity. For a theory that is aware of this, see *infra* Part II.C.

90 See Gerald L. Russello, *Catholic Social Thought and the Large Multinational Corporation*, 46 J. CATH. LEGAL STUD. 107, 131–33 (2007) (finding contractarianism inadequate to account for social responsibility). The inability of contractarianism to allow religious or nonbusiness moral considerations is played out in the near-total scholarly alienation between contractarian theory and theories of corporate social responsibility. See Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 859–60 (1997) (book review) ("Contractarians and noncontractarians no longer have much of interest to say to one another; indeed, they barely speak the same language.").

91 Most people recognize that cooperating individuals create a group, which is an entity or whole of some kind greater than a mere aggregation of individuals. For an example of this in an introductory corporate law text, see BAUMAN ET AL., *supra* note 69, at 19–20 (stating that the first key corporate characteristic is being a separate entity).

are wrong to think that individual rights are protected by denying that the corporation is a separate entity.⁹² Instead, the influence of contractarian theory will mean that asserting a personal religious right in the course of corporate business costs individuals their limited liability.⁹³ This is because the law and the legal world view corporations from an entity perspective that clashes with contractarian's claims.

Because the entity theorist thinks the corporation has its own rights and existence, the entity theorist will not let a contractarian assert individual rights through the corporation.⁹⁴ Contractarians argue that because the corporation is a label for a nexus of contracting individuals, it should be acceptable for members to exercise their personal rights in the corporate setting.⁹⁵ However, because an entity theorist will distinguish between individual rights and the corporate entity's rights, the entity theorist will understand the individuals asserting their own rights in the corporate setting to be something apart from the corporation—with serious legal consequences.

Whenever a corporation asserts individual rights in its name, limited liability probably will not attach to these claims. If limited liability remains exclusive to a separate corporate entity, limited liability will not protect what the entity theorist sees as noncorporate individual religious beliefs.⁹⁶ The entity theorist will not give corporate entity attributes (like the corporate name, or limited liability) to what the entity theorist does not see as belonging to the corporation (individual claims).⁹⁷ For the entity theorist, reducing corporations from an entity to individuals places the corporate form on the same footing as

92 See Watts, *supra* note 47, at 365. This is why inquiries about the expressive nature of corporations for some contractarians may turn on whether corporations are representational.

93 See generally Dwight A. Jones, *A Corporation as "A Distinct Entity,"* 2 COUNSELLOR 78, 81 (1892) ("Any mingling of corporate existence with the existence of the shareholders will weaken corporate rights.").

94 See *State ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 850–51 (Minn. 1985) (piercing the corporate veil when the rights asserted were individual in nature by admission of the individuals). These facts are simplified to one plausible, but not necessary, interpretation of this complicated case.

95 See Horwitz, *supra* note 47, at 204.

96 See *Blanding v. Sports & Health Club, Inc.*, 373 N.W.2d 784, 789–90 (Minn. Ct. App. 1985) (stating in dicta that "purely personal" free exercise rights cannot attach to a corporation but can only belong to the individual principals in a corporation).

97 See *McClure*, 370 N.W.2d at 850–51.

partnerships or other individual contracts, where liability is not limited.⁹⁸

As a result, contractarianism will encounter legal obstacles for a corporation asserting rights based on individual religious beliefs. Unless the corporation may claim a separate religious identity from the individuals, the religious right at stake must be the individuals' and not that of the entity entitled to limited liability.⁹⁹ If it is a personal right, the entity theorist will reason, the individuals should be personally responsible for their personal actions and claims.¹⁰⁰

If understanding corporations to be a nexus of contracting individuals practically results in risking the loss of limited liability for religious corporations, a corporate right to religious identity or expression needs a stronger theoretical ground. Despite some contractarians who argue that the state should let individuals contract for limited liability,¹⁰¹ limited liability in current practice is not treated as an intrinsic right but instead is seen as a legal bonus from the state to a corporate entity.¹⁰²

The contractarian conception, like the artificial entity theory before it, fails to keep pace with emerging corporate realities.¹⁰³ Treating corporate decisionmaking like a contract or partnership, where each member must consent to each action, potentially made corporate decisionmaking a matter of daily unanimity among stockholders.¹⁰⁴ In reality, transitory investors empower corporate directors to make daily decisions.¹⁰⁵ Contracts' absolute identification between shareholder and corporation meant that agency had a great potential to violate stockholder rights. Seeing the corporation as a separate entity from the shareholder could allow a stockholder to let the corporation act absent his express revision of his contractual rights—but that is precisely what the contractarian, by definition, refuses to allow.

98 See *Blanding*, 373 N.W.2d at 789 (grappling with the common understanding that limited liability is only available for the actions of stockholders investing in a separate corporate entity, not for personal actions).

99 See *id.* at 789 n.1 ("[T]he nature of the free exercise clause indicates that it is a purely personal guarantee.").

100 See *McClure*, 370 N.W.2d at 851. This decision came through a refusal to overturn a state examiner's decision to pierce the veil. See *id.* at 850.

101 See, e.g., Ribstein, *supra* note 55, at 98.

102 See generally E. Merrick Dodd, *The Evolution of Limited Liability in American Industry: Massachusetts*, 61 HARV. L. REV. 1351, 1373 (1948) (describing the historical shift to limited liability for corporations).

103 See *supra* Part II.A.

104 See Horwitz, *supra* note 47, at 202, 209, 213.

105 See *id.* at 204.

This theoretical impasse makes desirable a middle position between two unsatisfactory and diametrically opposite views: one of the corporation as an artificial entity not emerging from individual members, and another where a corporation is not an entity but only members. This middle ground envisions the corporation as a natural entity emerging from individual members—a difference that permits corporate religious expressive rights.

C. *The Natural Entity Theory and Associational Theory of a Corporation*

Denying the existence of a corporate entity is as much a fiction as saying the state created the corporation to the near-total exclusion of individuals. When people associate, by nature they become a group; that group has an identity as a group over and beyond being an aggregation of individuals.¹⁰⁶ Purposeful human interaction naturally creates groups: the voluntary association created for commercial action is called the corporation.¹⁰⁷

Natural entity theory understands this when it identifies the corporation as an entity distinct from its members,¹⁰⁸ but naturally formed by them, *and* when it argues that the corporation should be treated as a person.¹⁰⁹ Artificial entity theory was right that a corporation's creator controls and determines it. Artificial entity theory erred in identifying the state as creator. Contractarian theory was correct to see that individual agreement and cooperation is at the heart of the corporation. Its error was to stress the individual aspects at the expense of the collective.

In addition, natural entity theory is the only conception of a corporation to support corporate religious identity and expression.¹¹⁰ It is the only theory recognizing that a corporation is not a "thing," fic-

106 See Machen, *supra* note 48, at 260.

107 See MICHAEL NOVAK, *The Vision of Democratic Capitalism*, in *THREE IN ONE*, 1976–2000 at 47, 47 (Edward W. Younkins ed., 2001) ("[T]he distinctive social invention of democratic capitalism was not the individual but the *voluntary association*, registered in law as the *corporation*."). See generally FRIEDERICH AUGUST HAYEK, *THE MIRAGE OF SOCIAL JUSTICE* 148–51 (1976) (discussing the fact that "it is one of the greatest weaknesses of our time that we lack the patience and faith to build up voluntary organizations for purposes we value highly").

108 See Machen, *supra* note 48, at 258–62 ("We need not waste words in discussing the nature of the existence of this corporate entity. Its existence is precisely as real as the existence of any other composite unit. . . . 'A corporation is as visible a body as an army; for though the commission or authority be not seen by every one, yet the body, united by that authority, is seen by all but the blind.'") (quoting 1 STEWART KYD, *A TREATISE ON THE LAW OF CORPORATIONS* 16 (London, J. Butterworth 1793)).

109 See *id.* at 263–64.

110 See *infra* Part II.C.3–4.

tional or real, but is a group of people. The theory has several contributions to the subject of corporate religious identity.

1. The Contributions of Natural Entity Theory

The natural entity theory of the corporation gained traction around the dawn of the twentieth century as a conceptual method of resolving the overly collectivist and individualist tendencies of the artificial entity and contractarian theories.¹¹¹ It sought to find a more accurate description of the corporate form than considering it either a state's artificial creation or a nexus of contracts. As a result, natural entity theory best fits modern corporate realities.¹¹²

The early twentieth-century school of legal realism saw the Gilded Age corporate person as far from a fiction.¹¹³ "If a corporation is 'created,' it is real, and therefore cannot be a purely fictitious body having no existence except in the legal imagination. Moreover, a corporation cannot possibly be imaginary or fictitious and also composed of natural persons."¹¹⁴ Realists criticize artificial entity theory for being too quick to think that if the corporation is not physically like a corporate person, there is no group life in it:

The invisibility of the corporate entity is no indication that the idea in respect to it is unreal. . . . All legal propositions are ideas, but they are not fictions. . . . Each new corporation becomes a new member of society. Its obligations are its own, its property cannot be appropriated by others. Its separate existence is real and the law which deals with invisible rights can amply provide for its supervision.¹¹⁵

This view saw the corporation as a new group body naturally forming from the cooperation of its individual members.

Natural entity theory disavows the old corporate privileges and state control of the past. Instead, in today's free society, "[a]ll that the law can do is to recognize, or refuse to recognize, the existence of this

111 See Horwitz, *supra* note 47, at 179.

112 Cf. Allen, *supra* note 48, at 276 ("[U]ltimately both our courts and, more importantly, our legislatures have, in effect, endorsed the entity view."); Horwitz, *supra* note 47, at 175–76, 223 ("[A] natural entity theory of the corporation was a major factor in legitimating big business and . . . none of the other theoretical alternatives could provide as much sustenance to newly organized concentrated enterprise.").

113 See Horwitz, *supra* note 47, at 179–80.

114 See Machen, *supra* note 48, at 257. This insight is indebted to the German school of thought on the corporation, especially to Otto von Gierke. See OTTO VON GIERKE, *POLITICAL THEORIES OF THE MIDDLE AGES* (F.W. Maitland ed. & trans., 1900).

115 Jones, *supra* note 93, at 80.

entity.”¹¹⁶ Understanding that individuals, not the state, created the corporate entity historically “legitimate[d] large scale enterprise” and “destroy[ed] any special basis for state regulation of the corporation that derived from its creation by the state.”¹¹⁷ This theory historically justified the removal of heavy local regulations that impeded corporate interstate commerce.¹¹⁸ Today, it justifies treating corporations just like any other private entity.

Considering the corporation as an entity solves contractarian problems that result from considering the group identity equivalent to individual identity. First, it explains the investor model. Contractarianism denied that the corporation was a separate entity because a corporation could not seem to exist through time if its members frequently entered and left through the buying and selling of shares. It would be unfixed and ever-changing. However, conceiving of the corporation as an entity separate from individuals in fact allows for exactly that type of entry and exit: “[a]ny group of men . . . whose [investing] membership is changing, is necessarily an entity separate and distinct from the constituent members.”¹¹⁹ If the corporation is more than individual contracts, those contracts may change while the group entity remains. Second, by the same logic, natural entity theory allows action absent full investor management. The corporation is separate from each individual’s contractual agreement. Members may come to disagree about corporate purposes or the means to agreed-upon corporate ends even while the entity, identity, and limited liability of the corporation remain without complete unanimity.¹²⁰ Third, natural entity theory overcomes the problem inher-

116 Machen, *supra* note 48, at 260. Recognizing the individualistic nature of incorporation in the modern form, Michael Novak commented:

Here corporations ceased being based on state privilege, monopoly, trust, or grant and became inventions of civil society and independent citizens. The state retained a right to *approve of* applications and to register them, for good legal order, but it did not create a right or convey its own power to the corporation or guarantee the latter’s survival. . . . It brought . . . unparalleled social flexibility and a zest for risk and dare.

MICHAEL NOVAK, *THE FIRE OF INVENTION* 35 (1999).

117 Horwitz, *supra* note 47, at 221. *But see* *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990) (permitting regulation of political speech because of the “unique *state-conferred* corporate structure that facilitates the amassing of large treasuries” (emphasis added)).

118 See Horwitz, *supra* note 47, at 223.

119 Machen, *supra* note 48, at 259.

120 See Horwitz, *supra* note 47, at 223. Such an idea of a natural entity may be gravely misunderstood, as seen in one corporate speech case decided by the United States Supreme Court. Instead of understanding that natural entity theory leads to

ent in other theories, where forming a group inevitably limits individuals' rights. Even though contractarians insist that individuals should not lose natural rights by incorporating, including the right to act expressively and the right to join groups, they in fact surrender a good portion of these rights.¹²¹ Entity theorists allow for a group identity distinct from individual identities, so that the entity may express religious opinions without binding individual members to the opinions. Fourth, considering the corporation a separate entity avoids the problems for religious expression involved when contractarians absolutely identified the corporation with the sum of its members, like employees. Natural entity theory lets the group have an identity above and beyond the identity of its employees. Therefore, a corporation may be religious while its employees are not.

The natural entity doctrine gradually became the basis of modern constitutional law affecting corporations. It was identified as a distinct theory at the Supreme Court level as early as Justice Story's opinion in *Wood v. Dummer*.¹²² At the dawn of the twentieth century, in *Hale v. Henkel*,¹²³ a Supreme Court opinion acknowledged the new nature of modern corporations and began to look to a natural entity theory.¹²⁴ This sea change was a sign of the intervening maelstrom of debate within the legal profession.¹²⁵ *Hale* struggled with older and newer corporate conceptions when it extended Fourth Amendment protection¹²⁶ but denied Fifth Amendment protection¹²⁷ to corporations.¹²⁸

natural speech rights for the corporation, the natural entity theory "conception, as understood by the Court, suggests that corporations may hold positions with which their constituents disagree. Therefore, the Court concludes that these entities do not require First Amendment protection equal to that accorded to individuals." Watts, *supra* note 47, at 356–58 (citing *Austin*, 494 U.S. at 658–60). For a discussion of the split between group identity and individual disagreement in the context of churches, see Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1391 (1981).

121 See *supra* Part II.B.

122 30 F. Cas. 435, 436–37 (Story, Circuit Justice, C.C.D. Me. 1824) (No. 17,944) (understanding the corporation as analogous to a trust fund, an entity created by stockholders and not by the state or contracts); see Gerald T. Dunne, *Justice Story and the Modern Corporation—A Closing Circle?*, 17 AM. J. LEGAL HIST. 262, 263 (1973); Edwin S. Hunt, *The Trust Fund Theory and Some Substitutes for It*, 12 YALE L.J. 63, 63–65 (1902).

123 201 U.S. 43 (1906) (abrogated by *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964)).

124 *Id.* at 76.

125 See Horwitz, *supra* note 47, at 217; Machen, *supra* note 48, at 253.

126 See *Hale*, 201 U.S. at 75–76.

127 See *id.* at 67–70.

128 See Horwitz, *supra* note 47, at 182.

The natural entity conception facilitated many subsequent and controversial extensions of constitutional protections to corporations.¹²⁹ Although still in force, these corporate protections upset many scholars who are concerned “that neither states nor shareholders [can] effectively check management’s power over these massive entities.”¹³⁰ In any case, debates over the corporate nature eventually diminished in the face of skepticism about the utility and relevance of corporate theory. It seemed that theory did not inform corporate law, but that those in power would use any theory to reach the ends they wanted.¹³¹

2. The Mediating Role of Corporate Associations

If the corporation is a natural social entity, then the corporation is like other voluntary and cooperative social institutions that provide important mediating functions in society.¹³² Between the lone indi-

129 See *infra* Part III.A.

130 Watts, *supra* note 47, at 326–28; see also Kent Greenfield, Daniel J.H. Greenwood & Erik S. Jaffe, *Should Corporations Have First Amendment Rights?*, 30 SEATTLE U. L. REV. 875, 884 (2007) (recording the thought of Erik Jaffe that critiques of corporate theory relative to speech rights are motivated by a hostility to corporate speech).

131 See Watts, *supra* note 47, at 327–28; *supra* note 47.

132 See Timothy L. Fort, *Business as a Mediating Institution*, in RETHINKING THE PURPOSE OF BUSINESS 237, 242–43 (S.A. Cortright & Michael J. Naughton eds., 2002); cf. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 180 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835) (“Independent of the permanent associations created by law under the names of townships, cities, and counties, there is a multitude of others that owe their birth and development only to individual will.”). Scholarly attention came to American associations through Alexis de Tocqueville’s *Democracy in America*. Inquiring why the French political changes failed while the early American nation thrived, de Tocqueville noticed voluntary associations woven into American society that served as a buffer between the individual and the state to prevent tyranny by either—including “commercial and industrial associations in which all take part.” DE TOCQUEVILLE, *supra*, at 489–95. “It is clear that if each citizen, as he becomes individually weaker and consequently more incapable in isolation of preserving his freedom, does not learn the art of uniting with those like him to defend it, tyranny will necessarily grow with equality.” *Id.* Picking up de Tocqueville’s mantle in recent times, Robert Putnam, Richard John Neuhaus, and Peter Berger fermented debate by tracing increased social alienation and large-scale political collectives (“mega structures”) to the decline of smaller groups. See PETER BERGER & RICHARD JOHN NEUHAUS, *TO EMPOWER PEOPLE* 158 (1977); ROBERT D. PUTNAM, *BOWLING ALONE* 48–52 (2000). Legal scholarship responded by championing First Amendment protection for expressive associations. See, e.g., Richard W. Garnett, *The Story of Henry Adams’s Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1864–83 (2001). Why might corporations be overlooked by de Tocqueville’s successors in associational theory? De Tocqueville wrote at the end of an era and at the dawn of the Industrial Revolution, before society had the opportunity to witness

vidual and the state sit the many intermediate groups that compose civil society.¹³³ These associations help individuals find a sense of community, and help the state by voluntarily providing valuable social services.

Associations do this by their basic *relational* functions as mediators in tension with and between individuals and states.¹³⁴ Associations provide a place for individuals to have relational meaning both part of, and short of, an anonymous state union, which by its size, uniformity, and inability to allow individual identification with it, cannot fulfill the human communal longing. Associations naturally and unavoidably come into being for these ends.¹³⁵ When the corporate association mediates, it provides individuals a “bridge” of identity, expression, purpose, meaning, and social power to check the state.¹³⁶ When states push people out of associations, they limit human endeavor. Likewise, when individuals seek to replace state corporate control with radically individual control, not only is the state excluded, but individuals also find they have no mediating entity with which they may define their enterprise. Mediating institutions prevent the state from having to fulfill every need because corporations as separate persons have moral obligations to the community.¹³⁷ This conception remedies both the tendency of individualism to discount

corporations as engines for unprecedented economic development. Many associational theorists since him praise small associations not with tyranny in mind, but because of their dislike of modernity’s size and emphasis on the profit motive. For one operating on those criteria, corporations may not present as readily sympathetic a front as, say, the local bowling team. See PUTNAM, *supra*, at 178. For one torn associational theorist and critic of modernity, see Henry Adams, *The Relation of the State to Industrial Action*, 1 PUBLICATIONS AM. ECON. ASS’N 7, 61 (1887), and the discussion of Henry Adams in Garnett, *supra*, at 1842–43, 1849–57 and Horwitz, *supra* note 47, at 192–93. Despite its relatively quieter tone, over a century of associational scholarship asserts corporations’ mediating roles.

133 See RUSSELL KIRK, *THE CONSERVATIVE MIND* 130 (7th ed. 2001) (“The genius of English polity is a spirit of corporation, based upon the idea of neighborhood: cities, parishes, townships, guilds, professions, and trades are the corporate bodies which constitute the state.”).

134 See Robert K. Vischer, *The Good, the Bad and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949, 951–52, 958 (2004).

135 See Fitzgibbon, *supra* note 84, at 1272.

136 See Vischer, *supra* note 134, at 959–60.

137 See Clarke et al., *supra* note 3, at 150 (explaining the moral duties attendant upon corporate personhood); Vischer, *supra* note 134, at 951–52; *id.* at 958 (“When afforded their natural vitality and vibrancy, however, associations are the vehicles by which we transcend our individual, atomistic existences and carve out a communal role for ourselves that is distinct from, and often in opposition to, the identity of the state.”).

communal relation and responsibility in favor of unfettered individual autonomy, and also the tendency of collectivism to use individuals as means to collective ends.¹³⁸

Society works because states and individuals partially limit and control associations. Associations do not encroach upon state responsibilities because the state may regulate to keep their size or power restricted—such as with antitrust laws. Associations do not take the place of individuals because the state reserves rights to both individuals and associations, not just to associations alone. Individuals limit associations by being the members creating and running them. In the end, associations intrinsically fortify the strength of the nation because “[t]o be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections. It is the first link in the series by which we proceed towards a love to our country and to mankind.”¹³⁹ The corporation is one such group or community among many associational entities straddling the middle ground between individuals and the state.¹⁴⁰ Fondness, friendship, and accomplishment can result from corporate involvement.

Picturing a corporation as an institutional association shows how a corporation may be both created by and composed of quasi-contractual arrangements between individuals (as in the unduly individualistic contractarian theory) and an entity specially protected by laws (as in the overly collectivistic artificial entity view).¹⁴¹ Individual and collective tensions exist and should exist in every group. In fact, “when any single anchor of the association in relationship (individual versus

138 See Vischer, *supra* note 134, at 957.

139 EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 202 (J.C.D. Clark ed., Stanford Univ. Press 2001) (1790).

140 Failure to understand this creates confusion in modern Supreme Court jurisprudence. See *infra* Part III.D.

141 Corporations perform this mediating function through a variety of sizes and roles. See Vischer, *Mirror*, *supra* note 80 (“Smaller, non-profit corporations are especially likely to bring folks together in pursuit of a bonding, identity-shaping objective—i.e., provide a vehicle for participants to define themselves in a way that sets them apart from the surrounding, impersonal society. Large corporations focused on the bottom-line are less likely to meet that need. . . . But to the extent that particular corporations do serve a mediating function, it is important to acknowledge that function and protect it where possible, just as it’s important to protect the mediating functions of voluntary associations. . . . My concern with the ‘piece of paper’ rhetoric is that it encourages our society’s tendency to view legal issues through the one-dimensional lens of individual rights versus collective will. If we want to bring about a society with a robust system of bulwarks against alienating and coercive megastructures, we may need to think seriously before poking holes in corporations’ claims to be something more than the sum of their parts.”).

association versus state) is given unfettered authority to pursue its own interests at the expense of the others, the resulting disparity eviscerates the association's mediating values."¹⁴² So, when the artificial entity theory prioritizes state control, the result is not merely that the corporation lacks autonomy, but that individuals making up corporations have their voices deemphasized. When contractarianism accentuates individualism too much, it excludes the state from valid regulatory functions and it imposes costs on group functionality. In the end, a contractarian's individualism ultimately harms individuals when it limits the value of their voluntary association.

This social dynamic allows natural entity theorists to respond to the charge that natural entity theory strengthens corporations too much. Because a natural entity theory allows managerial autonomy to be delegated by individual stockholders, these managers could harm individuals. As a result, some artificial entity theorists wish to reduce the freedom of corporations. However, most of these critics of natural entity theory do not criticize extreme cases of unbounded corporate control; rather, they criticize corporate independence as such and dispute the value of mediating groups in society. If the individuals who contract and form the corporate entity bind corporate managers through articles of incorporation, shareholders need not wait for state regulation to check corporate managers.¹⁴³ They can check managers on their own, or they may sell their shares. If they fail, the state may correct abuses through criminal and commercial laws. In this way there is no void of individual checks that necessitates overpowering state regulation to destroy the autonomy of the corporate group's appointed managerial leader. Recognizing the tension in which corporations exist shows that fears of completely untrammelled managers ignore the real individual checks on them.¹⁴⁴

Perhaps the popularity of other theories stems from the real concern that natural entity theory wrongly enables corporate officers to

¹⁴² Vischer, *supra* note 134, at 952.

¹⁴³ See Ribstein, *supra* note 55, at 104.

¹⁴⁴ These statements, of course, raise important theoretical questions about the normative structure and role of the corporation in society, unfortunately beyond the scope of this Note. Guided by a principle of subsidiary, modern corporate legal scholarship in Catholic social thought is currently engaged in a vigorous debate over questions of "size, structure, and purpose" of corporations in economic and social life. See Russello, *supra* note 90, at 128–34. See generally Stephen M. Bainbridge, *Catholic Social Thought and the Corporation*, 1 J. CATH. SOC. THOUGHT 595 (2004) (summarizing the debate); Mark A. Sargent, *Competing Visions of the Corporation in Catholic Social Thought*, 1 J. CATH. SOC. THOUGHT 561 (2004) (same).

act in a socially irresponsible manner.¹⁴⁵ But individuals who create the corporations live together and are affected by other corporations.¹⁴⁶ That is why social responsibility matters for consumers and corporations.¹⁴⁷ Religious identity can help corporations by providing some of the benefits traditionally associated with less-regulated mediating associations.

3. Natural Entity Theory, Corporate Rights, and Religious Identity

Natural entity theory champions corporate expressive rights. Because it understands that corporations allow individuals to find social meaning in an entity and identity larger than themselves, it understands that belonging to a corporation forms part of individuals' social identities. Since corporations naturally have a group identity in formation, existence, and activity, they should be able to express it to the world.¹⁴⁸

Furthermore, natural entity theory supports corporate religious identity. Because a corporate religious identity can emerge from and be maintained by the individuals cooperating in the corporate activity, these individuals can choose to maintain a religious identity. This depends upon individual choice. "For many millions of religious persons the daily milieu in which they work out their salvation is the communal, corporate world of the workplace. . . . [It is] a kind of second family."¹⁴⁹ As a result, religious individuals may be attracted to work for a religious corporation, or to found one. More broadly, religion will have a subtle, but undeniable, influence. Managers and other actors will (and should) act in conformity with religious principles of moral responsibility. If they understand responsible action to be in

145 See Russello, *supra* note 90, at 131 (arguing that natural entity theory's freedom for the association enables its lack of social responsibility).

146 This analysis is not affected if another group forms a corporation, as with a wholly owned corporate subsidiary. Such corporations should not be treated differently because although the critical individual control is attenuated, it exists ultimately through the other corporate entity.

147 See *supra* notes 1–5 and accompanying text.

148 See Vischer, *supra* note 134, at 960. Even corporate architecture expresses its identity. See Richard W. Weaver, *Concealed Rhetoric in Scientific Sociology*, 13 GA. REV. 19 (1959) ("[A] tall and imposing-looking building is demonstrating that there is even a rhetoric of matter or of scene.").

149 MICHAEL NOVAK, *TOWARD A THEOLOGY OF THE CORPORATION* 56 (1990) (introducing the mediating functions of a corporation from a broad theological perspective).

the best interests of the corporation,¹⁵⁰ religion likely informs what they think responsible action is.

Corporations also may express their religious identity or opinions. First, if individual creators give corporations a religious purpose, the very fact of corporate existence communicates that the creators share a religious identity. Second, individuals endow corporations with the ability to act in furtherance of their purposes, including through the means of communication. Third, managers in their broad discretion may speak on any social topic they see related to the corporate ends. For example, they may express on the corporation's behalf how a social matter involving religion may affect the business, subject only to review or affirmative limits made by responsible corporate representatives of the stockholder or board of directors. This statement may be a religious opinion, in a loose sense.¹⁵¹

The corporate entity resembles a person even to the point of having a group conscience.¹⁵² The corporation has its own purposes and identity, makes choices, and has a faculty for judging the rightness and wrongness of action (conscience).¹⁵³ The corporation is a *composite* person, made of many individual wills, opinions, and identities.¹⁵⁴ Acting in violation of these, or in other words, acting contrary to the corporate purpose, is *how* a corporate conscience may be violated.¹⁵⁵

150 See Clarke et al., *supra* note 3, at 166–72 (considering conflicts between the religious manager's free moral agency and the manager's duty to maximize business profits).

151 The Court in *Bellotti* implicitly allowed these types of expression. The Court rejected the notion that a state had the right to restrict corporations to topics "materially affecting any of the property, business, or assets of the corporation" as a "novel and restrictive gloss on the First Amendment." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 768, 777 (1978). But see *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634–35 (1984) (O'Connor, J., concurring) (proposing a denial of expressive association rights to commercial entities).

152 See Machen, *supra* note 48, at 263 ("[W]hen a jurist first said, 'A corporation is a person,' he was using a metaphor to express the truth that a corporation bears some analogy or resemblance to a person, and is to be treated in law in certain respects as if it were a person, or a rational being capable of feeling and volition.").

153 See 1 THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. I, q. 79, art. 13, at 407–08 (Fathers of the English Dominican Province trans., Benziger Bros. 1947); *id.* pt. I-II, q. 19, arts. 5–6, at 674–76; CHARLES E. RICE, 50 QUESTIONS ON THE NATURAL LAW 236–40 (1999); see also *id.* (explaining that conscience is morally binding because conscience is a profound judgment as to whether a particular action treats others with love or whether the action does good).

154 See Machen, *supra* note 48, at 258–60.

155 Cf. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 32 (1986) (Rehnquist, C.J., dissenting) (discussing explicitly the rights of "natural" persons—not corporations—to speak or not to speak as part of a greater freedom of conscience). If people incorporate a corporation with a strictly business motive, it may analogously

If religious opinion depends upon an expression of conscience, then from its *duty* to further its own purposes, the corporation has the natural capacity for, and *right* to, its own religious expression.¹⁵⁶

Although natural entity theory developed in a society where law or habit often separated business concerns from other expressive values, the idea of a corporation does not necessarily limit corporate purposes to business.¹⁵⁷ The value of mediation and association intrinsically has no subject matter limit. Religion and profit-making coexist in a rich pluralistic framework of groups mediating between individuals, the state, and other groups. The corporation is a flexible entity determined by individual choices through law; its individual creators have the choice whether a corporation shall be single purpose (profit-making) or would do better to have many purposes (profit-making, social responsibility, and religious identity). Absence of corporate religious identity can only come from individual choices to incorporate for other purpose, state-created limits on permissible corporate purposes, or both.

4. Religious Pluralism and the Natural Entity Theory

For the pluralist, the state should not bar religion from any area of social activity. America's commitment to full and equal civic participation irrespective of creed demands protection for religious identities in the public square and market square. Conceptualizing religious expression as a purely individual or private affair ignores the fact that individuals always act in a relational setting.

Although freedom of conscience lies at the heart of individual religious expression, this goal cannot be served by protecting only individual free exercise rights. To protect the individual's freedom of conscience—in essence, his own sphere of autonomy—from substantial government intrusion, society must protect the social structure or

violate that corporate conscience when it acts beyond its secular purpose. The purpose of this Note is not to force religious or other opinions or identities upon corporations that choose not to be multipurpose. If they wish to change to be religious, reincorporation, merger, or dissolution may allow for amendment of the corporate purpose.

156 Cf. Machen, *supra* note 48, at 263 ("The truth is that the essence of juristic personality does not lie in the possession of rights but in subjection to liabilities.").

157 The reason an artificial entity theory has this limitation is because of the state control factor. A state cannot set up a religious group (at least, not in the Western tradition of the separation of church and state). But with natural entity theory, where the artificial entity theorist's overbearing quality of state control is removed, that state/religion divide is not present.

zone in which that freedom of conscience is exercised.¹⁵⁸ It must also protect the conscience rights of individuals in groups.

Corporate religious speech should be protected because that protection in turn protects the right to form a religious corporation. Religion by its nature lends itself to expression on individual and associational levels.¹⁵⁹ Because there is nothing about religion that keeps it from group expression, there is nothing unique about religion that prevents it from being one corporate purpose among others. If the law recognizes this, it will allow corporations to adopt a religious identity. Exploration of this question returns to the new legal scholarship arguing as a matter of policy that religion may benefit corporations.¹⁶⁰

In fact, corporate secularism might contribute to worker alienation in corporate cultures. Profit-making (the distinctive trait of the corporate association) can be part of individuals' broader quests to develop their individual values, or its secularity can be an obstacle to their total self-integration. Keeping religion and other communal identities out of profit-making corporations can result in atomistic individuals with little job or proprietary identity. Individuals in today's corporate associations may need a shared identity and a sense of communal place, more than those in any other social group. This sense of belonging, religious or not, is best conceptualized by the framework of a natural entity model.

For all these reasons, the natural entity model is integral to defending a corporation's First Amendment rights to religious speech. Only this model may properly explain the relationship between corporations, individuals, and society. By contrast, time has revealed artificial entity and contractarian theories to be unrealistic models of the modern corporate form.¹⁶¹ They do not adequately explain current business practice or support a religiously pluralistic society. These models should not be relied upon in future legal or constitutional scholarship because they misunderstand how corporations have developed. The state's proper role does not extend to pushing individuals and their associations out of society, and the state should not use outdated legal constructs to deny protection to corporate religious expression.

158 See *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1748 (1987) [hereinafter *Developments*].

159 See *id.* at 1740–42.

160 See *supra* notes 1–6 and accompanying text.

161 See *supra* Part II.A–B.

This Note will now show how natural entity philosophical preferences support First and Fourteenth Amendment protection for corporate religious expression.

III. CONSTITUTIONAL CORPORATE RIGHTS TO FREE RELIGIOUS EXPRESSION

Corporations have the constitutional right to freedom from state interference with their religious expression. Fourteenth Amendment jurisprudence acknowledges that corporations are persons holding rights under the Due Process and Equal Protection Clauses. These rights derive from the longstanding acknowledgement that the corporation is an independent, communal entity created by individuals.¹⁶² Because corporate persons merit the same protection as individual persons, the Fourteenth Amendment requires that corporations receive the same liberties of expression that individuals enjoy, including protection for their religious expression.¹⁶³

In addition, the First Amendment provides separate and ample protection for corporate religious expression.¹⁶⁴ As many theories of the First Amendment make clear, constitutional shelter for the freedom of speech does not hinge on the individual or corporate identity of its speaker.¹⁶⁵ Although no case or scholarship has explicitly explored corporate religious expression, cases litigating corporate rights in other areas support the conclusion that corporations are entitled to full protection for their religious expression.

A. *The Fourteenth Amendment Prelude of Personhood*

Today, the First Amendment protects corporate speech because corporations are "persons" for purposes of the Due Process Clause of the Fourteenth Amendment.¹⁶⁶ Through the doctrine of incorporation,¹⁶⁷ corporations' Fourteenth Amendment right to be free from unlawful state deprivations of liberty encompasses First Amendment

162 See *infra* Part III.A.

163 See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 779–80 & n.15 (1978).

164 See *infra* Part III.B–D.

165 See, e.g., *Bellotti*, 435 U.S. at 777–80 (1978).

166 U.S. CONST. amend. XIV, § 1.

167 As a matter of historical fact, the Bill of Rights is incorporated against the states from the operation of the Due Process Clause. See generally Akhil Reed Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against States?*, 19 HARV. J.L. & PUB. POL'Y 443 (1996) (discussing originalist arguments for and against incorporation). Overruling incorporation might not affect the impermissible scope of federal action. However, without incorporation, on state levels, the corporate speech inquiry would have to look to state protections.

free speech liberties.¹⁶⁸ The Fourteenth Amendment therefore requires the same protection for corporate speech—including religious speech—as is given to individual speech.

Understanding corporations as constitutional “persons” clarifies that corporate action is not state action. Unlike an artificial entity theory identifying the corporation as a creature of the state, natural entity conceptions explain that incorporation of a religious business is not an establishment of religion.¹⁶⁹ The state’s role is only to protect private religious associational and economic rights on a neutral footing with nonreligious associations. The state does not create and mandate corporate purposes, but instead facilitates individual religious activity by allowing religious actors equal access to incorporation. Chartering a religious corporation resembles a religious group’s self-formation. Further, because natural entity theory supports understanding corporations as persons, it makes sense to permit corporations to have the inalienable liberty to define their own identity—a liberty clearly enjoyed by individual persons.¹⁷⁰ So long as the government neutrally enforces corporate laws without discriminating for or against religion, it does not endorse or establish one viewpoint to the detriment of others.

As such, there is no Establishment Clause problem with the protection of corporate religious speech. The Establishment Clause bars state actors from establishing a state religion.¹⁷¹ Corporations ordinarily cannot be persons and state actors under the same Fourteenth Amendment.¹⁷² However, could approving the incorporation of a

168 See *Bellotti*, 435 U.S. at 779–80; *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244, 249 (1936). Personhood matters to enforce rights against states. For example, while the Fifth Amendment does not limit its text to protection of the property of persons, the Fourteenth Amendment, and the rights flowing from it, are textually limited to persons. See Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 591 n.71 (1990).

169 See Johnson, *supra* note 4, at 3 (“[T]he corporation . . . is not an arm of the state. Consequently, First Amendment concerns about the ‘separation of church and state’ do not mandate a ‘separation of faith and corporation.’ The absence of religious language in scholarly and business discourse, therefore, reflects a social practice, not a legal requirement.”); see also *supra* Part II.

170 For a discussion of the individual’s liberty interest in his or her own identity and concept of personhood, see *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”).

171 See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

172 See Johnson, *supra* note 4, at 3 (“[T]he corporation . . . is not an arm of the state.”).

religious corporation be an impermissible government establishment or endorsement of religion?¹⁷³ If the state creates corporations and their purposes, it would violate the Establishment Clause to charter and control a religious entity.¹⁷⁴ Artificial entity theorists, identifying corporate identity with state policy, might specially prohibit religious corporations as establishments. Contractarians do not see corporations as separately existing entities, so they (presumably) would skirt this problem by claiming there is no state action because there is no entity chartered to act as the state. But historically, states have incorporated churches without Establishment Clause problems.¹⁷⁵ Accordingly, chartering corporations for open-ended purposes poses no problem.

The historical development of the Fourteenth Amendment also rests upon natural entity theory. Because corporate charters and contract law covered most early American corporate disputes, for a century, corporate constitutional challenges usually were against states and limited to Contracts Clause suits, one of the few pre-Fourteenth Amendment provisions limiting states.¹⁷⁶ But as the Industrial Revolution progressed, the simultaneous rise of modern regulation and the large corporation began generating new corporate constitutional issues at the same time that the Fourteenth Amendment began limiting state action.¹⁷⁷

The Supreme Court recognizes that corporations are persons protected under the Fourteenth Amendment. In its early consideration of the Fourteenth Amendment, the Supreme Court in the *Slaughter-House Cases*¹⁷⁸ very narrowly construed the Privileges and Immunities Clause¹⁷⁹ and Equal Protection Clause,¹⁸⁰ which had the implicit result of reducing the strength of this provision as a potential corporate shield.¹⁸¹ The Court dramatically reconsidered this interpretation in *Santa Clara County v. Southern Pacific Railroad*,¹⁸² under

173 See Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 NW. U. L. REV. 239, 259–65 (2003).

174 See U.S. CONST. amend. I.

175 See Helminski, *supra* note 53, at 692.

176 See, e.g., *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

177 See Mayer, *supra* note 168, at 606.

178 83 U.S. (16 Wall.) 36 (1873).

179 U.S. CONST. amend. XIV, § 1.

180 *Id.*; *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 100–05; Horwitz, *supra* note 47, at 177.

181 See Horwitz, *supra* note 47, at 177.

182 118 U.S. 395 (1886)

the contractarian guidance of Justice Stephen Field.¹⁸³ The Court unanimously, summarily, and without oral argument recognized the corporation as a “person” entitled to equal protection of the laws.¹⁸⁴ While corporations never were to be citizens for the Privileges and Immunities Clause,¹⁸⁵ soon after, the Court also confirmed corporations as persons sheltered by the Due Process Clause.¹⁸⁶ Then, as courts realized liberties protected by the Due Process Clause included liberties guaranteed by the Bill of Rights, they “incorporated” the Bill of Rights against the states¹⁸⁷ to protect those liberties shared by Fourteenth Amendment persons.¹⁸⁸

183 See *id.* at 396 (“The Court does not wish to hear argument on the question of whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does.”); Horwitz, *supra* note 47, at 178 (explaining how contractarian Justice Field identified the corporation as a person when that precedent came to be used extensively by natural entity theorists).

184 *Santa Clara*, 118 U.S. at 397, 417.

185 See *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 185 (1888).

186 See, e.g., *Smyth v. Ames*, 169 U.S. 466, 522 (1898); *Gulf, Colo. & Santa Fé Ry. Co. v. Ellis*, 165 U.S. 150, 154 (1897); *Charlotte, Columbia & Augusta R.R. Co. v. Gibbes*, 142 U.S. 386, 391 (1892); *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 28 (1889).

187 See, e.g., *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 780 (1978); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 500–01 (1952); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243–44 (1936).

188 See, e.g., *Bellotti*, 435 U.S. at 776, 780. Corporate Bill of Rights protections are a work in progress. Fourth Amendment protections for the corporation came early, in *Hale v. Henkel*, 201 U.S. 43, 75–76 (1906), *abrogated by* *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 65–73 (1964), and were later supported in the regulatory field by *Marshall v. Barlow’s Inc.*, 436 U.S. 307, 315 (1978), but the Court created exceptions for the particular industries of liquor, see *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970), firearms, see *United States v. Biswell*, 406 U.S. 311, 317 (1972), and mining, see *Donovan v. Dewey*, 452 U.S. 594, 602 (1981). The Fifth Amendment’s Double Jeopardy, see *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977), Takings, see *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 412 (1922), and Due Process Clauses do apply, see *Noble v. Union River Logging R.R. Co.*, 147 U.S. 165, 171, 177 (1893). However, the Fifth Amendment privilege against self-incrimination does not apply. See *Hale*, 201 U.S. at 75. The Sixth Amendment protects the corporation’s right to a jury trial in criminal cases, see *Armour Packing Co. v. United States*, 209 U.S. 56, 76–77 (1908), while the Seventh Amendment protects the right to a jury trial for a corporation in most civil cases, see *Ross v. Bernhard*, 396 U.S. 531, 539 (1970). There are no decisions on the Second, Third, or Eighth Amendments. The Ninth and Tenth Amendments are inapplicable. Other constitutional rights depending on citizenship and not “personhood” are inapplicable, such as being a citizen under Article III, see *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch.) 61, 86–87 (1809), even though corporations are citizens for purposes of diversity citizenship, see *id.* Corporations are

The First Amendment is bound by the Fourteenth Amendment to protect corporations' speech as it protects individuals. Fifty years after the first recognition of Fourteenth Amendment corporate personhood, the Court extended the First Amendment through the Press Clause to a newspaper corporation.¹⁸⁹ Almost thirty years later, the Speech Clause protected corporate speech¹⁹⁰ when it relieved the "law firm of the NAACP" from state regulation.¹⁹¹ The Court believed that "modes of expression and association protected by the First and Fourteenth Amendments" do not require natural or individual speakers.¹⁹² It gave the NAACP institutional standing to sue for its own speech rights and representative standing to vindicate its members' rights.¹⁹³

not citizens for Article IV's Privileges and Immunities Clause. *See* *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 528–29 (1839). Corporations also lack the constitutional right to privacy, *see* *Cal. Bankers Ass'n v. Schultz*, 416 U.S. 21, 65 (1974) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 651–52 (1950)), while other rights, such as the right to travel, have not been decided. *See* Charles Gray, Comment, *Keeping the Home Team at Home*, 74 CAL. L. REV. 1329, 1354 (1986); Michael Schiano, Note, *Eminent Domain Exercised—Stare Decisis or a Warning: City of Oakland v. Oakland Raiders*, 4 PACE L. REV. 169, 188–91 (1983). *But see* Mayer, *supra* note 168, at 639 ("[T]he invocation by corporations of more intangible rights—of association, privacy, and speech—in response to Modern Regulation, and in defense of Modern Property, severely strained the argument that corporations are 'persons.'"); *id.* app. I, at 664; *id.* app. II, at 666.

189 *See Grosjean*, 297 U.S. at 243–51; Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1275 (2005) (arguing that the First Amendment might protect the press as an institution because, compared to other institutions, it "check[s] government abuse and provid[es] a forum for democratic deliberations"). *But see* Patrick Burke, Comment, *Pacific Gas and Electric v. Public Utilities Commission of California: Negative First Amendment Rights for Corporations*, 15 N.Y.U. REV. L. & SOC. CHANGE 371, 377 (1986) ("Newspapers are distinguishable from other types of corporations because of the specifically enumerated 'freedom of the press' within the first amendment. Historically, corporations have not played the role of newspapers as conveyors of individual ideas and opinion.").

190 *See NAACP v. Button*, 371 U.S. 415, 419 (1963) ("The NAACP was formed in 1909 and incorporated under New York law as a nonprofit membership corporation in 1911. . . . The corporation is licensed to do business in Virginia, and, has 89 branches there.").

191 *See id.* at 421–22 ("[T]he prospective litigant retains not so much a particular attorney as the 'firm' of NAACP and Defense Fund lawyers, which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation.").

192 *See id.* at 428–31.

193 *See id.* at 415, 430–31. Corporations' dual standing reflects a natural entity theory of the corporation, where the mediating societal structure achieves an existence and identity apart from the mere contracts of its members.

Sympathy for the NAACP did not bias the Court to give it protection where corporations otherwise lacked rights¹⁹⁴:

The course of our decisions in the First Amendment area makes plain that its protections would apply as fully to those who would arouse our society against the objectives of the petitioner. . . . For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered.¹⁹⁵

The Fourteenth Amendment prohibits First Amendment protections that discriminate against corporations. This affirmative limitation is in addition to (and perhaps makes redundant) the simultaneous First Amendment principles dictating the equal protection of corporate and individual speech.

B. First National Bank of Boston v. Bellotti and Corporate Speech

The Fourteenth Amendment claims for equality between corporations and individuals culminate in *First National Bank of Boston v. Bellotti*,¹⁹⁶ where the Supreme Court held that the First Amendment's Speech Clause protects corporate speech just as it protects individuals' speech.¹⁹⁷ In *Bellotti*, the First and Fourteenth Amendments protected the First National Bank of Boston's right to opine during a referendum,¹⁹⁸ and affirmed that when states regulate any kind of nongovernmental speech,¹⁹⁹ the speaker's identity does not matter.²⁰⁰

194 Some artificial entity theorists would regulate corporate speech, but carve out exceptions for NAACP-type groups less obviously the creature of the state. See, e.g., David Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 HASTINGS CONST. L.Q. 541, 545 (1991). Such speaker selectivity discriminates among types of speech preferred by society and precludes religious profit-seekers from entering the marketplace. It also implies that corporations gain protection through the expressive association rights of individuals and not through corporate personhood and Fourteenth Amendment rights.

195 *Button*, 371 U.S. at 444–45.

196 435 U.S. 765 (1978).

197 See *id.* at 777, 780; Ribstein, *supra* note 55, at 127 (“The Court reasoned that speech that is otherwise protected does not lose its protection because the speaker is a corporation—that speech is protected not merely as a property right, but as a part of the guarantee of liberty to all natural and artificial persons.”). Despite subsequent Supreme Court developments, much of *Bellotti* remains controlling law. See *infra* Part III.D.

198 See *Bellotti*, 435 U.S. at 795.

199 Speech in this context does not include specific nongermane exceptions to protection, such as obscenity, incitement, child pornography, etc. See generally EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES* 3–194 (2d ed. 2005).

In so doing, the Court removed any grounds to think corporations' speakers are unprotected by the First Amendment.²⁰¹ "The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the relevant statute] abridges expression that the First Amendment was meant to protect."²⁰² *Bellotti* also found that profit motive or organizational structure was irrelevant to the capacity to inform, and therefore corporate identity was not a bar to gaining protection as speech independently valued by the First Amendment.²⁰³

Both the First and Fourteenth Amendments independently mandated this holding. The Court found corporations' rights equal to other Fourteenth Amendment persons; hence, they held that the liberty interest of expression must be equally protected for all Fourteenth Amendment persons.²⁰⁴ The Court supplemented that holding by explaining how the First Amendment *also* by its nature protects all *types of speech* necessary to societal free discourse and information—regardless of who the speaker is.²⁰⁵ This First Amendment protection is in addition to any protection the Fourteenth Amendment ensures.

Corporate religious expression can be verbal or conduct-based expression without losing its Speech Clause protection. *Bellotti* requires regulations of speech to pass a strict scrutiny analysis—the most stringent analysis—which holds a regulation can only be found

(exploring comprehensively the many actions and expression not protected by the First Amendment).

200 *Bellotti* adopts a principle of strict neutrality, reflected in doctrine that does not discriminate by speaker. See *Bellotti*, 435 U.S. at 777, 780. Distinguishing between corporate and individual speakers treats "persons" unequally. See Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975); *infra* Part III.C.3.

201 See *Bellotti*, 435 U.S. at 784; see also *McConnell v. FEC*, 540 U.S. 93, 256–59 (2003) (Scalia, J., concurring in part and dissenting in part) (arguing that a true interpretation of *Bellotti* means that corporations have full constitutional speech rights). *Bellotti* is "a case that would establish the First Amendment rights of corporate America." CARYL LYNN SEGAL, *COMMERCIAL SPEECH AND THE FIRST AMENDMENT* 65 (1989).

202 *Bellotti*, 435 U.S. at 776; see *Developments*, *supra* note 158, at 1746.

203 See *Bellotti*, 435 U.S. at 777.

204 See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 353–54 (1995) (explaining that the Court's holding in *Bellotti* extended speech protection both to corporate and corporeal persons); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 20–21 (1986) (holding a state effort to compel corporate speech unconstitutional); *Bellotti*, 435 U.S. at 778.

205 See *Bellotti*, 435 U.S. at 786.

to be constitutional if it “furthers a compelling governmental interest and is narrowly tailored to achieve that interest.”²⁰⁶ Likewise, although not all religious conduct is susceptible of communicative content, when a corporation’s religious conduct has expressive components, it still merits some protection. *Bellotti*’s interpretation of the Speech Clause requires that regulations of expressive conduct pass the somewhat lower threshold of intermediate scrutiny in order to be constitutional.²⁰⁷ Intermediate scrutiny requires a constitutional regulation of expressive conduct to be content neutral, serve a substantial government interest, be narrowly tailored to the interest, and “leave open ample alternative channels for communication of the information.”²⁰⁸ Cognizable expressive conduct qualifying for intermediate scrutiny both “‘inten[ds] to convey a particularized message’” and “‘the likelihood [must be] great that the message would be understood by those who viewed it.’”²⁰⁹ Like language, religious or conscience-based conduct often involves an element of protest or identity that is commonly intended to have expressive components.²¹⁰

206 *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2664 (2007) (opinion of Roberts, C.J. & Alito, J.); *Bellotti*, 435 U.S. at 777.

207 *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 295 (1984).

208 *Id.* at 293. Professor Secunda asks whether the AFL-CIO’s model Worker Freedom Act is an impermissible time, place, and manner regulation because it is not content-neutral. *See Secunda, supra* note 22, at 210 n.8. A state’s regulation of the time, place, or manner of speech, if it avoids discriminating on the content of speech, merits an intermediate scrutiny analysis for its constitutionality. *See City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (plurality opinion); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986); *Clark*, 468 U.S. at 293. But the regulatory singling out of religious speech has been held to be an impermissible discrimination on the basis of content and viewpoint, and therefore fails to justify a time, place, or manner regulation. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 832 (1995). Therefore, WFEIA’s singling out of religious opinions most likely is content-discriminatory, will not merit intermediate scrutiny, and instead will merit strict scrutiny. For a rejection of possible government interests to overcome First Amendment strict scrutiny protection, see *infra* Part III.D.

209 *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)). *But see United States v. O’Brien*, 391 U.S. 367, 376 (1968) (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”).

210 For some examples of cases where the First Amendment protected actions that were symbols of protest, see *Johnson*, 491 U.S. at 399 (flag burning), *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 504 (1969) (armband), *Stromberg v. California*, 283 U.S. 359, 361 (1931) (flag waving).

These types of Speech Clause claims may protect corporate religious conduct where the Free Exercise Clause²¹¹ and claims for expressive association rights under the Speech Clause do not.²¹² The Supreme Court's more restrictive test for a finding of Free Exercise Clause protection announced in *Employment Division v. Smith*²¹³ causes many religious claimants to find unfavorable treatment under current Free Exercise Clause jurisprudence.²¹⁴ The resulting movement among civil rights litigants to frame Religion Clause claims as Speech Clause claims signals a practical judgment that today's Speech Clause favors individual religious autonomy more than the Free Exercise Clause does.²¹⁵ This is true for religiously expressive corporate conduct. Arguing that a regulation of corporate religious speech violates the Speech Clause will likely be more successful than arguing it violates the Free Exercise Clause.

Even expressive religious conduct is likely to do better under the Speech Clause. Although the reduced protection given to expressive conduct suggests that the intermediate scrutiny analysis is closer to the restrictive *Smith* test than to strict scrutiny, the differences count. The advantage of intermediate scrutiny is its particular requirements of narrow tailoring, content neutrality, and alternative channels: they form more and different kinds of obstacles over which a regulation

211 U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion].").

212 See *id.* ("Congress shall make no law . . . abridging the freedom of speech . . ."); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655–57 (2000) (delineating the extent of expressive association rights).

213 494 U.S. 872, 881–86 (1990) (holding that neutral, generally applicable laws burdening religiously motivated conduct no longer must be justified by a compelling interest, absent the concomitant "hybrid" violation of another constitutional right).

214 There are several recent examples. See, e.g., *Colo. Christian Univ. v. Baker*, No. 04-cv-02512-MSK-BNB, 2007 WL 1489801, at *6–12 (D. Colo. May 18, 2007) (holding that notwithstanding the Free Exercise Clause, a "pervasively sectarian" university may be denied equal funding benefits); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 92–95 (Cal. 2004) (holding that the Free Exercise Clause was not violated when a Catholic charity was required to provide insurance coverage for prescription contraceptives). See generally Julie Manning Magid & Jamie Darin Prenkert, *The Religious and Associational Freedoms of Business Owners*, 7 U. PA. J. LAB. & EMP. L. 191, 210–216 (2005) (speculating on a post-*Smith* hybrid rights claim of free exercise and expressive association for businesses).

215 See, e.g., *Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617, 620 n.1 (2d Cir. 2005) (noting that a Free Exercise Clause claim was dropped for a stronger Speech Clause claim over the same religious expression); Johnson, *supra* note 44, at 1300–08 (providing a case study suggesting the empirical weaknesses of free exercise protection); *supra* Part I.A (discussing some corporate religious free exercise claims potentially involving an overlooked speech act.).

may stumble. Narrow tailoring requires that a regulation exempt the expressive conduct unless the exemption would materially interfere with the government interest.²¹⁶ A regulation of conduct may not achieve its purpose by targeting the communicative impact of the conduct. If it does so, the regulation discriminates on the basis of content and fails to satisfy intermediate scrutiny's requirement of content neutrality. Then, instead of intermediate scrutiny, the more speech-protective analysis of strict scrutiny will test the regulation's constitutionality.²¹⁷

Corporate religious speech deserves these analyses—analyses that individuals' speech about, or motivated by, religion usually finds under the First Amendment's Speech Clause. The First Amendment's text does not deny protection for any specific speech topics, like religion. To the contrary, the First Amendment's juxtaposition of protections for religion and speech imply a commitment to religious autonomy and expression free from government intrusion.²¹⁸ Therefore, legal debates considering the scope of individual religious speech assume basic protection. Speech Clause doctrines are correspondingly devised so as not to silence valuable religious speech inadvertently.²¹⁹

The Court in *Bellotti* did not need to adopt any theory of the corporation. If the First Amendment protects all speech, regardless of the speaker's identity, then disputes about corporate theory are secondary.²²⁰ Professor Mayer is correct on one level when he considers *Bellotti*'s inquiries as antitheoretical exercises of constitutional operationalism that obscure the corporate theory at the heart of questions

216 See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

217 *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2664 (2007) (opinion of Roberts, C.J. & Alito, J.). To place religious conduct claims in the promised land of strict scrutiny protection, litigators should closely examine whether any aspect of their case involves language distinct from conduct, yet necessarily part of it.

218 See, e.g., Kent Greenawalt, *Religiously Based Judgments and Discourse in Political Life*, 22 ST. JOHN'S J. LEGAL COMMENT. 445, 448 (2007) ("No one proposes that anyone can be punished or silenced for making religious arguments; indeed, guarantees of free speech and free exercise protect such arguments.").

219 For example, principles of content neutrality determine protection without judging the subject matter of the speech, be it religious, political, artistic, or scientific. See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 190 (1983).

220 Compare Ribstein, *supra* note 55, at 96, 138–39 (arguing choice of theory matters), and Horwitz, *supra* note 47, at 175–76, with other sources cited *supra* note 47 (arguing that lawmakers use theory indiscriminately in service of their preferred policy ends).

of corporate religious speech.²²¹ *Bellotti's* protection test could rest upon First Amendment theory alone to find types of protected speech. But in another sense, theory helps understand what corporate speech is. Searching for protected speech means asking if communications that corporations issue are speech. This is made intelligible by corporate theory. Holding that corporations can speak on many topics relies on natural entity ideas and contradicts artificial entity and contractarian theories.

Artificial entity theory denies that corporations have purposes, opinions, rights, or identities apart from government.²²² Artificial entity theory demands regulation of corporate speech for concerns the *Bellotti* majority says nothing about: concerns, for example, like whether the profit motive corrupts the value of speech, whether corporate speech is worth risks of harms, or whether the price of entering the marketplace justifies legal limits on groups' identities.²²³ If the Court agreed with the artificial entity theories of Justices White and Rehnquist,²²⁴ it might either have denied corporate speaker equality or have found a compelling state interest to overcome corporate speech protection.²²⁵

Bellotti's idea of the corporation as an entity with identity troubles contractarians, because they do not view corporations as entities and believe corporate speech on behalf of divergent contractors violates individual autonomy. No pure contractarian would confuse his theory by arguing that the bank corporation "achieved an existence distinct from that of its members" and "the activities of the corporation were 'modes of expression and association protected by the First and Fourteenth Amendments.'"²²⁶ Only natural entity theory understands how

221 See Mayer, *supra* note 168, at 650–51.

222 See *supra* Part II.A.

223 Cf. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990) (finding such concerns and permitting regulation of political speech because of the "unique state-conferred corporate structure that facilitates the amassing of large treasures"); *infra* Part III.D.

224 See Watts, *supra* note 47, at 348.

225 See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 804 (1978) (White, J. dissenting); *id.* at 822 (Rehnquist, J., dissenting). The dissenting opinions of both Justices White and Rehnquist rely upon and are driven by fictional entity conceptions. "[T]he post-*Bellotti* cases on corporate political speech showed that it is easier to deny First Amendment rights if the speech is attributed to an artificial person." Ribstein, *supra* note 55, at 129; see also Watts, *supra* note 47, at 319–20 (arguing that *Austin* in 1990 and *Bellotti* in 1978 implicitly disagree over the corporate nature); *infra* Part III.D.

226 See *Developments*, *supra* note 158, at 1746 (quoting *NAACP v. Button*, 371 U.S. 415, 428–29 (1963)); Watts, *supra* note 47, at 338 (arguing that *Bellotti* saw the corpo-

corporate groups, like other socially valuable groups, may have multiple purposes, independent identities, and self-expression rights.²²⁷

Understanding corporations this way makes clear why *Bellotti* blocked legislatures from prohibiting

speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues [or imposing] a requirement that the speaker have a sufficiently great interest in the subject to justify communication.

. . . .

If a legislature may direct business corporations to “stick to business,” it may also limit other corporations—religious, charitable, or civic—to their respective “business” when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment.²²⁸

This Note next examines the assumptions about the First Amendment that support an interpretation of it so conducive to corporate speech protection.

C. First Amendment Theory, Bellotti, and Corporate Religious Speech

Does the Court beg the First Amendment question when it allows First Amendment protection to hinge on whether the speech at issue is an “expression that the First Amendment was meant to protect”?²²⁹ Does the Court say it decides on a case-by-case basis which corporate speech accords with First Amendment values or does it decide those values based on passing political preferences?²³⁰ If the First Amendment criterion is whether speech is valuable to society,²³¹ First National Bank only received protection because its particular referendum speech enriched democratic debate.²³² Litigators might push

ration as an entity “capable of being placed on equal footing with individuals as part of the polity”); see also *id.* at 340–44 (arguing that *Bellotti* does not have a clear foundation in any one corporate theory, but instead unclearly represents both artificial entity and contractarian theories). But see Ribstein, *supra* note 56, at 135, 142.

²²⁷ See *supra* Part II.C.

²²⁸ *Bellotti*, 435 U.S. at 784–85.

²²⁹ *Id.* at 776.

²³⁰ See STANLEY FISH, THERE’S NO SUCH THING AS FREE SPEECH 102 (1994) (“[A]bstract concepts like free speech do not have any ‘natural’ content but are filled with whatever content and direction one can manage to put into them. ‘Free speech’ is just the name we give to verbal behavior that serves the substantive agendas we wish to advance Free speech . . . is not an independent value but a political prize . . .”).

²³¹ See *Bellotti*, 435 U.S. at 776.

²³² See, e.g., Shelledy, *supra* note 194, at 542–43; Burke, *supra* note 189, at 376–77.

back corporate protections if they convince the Court that corporate voices and messages are of subordinate societal value.²³³

Bellotti presupposes a great deal about how the First Amendment works, but the foregoing interpretation misconceives *Bellotti*'s idea of the First Amendment. The last thing Justice Powell intended was to give a listener's veto to anyone who thinks corporate speech worthless. *Bellotti* did not find First Amendment protection because it decided the Bank had something important to say or because the use of corporate funds to buy media space threatened the existence of individual speech. *Bellotti* thought all speech was inherently valuable in the marketplace of ideas, especially political speech.²³⁴ *Bellotti*'s interpretation of the First Amendment ignores private speech's quality, content, and speaker, but spots when government silences input from certain voices.

Bellotti's understanding of a neutral First Amendment did not care that corporate speech may find a wide audience where individual speech may not. "But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.'"²³⁵ It does not make value judgments.²³⁶ *Bellotti* told corporations that the kind of speech the First Amendment protects for them is the same kind of speech it protects for individuals. Because the individual right to free speech includes the right to speak about religion, *Bellotti* protects religious speech as much as the Bank's political speech.²³⁷

If the theory supporting *Bellotti*'s protection of corporate political speech does not protect corporate speech on other topics, the Court might have been wrong to indicate otherwise.²³⁸ If there are concrete

233 See, e.g., Mayer, *supra* note 168, at 633-34, 650-51; Susan L. Ross, Note, *Corporate Speech on Political Issues: The First Amendment in Conflict with Democratic Ideals?*, 1985 U. ILL. L. REV. 445, 454-64; see also Shelledy, *supra* note 194, at 551 ("[W]e should view the First Amendment as normatively complex, embodying both private and public ideals: one of speaker autonomy and another of public debate, sometimes complementing and at other times limiting each other.").

234 Cf. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 24-28 (1960) (arguing for the value of free speech in order to maintain a free government).

235 *Bellotti*, 435 U.S. at 790 (quoting *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 689 (1959)).

236 See *NAACP v. Button*, 371 U.S. 415, 444-45 (1963).

237 See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

238 Theories play important adjudicative roles because of the textual limits of the First Amendment. Free speech jurisprudence relies on almost entirely judge-made law, usually in the absence of relevant historical information about the original meaning of the Amendment. The protection of liberty for communications becomes intel-

interests supporting protection of any speech, whether or not corporate, *Bellotti* has theoretical force. Many of the common explanations of the First Amendment in fact explain *Bellotti's* principles and advocate for First Amendment protection of corporate religious speech. Moreover, these principles largely overlap in their support of both corporate religious speech and corporate political speech.

1. Traditional First Amendment Theories and Corporate Religious Speech: Self-Realization and Democratic Participation

If the First Amendment promotes self-realization and individual expression as the “only one true value,”²³⁹ religious corporate speech might not gain protection if protection is contingent upon speech’s ability to promote individual self-expression.²⁴⁰ If corporations are not individuals, it might seem inapposite to consider that they could realize their potential through self-expression.²⁴¹ Critics of corporate speech rights have argued that the self-realization theory is “totally foreign” to corporations, if corporations are understood as artificial entities or a series of contracts.²⁴²

However, if the corporate entity is the naturally occurring product of individual initiative and cooperation, under the natural entity theory, then censorship of religious self-expression stifles individuals. Individuals uniting to take part in the corporate enterprise, as shareholders, directors, officers, and employees, have individual expressive input into the whole corporate expression. The corporate entity also

ligible from a combination of supporting reasons, the aggregation of which often determine case outcomes. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 785–89 (2d ed. 1988) (considering whether freedom of speech should not be conceived of as a means to an end, but an “expression of the sort of society we wish to become”); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 878–87 (1963) (considering the purposes of protections to be a combination of theories: individual self-fulfillment, attainment of truth, participation in decision-making, and balance between stability and change); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 *VAND. L. REV.* 265, 272–77 (1981) (“Freedom of speech need not have any one ‘essential’ feature. It is much more likely a bundle of interrelated principles sharing no common set of necessary and sufficient defining characteristics . . . possib[ly] . . . not reducible to any one common core.”).

239 Martin H. Redish, *The Value of Free Speech*, 130 *U. PA. L. REV.* 591, 593 (1982).

240 Cf. Alan Hirsch & Ralph Nader, “*The Corporate Conscience*” and *Other First Amendment Follies in Pacific Gas & Electric*, 41 *SAN DIEGO L. REV.* 483, 486–87 (2004) (arguing that self-realization may only support protections for the individual’s freedom of intellect and conscience and that corporations are unable to have the requisite individual intellect or conscience).

241 See Ross, *supra* note 233, at 460.

242 See *id.*

has an identity existentially expressed in the purposes and existence given it by individuals and in its own powers of speech. These individuals identify with corporate activity because it is theirs, too.²⁴³ Natural entity theory demonstrates that in protecting full self-expression for individuals, one must protect the corporate identities they form. If profit-seeking exists alongside religious expression in a group, the commercial character of a corporation does not nullify this self-expressive quality.

Another philosophical objection to protecting corporate religious communication may be the theory claiming that democratic participation is the criterion by which to judge all First Amendment value.²⁴⁴ In the political speech context, from which many of these theoretical foundations find their origin, this criterion is a powerful incentive for the protection of corporate political speech; *Bellotti* explicitly relied upon this rationale.²⁴⁵ However, even in that context, Susan Ross argues that "corporations cannot vote" and "there is arguably a zero-sum game between corporate and individual free speech."²⁴⁶ In her view, similar to the enhancement model discussed below,²⁴⁷ the risk of corporate speech harming public debate demands affirmative legal limits on corporate speech. Because corporate political speech cannot satisfy the democratic criterion by being sufficiently supportive of individual political speech, an individualistically oriented theory might find corporate religious speech even less compatible with democracy.

243 See Fort, *supra* note 5, at 453 (explaining that for a religious person, "beliefs are so fundamental to his business activities that to not speak of them would be as phony as he is accused of appearing" (discussing LAURA L. NASH, *BELIEVERS IN BUSINESS* 124 (1994))).

244 See MEIKLEJOHN, *supra* note 234, at 24–28 (arguing from a town meeting analogy for viewpoint neutrality and central protection of political speech); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20–28 (1971) (arguing that the political aspect is the only difference between the freedom of speech and other freedoms and is therefore the test for protection); Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 204–10 (advocating the paradigm of sedition for determination of First Amendment protection). Picturing political dissent as the *only* central case of the First Amendment unduly limits the constitutional imagination from recognizing the side-by-side priority and relationship between the freedoms of religion and speech.

245 See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.11 (1978) (citing ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 24–26 (1948)).

246 Ross, *supra* note 233, at 460, 462.

247 See *infra* text accompanying notes 263–71.

However, valuing speech for its capacity to benefit public debate, taken broadly, can support protecting all speech, including corporate religious speech.²⁴⁸ Free speech in a pluralistic society is not a zero-sum game.²⁴⁹ Welcoming all informative speech potentially contemplates as much speech by as many speakers as are willing on as many topics as possible. In an age where government regulation affects nearly every facet of life, information on any topic may contribute to policymaking. In particular, knowledge about something as socially important as religion can only lead to more informed decisions. An approach recognizing the unlimited opportunity for speech in a democracy could only protect speech that advocates policy decisions from a religious perspective. And, if policy is more broadly understood, this theory could justify protection of nearly all speech, including corporate religious speech.

2. Marketplace of Ideas Conceptions of Corporate Religious Expression

If, as is traditionally assumed, the “best test of truth is the power of the thought to get itself accepted in the competition of the market,” all corporate ideas deserve an equal opportunity.²⁵⁰ The “marketplace of ideas” theory insists that all speech be legally equal speech and none legally worthless speech.²⁵¹ America has a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”²⁵² The nation risks the harms that can result from false or dangerous ideas or voices.²⁵³

248 See MEIKLEJOHN, *supra* note 245, at 91 (“[C]itizens of the United States will be fit to govern themselves under their own institutions only if they have faced squarely and fearlessly everything that can be said in favor of those institutions, everything that can be said against them.”).

249 Cf. BERGER & NEUHAUS, *supra* note 132, at 41 (“[T]he process symbolized by ‘E Pluribus Unum’ is not a zero-sum game. That is, the *unum* is not to be achieved at the expense of the *plures*.”).

250 *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

251 See JOHN STUART MILL, *ON LIBERTY* 114 (David Bromwich & George Kateb eds., Vail-Ballou Press 2003) (1859) (“Truth, in the great practical concerns of life, is so much a question of the reconciling and combining of opposites that very few have minds sufficiently capacious and impartial to make the adjustment with an approach to correctness, and it has to be made by the rough process of a struggle between combatants fighting under hostile banners.”).

252 *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

253 See MILL, *supra* note 251, at 114 (“When there are persons to be found, who form an exception to the apparent unanimity of the world on any subject, even if the world is in the right, it is always probable that the dissentients have something worth hearing to say for themselves, and that truth would lose something by their silence.”).

Protecting all speech qua speech probably underlies the Supreme Court's commitment to protection of "expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered."²⁵⁴ *Bellotti* adopted this viewpoint when it stated that the First Amendment risks misunderstandings.²⁵⁵ No viewpoint should get disfavored government treatment.²⁵⁶ If the marketplace of ideas indiscriminately welcomes all voices on all topics, it welcomes corporate religious opinions.²⁵⁷

Some add that the marketplace of ideas' purpose is not merely debate in itself, but also the discovery of truth and knowledge through disputation.²⁵⁸ When censorship limits the marketplace of ideas, it limits the search for truth. So, if religious debates probe questions of truth,²⁵⁹ religious speech deserves high protection. If all speech may help find truth, limiting the religious speech of some, like profit-seeking groups, hinders this purpose.

Public choice theorists find value in the marketplace of ideas symbol because they consider free information as a community commodity undervalued by both the marketplace and the political system.²⁶⁰ Individuals have an incentive to "free ride" because they can enjoy the benefits of public goods without helping to produce those goods.²⁶¹ Consequently, neither market demands nor political incentives fully capture the social value of public goods such as information. Our polity responds to this undervaluation of information by providing special constitutional protection for information producing activities.²⁶²

254 *NAACP v. Button*, 371 U.S. 415, 444-45 (1963).

255 *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 (1978).

256 *See Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . .").

257 This theory is in line with the assertion that constitutionally, nothing should make corporate religious speech different from other corporate speech, and that all corporate speech should be protected. *See supra* Part I.B.

258 *See* JOHN GARVEY, *WHAT ARE FREEDOMS FOR?* 66 (1996) (arguing that seeking truth through speech is intrinsically good and human); FREDERICK SCHAUER, *FREE SPEECH* 19-29 (1982) (examining if the marketplace of ideas causes increased knowledge).

259 *See generally* POPE JOHN PAUL II, *FIDES ET RATIO* (1998) (claiming that the end of humanity's innate desire to question and love wisdom is knowledge of truth, which is God).

260 *See* Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554-55, 558-64, 568-69 (1991).

261 *See id.*

262 *See id.*

Encouraging the increase of society's raw quantity of information irrespective of society's opinion about particular speech may also justify protection of all speech. Although this "law and economics" approach may not underlie *Bellotti* and *Button* historically, it supports a speaker-neutral and content-neutral protection of speech, with the same results for corporate religious speech.

However, one twist on the marketplace of ideas model neither demands nor permits such government neutrality. The enhancement model considers the First Amendment not as a limit on government interference with speech, but as an authorization for government to create conditions for high-quality civil discussion.²⁶³ This model recognizes that the market may leave some voices silenced,²⁶⁴ generating unfair competition of ideas and placing the costs of speech on others. Depending on the circumstances, the enhancement model may either stay the censor's hand or require regulation of the marketplace of ideas.²⁶⁵ If corporations seem to drown out individuals' voices, regulating corporate speech may enhance civic discourse.²⁶⁶ If one recognizes that corporations play a valuable social role in allowing individual religious activity, then one might be less likely to argue that the marketplace of ideas is enhanced by silencing corporate religious speech.

Closely related to the enhancement model is the constitutional tension method, which expands the government's obligation as manager of the market to include considering how to balance other values found in the Constitution against free speech.²⁶⁷ Rejecting the paradigm of "freedom or regulation," it finds constitutional values tugging

263 See Lillian R. Bevier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 79–80, 102–13, 115–20.

264 See *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 657, 660 (1990).

265 See Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 263–65, 267–68, 272–76, 302, 304–09 (1992); *id.* at 309 ("For purposes of the Constitution, the question is whether the speech is a contribution to social deliberation, not whether it has political effects or sources.").

266 See Rodney A. Smolla, *Free the Fortune 500! The Debate over Corporate Speech and the First Amendment*, 54 CASE W. RES. L. REV. 1277, 1284 (2004) ("A close cousin of the corporation-is-not-a-human argument is the 'little guy' argument. Freedom of speech may be conceptualized as grounded in notions of David and Goliath, a constitutional guarantee aimed at protecting minority viewpoints against the tyrannies of majorities, at facilitating dissent, and at empowering the dispossessed to make their case against those in possession." (footnote omitted)).

267 See Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 791 (1987) ("[L]eft to itself public debate will not be 'uninhibited, robust, and wide open,' but instead will be skewed by the forces that dominate society. The state should be allowed to intervene, and sometimes even required to do so . . . to correct for the market.").

in different directions. These theories permit limits on corporate religious speech if it hurts individuals' expression, imposes social costs, or clashes with values like nonendorsement of religion or commercial regulation or equality.²⁶⁸ Broadly, they might condition religious corporate speech protection upon its value to society.

The counter to the enhancement and constitutional tension models of free speech is fourfold. First, one may say the true constitutional value is freedom, not censorship coated in benevolence. Second, in the balancing of other constitutional values against unregulated speech, speech should presumptively win because it rarely causes serious injury²⁶⁹ and the First Amendment anticipates and bears the risk of such injury.²⁷⁰ Third, the absolutist language of the Speech Clause might indicate that it should categorically win when constitutionally balanced, even if other clauses might say corporations should not express religious opinions. Fourth, the textual premise that the First Amendment, in requiring the state to abstain from abridging speech, actually requires the government to judge, improve, and limit speech, is attenuated. If the better interpretation seems to be that the First Amendment means to block state regulation of speech, legislators may not regulate corporate religious speech.²⁷¹

3. The First Amendment as a Check on the People: Fortress, Equality, and Tolerance Theories on Corporate Religious Speech

These last arguments rest upon a fortress theory—interpreting the First Amendment as a structural check against state attempts, noble or misguided, to “improve” the marketplace of ideas by “distorting” how it functions.²⁷² It tries to halt all who censor, because they think some form of speech is not worth protecting, be the censor

268 See Burke, *supra* note 189, at 388–89 (supporting a modern realignment of speech rights, like property rights).

269 See LEE C. BOLLINGER, *THE TOLERANT SOCIETY* 124 (1986) (“That speech generally causes less individual and social injury than does nonspeech behavior, while not in itself a sufficient justification for a free speech principle such as we now have, is nonetheless an important characteristic for explaining why speech is an appropriate setting in which to pursue a greater capacity for tolerance.”).

270 See *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939) (stating that an indirect consequence of protecting speech under the First Amendment is imposing a burden on others). This view argues that it cannot be a compelling or substantial state interest to stamp out the costs inherent in free speech in the first place.

271 See *Cohen v. California*, 403 U.S. 15, 24 (1971); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

272 See Bevier, *supra* note 263, at 79–80, 102–13, 115–20 (discussing differences between enhancement and distortion models of the Free Speech Clause).

a majority, a minority, a dissenter, or the powerless.²⁷³ This theory sees the main function of the First Amendment as removing decisions over the content of speech to associations and individuals in society.²⁷⁴ It may seem unusual to consider the stereotypical powerful corporation as a potential victim of the tyranny of the majority, but corporations, large or small, like other unpopular religious speakers, have the same right to protection from government action.²⁷⁵ A fortress theory certainly will protect corporate religious speech from state regulation.

Furthermore, constitutional tension theorists need not pit equality interests against free speech. Others instead find equality a driving principle in the Speech Clause because it insists that the state maintain neutrality between ideas and speakers.

When government restricts only certain ideas, viewpoints, or items of information, people wishing to express the restricted messages receive "unequal" treatment. . . . For just as we "strictly scrutinize" any law that discriminates on the basis of race, whether it denies an important or trivial benefit, so too must we "strictly scrutinize" any law that discriminates on the basis of content, whether it has a substantial or only a modest impact on public debate. It is the fact of

273 See, e.g., STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 1–2, 74–75, 82–83, 85, 203–04, 210 (1990); *id.* at 5 ("If the first amendment is to have an organizing symbol . . . let it be the image of the dissenter."). But see BOLLINGER, *supra* note 269, at 8–10, 120–21, 124–26; *id.* at 134 ("It should be borne in mind that the tolerance principle . . . is intended and designed to perform a self-reformation function for the general community and not . . . to offer a shield of protection either for the majority against the government or for minorities against . . . the majority.").

274 See Stone, *supra* note 219, at 228 ("[A]ny effort of government to restrict speech because it conveys a 'false' or 'bad' idea is inconsistent [I]n a self-governing system, the people, not the government 'are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments'" (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 (1978))).

275 See Ribstein, *supra* note 55, at 124 ("As sources of significant wealth and power, corporations are vulnerable to political manipulation. Thus, it is important to consider whether corporations' power to speak out against such manipulation is protected by the First Amendment."); see also CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 235 (1993) ("Let us begin with Justice White's claim that restrictions on corporate speech are a reasonable effort to promote corporate equality. If this is the rationale for such restrictions, . . . such restrictions should be invalidated as impermissibly selective. Many corporations are relatively poor. Many corporations are relatively rich. A limit on corporate speech is insufficiently connected to the general interest in ensuring equality in political campaigns."). But see Mayer, *supra* note 168, at 605 ("[C]ommon concerns about a tyranny of the majority are not present for the corporation.").

discrimination, not the impact on public debate that warrants "strict scrutiny."²⁷⁶

Bellotti might justify equal free speech rights for corporations because corporations are persons under the Fourteenth Amendment. Discriminating against corporate religious speech treats religious content and corporate speakers unequally, and for equality proponents, impermissibly so.²⁷⁷

On the other hand, equality may only be important insofar as it promotes tolerance. If restraining innate human tendencies toward intolerance is the end of enforced free speech,²⁷⁸ the absolute restraint of government interference with speech limits decisionmakers' "conscious or unconscious biases that may undermine their ability to evaluate accurately and impartially" the messages of unpopular speakers.²⁷⁹ Even if regulations come from good intentions or act on unworthy speech,

the problem of the [censoring] impulse—because it cuts through a variety of social interactions and involves a capacity for toleration in the broadest sense—must really be confronted by creating something of an *ethic* against regulation, which will exert force in the opposite direction, very much like the presumption of innocence does in the context of the criminal jury trial.²⁸⁰

The act of tolerance itself may teach the self-control needed for a society of free speakers,²⁸¹ especially when suppression is otherwise low-cost or invisible to most in society.²⁸² For these theorists, the very act of abstaining from regulation of all speech—presumably including corporate religious speech—has tolerance benefits overriding other concerns.

276 Stone, *supra* note 219, at 202.

277 This Note's interpretation of tolerance principles might be at odds with the practical suggestions potentially espoused by the proponents of tolerance. These scholars might disagree that their equality principles support protecting corporate religious speech, especially if they buttress their arguments with an enhancement model. If corporations already have a disproportionate influence, government could promote equality by restricting corporations. This Note already criticized use of that model, however. See *supra* notes 263–66 and accompanying text.

278 See Steven D. Smith, *The Restoration of Tolerance*, 78 CAL. L. REV. 305, 334–38 (1990) (describing the prudential and positive arguments for tolerance).

279 See Stone, *supra* note 219, at 225.

280 BOLLINGER, *supra* note 269, at 125.

281 See *id.* at 8–10, 120–21, 124–26, 133–36. But see David A. Strauss, *Why Be Tolerant?*, 53 U. CHI. L. REV. 1485, 1499 (1986) (reviewing BOLLINGER, *supra* note 269) ("It is not at all clear that people who are forced to tolerate speech they abhor will become more tolerant in other contexts; they might easily become *less* tolerant . . .").

282 See Strauss, *supra* note 281, at 1497.

4. Religious Pluralism and the Speech of Religious Corporations

In the end, *Bellotti* should not be read to exclude religious speech when the First Amendment as a whole protects religious autonomy.²⁸³ “Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.”²⁸⁴ The First Amendment therefore could find corporate religious speech equal to, or more significant than, corporate political speech.

However, if one thinks religion is purely private, one might say religious speech protection cannot belong to corporations. If individual freedom of mind and conscience validate rights to religious expression, only individuals, not corporations, qualify.²⁸⁵ However, only an artificial entity model or contractarian model supports the claim that corporate entities lack consciences, and this Note has already argued that these models inaccurately describe the modern corporation.²⁸⁶ Against them, natural entity theory holds that a group conscience and the consciences of the corporation’s members exist in a corporation. The corporation itself has an identity emerging from the uniting of individuals. Analogous conscience problems are presented when states require corporations to act in opposition to their identities and purposes.²⁸⁷ “[B]usiness leaders should not censor their religious motivations. . . . One should not create classifications based on religion; one should not prevent the engagement of a motivation that does have positive contributions to make to society; and one should preserve a moral prophetic ability to critique values that are shared.”²⁸⁸ America’s historic commitment to religious pluralism should be flexible enough to accept profit-seeking religious groups as well as traditional religious associations. What value lies in a

283 See Shelledy, *supra* note 194, at 548 (“[T]he Speech Clause is part of an amendment that protects religious freedom as well.”).

284 Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995).

285 See Burke, *supra* note 189, at 371; Hirsch & Nader, *supra* note 240, at 485; see also Shelledy, *supra* note 194, at 548 (“Because speech, assembly, and religion are all elements of liberty grounded at least in part in individual integrity and autonomy, the Speech and Religion Clauses can be seen in unity as safeguards of independent conscience and individual moral sovereignty.” (footnote omitted)); Mitchell C. Tilner, *Government Compulsion of Corporate Speech: Legitimate Regulation or First Amendment Violation? A Critique of PG&E v. Public Utilities Commission*, 27 SANTA CLARA L. REV. 485, 486 (1987) (denying the corporate freedom of mind).

286 See *supra* Part II.

287 For more on how the corporation may have a conscience, see *supra* Part II.C.3.

288 Fort, *supra* note 5, at 469.

commitment to religious freedom if groups must shed their religious beliefs or expression at the boardroom door?

This subpart has argued that the First Amendment protects corporate religious speech, in theory and in fact. This Note next queries how well these philosophical presumptions of freedom prevented state regulation by examining how *Bellotti*'s First Amendment protections fare in practice.

D. Subsequent Developments in Corporate Speech Cases

No Supreme Court case specifically addresses corporate religious speech. As a result, the only clues to its protection exist in cases like *Bellotti*, advocating general or full corporate speech protection.²⁸⁹ While the Court never overruled *Bellotti*, the case operated in an uncertain area for some time.²⁹⁰ Corporate religious speech protections were cast in doubt when modern political speech cases carved exceptions to *Bellotti*'s prohibitions against speaker discrimination.²⁹¹ While recent developments show that *Bellotti* is here to stay, it is important to distinguish the deviation from full-strength *Bellotti* protection. This exercise highlights the continued importance of corporate theory in this area of constitutional law.

Because of the complexities of the doctrinal framework of Free Speech claims, it is not enough to say that the Speech Clause protects (or does not protect) a form of speech without first examining the compelling government interests the Court has historically identified as able to surmount First Amendment protection. Under existing case law, the strongest Speech Clause protection, a strict scrutiny analysis, finds regulations constitutional only if a compelling government interest justifies a statute and the statute is narrowly tailored to serve that compelling state interest. Different, highly specific compelling government interests may ultimately justify one topical regulation where they could not suffice for another protected subject area regulation.²⁹² Likewise, in considering intermediate scrutiny (which only requires that a substantial government interest justify either a regula-

289 See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 (1978).

290 "In general, these cases suggest that the application of the First Amendment to corporate speech is very much an open question." Ribstein, *supra* note 55, at 129.

291 See *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990). But see *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 8-9 (1986); *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 533-35 (1980).

292 In equating the constitutional value of all corporate speech, including political and religious, and in arguing that this constitutional value is high, this Note affirms that the First Amendment requires, at the very least, application of a strict scrutiny analysis.

tion of expressive conduct or regulation of conduct based on time, place, or manner), a liberal scope given to substantial government interests has the potential to strip constitutional speech protection of much of its force.²⁹³

Some might argue that compelling state interests justify the regulation of corporate religious speech. For example, in a future litigation setting, the government might attempt to justify WFEIA by asserting a compelling or substantial government interest in protecting a listener's workplace privacy or freedom from coercion.²⁹⁴ Privacy rights can be implicated when individuals are "captive" to speech and the speech intrudes upon an area in which they should be free from repeated or unwarranted invasions by the speech.²⁹⁵ That right in the WFEIA setting would mean that listeners have the right to "veto" or reject any unwanted religious communications, without risking adverse employment action from their employers. If found to be adequate, the state interest in protecting this right would be sufficient to overcome any statutory viewpoint-based or content-based discrimination. However, such listeners' vetoes run against the spirit of the First Amendment and do not (yet) justify state regulation.²⁹⁶

Cases denying political speech protection to corporations in the last two decades strayed from *Bellotti's* natural entity conceptions in the face of compelling government interests based on campaign

293 See *supra* notes 206–10 and accompanying text.

294 See *Secunda*, *supra* note 22, at 210 n.8 (citing *Cohen v. California*, 403 U.S. 15, 21 (1971)); cf. *Hill v. Colorado*, 530 U.S. 703, 718 (2000) (indicating that, on behalf of a listener, the state has the right to restrict the speech of sidewalk abortion counselors).

295 See *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 736–38 (1970) ("We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another.").

296 See, e.g., *id.* at 738 ("[W]e are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sounds . . ."); cf. *Cohen*, 403 U.S. at 21 ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections."). For further discussion, see *supra* Part III.C. But see *Hill*, 530 U.S. at 718 (justifying a speech restriction based on the state's interest in protecting both the right to be free from unwanted communication and the right to pass into an abortion clinic without obstruction). As a result, WFEIA's constitutionality is instead likely to reduce to questions of (1) whether corporations have religious speech rights, (2) whether those rights are coextensive with individuals, and (3) whether a compelling government interest overcomes the presumption of protection. For detailed discussion of these doctrinal concepts, see *supra* Part III.A–C.

finance considerations bolstered by an artificial entity theory. The Court adopted an openly artificial entity perspective as the basis for permissive state speech regulation, referring to the “unique *state-conferred* corporate structure that facilitates the amassing of large treasuries” as its justification for speech restrictions.²⁹⁷ Freedom of association took second place to stopping “corporate use of ‘substantial aggregations of wealth amassed by the special advantages which go along with the corporate form of organization’ and [to] protecting individuals from corporate use of money to support candidates individuals may oppose.”²⁹⁸ However, the notion that corporations are “creatures of the state” and thus merit less constitutional protection from the state’s speech regulation relies on outdated conceptions of the corporate form.²⁹⁹ The idea that wealth and power eliminates free speech protection also runs afoul of the motivation behind the Speech Clause.³⁰⁰

*Austin v. Michigan State Chamber of Commerce*³⁰¹ reflects the height of these cases where the Court subordinated corporate speech rights to the compelling state interest in stopping “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”³⁰² After *Austin* questioned their theoretical foundations, the rights of corporations and groups were predictively uncertain.³⁰³

For over fifteen years after *Austin*, the Court paid lip service to *Bellotti* and mandated a strict scrutiny analysis as the supposed protection for corporate speech—while in practice it placed different values upon different groups’ political speech. This devaluing occurred when it found in *Austin* that interests in preventing the corrosive effects of corporate speech surmounted the other benefits of corpo-

297 *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990) (emphasis added). For a discussion of *Austin*’s deep confusion of corporate theory, see Watts, *supra* note 47, at 357, 359–61, 372.

298 Ribstein, *supra* note 56, at 113 (quoting *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 207–08 (1982)); see Eric L. Richards, *The Jurisprudential Sin of Treating Differents Alike: Emergence of Full First Amendment Protection for Corporate Speakers*, 17 MEMPHIS ST. U. L. REV. 173, 218–19 (1987) (arguing for an artificial entity theory in order to justify denying free speech rights to corporations).

299 See *supra* Part II.

300 See *supra* Part III.C.

301 494 U.S. 652 (1990).

302 *Id.* at 660.

303 See *id.* at 657 (asserting that the “mere fact that the Chamber is a corporation does not remove its speech from the ambit of the First Amendment,” but finding a compelling interest to override free speech rights).

rate speech to society.³⁰⁴ By the results of their analyses, *Austin* and its progeny seem not to be applying the strict scrutiny test in the spirit of *Bellotti*, even though the opinions professed to follow *Bellotti*. However, *Austin*'s ad hoc restrictions did not profess to cover or translate to nonpolitical religious environments even though they present difficulties irreconcilable with *Bellotti*'s understandings.³⁰⁵

An analogy of the rationale of *Austin* to the religious square could equally silence corporate religious speech. This rationale could theoretically cross over from the corporate political speech realm to the religious speech realm upon a factual showing that corporate religious speech has a distorting effect like the distorting effect of corporate political speech. *Austin* indicates that censorship is justified either when a speaker invests a great deal of its money to get its message out or when the speaker is a corporation.³⁰⁶

This rationale should be avoided in a consideration of corporate religious speech, because on its terms it gives the government a license to silence all corporate speech.³⁰⁷ Restraining the voices of some to enhance the voices of others, through discrimination on the basis of wealth, is anathema to understanding the First Amendment as a structural check on government to facilitate a robust marketplace of ideas.³⁰⁸ If political and religious speech may be silenced, where will the state's power end? Will corporate scientific research breakthroughs be able to be limited for fear that individuals' scientific results will not get an audience? Free speech cannot be free from government tinkering if one sees it as a zero-sum game, and not as an opportunity for an abundant amount of communication.³⁰⁹

304 See Watts, *supra* note 47, at 333 ("*Austin*, therefore, permitted what the Court in *Bellotti* had strained to avoid—differential treatment of corporate speech and individual speech under the First Amendment.”).

305 See Ribstein, *supra* note 56, at 116 ("*Austin*'s and *Bellotti*'s polar positions cannot both be correct.”).

306 See *Austin*, 494 U.S. at 660.

307 For arguments against *Austin* from an enhancement model theorist, see SUNSTEIN, *supra* note 275, at 238–39 (“It may be legitimate to condition new corporate benefits on new agreements to refrain from speech. But in the long history of the corporate form, we have reason to fear that the new restrictions on that old form are not an effort to prevent abuse of the form, but amount instead to highly selective effort to stop businesses from speaking to the public about matters that concern them. . . . It follows that a limitation on corporate speech should be treated as an unconstitutional condition.”).

308 See *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam) (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment”); *supra* Part III.C.2–3.

309 See *supra* notes 246–49 and accompanying text.

Recently, the Roberts Court signaled its reluctance to continue this approach and affirmed that a limit on some political speech does not necessarily limit corporate speech on other topics.³¹⁰ In *FEC v. Wisconsin Right to Life, Inc.*,³¹¹ the Court found that the federal government could not justify a restriction on corporate political speech.³¹² Nor would the Court provide corporations lesser constitutional protection than it accorded to individuals.³¹³ The decision explicitly reaffirmed *Bellotti's* strict scrutiny protection of all corporate speech.³¹⁴ *Wisconsin Right to Life* limited *Austin*, so the state's supposed compelling interest in preventing corruptive speech applies only to justify regulating express political advocacy.³¹⁵ Chief Justice Roberts asserted that the First Amendment protected different kinds of speech equally; that *Austin* found compelling interests to overcome First Amendment protection for one important form of speech will not persuade the current Court to extend or adopt *Austin's* rationales to allow regulation of other types of speech.³¹⁶

A corporate ad expressing support for the local football team could not be regulated on the ground that such speech is less "core" than corporate speech about an election A court applying strict scrutiny must ensure that a compelling interest supports *each application* of a statute restricting speech. . . . Such a greater-includes-the-lesser argument would dictate that virtually *all* corporate speech can be suppressed, since few kinds of speech can lay claim to being as central to the First Amendment as campaign speech. That conclusion is clearly foreclosed by our precedent.³¹⁷

Calling the extension of *Austin's* rationale "a constitutional 'bait and switch,'" the Court noted that *Austin's* own justifications should instead preclude using anticorruption interests to justify the regulation of other topics of speech, because *Austin* only permitted some regulation if the state left corporations able to communicate on other

310 *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2673 (2007) (opinion of Roberts, C.J. & Alito, J.).

311 127 S. Ct. 2652.

312 *See id.* at 2674.

313 *See id.* at 2673.

314 *See id.* at 2660 (majority opinion); *id.* at 2664, 2671, 2673 (opinion of Roberts, C.J. & Alito, J.) (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 (1978)); *id.* at 2677–87 (Scalia, J., concurring) (arguing with Justices Thomas and Kennedy for a full return to *Bellotti*). This shows that the decision to change directional courses back to *Bellotti*, regardless of extent, commands a majority of the current Court.

315 *See id.* at 2671–73 (opinion of Roberts, C.J. & Alito, J.).

316 *See id.*

317 *Id.* at 2671–72 (citing *Bellotti*, 435 U.S. at 776–77).

topics.³¹⁸ Since *Austin* and its progeny's anticorruption interests will probably not be extended by the Court, the default case on point is *Bellotti*.

Bellotti governs today to prevent corporate speaker discrimination.³¹⁹ Chief Justice Roberts, like Justice Powell writing before him in *Bellotti*, understands that First Amendment strict scrutiny protection exists for all corporate speech without excluding any topics of speech.³²⁰ Therefore, relying on *Bellotti*'s egalitarian protections and the historical First Amendment protection of religious speech topics,³²¹ the First Amendment today defends corporate religious speech.

CONCLUSION

Because the area of corporate religious speech is new to academia, the thesis of this Note stakes out a position likely to arouse debate. The proliferation of case law, theories, and variables in play, combined with the passions that the First Amendment, corporations, and religion arouse, leave room for serious disagreement. This Note hopes to have shaped the future debate by conducting an analytic survey showing where the fault lines of future debate may lie.

Accordingly, this Note drew attention to the important theoretical and constitutional issues facing corporations hoping to prioritize social responsibility through religious identity. The First and Fourteenth Amendments could and should rely on a natural entity theory of the corporation to protect corporate religious speech from special restrictions. These amendments entitle corporate religious speech to constitutional armor. Examining this issue now aids corporations and lawmakers unaware of the rights interfered with by recent legislation, like WFEIA.

Among the three main theories of the corporation, only a natural entity theory supports protecting corporate religious expression. The other two theories, discredited even in the nineteenth century, rely on inaccurate understandings of the modern corporation when they deny that it may have rights to religious expression. Artificial entity theory encourages heavy state regulation when it conceives of corporations as creatures of the state without independent rights or identi-

318 See *id.* at 2672–73 (citing *McConnell v. FEC*, 540 U.S. 93, 206 n.88 (2003); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 675–78 (1990) (Brennan, J., concurring); *id.* at 678 (Stevens, J., concurring)).

319 See *id.* at 2673 (opinion of Roberts, C.J. & Alito, J.); *supra* Part III.B.

320 See *Bellotti*, 435 U.S. at 776–77.

321 See, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995); *supra* Part III.C.

ties. Contractarian theories think that corporations lack rights to religious expression, because they deny that corporations exist as an entity separate from individuals. Constitutional law should instead be based on a theory correctly understanding corporate persons as natural entities formed by individual cooperation, which have independent identities, expressive capacities, and institutional rights.

The Constitution relies on a natural entity theory to protect religious corporate speech under the First and Fourteenth Amendments. Because corporations are persons for purposes of the Due Process Clause, the liberties guaranteed to them include the same speech protections as individuals enjoy under the First Amendment. Moreover, the First Amendment itself independently protects corporate religious speech. Discrimination based on speaker identity finds opposition in most theories explaining the American freedom of speech.

The best possible safeguard of corporate rights in this area would come from judicial recognition of the corporate right to religious expression.³²² Even opponents of corporate protections recognize that a reasonable court is likely to find Bill of Rights protections for corporate freedoms.³²³ Until the judiciary sets out clear law protecting corporate religious expression, legislators should realize that statutes like WFEIA, which make it impossible for a corporation to be religious, undercut the nation's commitment to religious pluralism.³²⁴ They may and should protect corporate religious speech through explicit statutory grants of protection.³²⁵ Corporations in turn may

322 Lee Bollinger argues that judicial guardianship alleviates society's tendency to be intolerant of unpopular speech or speakers. "[W]hen the needs of intolerance run extremely high, there is in the structure of free speech a means for making tolerance more palatable" BOLLINGER, *supra* note 269, at 136.

323 See, e.g., Mayer, *supra* note 168, at 660–61 (proposing a constitutional amendment to remove corporate Bill of Rights eligibility).

324 Absent a clear Supreme Court lead, ad hoc protection by legislatures of differing jurisdictions is one way to ensure national protection of this First Amendment right. Congress may not expand or define the scope of Fourteenth Amendment protection through its Section 5 power in contravention of the Supreme Court's determination of corporate rights, but only may create protections against the federal government. See *City of Boerne v. Flores*, 521 U.S. 507, 527 (1997) ("Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law.").

325 There are examples of well-tailored exemptions for religious persons incorporated in statutes, see Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of Smith*, 2004 BYU L. REV. 1633, 1653; Michael J. Mazza, *May a Catholic University Have a Catholic Faculty?*, 78 NOTRE DAME L. REV. 1329, 1356 (2003); Joshua D. Dunlap, Note, *When Big Brother Plays God: The Religion Clauses, Title VII, and the Ministerial Exception*, 82 NOTRE DAME L. REV. 2005, 2008–10 (2007), by which courts and legislatures limit the application of antidiscrimination statutes to some religious

define their religious identities in the articles of incorporation or develop a paper trail detailing their bona fide religious beliefs.³²⁶

The law favors allowing corporations to have religious speech rights. Still, there may be more compelling reasons for protecting religious businesses. Religious consciousness can curb certain corporate abuses by fostering greater social responsibility. And by acting to protect religious corporations, Americans can show that they will make room for religious actors in all areas of society. Individuals who want to seek profit together should not be forced to check their religious identities at the boardroom door. Instead, if America stands by its historically robust religious pluralism, all individuals and groups—including corporations—should be able to bring religion not only to the public square, but also to the market square.

persons. *But see supra* notes 27–32 and accompanying text (discussing Title VII's application to religious speech).

326 For example, note how Delaware's incorporation statutes provide: "Notice of an intention to apply for a charter or articles of association shall . . . set[] forth briefly the character and purpose of the corporation and the kind of service to be performed by it." DEL. CODE ANN. tit. 3, § 8502(b) (2001).

