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Ronald J. Colombo

Maurice A. Deane School of Law at Hofstra University

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Recommended Citation

Ronald J. Colombo, *Religious Conceptions of Corporate Purpose*, 74 Wash. & Lee L. Rev. 813 (2017)

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Religious Conceptions of Corporate Purpose

Ronald J. Colombo*

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I. Introduction

This Essay on religious conceptions of corporate purpose was prepared, in part, to commemorate the incredibly rich corporate law scholarship of Professors Lyman Johnson and David Millon. Consequently, my reflections on this topic will draw heavily and primarily from the work of these two outstanding academicians.

As far back as 1986, in what appears to be his second published piece of scholarship, Lyman Johnson points out the necessity of confronting the issue of "corporate purpose."¹ An Aristotelian myself, I heartily subscribe to Professor Johnson's

* Professor of Law and Associate Dean for Distance Education, Maurice A. Deane School of Law, Hofstra University.

1. See Lyman Johnson, *Corporate Takeovers and Corporations: Who Are They For?*, 43 WASH. & LEE L. REV. 781, 788 (1986) [hereinafter Johnson, *Corporate Takeovers and Corporations: Who Are They For?*] ("Given the turmoil that takeovers have caused in corporate life and corporate law, it seems appropriate to reconsider the issue of corporate purpose.").

emphasis on purposes, for how else can one assess the goodness of a thing, or of its conduct, without an appreciation of its teleology?²

As the title suggests, this Essay will examine *religious* conceptions of corporate purpose. More specifically, I shall examine whether a business corporation may, may not, or must have a religious purpose—as these three perspectives exhaust the various possibilities. In other words: might a business corporation adopt a religious purpose at its own discretion? Or, are all business corporations precluded from adopting a religious purpose by their very nature? Or, finally, might it be the case that business corporations invariably have a religious purpose, regardless of whether this is explicitly recognized or not (by either the corporation itself or the public at large)?

I will advance the admittedly aggressive position that the third of these three perspectives is the correct one: that the nature and purposes of business corporations are unavoidably religious.

In doing so, I seek to respond to Professor Johnson's call that "corporate law scholars find creative ways to give greater prominence to a more organic sensibility, a sensibility emphasizing in the cultural-business sphere the same appreciation for *sustainable* human endeavor now being underscored in the heightened environmental consciousness."³

In embarking upon this project, I also take up Professor Johnson's call to "re-enchant" corporate law.⁴ Time and again, Professor Johnson has urged the necessity of "acknowledging faith's importance—even in the workplace."⁵ As he has explained,

2. See Aristotle (384–322 B.C.), SPARKNOTES, <http://www.sparknotes.com/philosophy/aristotle/themes.html> (last visited May 2, 2017) ("Teleology is the study of the ends or purposes that things serve, and Aristotle's emphasis on teleology has repercussions throughout his philosophy. Aristotle believed that the best way to understand why things are the way they are is to understand what purpose they were designed to serve.") (on file with the Washington and Lee Law Review).

3. Lyman Johnson, *Individual and Collective Sovereignty in the Corporate Enterprise*, 92 COLUM. L. REV. 2215, 2249 (1992) [hereinafter Johnson, *Individual and Collective Sovereignty*].

4. See Lyman Johnson, *Re-Enchanting the Corporation*, 1 WM. & MARY BUS. L. REV. 83, 105 (2010) ("[T]o re-enchant the corporation (or to acknowledge its continuing enchantment) is to permit people of faith and spirituality to ground their work lives on something enduring and transcendent, rather than on something precarious and fleeting.")

5. *Id.* at 106.

this “permits an emphasis on the forgotten associational elements of corporateness.”⁶ For example, the Bible’s “ancient admonition against ‘serving two masters’ underlies the fiduciary duty of loyalty in corporate law. And it has much to say about ‘faithfulness’ in general, the core demand of a fiduciary’s loyal behavior.”⁷ Thus, a failure to perceive the significant contribution that religious traditions and perspectives can have on our understanding of the corporation yields an approach to corporate law that is sapped of its full potential vibrancy and robustness.

I would go a step further, however, and invoke Fyodor Dostoyevsky’s observation that “without God, all things are permitted.”⁸ In an era characterized by repeated instances of gross corporate misconduct, coupled with ceaseless calls for greater corporate responsibility, it seems baffling to omit from the discussion the phenomenon of religion, which arguably constitutes the greatest bridle of mankind’s passions and one of the most important shapers of human behavior.

In this Essay, I will proceed as follows: first, I will define the term “religion,”⁹ as this concept is central to our inquiry. Next, I will observe how the divorce of religion from economics and business, and how the treatment of business as a wholly secular undertaking, is a departure from historical norms.¹⁰ Thereafter, I will confront the central question of this Essay and explain why a corporation’s purpose is invariably religious in nature.¹¹ Finally, I will conclude with a discussion of the repercussions flowing from this understanding of corporate purpose.¹²

6. *Id.*

7. Lyman Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles*, 2009 MICH. ST. L. REV. 847, 853.

8. The quotation in this or similar forms is commonly attributed to Dostoevsky, but his actual words, to be completely accurate, were as follows: “If you were to destroy in mankind the belief in immortality, not only love but every living force maintaining the life of the world would at once be dried up. Moreover, then nothing would be immoral, everything would be lawful.” THE YALE BOOK OF QUOTATIONS 210–11 (Fred R. Shapiro ed., 2006) (quoting THE BROTHERS KARAMAZOV bk. 2, ch. 6 (1880)).

9. *Infra* Part II.

10. *Infra* Part III.

11. *Infra* Parts IV–V.

12. *Infra* Part VI.

II. Religion Defined

Let us begin our examination of religious conceptions of corporate purpose by defining the term “religious.” “Religious,” as used here, is an adjective meaning having to do with religion.¹³ That, of course, only begs the question: what does “religion” mean?

Although it is a question of some debate, it appears as though the word “religion” stems from the word “religare,” which means “to bind.”¹⁴ Thus, religion means to bind oneself to God (or, in the case of the ancients, to the gods).¹⁵

Now, why would one do that? Why would one bind oneself to God? Different peoples and different people individually have done so for different reasons, including: out of fear;¹⁶ out of love;¹⁷ out of need;¹⁸ or, out of gratitude.¹⁹

But let’s dig a little deeper. Out of fear or love of what? Out of need or gratitude of what? It would seem to be out of concern over the most basic human desire of all: “happiness” (or its absence).²⁰ And indeed, all religions, as far as I can tell, focus largely on the issue of human happiness, and provide guidance on how to best obtain it.²¹

13. See *Religious*, DICTIONARY.COM, <http://www.dictionary.com/browse/religious> (last visited May 2, 2017) (defining religious as “of, relating to, or concerned with religion”) (on file with the Washington and Lee Law Review).

14. *Religion*, THE CATHOLIC ENCYCLOPEDIA, <http://www.newadvent.org/cathen/12738a.htm> (last visited May 2, 2017) (on file with the Washington and Lee Law Review).

15. See *id.* (“We are tied to God and bound to Him . . .”).

16. See *id.* (“A common theory with the Greek and Roman philosophers, favoured by a few writers of modern times, is that religion had its origin in fear . . .”).

17. See *id.* (“Thirdly, the love of God for His own sake is a concomitant of the virtue of religion, being needed for its perfection.”).

18. See *id.* (“There thus arises in the natural order a sense of dependence on the Deity, deeply felt need of Divine help.”).

19. See *id.* (“We have already seen that fear is not the predominating tone even in lower religions, as is shown by the universal use of rites expressing joy, hope, and gratitude.”).

20. See *id.* (“What man aims at in religion is communion with the Deity, in which he hopes to attain his happiness and perfection.”).

21. See generally April L. Bogle, *The Role of Happiness in the World Religions*, HUFFINGTON POST: THE BLOG (Oct. 17, 2010, 7:55 AM), http://www.huffingtonpost.com/april-l-bogle/dalai-lama-happiness-summit_b_764783.html (last updated May 25, 2011) (last visited May 2, 2017) (on file with

This, however, only presents us with yet another question: What exactly is happiness? On one end of the spectrum, “happiness” is conceptualized as revolving around material prosperity and creature comforts.²² On the other end of the spectrum happiness is conceptualized as the attainment of moral goodness—of human virtue and spiritual perfection.²³

Regardless of one’s position on the continuum, it should become quickly apparent, I posit that religion and the corporation have a lot to do with one another. For what else is the corporation other than a predominant form by which modern man has organized himself in his pursuit of happiness? In Western society at least (and perhaps this holds true for most of the world beyond as well), it is within the corporate form that most men and women work, it is from the corporation that men and women satisfy their myriad desires through purchasing goods and services, and it is in the corporation that countless individuals invest in order to attain their financial goals, be that the ability to retire comfortably, pay for their children’s educations, or simply accumulate wealth. In short, it is not unfair to say that both religion and the corporation are focused on the ascertainment of human happiness.

Some may object that whereas religiously pursued happiness is spiritually oriented, corporately pursued happiness is economically oriented. I do not believe that such a blanket statement is sustainable. For it depends upon the religion, the corporation, and the individual. We’re all familiar with the “Prosperity Gospel” and Joel Osteen.²⁴ And indeed, for the ancients, one of the reasons that religion was taken so seriously

the Washington and Lee Law Review).

22. See *Religion*, CATH. ENCYCLOPEDIA, <http://www.newadvent.org/cathen/12738a.htm> (last visited May 2, 2017) (“The sum of happiness looked for is prosperity in the present life and a continuation of the same bodily comforts in the life to come.”) (on file with the Washington and Lee Law Review).

23. See *id.* (“In the higher religions, the perfection sought in religion becomes more intimately associated with moral goodness. In Christianity, the highest of religions, communion with God implies spiritual perfection of the highest possible kind . . .”).

24. See generally Ted Olsen, *Joel Osteen vs. Rick Warren on Prosperity Gospel*, CHRISTIANITY TODAY (Sept. 14, 2006), <http://www.christianitytoday.com/ct/2006/septemberweb-only/137-41.0.html> (last visited May 2, 2017) (on file with the Washington and Lee Law Review).

was out of concern for very concrete, real-world, mundane (in the truest sense of the term) priorities.²⁵

On the flip side, to quote Professor Johnson: “Profit is a means, not an end.”²⁶ Therefore, one’s efforts to increase his or her wealth via the corporate form (as either an investor or employee or consumer) may very well be done with an ultimate spiritual objective in mind. Perhaps the young man is working for Apple in order to save enough money to finance his seminary education, or perhaps the widow is investing in Sony in order to leave the most sizeable bequest possible to her church. Perhaps the rabbi is purchasing goods from Bed, Bath, and Beyond in order to make his synagogue a more fitting house of worship, for the greater glory of God.

In short, therefore, I do not think it is particularly wise or accurate to compartmentalize the happiness one seeks into happiness sought via religion versus happiness sought via the corporation. I fully appreciate that some attempt to do this—to divide the world into spiritual and secular, placing religion into one category and the corporation into another. But this can also be undone, and for many, these lines are quite blurred. Corporate law ought not turn a blind eye to these possibilities. The reasons why individuals do what they do can be both myriad and quite complicated. Consequently, “[t]he discipline of corporate law should acknowledge the richness and complexity of commercial endeavor,”²⁷ and eschew an approach that unrealistically constricts our understanding of the corporation (and its various actors).

25. See Joshua J. Mark, *Religion in the Ancient World*, ANCIENT HIST. ENCYCLOPEDIA (Sept. 2, 2009), <https://www.ancient.eu/religion/> (last visited May 2, 2017) (describing the history and role of religion in ancient cultures) (on file with the Washington and Lee Law Review).

26. Lyman Johnson, Michael Naughton & William Bojan, *Rethinking How Business Purpose Is Taught in Catholic Business Education*, 32 J. CATH. HIGHER ED. 59, 75 (2013) [hereinafter Johnson et al., *Rethinking*].

27. Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 TEX. L. REV. 865, 936 (1990) [hereinafter Johnson, *Delaware Judiciary*].

III. *The Historical Linkage of Faith and Work*

As acknowledged, some individuals may choose to compartmentalize their spiritual life and their secular life. Some adhere to a separation of faith and work. I have not seen statistics demonstrating whether this approach is shared by the greater or lesser part of humankind today.²⁸

Historically speaking, however, such a compartmentalization, or separation, would have been quite anomalous.²⁹ Throughout most of humanity's existence, practically every decision of import was viewed as having moral repercussions and a religious dimension.³⁰ Decisions about money, from how to earn it to how to spend it, were no exception.³¹ Indeed, it is no mere coincidence that economics, as a discipline, was originally a "branch of morality philosophy."³² Important economic decisions are ordinarily understood as important moral decisions as well.³³ And important moral decisions are, for every religion that I am aware of, typically important religious decisions too.

Recall the words of Christ, which, I believe, would resonate with non-Christians as well: "For what shall it profit a man, if he

28. To the extent that most do subscribe to such separation, I would concur with the following sentiments expressed by Professor Johnson: "Having abandoned the quest for unity of aesthetic or philosophical vision, the postmodern sensibility may regard this question as not only hopelessly opaque but pointless even to ask. Such regard, however, says more about the emptiness of the postmodern outlook than the enduring value of the question." *Id.* at 866 n.3.

29. See Ronald J. Colombo, *The Naked Private Square*, 51 HOUS. L. REV. 1, 7 (2013) [hereinafter Colombo, *The Naked Private Square*] ("In other words, what has brought about this separation of 'church and business?' As an initial matter, the separation does not appear to be a particularly natural one, in the sense that it fails to comport with the traditions of human society.").

30. See *id.* at 11 ("It is not simply the case that work traditionally possessed a religious dimension but rather that it was also traditionally understood that 'every economic decision has a moral consequence.'" (quoting GEORGE P. SCHWARTZ & WILLIAM J. KOSHELNYK, *GOOD RETURNS: MAKING MONEY BY MORALLY RESPONSIBLE INVESTING* xvi (2010))).

31. And, in more modern times, we see these concerns affect decisions on how to invest money as well, with the advent of socially-responsible and religiously-directed mutual funds.

32. Colombo, *The Naked Private Square*, *supra* note 29, at 11–12 (2013).

33. See *id.* at 11 ("[I]t was . . . traditionally understood that 'every economic decision has a moral consequence.'" (quoting GEORGE P. SCHWARTZ & WILLIAM J. KOSHELNYK, *GOOD RETURNS: MAKING MONEY BY MORALLY RESPONSIBLE INVESTING* xvi (2010))).

gain the whole world, and suffer the loss of his soul?"³⁴ Would not this apply to matters less weighty than the whole world? Would not this apply to the gain of stock dividends or additional income as well? Of course it would.³⁵

St. Paul also addressed this same concept, but from a proactive angle: "Whether you eat or drink, or whatsoever else you do, do all to the glory of God . . . All whatsoever you do in word or in work, all things do ye in the name of the Lord Jesus Christ."³⁶

Nearly two-thousand years later, G.K. Chesterton essentially summarized St. Paul in his own words when he wrote:

You say grace before meals. All right. But I say grace before the concert and the opera, and grace before the play and pantomime, and grace before I open a book, and grace before sketching, painting, swimming, fencing, boxing, walking, playing, dancing and grace before I dip the pen in the ink.³⁷

In short, there is a long and venerable tradition within which practically everything we say, do, and encounter ought to be treated as a matter of religious concern. The activity of the corporation is not exempt from this. Indeed, corporate activity frequently (if not virtually always) overlaps with matters upon which religion has much to say. Consequently, the faithful religious consumer, worker, officer, director, or shareholder should be expected to take his or her religious principles and beliefs into account when interacting with (or within) the business corporation. As Professor Johnson observed: "Given the interconnectedness of our work and personal lives, the institutional answer [to the purpose of the corporation] inevitably spills into and colors our sense of individual meaning as well."³⁸

34. *Mark* 8:36 (Douay-Rheims).

35. *Cf.* Johnson, *Delaware Judiciary*, *supra* note 27, at 877 ("Given the interconnectedness of our work and personal lives, the institutional answer [to the purpose of the corporation] inevitably spills into and colors our sense of individual meaning as well.").

36. *1 Corinthians* 10:31; *Colossians* 3:17.

37. *Gilbert K. Chesterton Quote*, IZ QUOTES, <http://izquotes.com/quote/295385> (last visited May 2, 2017) (on file with the Washington and Lee Law Review).

38. Johnson, *Delaware Judiciary*, *supra* note 27, at 877.

IV. Corporations and Religion

The modern business corporation, and indeed corporate law itself, overflows with interpersonal interactions, and continuously implicates how we, as human beings, ought to treat one another. Thus, our observations about the interconnectedness of faith and work are particularly relevant to the corporation itself.

Indeed, just as economics was originally a branch of moral philosophy (as mentioned above), “corporation law exists, not as an isolated body of rules and principles, but rather in a historical setting and as a part of a larger body of law premised upon shared values.”³⁹ The duty of care, for example, central to corporate law, is rich with religious meaning, as Professor Johnson has pointed out in his scholarship.⁴⁰ “Fiduciary duties retain a moral and spiritual quality even in the highly secularized discourse of twenty-first century corporate law.”⁴¹ Thus, one need not strain to see the overlapping territory of religious and corporate concern—the confluence is, quite frequently, in plain sight.

And even putting aside the moral dimension of “purely” economic and fiscal decisions, or fiduciary obligations, “[d]irectors and managers, as representatives of shareholders, vicariously confront moral choices all the time and they should address them in just that way—as moral choices.”⁴²

Nevertheless, just as many separate faith and work, still more view the corporation as an inherently and thoroughly secular institution.⁴³ Narrower still, the corporation, and even corporate

39. *Id.* at 919 (1990) (quoting *City Capital Assocs. Ltd. v. Interco, Inc.*, 551 A.2d 787, 800 (Del. Ch. 1988), *appeal dismissed as moot*, 556 A.2d 1070 (Del. 1988)).

40. See Lyman Johnson, *After Enron: Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. L. 27, 28, 43 (2003) [hereinafter Johnson, *After Enron*] (“Modern corporate law has inherited, but risks squandering, a rich, moral vocabulary Religious stories confirm the central place of care.”); see also Lyman P.Q. Johnson, *Faith and Faithfulness in Corporate Theory*, 56 CATH. U. L. REV. 1, 28 (2006) [hereinafter Johnson, *Faith and Faithfulness*] (“Fiduciary duties retain a moral and spiritual quality even in the highly secularized discourse of twenty-first century corporate law.”).

41. Johnson, *Faith and Faithfulness*, *supra* note 40, at 28.

42. Lyman Johnson, *Reclaiming an Ethic of Corporate Responsibility*, 70 GEO. WASH. L. REV. 957, 963 (2002) [hereinafter Johnson, *Reclaiming an Ethic of Corporate Responsibility*].

43. See Johnson, *Faith and Faithfulness*, *supra* note 40, at 2 (“The

law, is commonly analyzed only under economic lenses—to the exclusion of several other fields of human knowledge.⁴⁴ As such, attempts to introduce religious concerns or insights into an analysis of the corporation are quite alien to the field of corporate law and typically jarring to the corporate lawyer.⁴⁵

Religion itself appears to shoulder some of the blame for this. Sustained attention upon the nature of the corporate form from religious quarters has generally been lacking.⁴⁶ Professor Johnson commented upon this “failure of Christian thought to attend specifically to the linking of faith and work,”⁴⁷ adding that it “leads managers . . . to live ‘a divided life.’”⁴⁸

That said, there have been exceptions to this. In recent times, Michael Novak stands out as someone who has seriously undertaken the work of crafting a “theology of the corporation.”⁴⁹ He has his predecessors, however. Pope Pius XI, for example, sketched a tradition of corporate purpose quite different from the common account put forth by Berle and Means.⁵⁰ Under the

vocabulary of corporate law theory may be secular because that which is observed—the corporation—is thought to be a wholly secular institution best understood solely in secular terms, or because the overarching conceptual framework of most scholars is itself exclusively secular, thereby overlooking the corporation’s religious dimension.”)

44. See Lyman Johnson, *New Approaches to Corporate Law*, 50 WASH. & LEE L. REV. 1713, 1722 (1993) (“We need . . . to search for insights in the fields of anthropology, sociology, political science, ethics and theology, psychology, and industrial organization.”).

45. See Johnson, *Faith and Faithfulness*, *supra* note 40, at 17

The general lack of attention to the role of religious faith in corporate law is surprising, given that corporate law, like other areas of law, has been assessed from a host of other standpoints. Much of the ‘silence’ in corporate scholarship may . . . simply stem from a lack of interest in religion on the part of legal scholars or from a belief that religion is irrelevant to modern corporate theory. It may also reflect adherence to a ‘norm’ among legal academics generally to the effect that religion and legal scholarship do not mix.

46. See *id.* (“[V]ery little corporate law scholarship examines the corporation from a religious vantage point.”).

47. Lyman P.Q. Johnson, *A Role for Law and Lawyers in Educating (Christian) Business Managers About Corporate Purpose* 31 (University of St. Thomas School of Law, Working Paper No. 08–22, 2008) [hereinafter Johnson, *A Role for Law and Lawyers*].

48. *Id.*

49. MICHAEL NOVAK, *TOWARD A THEOLOGY OF THE CORPORATION* 33 (1990).

50. See Johnson et al., *Rethinking*, *supra* note 26, at 67 (“[U]nlike Berle and

Catholic Social Teaching tradition in which Pius XI wrote, “business either moves on a trajectory that sees itself as an ‘association of individuals’ or as a ‘community of persons,’”⁵¹ the former of which supports a more contractarian vision of the corporation, the latter of which supports a more communitarian view of the corporation (a point to which we shall return).

Pope John Paul II addressed the corporation, identifying the organization as a “community of persons.”⁵² More recently, Pope Benedict XVI stated that any conceptualization of the corporation must be grounded upon “a *comprehensive picture of man* which respects all the dimensions of his being and which subordinates his material and instinctive dimensions to his interior and spiritual ones.”⁵³ In other words, “[w]hile it is true that human beings are individuals who have self-interests and seek utility, they are not *only* individuals but also persons with a spiritual and relational dimension.”⁵⁴ This remains true whether these persons are serving as officers, directors, or shareholders of a corporation.

Admittedly, however, the voices above remain in the minority when it comes to the common conceptualization of the corporation. Instead, as alluded to earlier, economic analysis has largely monopolized the field of corporate discourse.⁵⁵ This monopolization extends not only to scholarly commentary on corporate law and the corporation itself, but also to the understanding that officers and directors have regarding the proper fulfillment of their duties to

Means, he encouraged business leaders to move from understanding the firm as only an investor-centered exchange of contracts and market incentives to one of relationship or partnership between capital and labor that would be drawn from the larger moral and religious culture.”).

51. *Id.* at 68.

52. *See id.* at 73 (“[A]lthough Pius XI began to develop a view of the corporation as a partnership and community, it was not until 1991 that John Paul II provided one of the most explicit definitions of the purpose of business within Catholic social teachings by using the phrase ‘community of persons.’”).

53. *Id.* at 77 (quoting Benedict XVI, *Caritas in veritate*, 36).

54. *Id.* at 74.

55. *See* Johnson, *Faith and Faithfulness*, *supra* note 40, at 1–2

Discourse in corporate law theory is highly secular. This quality both reflects, and shapes, the nature of discourse within corporations themselves. Virtually nontheoretical until the mid-1970s, corporate law scholarship has been deeply influenced in the last thirty years by neoclassical economic analysis, and, more recently, it has been enriched by a host of other perspectives.

the corporation. This has led to a pernicious view of the corporate boardroom as values-free zone focused solely on economic profit and loss.

It has been said that the devil's greatest accomplishment was to convince the world that he doesn't exist. Analogously, perhaps it has been the greatest accomplishment of law-and-economics scholars to convince the world that efficiency and economics are value neutral.⁵⁶ For it is exactly this perspective that has helped further the notion that corporate officers and directors ought not interject their values into corporate decision-making, but should, rather, adhere to the purportedly value-neutral program of maximizing profits for the benefit of the corporation's shareholders.⁵⁷ This awful myth has had profoundly negative consequences. For "[t]here is no moral free zone"⁵⁸ as Professor Johnson has pointed out. Prioritizing efficiency is as much of a value judgment as any other. Similarly, operating a business to maximize profits is a value judgment just as any other. Regardless of whether a person agrees or disagrees with the propriety of prioritizing efficiency and profit maximization, he or she ought to acknowledge the fairly modest assertion that these positions necessarily reflect certain value-choices. Indeed, these reflect rather profound value-choices, and as such reinforce the point that corporate conduct implicates the kinds of concerns over which religion has traditionally (and continues to have) a great deal to say. For contrary to the popular modern misconception, the vast majority of religious teaching and exhortation is not about sex. It is more typically about how one best fulfills his or her duties to God. This, in turn, is ordinarily worked out via a person's treatment of and interactions with his fellow man (sexual ethics is but one inevitable sub-set of this).

56. I don't mean to compare those in the law-and-economics movement to the devil.

57. See Johnson et al., *Rethinking*, *supra* note 26, at 70

In the shareholder-centric view, the corporation favors the *shareholder* as the central claimant in the corporation. Those who manage corporate assets are not thought to have the power to choose among values. Instead, within this "association of shares," the firm serves largely as a locus for exchanging outputs and inputs, where managers seek to maximize re-turns for shareholders.

58. *Id.* at 68.

V. The Necessarily Religious Understanding of Corporate Purpose

Let us now return to the three possible options that are presented to us with regard to religious conceptualizations of corporate purpose, as highlighted at the outset of this Essay. For easier analysis, I have reframed and reordered them here:

- Option 1: By virtue of its nature, the corporation cannot have a religious purpose
- Option 2: By virtue of its nature, the corporation may or may not, within its own discretion, have a religious purpose
- Option 3: By virtue of its nature, the corporation must have a religious purpose

Although I have already announced my preference for Option 3, here I will nevertheless march through all three options methodically, elaborating upon the deficiencies afflicting Options 1 and 2.

In a number of states, including New York⁵⁹ and New Jersey,⁶⁰ state corporate law explicitly addresses, in great detail, “religious corporations.” By “religious corporations,” the statutes do not mean entities such as Hobby Lobby or Chick-fil-A, but rather parishes, congregations, dioceses, and the like.⁶¹ In these states, religious entities are organized explicitly as corporations.⁶² As would be expected, their purposes are inherently religious in nature.

Some may balk, however, and assert that the observation set forth above is irrelevant. They would point out that “business corporations,” are the focus here, and not non-profit “religious corporations.” They would want to reformulate Option 1 as: “By virtue of its nature, the *business* corporation cannot have a religious purpose.” I will allow that reformulation for argument’s sake, but before doing so I would like to point out the weakness of the distinction between a “for-profit” corporation and a “non-profit” corporation.

59. N.Y. RELIG. CORP. LAW (McKinney 2016).

60. N.J. STAT. ANN. § 16 (West 2016).

61. See generally N.Y. RELIG. CORP. LAW § 2 (McKinney 2016); N.J. STAT. ANN. § 16:1–1 (West 2016).

62. See generally N.Y. RELIG. CORP. LAW § 2; N.J. STAT. ANN. § 16:1–1.

The naysayers essentially claim “for-profit corporations cannot have a religious purpose.” They are willing to concede, as they absolutely must, that the universe of organizations that take on the corporate form includes some that are explicitly religious.⁶³ Such religious corporations must be, they argue, invariably nonprofit in form. And the line between for-profit and nonprofit corporations is a thick one and shall not be crossed.

But is it not crossed quite frequently? As has Professor Johnson, I have previously questioned the for-profit and non-profit distinction.⁶⁴ Both such entities, regardless of their categorization, typically work very hard to increase revenues and reduce costs.⁶⁵ Indeed, the day-to-day operations of both for-profit and nonprofit corporations can closely resemble one another.

Nevertheless, the significant difference between the two (as the argument goes) is that for-profit corporations are viewed as entirely profit-driven, whereas non-profit corporations are viewed as “mission” driven.⁶⁶ “Mission” driven is understood as some philanthropic or charitable cause—not strictly a focus on the organization’s bottom line.⁶⁷ This is, however, repeatedly belied in practice. The NCAA, for example, is an \$11 billion “non-profit” corporation.⁶⁸ A large number of “for-profit” business corporations not only enjoy far less income, but, moreover, are demonstrably more dedicated to philanthropic causes and concerns.⁶⁹ Put

63. *Supra* notes 60–62 and accompanying text.

64. See Johnson, *A Role for Law and Lawyers*, *supra* note 47, at 17 (“Perhaps the current typology of ‘for profit’ and ‘not for profit’ organizations is too dichotomous if the former means only a focus on maximizing returns to capital.”).

65. See *id.* (“To be sure, business corporations will and must make profits . . .”).

66. See RONALD J. COLOMBO, *THE FIRST AMENDMENT AND THE BUSINESS CORPORATION* 71–74 (2015) (discussing the alleged distinction between for-profit and nonprofit corporations).

67. See generally *What is a Mission-Driven Business?*, TERRAPASS: THE FOOTPRINT BLOG, <https://www.terrapass.com/what-is-a-missi> (last visited Mar. 28, 2017) (on file with the Washington and Lee Law Review).

68. Andrew Syrios, *The NCAA Racket: \$10 Billion ‘Non-Profit’ Organization*, VALUE WALK (Sept. 16, 2014, 7:38 PM), <http://www.valuewalk.com/2014/09/ncaa-business/> (last visited May 2, 2017) (on file with the Washington and Lee Law Review).

69. See Evangeline Gomez, *The Rise of the Charitable For-Profit Entity*, FORBES (Jan. 13, 2012, 6:16 PM), <http://www.forbes.com/sites/evangelinagomez/2012/01/13/the-rise-of-the-charitable-for-profit-entity/#fbff0be291cc> (last visited

differently, it is mistaken to suggest that nonprofits are invariably more “mission-oriented” and that “for-profits” are invariably more “revenue-oriented.” Quite frequently, these characteristics are reversed.

Critically, as Professors Johnson and Millon have pointed out time and again, there is nothing in corporate law that precludes a for-profit business corporation from being mission-oriented, even at the sacrifice of some degree of profitability.⁷⁰ “Perhaps the current typology of ‘for-profit’ and ‘not-for-profit’ organizations is too dichotomous if the former means only a focus on maximizing returns to capital.”⁷¹

But, even if we acknowledge the possibility, or recognize the reality, of mission-driven, for-profit corporations, does it follow that a corporation can be religious in nature as well? Might a for-profit business corporation with a religious purpose be simply a bridge too far? I find myself again in agreement with Professor Johnson who wrote, in 2006, that “[a] business corporation . . . is not, and need not be, inherently secular in nature.”⁷² There exist several companies whose “founders and leaders . . . were culturally embedded in a faith tradition that influenced how they and their families understood business.”⁷³ Many go a step further and embrace a fundamentally religious purpose. Hobby Lobby and Chick-fil-A come to mind.

May 2, 2017) (describing “two new types of corporations have been created to address the goals of making money, attracting private investors and addressing societal concerns”) (on file with the Washington and Lee Law Review).

70. See Johnson, *Faith and Faithfulness*, *supra* note 40, at 19 (“[I]t is not law—where managerial discretion is broad, though still constrained by fiduciary duties—that silences the religious voice within corporations.”). I personally quibble with Professors Johnson and Millon over the legal force of the shareholder-wealth-maximization norm. Whereas they read *Dodge v. Ford* as nonbinding, I generally believe that it does accurately describe the duties of a corporation’s directors. That said, I readily concede that, practically speaking, due to the business judgment rule, a corporation’s officers and directors would ordinarily have wide latitude in pursuing objectives aside from the maximization of corporate profits.

71. Johnson, *A Role for Law and Lawyers*, *supra* note 47, at 17.

72. Johnson, *Faith and Faithfulness*, *supra* note 40, at 3; see also Johnson et al., *Rethinking*, *supra* note 26, at 68 (“Berle and Means and Pius XI reflect two different models, and two different traditions, of the corporation’s purpose which have developed over the last eighty years.”).

73. Johnson et al., *Rethinking*, *supra* note 26, at 74–75 (2013).

According to Hobby Lobby: “We are committed to: (1) Honoring the Lord in all we do by operating the company in a manner consistent with Biblical principles”⁷⁴ That is a religious purpose. So, unless one is willing to assert that Hobby Lobby is lying to itself and the public (an assertion that was not raised in federal litigation when there was ample opportunity and incentive to do so),⁷⁵ then it is simply undeniable that this particular corporation does, in fact, have a religious purpose.

Indeed, the law itself in many states has come to recognize that corporations need not exist for solely the purpose of maximizing profits.⁷⁶ Via the promulgation of “Benefit Corporation” statutes, business organizations in a growing number of states are explicitly authorized to take into account concerns of social interest—concerns that go beyond simply those of profit maximization.⁷⁷ “Benefit Corp. statutes illuminate the unresolved muddle in corporate law doctrine and theory concerning the inter-relationship among corporate purpose, a corporation’s best interests, and fiduciary duties.”⁷⁸

In light of the overwhelming evidence that religiously inspired business corporations do exist,⁷⁹ and in light of changes in corporate law authorizing such corporations to exist,⁸⁰ why would anyone continue to contest this fact? I would posit it is because

74. *Our Story*, HOBBY LOBBY, <http://www.hobbylobby.com/about-us/our-story> (last visited May 2, 2017) (on file with the Washington and Lee Law Review).

75. See generally *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

76. See Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 270 (2013) [hereinafter Johnson, *Pluralism in Corporate Form*] (“Pioneered by Maryland in 2010, Benefit Corp. statutes subsequently sailed through the New York and New Jersey legislatures without a single dissenting vote.”).

77. See RONALD J. COLOMBO, *THE FIRST AMENDMENT AND THE BUSINESS CORPORATION* 62–63 (2015) (“The New York benefit corporation statute (which is typical), proclaims that the corporation’s directors and officers ‘shall not be required to give priority to the interests of any particular person or group . . . over the interests of any other person or group.’”).

78. Johnson, *Pluralism in Corporate Form*, *supra* note 76, at 298.

79. See Colombo, *The Naked Private Square*, *supra* note 29, at 21 (suggesting that a newly formed company is likely created by an individual influenced by religion given that fifty-five percent of Americans generally prioritize religion in life).

80. See *id.* at 50–51 (explaining that states were beginning to allow businesses to incorporate for any purpose even absent public-oriented objectives).

they are not happy with what they see as the repercussions of acknowledging it. It is akin to Joan Osborne's 1995 song "One of Us." That's the song that kept plaintively asking "what if God was one of us?"⁸¹ In one of her verses, Osborne sings the following:

If God had a face, what would it look like?
 And would you want to see
 If seeing meant that you would have to believe
 In things like Heaven and in Jesus and the saints
 And all the prophets?⁸²

In short, commentators fear that by acknowledging that corporations could have a religious purpose, they would be buying into a parade of horrors.⁸³ This would include, but not be limited to religious exemptions against contraceptive coverage, a right to discrimination (especially against sexual minorities), and the unwelcome proselytizing of employees and customers.⁸⁴ I think it is pretty unmistakable that this is what drives a large part of the opposition against recognizing the possibility that business corporations can be legitimately religious.

Frankly, this opposition is understandable, as these issues touch upon some deep cultural, ideological, and philosophical concerns that divide our nation. But scholars and all informed individuals of good faith ought to defuse the situation by noting that one acknowledgment does not entail the other. That is, as a matter of law, under both the Free Exercise Clause and the Religious Freedom Restoration Act, simply adhering to a set of religious beliefs does not automatically afford one the right to a religious exemption.⁸⁵ Indeed, in the vast majority of situations, individuals and religious institutions (even unquestionably religious institutions) are afforded no relief whatsoever from laws

81. JOAN OSBORNE, *One of Us*, on RELISH (Blue Gorilla Records 1995).

82. *Id.*

83. See Colombo, *The Naked Private Square*, *supra* note 29, at 12–13 ("It was simply seen as unwise to introduce a subject as 'divisive' as religion into the business setting, which thrives on unity, stability, and peace.").

84. See *id.* at 81 ("The primary objection that can be anticipated is the fear of rampant discrimination in hiring, accommodation, and other areas in the wake of corporate Free Exercise rights.").

85. See *id.* ("Consequently, recognition of corporate Free Exercise rights does not mean that corporations will be necessarily absolved of compliance with laws . . . even if they happen to be fervently religious in character.").

that violate the dictates of their religiously informed consciences and principles.⁸⁶

That said, it would be disingenuous not to acknowledge that recognition of a corporation's religious purpose certainly opens the door to such developments, whereas avoiding recognition of a corporation's religious purpose would seem to keep the door tightly shut. However, it is, in my opinion, one of the worst tendencies of advocates, and one that oftentimes borders on intellectual dishonesty, to unreasonably insist on yielding no ground whatsoever on a given point out of fear of what might eventually follow therefrom. I suggest that if a given situation or context most reasonably suggests a particular characterization or result, that characterization or result ought to follow on the strength of its own merits; it ought not be held back or denied out of fear of some other, hypothetical situation or context that might thereafter arise.

But to assuage such understandable fears, it should be recognized that courts and administrative agencies may very well settle upon different standards with regard to religious exemptions—one for individuals, one for churches, and one for religiously motivated business corporations. In other words, the complicated and controversial field of religious exemptions and accommodations is an issue separate and apart from the question of whether or not a business corporation can be deemed to be religious.

Thus, in the face of evidence that some for-profit business corporations are, in fact, formed and operated pursuant to an explicit religious purpose,⁸⁷ it seems foolish to argue that this is inconceivable. To do so (and if you will forgive another pop culture reference) reminds me of the film *A Princess Bride*,⁸⁸ in which the character, Vizzini, frequently proclaims something that has just happened to be “inconceivable.” In reply another character, Inigo

86. See, e.g., *United States v. Lee*, 455 U.S. 252, 257 (1982) (“Not all burdens on religion are unconstitutional. The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.”) (internal citations omitted).

87. See Colombo, *The Naked Private Square*, *supra* note 29, at 20 (illustrating how biblical principles directed the business approach of Chick-Fil-A's founder).

88. *THE PRINCESS BRIDE* (20th Century Fox 1987).

Montoya, responds, “[y]ou keep using that word. I do not think it means what you think it means.”⁸⁹

Option 2 would, therefore, seem to represent much firmer ground. This is the perspective that a corporation may or may not have a religious purpose depending on its own wishes. For every corporation that has selected an identifiable religious purpose (such as Hobby Lobby), there are dozens that have not.⁹⁰ Thus, Option 2 seems unassailable.

And if Option 2 is unassailable, logic would dictate that Option 3 must be rejected. For Option 3 posited that “by virtue of its nature, the corporation must have a religious purpose.” Just as the existence of corporations with a religious purpose defeated Option 1, the existence of corporations lacking a religious purpose defeats Option 3. Case closed.

Or is it? Is there really such a thing as a corporation lacking a religious purpose? If I am correct in stating, as I did earlier, that both religion and corporations share a common fundamental purpose (to attain human happiness), would it not follow that all corporations, by definition, possess a religious purpose regardless of their declared objectives? I suggest that this may be so. In other words, if the pursuit of happiness (along with the means by which this pursuit is conducted) is an inextricably religious undertaking, and if the profit-maximizing objective of the paradigmatic business corporation is simply one instantiation of that basic human longing, then it would seem to follow that the purpose of the business corporation, any business corporation, is necessarily and inescapably religious by its very nature. This is regardless of the intentions of the corporation’s founders, owners, employees, and customers (although, in fairness, sometimes explicitly pursuant to them).

89. *The Princess Bride Quotes*, IMDB, <http://www.imdb.com/title/tt0093779/quotes> (last visited Mar. 28, 2017) (providing specific character quotes from the film) (on file with the Washington and Lee Law Review).

90. See Colombo, *The Naked Private Square*, *supra* note 29, at 6 (“The modern business corporation is commonly portrayed as a thoroughly secular institution in which religion plays no role and has no place.”).

VI. Repercussions

The conclusion that the business corporation is, by its nature, necessarily an institution with a religious purpose gives rise to a number of consequences and repercussions. Some of these have been touched upon previously.⁹¹

Primary among these might be the contribution that a religious understanding of corporate purpose can have to the ongoing debate between contractarians on the one hand and communitarians on the other.⁹² This debate is focused largely on the shareholder primacy norm—whether it ought to persist and, if so, how it ought to be understood.⁹³

What is at stake [in this debate] is a profound difference in normative world view. This ideological difference defines the basic divide between communitarians and contractarians

Contractarians start from the presumption that people ought to be free to make their own choices about how to live their lives

Communitarians [believe] . . . individuals owe obligations to each other that exist independently of contract The state acts appropriately when it enforces such duties.⁹⁴

To most contractarians, the corporation is “merely an intersection of atomistic contracting individuals.”⁹⁵ From this it ordinarily follows that the corporation exists to serve, primarily, the interests of the shareholders.⁹⁶ These interests, in turn, are

91. See *supra* Part V (discussing commentators’ fears over contraception coverage, employer discrimination, and proselytization).

92. See David Millon, *New Directions in Corporate Law: Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1375–76 (1993) [hereinafter Millon, *Crisis in Corporate Law*] (“[T]hirty states have passed statutes that allow management to consider enumerated nonshareholder interests (in addition to those of shareholders) in corporate decisionmaking.”).

93. See *id.* at 1377 (“The possibility of effective shareholder control seems to promise a revolution in corporate governance no less startling than the emergence into plain view of nonshareholder considerations.”).

94. *Id.* at 1382–83.

95. Lyman Johnson, *Making (Corporate) Law in a Skeptical World*, 49 WASH. & LEE L. REV. 161, 177 (1992).

96. See *id.* at 178 (“Corporate activity surely *shapes* individual preferences and behavior as well as being *shaped* by them.”) (emphasis added).

typically reduced to that of maximizing economic returns.⁹⁷ This is currently the prevalent understanding of the corporation: that “the business firm—in its typical form, the corporation—is managed, or at least should be managed, in the sole interest of the body of shareholders”⁹⁸

If a detour may be permitted, I have long questioned the appropriateness of equating shareholder primacy with shareholder wealth maximization.⁹⁹ So too has Professor Johnson, who queried, “whether shareholders themselves really reject calls for more socially responsible conduct. Do we wrongly caricature them in portraying them as intolerant of socially/morally responsible conduct?”¹⁰⁰ This digression introduces the possibility of recognizing a more socially responsible conceptualization of officers’ and directors’ fiduciary duties within the existing framework of the shareholder primacy norm.¹⁰¹ Unfortunately, few others have shown an appetite for reformulating shareholder primacy along these lines.¹⁰² As such, the contractarians and communitarians somewhat resemble the entrenched Entente and Central armies of World War I along the Western Front.

According to the communitarians (a term I am using to broadly cover the advocates of “progressive corporate law” and stakeholder theorists), the corporation ought not be beholden to

97. See Ronald J. Colombo, *Ownership, Limited: Reconciling Traditional and Progressive Corporate Law via an Aristotelian Understanding of Ownership*, 34 J. CORP. L. 247, 258–59 (2008) [hereinafter Colombo, *Ownership, Limited*] (discussing how shareholders provide equity investment in exchange for the expectation of officers’ and directors’ fiduciary duties).

98. Lyman Johnson, *The Eventual Clash Between Judicial and Legislative Notions of Target Management Conduct*, 14 J. CORP. LAW 35, 40 (1988) (quoting M. AOKI, *THE CO-OPERATIVE GAME THEORY OF THE FIRM* 3 (1984)).

99. See Colombo, *Ownership, Limited*, *supra* note at 97, 268–69 (discussing the main objective for the board of directors is to maximize shareholder wealth).

100. Johnson, *Reclaiming an Ethic of Corporate Responsibility*, *supra* note 42, at 965.

101. See Colombo, *Ownership, Limited*, *supra* note at 97, 268–69 (“Many (if not most) individuals subscribe to values and principles that surpass material wealth in order of importance, and routinely factor moral and ethical concerns into their decision-making.”).

102. See *id.* at 267 (“[T]he predominant modern view of property ownership largely disclaims moral obligations . . . shareholders . . . are usually viewed as mere investors, detached from any personal moral obligations derived from their status as owners of a corporation.”).

shareholders alone—or perhaps even to the shareholders primarily.¹⁰³ Rather, the corporation’s officers and directors are compelled to take into account the interests of various corporate constituencies, including, for example, employees and consumers.¹⁰⁴ Naturally, “[c]ommunitarians also differ from contractarians in emphasizing the broad social effects of corporate activity,”¹⁰⁵ and as such the corporate social responsibility movement is largely fueled by communitarian perspectives of corporate law.¹⁰⁶

Professors Johnson and Millon have long asserted that “[t]he idea of shareholder primacy . . . no longer commands general respect.”¹⁰⁷ At the same time, however, they have been forced to recognize that “[i]f corporate law is to move beyond exclusive concern for shareholders, some will seek to develop a new theoretical foundation upon which a new body of doctrine can be erected Those who say that communitarians have not yet articulated a fully developed alternative agenda are correct.”¹⁰⁸ I suggest that by conceptualizing the purpose of the corporation as inherently (or unavoidably) religious, we travel further down the road toward such a new theoretical foundation. We do so by infusing our understanding of the corporation with “other-regarding, caring impulse[s] and some subduing of the egoistic, self-serving impulse. We need this both in our personal lives and in our institutional lives, of which the business corporation is just one instance.”¹⁰⁹ Indeed, it may even help legitimize the corporation, for our current decision to “rest the corporation’s legitimacy on faithful allegiance to capital is to

103. See *id.* at 255–58 (examining the inevitable reduction of employees and increased layoffs following a corporate takeover).

104. See *id.* (“[S]tate legislatures across the United States passed “constituency” statutes that enable . . . boards to take into account the interests of nonshareholder stakeholders in corporate decision-making.”).

105. See Millon, *Crisis in Corporate Law*, *supra* note 92, at 1379.

106. See *id.* (“Communitarians see corporations as more than just agglomerations of private contracts; they’re powerful institutions whose conduct has substantial public implications.”).

107. Lyman Johnson & David Millon, *Corporate Takeovers and Corporate Law: Who’s in Control?*, 61 GEO. WASH. L. REV. 1177, 1210 (1993).

108. Millon, *Crisis in Corporate Law*, *supra* note 92, at 1387.

109. Johnson, *Reclaiming an Ethic of Corporate Responsibility*, *supra* note 42, at 967.

demean the contributions of others and, in the end, to expect very little of the institution.”¹¹⁰

How would a religious understanding of corporate purpose help accomplish this and further a more communitarian vision of corporate law? This is possible in a number of ways.

For starters, it would reinvigorate a more balanced understanding of the duties of officers and directors.¹¹¹ “As we currently stand in the midst of a seemingly strict shareholder primacy theoretical era, it should be recalled that normative positions on corporate purpose have dramatically changed, historically.”¹¹² Similarly, “[i]deas about what corporations are, and the normative implications that follow from those ideas, have changed radically over time.”¹¹³

A religious understanding of corporate purpose would harken us back to yesteryear—to a time when the shareholder primacy norm was not ensconced in corporate law to the same degree as it is today. As Professor Millon has explained:

Radical shareholder primacy’s conception of corporate governance contrasts with an older, long-established model that I term traditional shareholder primacy Once it is understood that the [radical] agency model is aspirational rather than grounded in corporate law, a more serious conversation about corporate purpose and the desirable balance of power between management and shareholders can occur.¹¹⁴

This would, in turn, help justify an approach to corporate law that is far more accommodating to the interests of non-shareholder constituencies than the prevailing approach. In place of the current “fragmented and cramped conception of corporate purpose”

110. Johnson, *Corporate Takeovers and Corporations: Who Are They For?*, *supra* note 1, at 822.

111. See Colombo, *The Naked Private Square*, *supra* note 29, at 87–88 (“[F]ailure to recognize the religious liberty rights of the business corporation . . . undermine[s] both the spirit and the efficacy of the First Amendment and call[s] into question our nation’s alleged commitment to pluralism, diversity, and tolerance.”).

112. Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgement Rule, Corporate Purpose*, 38 DEL. J. OF CORP. L. 405, 438 (2013).

113. David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 262 (1990).

114. David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013, 1043–44 (2013).

a religious understanding of corporate purpose would invite a more serious discussion about how the corporation “can both be better governed and contribute more positively to society.”¹¹⁵

A religious understanding of corporate purpose would also reinvigorate our approach to fiduciary duties, as alluded to previously.¹¹⁶ For “[m]odern corporate law has inherited . . . a rich, moral vocabulary[]”¹¹⁷ that has largely been squandered by the “quest to bottom law on economic efficiency”¹¹⁸ “The historic decision within corporate law initially to deploy a moral vocabulary suggests a view that a moral subject matter was under consideration.”¹¹⁹

Since “[r]eligious stories confirm the central place of care[,]”¹²⁰ religion can serve a useful role in fleshing out the full depths of corporate fiduciary duties. A religious reading of fiduciary duties could, for example, help justify “a ‘covenantal interpretation’ of the corporation.”¹²¹

Some might protest that, regardless of its desirability, any effort to veer from the shareholder wealth maximization runs afoul established corporate law.¹²² Professor Johnson has repeatedly attacked this notion, arguing “not a single corporate statute explicitly addresses the purpose of corporate activity.”¹²³ He has added “no U.S. law requires a business corporation to maximize shareholder wealth except in one unusual setting. Instead, the law is ambivalent as to, and therefore remarkable permissive on, the question of corporate purpose, according senior managers significant discretion on a matter of signal importance.”¹²⁴ Put

115. Johnson et al., *Rethinking*, *supra* note 26, at 60.

116. See *supra* Part VI (comparing shareholder primacy with shareholder wealth maximization).

117. Johnson, *After Enron*, *supra* note 40, at 28.

118. Johnson, *Individual and Collective Sovereignty*, *supra* note 3, at 2236.

119. Johnson, *After Enron*, *supra* note 40, at 53–54.

120. *Id.* at 43.

121. Johnson, *Faith and Faithfulness*, *supra* note 40, at 16.

122. See Colombo, *The Naked Private Square*, *supra* note *supra* note 29, at 6–7 (“[M]any balk at the notion that a business corporation should be afforded any First Amendment rights The corporation is truly ‘monomaniac[all]’ and ‘soulless,’ existing for the singular purpose of profit-maximization”).

123. Johnson, *Delaware Judiciary*, *supra* note 27, at 874.

124. Johnson, *A Role for Law and Lawyers*, *supra* note 47, at 4.

quite simply, “managers possess sufficient discretion to make moral choices[,]”¹²⁵ even religiously based moral choices.

Indeed, the Supreme Court’s recent decision in the *Hobby Lobby*¹²⁶ case, concerning the “contraceptive mandate” promulgated by the Department of Health and Human Services in the wake of the Affordable Care Act, drives this point home quite forcefully.¹²⁷ For in that case, “the United States Supreme Court speaks clearly to the fundamental issue of corporate purpose and states correctly that corporate law authorizes non-profit-maximizing behavior.”¹²⁸

However, merely recognizing that the constraints of the shareholder wealth maximization norm on managerial discretion are largely illusory is not enough. As Professor Johnson wrote: “the necessary pre-condition—freedom—is not a sufficient condition for successful reform. Also essential is a *willingness* to act and the *knowledge* of how to act.”¹²⁹ He continued:

Appreciating the scope of managerial freedom to act is thus the necessary first step, but by itself not a sufficient step, for attaining managerial conduct congruent with religious tenets. To be given proper expression in the business-legal world, religious convictions require a vocabulary that can mediate the discourse of spiritual-religious insight, on the one hand, and compliance with business and legal duties in the secular world, on the other hand.¹³⁰

Thus, although “no changes in positive law are needed to introduce religious perspectives into corporate law,”¹³¹ normative and cultural changes are probably necessary:

[I]t is not law—where managerial discretion is broad, though still constrained by fiduciary duties—that silences the religious

125. Johnson, *Faith and Faithfulness*, *supra* note 40, at 17.

126. 134 S. Ct. 2751 (2014).

127. See Lyman Johnson, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1, 30 (2015) (“Hobby Lobby illustrates that the business corporation is a legal person . . . that . . . can have an institutional purpose distinct from that of its shareholders.”).

128. *Id.* at 31.

129. Johnson, *Reclaiming an Ethic of Corporate Responsibility*, *supra* note 42, at 963–64.

130. Johnson, *A Role for Law and Lawyers*, *supra* note 47, at 4.

131. Johnson, *Faith and Faithfulness*, *supra* note 40, at 19.

voice within corporations. Rather, it is the secularization of corporate law discourse itself, along with social norms and linguistic practices within corporations themselves, that hinder free expression and therefore need reforming.¹³²

This would take quite a bit of work, especially after decades of fixation on wealth maximization. It would not be an understatement to declare that, within the context of the corporation, “moral discourse must be rejuvenated”¹³³ This would require “a willingness to engage in moral dialogue and moral encounter”¹³⁴ on the part of officers and directors—a far cry from the current practice in which “directors enter the boardroom, and abandon their pre-existing moral vision”¹³⁵

Perhaps, however, the difficulty here is being overstated. For if given the choice, “[i]t would be odd if business managers themselves . . . did not draw on their deepest, most cherished convictions in ascertaining how to think and act in the business sphere.”¹³⁶

Were such a normative transformation to be unleashed, the effects upon corporate social responsibility would be profound. For as things currently stand, “[m]any citizens and business actors continue to believe . . . that if one is obeying the law, then one is also necessarily behaving in a morally responsible manner.”¹³⁷ This is damning, as pursuant to this approach all law becomes a *de minimis* form of morality that the vast majority of people would most likely reject if they thoughtfully considered it. Yet, nevertheless, officers and directors find themselves constrained to the law itself, hesitant to venture much beyond its requirements.¹³⁸ Liberating corporate officers and directors from this worldview

132. *Id.*

133. Johnson, *Reclaiming an Ethic of Corporate Responsibility*, *supra* note 42, at 965.

134. *Id.*

135. *Id.* at 965–66.

136. Johnson, *A Role for Law and Lawyers*, *supra* note 47, at 29.

137. Lyman Johnson, *Beyond the Inevitable and Inadequate Regulation of Bankers: A Comment on Painter*, 8 U. ST. THOMAS L.J. 29, 31 (2010).

138. See Johnson, *A Role for Law and Lawyers*, *supra* note 47, at 12 (“A recent analysis of 167 studies conducted over thirty-five years on the linkage between corporate social responsibility and corporate financial performance found no correlation between ‘doing well’ and ‘doing good.’ In other words, deliberately seeking to be socially responsible did not enhance profitability.”).

would empower them to embrace a more fully human morality: one that comports with their own intuitions and values, and not one watered-down by the compromise and pragmatism of the legislative process. This would also invite those officers and directors who were not particularly religious to more comfortably assert their deeply held moral beliefs as well—an additional, collateral benefit to introducing religious perspectives into corporate decision making.

Thus far, we have considered the societal consequences of a religious conception of corporate purpose, especially with regard to the phenomenon of corporate social responsibility. We should not overlook, however, the consequences of such an understanding upon those individuals who are themselves religious (a number which is not insignificant).

Directors and senior officers will be freed from the psychological and spiritual burden of keeping two distinct moral frames of reference, one for work and the other for the rest of life. Instead, they will face the formidable challenge of determining how to advance the common corporate good by drawing on understandings of faithfulness derived from deeper sources of authority, including religious conviction.¹³⁹

Not surprisingly, it has been found that the “effort to blend faith and work led to more meaningful work experiences for the individuals themselves, higher ethical standards, and more human employee practices at the company level.”¹⁴⁰ In other words, this development would permit corporate officers and directors (in addition to, perhaps, employees and shareholders) to live more integrated lives, in which their professional responsibilities more closely aligned with their deepest values and beliefs.¹⁴¹

Finally, and related to each of the preceding consequences, recognition of the undeniably religious purposes of the corporation would provide a firmer footing for the Supreme Court’s decision in *Burwell v. Hobby Lobby*.¹⁴² As referenced previously, many

139. *Id.* at 32.

140. Johnson, *Faith and Faithfulness*, *supra* note 40, at 16.

141. *See id.* (“[A] covenantal model both better situates the corporation in a wider social context . . . link[ing] corporate endeavor to . . . social purpose, moral values, and religious belief.”).

142. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) (“Congress did not discriminate in this way against men and women who wish to

commentators continue to challenge the concept of corporate religious liberty.¹⁴³ Although the precise contours and form of this liberty is a matter that merits serious thought and reflection, its very possibility ought no longer be denied. Recognizing the purposes of corporate activity as inherently religious in nature helps promote this important debate by setting aside the conversation-stopper that any religious understanding of the corporation is simply inconceivable.

Elsewhere, I have studied the question of corporate religious liberty.¹⁴⁴ As I have argued, corporate religious liberty fosters a more robust approach to corporate social responsibility and contributes to the possibility of more authentically religious corporate environments.¹⁴⁵ This is because corporate religious liberty enables a business corporation to embrace more fully a religious identity, should it wish to do so, or to respond to religious influences and impulses even if it forgoes an explicit religious identity.¹⁴⁶ It is difficult to embrace such identities, many of which are counter-cultural, in the face of laws and regulations that serve to undermine them.¹⁴⁷ To provide just one example, it is difficult to see how an authentically Catholic pharmacy could maintain its identity as such if forced by law to sell contraceptives and abortifacients, given the Catholic Church's clear and consistent teaching against such things.¹⁴⁸ Thus, recognition of corporate

run their businesses as for-profit corporations in the manner required by their religious beliefs.”).

143. See *supra* Part V (examining the low probability that a corporation may take advantage of religious exemptions to the detriment of non-religiously affiliated employees).

144. See Colombo, *The Naked Private Square*, *supra* note 29, at 3 (“a for-profit corporation’s right to the free exercise of religion . . . cannot be fully realized if relegated to the privacy of one’s home and temple.”).

145. *Id.* at 87–88 (“[F]ailure to recognize the religious liberty rights of the business corporation means failure to recognize fully the religious liberty rights of flesh-and-blood human beings.”).

146. *Id.* at 24 (suggesting that a company founded by an individual of strong religious convictions, of which is implicated by the company’s policies and practices, may attract investors, officers, and employees who share those same convictions).

147. *Id.* at 6 (“American employment law has been interpreted to require a religiously neutral workplace . . . business executives check their morals at the door . . .”).

148. See, e.g., CATECHISM OF THE CATHOLIC CHURCH 547–49, 570 (2d ed. 2016)

religious liberty allows corporations to take religion seriously.¹⁴⁹ And a seriously religious corporation will not view itself as merely empowered to embrace the obligations posed by a robust understanding of corporate social responsibility, but may very well find itself compelled to embrace such responsibilities, derived from the religious beliefs and convictions upon which it is grounded.¹⁵⁰ Such recognition may also cause the corporation to adopt a corporate culture and foster a workplace environment much more in keeping with certain religious sensibilities.¹⁵¹

As referenced previously, a religious understanding of corporate purpose certainly stokes the fears of some.¹⁵² Two rise to the top of this list and merit our attention here.

The first is that a religious understanding of corporate purpose would lead to the existence of more explicitly religious business corporations, as described immediately above. Although there were times when such a turn of events would have been broadly welcome, this is not such a time. To many individuals today, “religious” is viewed as equivalent to the sin of all sins: intolerance.¹⁵³ Although this is a characterization that I would dispute vehemently and on a number of levels, this article is not a piece on religious apologetics, and as such, I shall prescind from doing so. I will, however, advert again to the wisdom of Professor Johnson, who once wrote: “[I]n a market-oriented, democratic society, there is no reason why business corporations do not exhibit more institutional pluralism in both ends and approaches to

(“Human life must be respected and protected absolutely from the moment of conception Formal cooperation in an abortion constitutes a grave offense.”).

149. *Id.* at 22 (“The values embraced by a corporation, religious or otherwise, are of increasing concern to investors as well, and this, too, contributes to the rise of the religiously expressive association.”).

150. *Id.* at 20 (“An individual’s development as a human being, on a variety of levels, can very well occur largely within the context of their employment and careers.”).

151. *Id.* (“[E]mployees are increasingly seeking out workplaces congruent with their values—including their religious values.”).

152. *See supra* Part V (discussing individuals who refuse to recognize a corporation’s religious character because of concerns that it would lead to the development of hypothetical, future fears).

153. *See Colombo, The Naked Private Square, supra* note 29, at 10 (“[T]he Protestant Reformation, which tore asunder the uniformity of religious belief . . . began the process of religious individualism, and with it the inability to reach consensus on questions of faith.”).

business.”¹⁵⁴ In short, I am comfortable with a society in which some of us are made uncomfortable by the religiosity of others. Given the existing legal parameters in place, I trust that such religiosity, just as any other deeply held set of beliefs, will not frequently cross society’s lines of impropriety, and as such not give rise to unjust discrimination or the like. This takes into account the possibility of religious exemptions to such laws—exemptions that the courts would be entrusted with policing.

From a corporate law perspective, some fear that by untethering management from a strict duty of shareholder profit maximization, we risk unleashing untold abuses upon corporate shareholders.¹⁵⁵ In other words, corporate fiduciaries cannot be trusted to properly exercise such discretion: they will inevitably take advantage of the opportunity to shirk their duties or, worse still, put shareholders’ interests second to those of their personal own.¹⁵⁶ Power corrupts, and the danger with corporate mission creep is the potential it has for entrusting corporate boards with “uncontrollable power.”¹⁵⁷

Here too Professor Johnson has provided us with some insightful thoughts to consider:

Ensuring that managers do not wrongly advance their own interests over shareholder welfare is one thing. It is another thing, however, to focus so single-mindedly on the second-level, ‘agency’ problem that the deeper institutional dilemma of harmonizing the interests of numerous physically absent shareholders with the interests of a host of other corporate participants is ignored. Viewed this way, as a subset of the universal and longstanding individual/group dilemma, the real challenge for corporate directors—and corporate governance—should have been cast from the outset as the task of figuring out how to constrain or induce directors to act in a way that

154. Johnson, *A Role for Law and Lawyers*, *supra* note 47, at 30.

155. See Millon, *Crisis in Corporate Law*, *supra* note 92, at 1384 (“[U]nder the current corporate law, shareholders are for the most part entitled to pursue their own financial advantages without regard for possible harms to nonshareholders . . .”).

156. See *id.* at 1374 (“[T]he ongoing theme in corporate law discourse has been the need to increase the accountability of management to the corporation’s shareholders.”).

157. Johnson, *A Role for Law and Lawyers*, *supra* note 47, at 793 (quoting 3 F. A. HAYEK, *LAW, LEGISLATION, AND LIBERTY* 82 (1982)).

advances the interests of shareholders consistent with fulfilling the overarching interests/purposes of the corporate group.¹⁵⁸

In short, there ought to be a better way of constraining or policing the conduct of officers and directors. We ought to reject a solution that comes with so high a cost as that exacted by the wealth maximization norm. As Professor Johnson has explained, this current approach may have the tail wagging the dog:

[B]y stubbornly insisting that management focus exclusively on shareholder welfare, corporate law's dogma may well succeed in checking management's broad discretion. That success, however, may come at the expense of preordaining the answer to the more fundamental question of whether the single-minded apotheosis of capital providers is in fact the proper aim of corporate endeavor.¹⁵⁹

Thus, "the belief that corporate managers should be held accountable does not logically lead to the conclusion that maximizing shareholder wealth is the proper focal point of corporate activity."¹⁶⁰

VII. Conclusion

Few developments in the legal academy have been as influential as that of the law and economics movement. And there are few fields that have been more affected by this movement than that of corporate law.

Although law and economics has shed incredible light upon many legal problems, and provided powerful analytical tools with which to examine the law, it has, unfortunately, contributed to a view of the corporation that is entirely economic in nature.¹⁶¹ It has helped propel a contractarian understanding of the corporation,

158. Johnson, *Reclaiming an Ethic of Corporate Responsibility*, *supra* note 42, at 958.

159. Johnson, *Delaware Judiciary*, *supra* note 27, at 876.

160. *Id.* at 882.

161. See Colombo, *The Naked Private Square*, *supra* note 29, at 13 ("Title VII famously prohibits employment discrimination on the basis of religion, sex, race, or natural origin [It] forbade employers from making employment decision on the basis of religion").

and with it an understanding of corporate purpose defined narrowly as profit maximization for shareholder benefit.¹⁶²

There are, and have always been, competing theories of the corporation. These include perspectives that are more communitarian in nature, and that stress the concept of corporate social responsibility.¹⁶³ Such theories have, however, largely failed to gain much traction in recent times.¹⁶⁴ In years past, however, these theories have had their day.¹⁶⁵ Recognizing the corporation's purpose as fundamentally religious in nature can reclaim much of this discarded past. For with this recognition would come a deeper, richer understanding of corporate fiduciary duties. It would also provide a principled justification (which has thus far proven elusive) for greater corporate social responsibility. This, in turn, would empower officers and directors to take such responsibility more seriously.

Although a religious conceptualization of corporate purpose would admittedly take many by surprise, a careful review of the corporation reveals that such a conceptualization is justifiable if not unavoidable. Arguably more influential than even the nation state in modern times,¹⁶⁶ the business corporation is the means by which vast numbers of people satisfy their myriad needs and desires. It is within their place of corporate employment that countless workers spend most of their waking hours.¹⁶⁷ It is

162. See *id.* at 15 (“As a result of [Title VII and the Worker Freedom acts], ‘people had incorrectly assumed that it was illegal to practice any form of religious expression in the workplace.’”).

163. See Millon, *Crisis in Corporate Law*, *supra* note 92, at 1378 (explaining the communitarian belief that corporate law should confront the harmful effects on non-shareholder constituencies through the managerial pursuit of shareholder wealth maximization).

164. See *id.* at 1376 (“[A]dvocates for shareholder interests have not abandoned the field. They have returned to the fray, reinvigorated by recent developments in the corporate world.”).

165. See *id.* at 1375 (“Hostile takeovers, which seemed to promise so much for shareholders, ended up raising serious doubts about the shareholder primacy norm that was their strongest justification.”).

166. Indeed, many corporations are undeniably far more influential and powerful than many national governments. See Colombo, *The Naked Private Square*, *supra* note 29, at 49 (“[M]edieval corporations, and practically all corporations up until the mid-nineteenth century, concerned themselves with undertakings such as education, religion, colonization, foreign trade, bridge-building, hospital maintenance, and other public-oriented activities.”).

167. See *id.* at 20 (“An individual’s development as a human being, on a

therefore no exaggeration to claim that for untold numbers of individuals, their very salvation will turn upon the decisions they make with respect to the corporations they work for, invest in, or transact business with. An entity with such influence and power, and that touches the lives of virtually every human being, is an entity that demands scrutiny under the world's various religious traditions. And once applied, most religious traditions will quickly realize that not only corporate activity, but even the very purpose of the business corporation is unavoidably religious in nature in that that it serves as a critical means by which so many individuals pursue their ultimate end.

variety of levels, can very well occur largely within the context of their employment and careers.”).

