# Christianity and the Large Scale Corporation

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# CHRISTIANITY AND THE LARGE SCALE CORPORATION

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Ask most people what they associate with "Christianity and the corporation" and, at least in the US, they may mention activist nuns calling for shareholder votes on sweatshop labor, nuclear weapons or divestment from South Africa, or perhaps a newspaper story about mutual funds that invest only in "faith friendly" corporations. Each is a contemporary manifestation of relations that run far deeper, and date back well over a thousand years. The early church spawned many of the largest corporate enterprises of the middle ages, and tenaciously promoted the concept of a collective entity distinct from the state. When the modern large scale corporation emerged in the nineteenth century, Christian responses were more complicated. Many worried about the effects of limited liability, and evangelical populists insisted that railroads and other large corporations needed to be tamed by governmental regulation. But others held very different views. More recently, Christians perspectives have tended divide between those who view large scale corporations as an essential counterbalance to state power that should be free from governmental interference, and those who favor a much firmer regulatory grip.

This chapter traces these Christian attitudes toward and influence on the large scale corporation. We begin with the pre-history, the emergence of key attributes of the corporate form in Western Europe in the late Roman Empire and thereafter. From there, we turn to England and the United States, where the corporation achieved its modern form in the mid nineteenth century. The remainder of the chapter focuses most extensively on the United States, which saw a remarkable proliferation of large, widely held corporations as a result of the so-called Great Merger Wave at the end of the nineteenth century. We are now in the midst of another upheaval. While the corporate

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form itself has not changed, the advent of new financing techniques has simultaneously provided new tools for, and put more pressure on, corporate managers. It is too early to define the Christian contributions to these developments with any precision, but just the right time to consider some of the possibilities.

Because the chapter focuses on large scale corporations, it treats partnerships and some of the new business entity forms that have emerged in recent decades only in passing. But I will make reference to exciting recent work that explores these other developments. Because of my own religious orientation, and because the center of gravity shifts to the United States when large scale corporations emerge, the chapter also has a somewhat Protestant feel. But Catholic thought and influence features both in the beginning and in the end.

## Pre-History of the Modern Corporation

The standard definition of the corporation focuses on five key characteristics: limited liability (meaning that the corporation's shareholders are not personally liable for its debts), free transferability of ownership interests (shares can be sold by one investor to another), continuity of existence (the corporation is "immortal;" it continues indefinitely, even if individual shareholders die or go bankrupt), centralized management (the management role is distinct from ownership, so that the corporation can be run by professional managers who need not own stock), and entity status (the corporation is a distinct entity with, among other things, the power to hold property and to sue or be sued in its own name). By contract and in its constitutional documents, a corporation may waive one or more of these attributes. Small corporations often restrict the transferability of the company's stock to ensure that it does not get into undesirable hands, for instance, and shareholders relinquish a portion of their limited liability if they agree to guaranty a key corporate obligation such as a bank loan. But in principle, corporations have each of the five characteristics.

The most recognizable and consciously sought after attribute is the first, limited liability. Limited liability is indeed hugely important; as we shall see, it occasioned sharp rhetorical clashes, with theological artillery on both sides, in nineteenth century England. But in a series of pathbreaking recent articles, Henry Hansmann and Reinier Kraackman (joined in their most recent effort by Richard Squire) contend that the key historical development actually was legal recognition of the last of the attributes, entity form.[3] Of particular importance is the quality they call "entity shielding." If the entity is governed by "weak" entity shielding, as partnerships are, creditors of the entity have first dibs on its assets, prior to any claims of creditors of the owners of the entity. Thus, if a partnership fails, its assets are distributed to partnership creditors before any creditors of individual partners are entitled to any share. With corporations, which enjoy "strong" entity shielding, another type of entity shielding is added: liquidation protection. Neither a shareholder nor a personal creditor of a shareholder can force the corporation to pay out the shareholder's ownership stake in the corporation. It is far more difficult than with a partnership for shareholders to liquidate their stake; consequently, the corporate entity has superior staying power.[4]

Not only does entity shielding provide essential benefits (it simplifies the monitoring that entity creditors need to do, and reduces the risk that vibrant enterprises will be dismembered if an owner dies or goes bankrupt), it also is the only attribute of a corporation that enterprising business people could not have achieved privately, through clever use of contractual provisions. To make sure that the claims of entity creditors came first, each owner would need to persuade every one of her current and future personal creditors to agree by contract to subordinate their own claims against entity assets to creditors of the entity. To make matters worse, each owner would be tempted to cheat, since creditors might be willing to extend personal credit on more generous terms if their potential claim against the entity were not subordinated. The law solves this

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[3] Henry Hansmann, Reinier Kraakman, and Richard Squire, "Law and the Rise of the Firm," *Harv. L. Rev.* 119 (2006), p. 1333; Henry Hansmann and Reinier Kraakman, "The Essential Role of Organization Law," *Yale L.J.* 110 (2000), p. 387.

[4] The most elaborate form of entity shielding, "complete" entity shielding, insulates the entity from claims by anyone except the entity's creditors. Hansmann et al, *ibid.*, at 1338 (listing nonprofit corporations and trust as familiar examples).

dilemma by providing entity shielding as one of the attributes that comes with the decision to form a corporation.

The key characteristics of the corporation emerged fitfully over the centuries, with bursts of innovation occurring at irregular intervals.[5] Its antecedents are often traced to ancient Rome, which developed a variety of private business forms that foreshadow the modern corporation in some respects. The *peculium*, which governed assets managed by a Roman's slave, appears to have enjoyed limited liability: creditor suits against the slave's master were limited to the value of the *peculium* itself. When a group of investors bid on state contracts, they set up an entity, the *societas publicanorum*, that functioned very much like a modern limited partnership. Investors who did not participate in management enjoyed limited liability, whereas managing partners were personally liable for the debts of the venture. Ownership interests were freely traded, and the *societas publicanorum* appears to have subject to strong entity shielding with respect to its limited partners. A few centuries later, in medieval and renaissance Italy, the resurgence of vibrant commercial enterprise was accompanied by another cluster of new business forms. The *compania*, the principal partnership form, evolved to provide a geographically oriented form of weak entity shielding: local *campagnia* creditors enjoyed priority, a status both reflected in and reinforced by the hub-and-spoke framework used by the Medici banking empire, with separate partnerships for each of the cities where the bank established a presence. Like the Roman *societas publicanorum*, the Italian *commenda*, which was first used for shipping ventures, resembled the modern limited partnership, with limited liability, strong entity shielding and tradeable partnership interests. Later still, in the seventeenth and eighteenth centuries, the forbears of today's giant publicly held corporations emerged. The Dutch East India Company and England's East India Company were given limited liability and strong entity shielding by their respective sovereigns; these protections, as well as the monopoly privileges the companies enjoyed, fueled a vibrant market in their shares.

Throughout this early history, the Catholic church played a prominent role in legitimizing corporate enterprise. "[T]he church rejected the Roman view that apart from

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[5] The discussion in this paragraph draws on Hansmann et al, *ibid.*.

public corporations ... only collegia recognized as corporations by the imperial authority were to have the privileges and liberties of corporations," Harold Berman has written. "In contrast, under canon law any group of persons which had the requisite structure and purpose– for example an almshouse or a hospital or a body of students, as well as a bishopric or, indeed, the Church Universal– constituted a corporation, without special permission of a higher authority."[6] The participants in Christian enterprises, which included many of the largest businesses of the medieval and early modern period, entered into contracts and defended against debt collection actions as a collective, rather than individuals. (Only much later did they begin to own property collectively, however; Christian enterprises hewed to the Germanic practice of holding assets in the names of each of the members).[7] One scholar has recently attributed the popularity and acceptance of corporate enterprise to the absence of strong states after the decline of the Roman Empire. "The consequent power vacuum provided incentives as well as opportunities to institute private legal systems as a means of enhancing organizational efficiency," he argues, with particular reference to the development of canon law. "The resulting process of incorporation fed on itself as new corporations increased experience and familiarity with decentralized governance."[8] The church-related corporations that thrived in this environment differed from modern for-profit corporations in crucial respects due to their nonprofit status. Other than salaries, they were not permitted to make distributions to their members; nor did they have tradable ownership interests. This meant that many of the characteristic dilemmas of modern corporations, such as the need to police distributions and to protect minority shareholders from oppression by the majority, did not arise in the same way in even the largest Christian enterprises. But the church was squarely in the middle of the early evolution of the corporation, not just acceding to the idea of collective, nonpublic enterprise but serving as its most important exemplar.

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[6] Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983), pp. 216, 219.

[7] *Ibid.* p. 219.

[8] Timur Kuran, "The Absence of the Corporation in Islamic Law: Origins and Persistence," *Am. J. Comp. L.* 53 (2005), 785, 793.

Nineteenth Century Ideology and the Modern Corporation

While there were important predecessors, such as the Dutch East India Company and the East India Company in the 17th and 18th centuries, the modern corporation truly came into its own in England and the United States in the nineteenth century. Two further regulatory developments set the stage. The first was a radical loosening of the constraints on forming a corporation. In 1720, England had enacted the Bubble Act to curb the formation of joint stock companies, the predecessors of the modern corporation. The Bubble Act "was widely understood to have been enacted for the benefit of the South Sea Company," as historian Stuart Banner has noted, "as a means of driving a large swath of alternative investment vehicles from the market, thus channeling more capital into South Sea shares."[9] But when a bubble of speculative investment burst shortly after its enactment, the Bubble Act served as a general indictment of joint-stock companies. Under the act, the only way to obtain all the benefits of the corporate form was to petition the crown for a formal charter. It was quite difficult to obtain a charter, which meant that the number of new corporate charters was quite small.

The same stance toward corporations also made its way across the Atlantic to America. From the beginning, the states were the ones who dispensed corporate charters (this tradition explains why so much of US corporate law continues to be regulated by the states today); and state lawmakers initially were quite stingy with this privilege. Most states granted only a handful each year, and most went either to nonprofit entities like churches or schools, or for very specific projects. If a state needed a bridge or canal, it would grant a charter to a bridge- or canal-building company. In practice, these corporations were more like branches of state government– like little administrative agencies– than like the corporations of today.

During the course of the nineteenth century, however, the genteel pattern of carefully regulated corporate charters began to break down as opportunities to make

[9] Stuart Banner, *Anglo-American Securities Regulation: Cultural and Political Roots, 1690-1860* (Cambridge: Cambridge University Press, 1998), 76.

money in mining, manufacturing, and other areas proliferated. In England, entrepreneurs had long evaded the strictures of the Bubble Act by creating unincorporated joint stock companies, which relied on a combination of partnership and trust law to achieve many of the benefits of incorporation. In 1844, Parliament abandoned its century-long resistence to corporations and enacted legislation permitting nearly anyone to form one. In the United States, Louisiana led the way, abolishing the system of special incorporation in 1845. A number of states adopted dual systems with both special and general incorporation thereafter, but by the last two decades of the nineteenth century, specialized incorporation had been abandoned everywhere. In 1800, there had been 335 corporate charters in the U.S. By 1890, the number would be nearly 500,000.[10]

The second key development was limited liability. Here, the watershed came in 1855, when Parliament amended the 1844 Act to authorize limited liability at the option of the entrepreneurs who established a corporation. The fact that limited liability came eleven years after the original legislation is not accidental. Although limited liability was not a new idea, providing it as a standard feature of general incorporation proved quite controversial. Christian leaders featured prominently in the debate, which unfolded against the background of the larger debate about free market economics in nineteenth century England.

In the first half of the nineteenth century, mainstream evangelical leaders vigorously supported the free trade policies known as laissez faire economics. "Barriers to Free Trade," they argued, as recounted by a British historian, "like monopolies, protective duties, and preferences, not only offended the unprivileged, but were elements of friction obscuring God's clockwork providence."[11] Free trade was thus equated with the recognition of God's providence in all of life. Thomas Chalmers, the leading spokesman for the evangelical perspective, also extolled the chastening effects of free markets. He argued that fear of disaster would encourage businessman to practice moral

[10] Cited in Margaret M. Blair, "Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century," *UCLA L. Rev.* 51 (2003): 387, 389n.3.

[11] Boyd Hilton, *The Age of Atonement: The Influence of Evangelicalism on Social and Economic Thought, 1795-1865* (Oxford: Clarendon Press, 1988), p.69.

restraint in their business ventures, and that the failures of those who did not would chasten them, perhaps spurring an attitude of repentance for their excesses.

In the debate over limited liability in the 1850s, both sides tried to characterize their views as a manifestation of free market economics. Opponents insisted that limited liability interfered with the market by limiting an entrepreneur's exposure to the risks he undertook; enthusiasts countered that entrepreneurs should be permitted to set up whatever structure they wished, so long as they provided full disclosure to potential investors. Most mainstream evangelicals took the former view. "In the scheme laid down by Providence for the government of the world," as one limited liability critic put this view, "there is no shifting or narrowing of responsibilities, every man being personally answerable to the utmost extent for all his actions."[12] Groups such as the Christian Socialists, who defended limited liability, arguing that it might enable people of modest means to invest in corporate enterprise, were a distinct minority among Christians. But the range of people who would benefit from limited liability (such as existing, well off investors) or who favored it on social grounds was wide and deep by the 1850s. Within a few years, the argument that business people should be exposed to the full rigors of the market would lose much of its resonance in English politics, even among evangelicals.

In the U.S., Christian groups seemed to show much less concern about the advent of limited liability than their English peers. It was not limited liability so much as its fruits that stirred Christian leaders and groups into action.

## Regulating America's New Large Scale Corporations

The large scale corporation as we now know it was born in the late nineteenth century, most pervasively in the United States and particularly in the railroad industry. As the railroads expanded, revolutionizing transportation and at the same time benefitting from the markets created by this revolution, they adopted increasingly hierarchical

[12] J.R. McCulloch, quoted in *Age of Atonement*, p.260.

business structures, with a class of middle managers between the railroad's workers and its executive officers. So long as shareholders enjoyed limited liability and thus were not responsible for its obligations if it failed, it wasn't necessary that they actively manage or oversee the business. This made it much easier to separate ownership from management and to develop a specialized class of managers, and it radically expanded the pool of potential investors.

The same railroads that emerged as America's first large scale corporations also provided the first great corporate scandals.[13] Railroad owners could make enormous profits by taking control of important segments of track and charging as much as the market would bear. The swashbucklers who played this game, men like Jay Gould, Drew Drew, and Jim Fisk, have long been known as the robber barons. (The Erie Railway, the subject of the most infamous of the railroad battles in the early 1870s, became known as the "Scarlet Woman of Wall Street" because of the rampant bribery and other misbehavior used by both groups of combatants in the fight for control, one led by Cornelius Vanderbilt and the other by Daniel Drew and Jay Gould). In 1873, the travails of America's second transcontinental railroad, the Northern Pacific, toppled Philadelphia banker Jay Cooke and his bank, triggering a nationwide economic depression. Cooke's failure spurred a populist backlash that ultimately led the enactment of the Interstate Commerce Act of 1887, which established federal regulation of railroads; and the Sherman Antitrust Act of 1890 to prohibit monopolization of industry.

By 1890, the railroads were not the only large scale corporations. To circumvent state corporate laws that prevented one corporation from owning the stock of another, John D. Rockefeller and others created "trusts" to consolidate control of a variety of industries, from oil to sugar and tobacco. Although the Sherman Act was designed to thwart monopolization of industry, but it was narrowly construed by the Supreme Court in 1895. In part as a result, the decade that followed, which became known as the Great Merger Wave, saw even greater consolidation. Although some of the new behemoths were controlled by a Rockefeller or Havemeyer, many were midwifed by J.P. Morgan

[13] The scandals and the regulation they prompted are described in more detail in David Skeel, *Icarus in the Boardroom: The Fundamental Flaws in Corporate America and Where They Came From* (New York: Oxford University Press, 2005).

and other investment banks. These companies were held not by a single controlling individual group, but by thousands of shareholders, each of whom may have held a relatively small stake.

The emergence of large scale corporations raised two related, but conceptually distinct, kinds of concerns. First is the risk that the managers and directors of a corporation will take actions that benefit themselves rather than shareholders. In several of the railroad scandals, the managers started construction companies, which built track under contracts that plumped the managers bank accounts at the expense of the railroad and its shareholders. The second concern was that a corporation would act in a way that benefitted itself and its stakeholders at the expense of everyone else. Here, as already noted, the overriding concern was monopoly– the danger that corporations would snuff out competition in their industry and charge exorbitant prices to consumers.

While it is difficult to precisely trace the Christian influence on American corporations in the nineteenth century, due to the limits of existing historical scholarship and because Christianity was often a pervasive but unstated background assumption in American life, it is probably fair to say that the same factors that produced American denominationalism and Christian support for free markets assured a general sympathy for the corporate form. But this enthusiasm receded when it came to the corporate trusts, which struck many as inconsistent with market competition and some as a form of private socialism.

By nearly any yardstick, the nation's most visible and influential evangelical Christian in the late nineteenth and early twentieth centuries was William Jennings Bryan, the charismatic orator whose "Cross of Gold" speech had propelled him to the Democratic presidential nomination for the first of three times in 1896. From the outset of his political career, Bryan's Populist attacks on corporate power were a signature theme, along with his insistence on loosening links between the dollar and gold. Excoriating the effects of the Great Merger Wave in the 1900 campaign and arguing for more competition, Bryan concluded: "There can be no good monopoly in private hands until the Almighty sends us angels to preside over the monopoly."[14] Bryan briefly went

[14] Quoted in Michael Kazin, *A Godly Hero: The Life of William Jennings Bryan* (New York: Alfred A. Knopf, 2006), p.96.

so far as to argue for government ownership of the railroads, but backed off when it became clear that advocating federal control would cost him any hope of support in the South.

Although a large majority of Christians and of Americans seemed to have worried about the power of large corporations, Christian opinion was not monolithic even on this point. J.P. Morgan, the architect of many of the leading trusts, was himself a committed Christian. Morgan believed that unbridled corporate competition was destructive, and that trusts run by himself and others with genuine character could produce goods and provide services much more efficiently than fragmented industries with numerous competing corporations.

A third major figure was Walter Rauschenbusch, one of the leaders of the Social Gospel movement, which advocated greater Christian involvement in social change. Although Rauschenbush, like his Social Gospel peers, was more theologically liberal than Bryan, the two admired one another and shared similar views of corporate regulation. Drawing on Jesus's parables on stewardship, Rauschenbusch called for federal oversight of trust, especially "natural monopolies" like railroads and utilities. These corporations, he wrote:

> are stewards and have acted as if they were the owners. The present movement for rate-regulation, for instance, is simply an effort to assert the rights of the owner over the steward, and the aggrieved astonishment with which this movement has been met by the class that owns the railways is interesting proof that the usual historical process was very far advanced.[15]

By the turn of the century, immigration had vastly increased the number of Catholics among American Christians. Some of the campaigns with which leaders like Bryan and Rauschenbush were associated, such as the Temperance movement, were at

[15] Walter Rauschenbusch, *Christianity and the Social Crisis* (New York: The McMillan Company, 1916)(first printed 1907), p.385. Rauschenbush's life and teachings are recounted in a useful recent biography. Christopher H. Evans, *The Kingdom is Always But Coming: A Life of Walter Rauschenbusch* (Grand Rapids, MI: William B. Eerdmans, 2004).

least in part anti-Catholic and anti-immigrant. But their concern about corporate influence echoed emerging Catholic views in important respects. Pope Leo XIII's 1891 letter *Rerum novarum* inaugurated a tradition of Catholic Social Thought that has generally defended the interests of labor and called for restraints on the power of corporations.[16]

As reflected in the major Protestant Christian periodicals of the time, the weight of Christian opinion seems to have favored at least some governmental regulation of corporations. *Outlook*, a leading Social Gospel magazine, opined that "corporations deriving their existence from the hands of the people must submit to regulation by the people," a view echoed by other articles of the time.[17]

In keeping with the overwhelming emphasis on the second of the dangers posed by the emergence of large scale corporations, monopoly, much of the regulatory response in the early twentieth century focused on counteracting the market power of the largest corporations. The single most successful initiative was Theodore Roosevelt's "trust busting" campaign, whose landmark achievement was a 1904 Supreme Court decision that broke up the North Securities Corporation, a trust that combined the two transcontinental railroads. The Roosevelt administration also saw the enactment of the Railway Rate Regulation Law in 1906, and the 1907 Tillman Act, which prohibited corporations from making contributions directly to political candidates. Roosevelt even threw his weight behind proposed legislation that would have federalized the incorporation of the nation's corporations. The failure of this last initiative, federal incorporation, ultimately contributed to a sharp distinction in American law between internal corporate governance issues (the conflicts of interest between managers and shareholders that are regulated primarily by the states) and "external" concerns such as

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[16] Pope Leo XIII, "Rerum Novarum," reprinted in *Proclaiming Justice & Peace: Papal Documents from* Rerum Novarum *Through* Centesimus Annus (Mystic, CT: Twenty-Third Publications, 1991), p.15.

[17] "The Supreme Court on Railway Regulation," *Outlook*, Mar. 3, 1906, at 493. For a description of the increasing Christian concern about the corporate trusts, see Henry F. May, *Protestant Churches and Industrial America* (New York: Octagon Press, 1963), pp. 130-33.

antitrust, employment law and environmental law (much of which are now regulated by federal law).

The legislative and judicial efforts described in the last paragraph have historically been attributed to the Progressive movement, which achieved its greatest prominence during the early twentieth century. After the Democrats finally regained the White House in 1913, the Progressive movement achieved several additional regulatory victories with the enactment of the Clayton Anti-Trust Act in 1914, which restricted directors from serving on the boards of directors of their competitors, and the creation of the Federal Trade Commission to police the trusts. While Progressivism was not conspicuously Christian in orientation, there were close links to the Social Gospel. Some historians have suggested that the Social Gospel movement laid the groundwork for Progressivism through its support for labor and social change, and Social Gospelers were both participants in and cheerleaders for the Progressives' efforts to enact corporate regulation.

By the second decade of the twentieth century, then, large scale corporations were generally accepted, but a variety of measures had been put in place to protect competition within the marketplace. These measures reduced the risk of monopoly (at least by industrial corporations; J.P. Morgan and a small group of other investment banks continued to monopolize American corporate finance.) Although less identifiably Christian than Prohibition or even Women's Suffrage, the Progressive reforms seem to have been influenced by the Social Gospel (as well as the evangelical constituency represented by William Jennings Bryan) and to have reflected the general views of most American Christians.

## The Federal Council of Churches and The New Deal

The New Deal brought sweeping federal regulation of American corporate and financial life, establishing what still are the basic parameters of American corporate regulation. Perhaps most dramatically, Congress completely restructured the banking industry. The Glass-Steagall Act drove a wedge between commercial and investment banking by prohibiting banks from providing both loans (the standard fare of a commercial bank) and underwriting (investment banks' bread and butter). The goal, quite candidly stated by the New Dealers, was to destroy the monopoly J.P. Morgan and its peers had on American corporate finance and to limit their influence over large scale American corporations. To enhance oversight of and confidence in the securities markets, Congress enacted new securities regulation in 1933 and 1934. The securities acts require extensive disclosure by large scale corporations; and they created the Securities and Exchange Commission to police the markets on investors' behalf.

In several of the speeches laying the groundwork for corporate and financial reform, Franklin D. Roosevelt employed distinctively religious rhetoric. One of the most important economic speeches of Roosevelt's 1932 campaign condemned Chicago utilities magnate Samuel Insull, whose dramatic collapse had stunned the nation, and vowed to take arms against "the Ishmael or Insull, whose hand is against every man's."[18] While this call to protect the little guy against the predations of a corporate titan echoed Bryan's earlier Democratic presidential campaigns, the religious landscape in American politics had dramatically shifted by the outset of the New Deal. Starting in roughly 1925, the year of the Scopes trial and Bryan's death, evangelicals had increasingly absented themselves from American political life. One can find occasional articles in evangelical magazines condemning the corporate scandals that followed the 1929 stock market crash, but evangelicals did not play any visible role in Roosevelt administration or the New Deal generally.

Christian involvement in Roosevelt's New Deal coalition seems to have come not from evangelicals, but from mainline Protestants, the principal heirs of the Social Gospel, and from Catholics. The Federal Council of Churches, which was founded in 1908 and had become the leading interdenominational voice of mainline Protestantism, was actively involved in New Deal labor and work legislation and seems to have supported the banking and securities reforms, though not as visibly. At the outset of the New Deal, *The Christian Century*, the most widely read journal of progressive Christianity, ran a

[18] The speech and Roosevelt's New Deal initiatives are recounted in Skeel, *Icarus in the Boardroom*, pp. 75-106.

series of articles on economic issues, most applauding the New Deal initiatives and some calling for even more radical regulation (in one case, for government control of banks).[19]

Catholic Americans were the other major Christian New Deal constituency. By the early twentieth century, Catholicism claimed more adherents than any of the Protestant denominations– and most supported Roosevelt and his reformers. Perhaps the most visible representative of progressive Catholic support was Father John Ryan, who had popularized the term "living wage" several decades earlier and mounted a spirited defense of New Deal legislation that included skirmishes on the radio and in print with demagogic priest Father Coughlin.[20]

Christian views on the New Deal business and financial legislation were no more monolithic than the views of Americans generally. Nor were Christians the most visible advocates for the reforms. But leading figures in mainline Protestantism and among progressive Catholics defended the New Deal program, and the reforms can be traced, at least indirectly, to the political vision that Bryan and the Social Gospels promoted decades earlier.

## The New Corporate and Financial Marketplace

In the past twenty-five years, the governance of large scale corporations has been transformed yet again, though more through the marketplace than by regulation. Corporate takeovers have been a standard feature of the corporate landscape for several decades, and shareholder-centered governance is increasingly the norm not just in the U.S. and England, but in much of the world. Seemingly endless innovation in financial instruments and the rise of equity and hedge funds has provided new sources of financing and new ways to manage risk, as well as intense pressure to perform. The U.S. corporate

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[19] "An Approaching Crisis in Washington," *Christian Century*, April 5, 1933, at 446.

[20] Father Ryan's contributions to the New Deal, including his debate with Coughlin, are chronicled in Francis L. Broderick, *The Right Reverend New Dealer: John A. Ryan* (New York: The MacMillan Company, 1963), at 211-43.

scandals subjected these developments to scrutiny, but did not significantly alter any of the underlying trends.

Protestant views on these issues fall into two major camps. The mainline Protestant denominations, at least at the leadership level, have favored extensive governmental oversight of corporations, as they did during the New Deal. Although the evangelical left in America differs with mainline Protestants on other issues, they generally share a desire to rein in large corporations. Both enthusiastically supported the corporate responsibility reforms that the U.S. Congress enacted after the Enron and WorldCom scandals. The evangelical right (which includes a substantial majority of evangelicals by most accounts) has been much less supportive of intervention. Since their re-emergence in American political life starting in the 1970s, most of these evangelicals have favored free markets and limited government involvement.

Catholic perspectives fall into a similar pattern. Although Catholic theologian Michael Novak is best known for his fervent, theological defense of free market economics, he has also defended the corporation and called for limited governmental intrusion, arguing that this best accords with the tradition of Catholic Social Thought.[21] Others argue that a more hands on regulatory approach is most consistent with the concerns of Catholic Social Thought.

One difficulty in making sense of current Christian perspectives on corporate regulation is that corporate regulation has been a secondary concern for many Christians, particularly among Protestants. The evangelical right has invested less energy on economic issues than on social ones, and the principal economic emphasis has been free markets and a general distaste for regulation rather than corporate and securities law. Mainline Protestants and the evangelical left have been most concerned with the pervasive Biblical concern for the poor and for other social issues such as race relations. Corporations have figured more prominently in Catholic discourse, due in important part to the papal letters of Pope John Paul II on economic issues, but here too they have not loomed as large (particularly in the U.S.) as other issues.

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[21] See, for example, Michael Novak, *Toward a Theology of the Corporation* (Washington, D.C.: The AEI Press, 1990).

Christian perspectives on corporations also can be very difficult to distinguish from secular perspectives. Perhaps this was inevitable. Once the corporate form and the legitimacy of limited liability were accepted, and so long as government ownership of corporations is largely ruled out, the range of internal corporate governance issues around which one might develop a theology of the corporation is relatively limited. The hiving off of antitrust, employment law and other issues "external" to the corporation from corporate law in the U.S., and treating them as separate bodies of law, has reinforced this narrowness.

Yet the opportunities for developing a distinctively Christian critique of contemporary corporate law, and for shaping the coming generation, are extraordinary. One approach is to construct a theology of the corporation and of corporate responsibility. Drawing on Catholic Social Thought, a small group of Catholic legal scholars have taken tentative first steps toward such a theology.[22] Protestant scholars have been slower to develop a careful theological analysis of the corporation, but the seeds of such an analysis are scattered through modern Protestant theology, in the work of Rauschenbusch, Abraham Kuyper, Reinhold Niebuhr and others.

Other scholars may come at these questions from a slightly different perspective: how much can, or should, the secular law do to regulate corporate life? In recent work, William Stuntz and I have argued that, while God's law is pervasive, human law should be far more modest in its aspirations.[23] Because regulators and law enforcers are sinful, just as ordinary citizens are, we should be wary of laws that are too broad to be systematically enforced; sweeping discretion invites discriminatory enforcement. Law works best if its ambitions are modest, leaving wider scope for ordinary morality. In corporate law, this modest rule of law principle suggests that it is a mistake to try prescribe the do's and don'ts of proper manager and director behavior by law– especially

[22] The principal advocate for deference to corporate managers has been Steve Bainbridge. Susan Stabile has interpreted the CST emphasis on the common good as calling for more regulatory intervention. The debate is surveyed and critiqued, with citations to the leading contributions, in Mark A. Sargent, "Competing Visions in Catholic Social Thought," *J. Catholic Soc. Thought* 1 (2004), p. 561.

[23] David A. Skeel, Jr. & William J. Stuntz, "Christianity and the (Modest) Rule of Law," *Penn. J. Const. L.* 8 (2006), p. 809.

through criminal sanctions. A narrower objective might be to focus principally on removing obvious structural perversities in the market and regulatory framework. Structural flaws were a major factor in the corporate scandals of the early 2000s. The oversight of auditors and securities analysts, for instance, was undermined by structural conflicts of interest that discouraged each from giving candid, honest assessments of the companies they investigated in the 1990s. The tendency to overuse stock option-based compensation, which can tempt corporate executives to pump up the company's stock price through any means possible, was exacerbated by a tax rule that rewarded companies for paying executives with options rather than cash. Some of these structural problems have been fixed; others (such as the compensation rule) have not.

Christianity also offers insights that are more cultural than legal in form. One of most sobering lessons of the recent corporate scandals was the extent to which sin can pervade every facet of institutional life. Perhaps the most vivid illustration was Enron, whose employees were herded into a room and pretended to conduct a vibrant trading market when a group of analysts made the trip to Houston to visit the firm. The psychological literature suggests that our tendency to conform to those around us, even if what they do is clearly wrong, and to obey authority, helps to explain the poisonous internal culture at companies like Enron. But the literature also shows that if even one person takes a stand, the likelihood of misbehavior sharply declines. Christian scripture offers rich insight into the benefits of maintaining a moral compass, not least in the emotionally honest prayers of the psalms. "I have hidden your word in my heart," one of the psalmists proclaims, "that I might not sin against you." Ps. 119. Jesus's servant and steward parables provide similarly useful instruction on fiduciary relationships, and might contribute to a board's deliberations about its fiduciary responsibilities.[24] As each of these illustrations suggests, it took more than law alone to create large scale corporations, and it will take a lot more than law to sustain them.

[24] See [cite to Lyman Johnson article draft].

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