

# Reflecting on Three Decades of Corporate Law Scholarship

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## *I. Introduction*

This short Article is a written version of remarks I delivered as a keynote speech at the October 21–22, 2016 Washington and Lee University Lara D. Gass Law Review Symposium.<sup>1</sup> The 2016 Symposium, I am gratified to say, paid tribute to my scholarship and that of my longtime colleague, David Millon. Professor Millon, along with my other corporate law colleague, Christopher Bruner, also spoke at the conference, as did a number of highly regarded corporate scholars from other law schools, distinguished

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1. The Lara D. Gass Symposium is named in honor of Lara Gass, a member of the Law Class of 2014 who passed away in an automobile accident in March of 2014. Lara served as Symposium Editor for the Washington and Lee Law Review, organizing the Law Review's 2014 symposium focused on the 40th anniversary of *Roe v. Wade*.

judges—including Chief Justice Leo Strine of the Delaware Supreme Court, and members of the bar—including former Justice Jack Jacobs. All of these persons have sought over their careers to improve corporate law and help it better serve the larger end of justice. They also have greatly influenced my scholarship.

This piece will briefly touch on two subjects as a way to reflect on my thirty-one years of corporate law scholarship—so far!—during thirty years of which David Millon was my esteemed colleague and frequent collaborator, as well as a true friend. My scholarship has spanned a broad number of subjects and I will refer to only a few of them in this Article,<sup>2</sup> but I will not purport to fully capture all of it, summarize it, or offer a detailed explanation of it. I am grateful for those scholars who attended the Symposium and engaged my work in their published articles for this issue of the Law Review, as well as other scholars, lawyers, and judges who in other venues have responded to my writing.

First, I will describe what I found when I entered the world of teaching and corporate law scholarship in the mid-1980s.<sup>3</sup> This is not just a nostalgic walk down memory lane. Rather, this period was a tumultuous time that profoundly shaped (and still shapes) legal doctrine, theory, corporate norms and practices, as well as today's dynamic scholarship.

Second, I will highlight two areas and themes in corporate law that have occupied David's and my collaborative work<sup>4</sup> and one that I have explored in my own individual scholarship;<sup>5</sup> and then I will link a couple of those themes to what interests me now about corporate law and about that important, complex, and sometimes infuriating institution: the business corporation.<sup>6</sup>

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2. David Millon's keynote address and article for this symposium also elaborate certain themes he and I have explored in our writing. See David Millon, *Looking Back, Looking Forward: Personal Reflections on a Scholarly Career*, 74 WASH. & LEE L. REV. 699 (2017).

3. See *infra* Part II (describing the 1980s' hostile corporate takeovers and subsequent legal developments).

4. See *infra* Part III (focusing on corporate purpose and corporate officers).

5. See *infra* Part III.B.2 (discussing religious purposes in corporate law).

6. See *infra* Part IV (urging continued creativity by the Delaware judiciary in developing corporate law).

## II. My Entry into the World of Corporate Law Scholarship

Several cultural changes accompanied my entry into law school teaching and scholarship in the mid-1980s, and culture matters a great deal to *how* we see things—and also *what* we see. First, in moving from being a partner in a Twin Cities law firm who was actively engaged in a corporate law practice to the academy, I was struck by how much work one does alone. In practice, we frequently worked together or at least picked each other's brains (sometimes by engaging in that quaint ritual of "walking down the hall"). David's arrival the next year filled that collaborative vacuum, a point I will come back to.

Second, I came not only from a practice culture, I moved from an upper Midwest, open, recently settled (at least by Virginia standards), non-hierarchical, Lake Wobegon culture,<sup>7</sup> where I actually drove on Highway 61 and didn't just listen to Bob Dylan's iconic song about it,<sup>8</sup> to . . . the South; in other words, to a setting where, because I was routinely jarred by how things were done so differently in the day-to-day social sphere, I was ripe as well for intellectual change. And intellectual change there was in corporate law, and that was the third cultural change. The corporation itself, and so also corporate law, was experiencing enormous upheaval, the key driver of which was the hostile corporate takeover movement.

Hostile tender offers—in which a determined bidder for a public company seeks to buy control in the capital markets notwithstanding target company resistance—had always been legally possible,<sup>9</sup> but they were quite rare due to business norms until the 1970s and 1980s. Then, when those norms dissolved, Michael Milken at the daring investment bank of Drexel Burnham Lambert famously launched the "highly confident letter" promising the firm could sell "junk bonds"<sup>10</sup> to finance

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7. See generally GARRISON KEILLOR, *LAKE WOBEGON DAYS* (1985) (chronicling a young boy's coming-of-age in the fictitious small town of Lake Wobegon, Minnesota).

8. BOB DYLAN, *HIGHWAY 61 REVISITED* (Capitol Records 1965).

9. See Lyman Johnson & David Millon, *Misreading the Williams Act*, 87 MICH. L. REV. 1862, 1898 (1989) (explaining that shareholders' rights to sell to hostile bidders was "historically unquestioned").

10. See *Junk Bond*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A bond that pays interest at a high rate because of significant risks—often issued to raise

what, initially, were highly leveraged purchases.<sup>11</sup> Unlike the Woodstock Festival in 1969—where they say if you remember it you probably weren't there—many of us vividly recall how takeovers unleashed the tumult of the 1980s.

Takeovers were hailed by many as a nifty, free-market solution to corporate law's longstanding accountability challenge: namely, how to make sometimes shirking, self-serving corporate directors and officers more responsive to shareholders.<sup>12</sup> The solution: subject directors and officers to the harsh discipline of the capital markets, free of heavy-handed government and law-centered regulation—an appealing idea in the de-regulatory 1980s when President Reagan and Prime Minister Thatcher governed, and when the Berlin Wall came down (and Wall Street was still glamorized), and the Soviet Union rapidly unraveled, and with it—supposedly and naively—the permanent triumph of liberal democracy.<sup>13</sup>

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money quickly in order to buy the shares of another company.”).

11. See Kurt Eichenwald, *The Collapse of Drexel Burnham Lambert; Drexel, Symbol of Wall St. Era, Is Dismantling; Bankruptcy Filed*, N.Y. TIMES (Feb. 14, 1990), <http://www.nytimes.com/1990/02/14/business/collapse-drexel-burnham-lambert-drexel-symbol-wall-st-era-dismantling-bankruptcy.html?pagewanted=all> (last visited Apr. 6, 2017) (describing Michael Milken's involvement with junk bonds) (on file with the Washington and Lee Law Review). Michael Milken was head of Drexel's junk bond division during the 1980s. *Id.* Under Milken's leadership, Drexel financed small companies that placed bids for large corporations using junk bonds. *Id.* In 1986, the firm began to collapse and Milken was later convicted of six felonies. *Id.*

12. The challenge arose from the separation of ownership and management in the public company as described by Adolf Berle and Gardiner Means in their seminal work. See generally ADOLF BERLE & GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

13. See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* xi (1992) (“I argued that a remarkable consensus concerning the legitimacy of liberal democracy as a system of government had emerged throughout the world over the past few years . . .”). Fukuyama's 1992 book expanded on his 1989 essay, “*The End of History?*” published in *The National Interest*. See generally Francis Fukuyama, *The End of History?*, 16 NAT'L INT. 3 (1989) (announcing the inevitable triumph of liberal capitalist democracy).

A similarly naïve and wrongheaded claim for the “end of history for corporate law”—i.e., the triumph of the ideology of shareholder primacy in corporate law—was made by Professors Henry Hansmann and Reinier Kraakman in a 2001 article. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001). As seen with Mark Twain's droll response to reports of his death, the Hansmann-Kraakman assessment, like that of Fukuyama, was “greatly exaggerated.” See GYLES BRANDRETH, OXFORD

This lofty view of takeovers received the needed intellectual endorsement from the University of Chicago's Law and Economics movement which, through the work of Frank Easterbrook and Daniel Fischel, imported into the legal academy the insights of financial economics,<sup>14</sup> albeit in a highly reductionist, over-simplified manner that drained humans of their full humanity and boiled the complex corporate institution down to a set of contracts (dressed up as a "nexus") and that rested as well on a simplistic—and legally inaccurate—principal-agent conception of corporateness.<sup>15</sup> The account also stumbled badly in failing to consider and account for the growing political and social backlash to the dreary vision of economic life it championed.<sup>16</sup>

Not everyone, it turned out, was convinced of the social utility of hostile takeovers (think today, for a mild comparison, of shareholder activism). Many were concerned that notwithstanding supposed (but disputed) efficiency considerations, largely based on short term stock event studies, adverse effects were too often experienced by laid-off or fearful employees, along with cuts in research and development budgets, losses to local communities and civic leadership when plants and offices were shuttered, and over-leveraged balance sheets that burdened and hobbled companies themselves.

Dissenting voices were heard not just from business leaders and labor interests, who of course felt imperiled, but also, and this was very healthy, corporations were discussed as part of a larger public discourse. For example, novelists such as our own Tom Wolfe, in his book *Bonfire of the Vanities*, where he skewers the mores of ultra-rich Wall Street "Masters of the Universe."<sup>17</sup>

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DICTIONARY OF HUMOROUS QUOTATIONS 82 (5th ed. 2013) (explaining the origin of Twain's famous quote).

14. This intellectual history is well described by Professor David Millon. See generally David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013 (2013).

15. See generally Lyman Johnson, *Individual and Collective Sovereignty in the Corporate Enterprise*, 92 COLUM. L. REV. 2215 (1992) (critiquing the nexus theory).

16. See *id.* at 2224 (describing the resistance to corporate takeovers by state legislatures and Delaware's judges during the 1980s).

17. TOM WOLFE, *THE BONFIRE OF THE VANITIES* 10 (1989). Mr. Wolfe is a 1951 graduate of the college at Washington and Lee University. The book of

But also, movie makers (remember Wall Street with its unnerving “greed is good” line),<sup>18</sup> theologians,<sup>19</sup> and state legislators weighed in.<sup>20</sup> The latter dependably passed anti-takeover legislation first struck down by the Supreme Court in 1982,<sup>21</sup> but later upheld in far weaker form in 1987 in an opinion by our alumnus Justice Lewis Powell,<sup>22</sup> under the somewhat misleading rubric of being a form of “shareholder protection.”<sup>23</sup> David and I pointed out that, in fact, the emperor had no clothes, and we called that legislation what it was in one of our Michigan pieces<sup>24</sup>—it was *anti*-takeover legislation, designed to slow down if not halt takeovers. But takeovers rolled on.

For its part, Congress dithered. It held countless hearings but took no meaningful action,<sup>25</sup> being utterly unsure what to do. The SEC moved only in quite modest ways.<sup>26</sup> Of course, in recent

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Ecclesiastes in the Bible famously warns about a human’s lack of ultimate personal control in its phrase “vanity of vanities; all is vanity,” a key theme in Mr. Wolfe’s modern portrayal of “vanity.” *Ecclesiastes* 1:2 (King James).

18. WALL STREET (20th Century Fox).

19. See Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 TEX. L. REV. 865, 869 n.17 (1990) [hereinafter Johnson, *Meaning of Corporate Life*] (noting the Church of England’s exploration of corporate takeovers).

20. See Lyman Johnson & David Millon, *Missing the Point About State Takeover Statutes*, 87 MICH. L. REV. 846, 848 (1989) [hereinafter Johnson & Millon, *Missing the Point*] (“Rightly or wrongly, state legislators perceive that hostile takeovers cause lost jobs, destruction of established supplier and customer relationships, and loss of tax revenues and charitable contributions.”).

21. See *Edgar v. MITE Corp.*, 457 U.S. 624, 646 (1982) (concluding that Illinois’ anti-takeover legislation was invalid under the Commerce Clause).

22. Former Justice Lewis Powell was a graduate of the college and Law School at Washington and Lee University.

23. See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 94 (1987) (upholding Indiana’s anti-takeover legislation). I analyze Justice Powell’s rhetoric of “investor protection” in my article, *Making (Corporate) Law in a Skeptical World*. Lyman Johnson, *Making (Corporate) Law in a Skeptical World*, 49 WASH. & LEE L. REV. 161 (1992).

24. See Johnson & Millon, *Missing the Point*, *supra* note 20, at 848 (“State takeover laws are *anti* takeover laws.”).

25. See Johnson, *Meaning of Corporate Life*, *supra* note 19, at 868 n.10, 870 n.22 (describing Congressional activity surrounding corporate takeovers).

26. See Steven M. Davidoff, *The SEC and the Failure of Federal Takeover Regulation*, 34 FLA. ST. U. L. REV. 211, 224 (2007) (“Although the SEC’s involvement in takeover regulation during this period was extensive and reached high tide, the SEC arguably failed to meet many of its announced goals.”).

years Congress and the SEC, for good or bad, have addressed a host of corporate law subjects such as executive compensation and director independence, and others,<sup>27</sup> but largely from a reflexive pro-shareholder, anti-management perspective flowing out of its typically cramped two-party view of corporate relations. In the 1980s, however, federal actors were largely silent, and someone had to articulate the ground rules for responding to the new disruptive socio-legal phenomenon of hostile takeovers, and that someone was the Delaware judiciary. These judges may not have asked for that momentous job, but unlike actors at the federal level, they could not escape it.<sup>28</sup>

So, in short order we had several landmark decisions. These included, in 1984, *Aronson v. Lewis*,<sup>29</sup> which clarified the required procedure for initiating a shareholder derivative action.<sup>30</sup> This decision presaged a dramatic upsurge in such litigation in the years that followed. In 1985, several important cases were decided by the Delaware Supreme Court. In *Smith v. Van Gorkom*,<sup>31</sup> the court elaborated for the first time the director duty of care.<sup>32</sup> In *Unocal v. Mesa Petroleum Co.*,<sup>33</sup> the court articulated an intermediate standard for judicially reviewing the adoption of anti-takeover defensive measures,<sup>34</sup> a standard slightly modified in 1995,<sup>35</sup> but enduring to this day. And in *Moran v. Household*

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27. See Lyman Johnson, *Law and the History of Corporate Responsibility: Corporate Governance*, 10 U. ST. THOMAS L.J. 974, 980, 980 nn.34–46 (2014) [hereinafter Johnson, *Corporate Responsibility*] (reviewing Congress' regulation of corporate governance through the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and the Sarbanes-Oxley Act of 2002).

28. See *Meaning of Corporate Life*, *supra* note 19, at 872 (describing the Delaware judiciary's role in deciding corporate takeover issues).

29. 473 A.2d 805 (Del. 1984).

30. See *id.* at 811 (establishing that the demand requirement "exists at the threshold" of a shareholder derivative suit and can only be excused if the plaintiff alleges facts that create reasonable doubt as to the application of the business judgment rule).

31. 488 A.2d 858 (Del. 1985).

32. See *id.* at 872–73 ("[A] director's duty to exercise an informed business judgement is in the nature of a duty of care, as distinguished from a duty of loyalty.").

33. 493 A.2d 946 (Del. 1985).

34. See *id.* at 954–55 (articulating the standard used by the Delaware Supreme Court).

35. See *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1371–80 (Del. 1995)

*Int'l Inc.*,<sup>36</sup> the court upheld a target company board's initial adoption of a so-called shareholder rights plan—i.e., a “poison pill.”<sup>37</sup> In 1986, addressing corporate purpose for the first time, the court required a target company board to maximize the sale price of the common stock once the board had decided the breakup of the company was inevitable.<sup>38</sup>

The tools at hand for this new challenge were quite traditional: Equity (a part of Western thinking since Aristotle)<sup>39</sup> and fiduciary duties. Director duties were recrafted to strike the proper balance between preserving director prerogative and enhancing shareholder welfare; a task that continued into the 1990s and beyond. With respect to *Revlon*,<sup>40</sup> that doctrine, now substantially dwindled in significance,<sup>41</sup> continues to be worked

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(applying and modifying *Unocal*).

36. 500 A.2d 1346 (Del. 1985).

37. See *id.* at 1354–55 (upholding Household's poison pill plan). A poison pill is “a defensive measure . . . used to ward off a hostile takeover” Joseph Grieco, Note, *The Ever-Evolving Poison Pill: The Pill in Asset Protection and Closely-Held Corporation Cases*, 36 DEL. J. CORP. L. 625, 627 (2011). Referred to as a shareholder rights plan, under a poison pill plan, a corporate board of directors issues stock purchase rights that permit all shareholders (except the hostile bidder) to purchase new stock at a discounted rate upon receiving a hostile takeover bid. *Id.* The entity attempting to take over the corporation cannot purchase the new stock. *Id.* Any such issuance of stock would then dilute the ownership position of the hostile offeror. *Id.*

38. See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (“The directors’ role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company.”). See Lyman Johnson & Robert Ricca’s *The Dwindling of Revlon*, *infra* note 41, for the subsequent development of the *Revlon* doctrine.

39. See Lyman Johnson, *Delaware’s Non-Waivable Duties*, 91 B.U. L. REV. 701, 709 (2011) (describing Aristotle’s use of equity as a corrective to injustice).

40. 506 A.2d 173 (Del. 1986).

41. See Lyman Johnson & Robert Ricca, *The Dwindling of Revlon*, 71 WASH. & LEE L. REV. 167, 205–10 (2014) [hereinafter Johnson & Ricca, *Dwindling*] (describing the remedial decline of *Revlon*’s duty of loyalty by corporate directors through a series of Delaware Supreme Court decisions in the second decade of the 2000s).

back into the larger fabric of traditional fiduciary duties<sup>42</sup> as recently seen in *C&J Energy*<sup>43</sup> and *Cornerstone*.<sup>44</sup>

The culturally significant and valuable stabilizing role played by Delaware's courts during this corporate upheaval—and today—cannot be overstated, and Delaware's enormous policy influence may not be fully appreciated by those outside corporate law. Their opinions—then and now—comprise the community campfire we corporate law types gather around to discuss, just as our constitutional law colleagues do with respect to that other Supreme Court. Much of my scholarly life has been spent reading, analyzing, discussing, questioning, and sometimes criticizing, these rich materials.

### III. Collaboration

In mid-1986, I was one year into teaching and struggling to absorb and write about all of this rapid change in corporate law—while enjoying the arrival of my second son Darren, who spent a lot of time in the backpack on my back that summer as I pondered these issues while playing with my other energetic son, Nathan (who later graduated from Washington & Lee)—when David Millon arrived at W&L. David and I are not exactly cut from the same cultural or ideological bolt of cloth; he is a liberal progressive with whom I, as a conservative communitarian, have frequently disagreed on political, social, and law school policy issues. In other words, for fruitful collaboration, it was a match made in heaven, and we quickly hit it off, above all, because we listened to each other, and we often refined—and sometimes changed—our views after one of our many exchanges. And

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42. See Lyman Johnson, *The Reconfiguring of Revlon*, in CLAIR A. HILL & STEVEN DAVIDOFF SOLOMON, RESEARCH HANDBOOK ON MERGERS AND ACQUISITIONS 263, 279–83 (2016) (arguing that *Revlon* continues to play a strong *ex ante* role in guiding director deal behavior).

43. See *C&J Energy Services, Inc. v. Miami*, 107 A.3d 1049, 1067–71 (Del. 2014) (clarifying *Revlon* and concluding the Court of Chancery erred in applying its standard).

44. See *In re Cornerstone Therapeutics Inc., Stockholder Litig.*, 115 A.3d 1173, 1177–78 (Del. 2015) (reversing the Court of Chancery's decision to deny independent directors' motion to dismiss and remanding to determine if the independent directors violated their duty of loyalty).

David's intelligence, creativity, deep sense of fair play, easy manner, superb work ethic, and accessible writing style made him a delightful colleague.

#### *A. Style*

As to working method, we both enjoy in-person, ongoing idea exchanges. But our collaboration styles reflected our view of work and business as well, i.e., that people everywhere crave meaningful work, not just to earn money, but to produce something of benefit, to enjoy some measure of camaraderie, to serve others, maybe to express some part of themselves, and to gain an enlarged sense of human dignity and flourishing through sustained mutual exertion. This view dovetailed with our ideas about corporations and corporate law, however unorthodox and idealistic.

#### *B. Themes of Scholarship*

I hope our scholarship speaks for itself, and I am grateful for those who are engaging it at this symposium and more generally, but I won't rehash various pieces or purport to capture the many themes explored in our work. Instead, I will touch on three subjects, two of which David and I worked on together and another of which I delved into alone. I will also try to explain why these subjects remain important and should continue to be so in the future, even though none of them occupies an especially prominent place in American corporate discourse today.

The three subjects are: corporate purpose; corporate law's neglect of corporate officers; and the relationship of religious faith to the corporation and corporate law, the latter being a missing part of a much larger and very challenging "conversation"—and let's hope it truly is a conversation, not a series of one-way rants—being held outside corporate law about the place of religious convictions in our society. This subject has grown disturbingly contentious, particularly as we become more secular and diverse and divided, and find more and more of our lives subjected to regulation to which some may object on religious grounds. Moreover, as different conceptions of responsible

corporate conduct pointedly clash within corporations, as well as in other organizational venues, and as numerous sectors of society struggle to accommodate—and, I hope, genuinely listen to and not stifle—conflicting views, corporate law scholarship should play a salutary role in this larger conversation.

### 1. Corporate Purpose

An ongoing theme for David and me has been to keep in the spotlight the question—maybe the most important question—of corporate purpose, and the related question of who exactly in a political democracy should have “voice” on that question. We have long argued that, descriptively and historically, corporate law largely and sensibly has been agnostic on this question,<sup>45</sup> a position we understand is hotly contested by others<sup>46</sup> and that, normatively, a pluralistic approach to this issue—which has enormous social significance—is to be preferred to an economic reductionistic view that business corporations are only financial mechanisms that should have a singular focus, i.e., shareholder wealth maximization. David and I, along with others—Lynne Dallas, Lynn Stout, Bill Bratton, Eric Orts, Cheryl Wade, and others later—were “dissenters” from an emerging orthodoxy in corporate law theory in the 1980s that a managerial fixation on shareholder primacy (a term, by the way, that David and I introduced into corporate law and that does not mean shareholder “exclusivity”)<sup>47</sup> also would advance overall social welfare and the common good. Maybe, but maybe not.

But one can ask: Why is this even a proper subject for corporate law? Isn’t this rather the domain of business ethicists

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45. See Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1, 13 (2015) [hereinafter Johnson & Millon, *Hobby Lobby*] (“Delaware law is agnostic on the question of corporate purpose.”).

46. See Leo Strine, *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 135–36 (2012) (expressing skepticism that corporations are motivated by purposes beyond profit maximization).

47. See Millon, *supra* note 14, at 1015 (describing the introduction of the term in early 1989 by Millon and Johnson individually, and then analyzed jointly in Johnson & Millon, *Misreading the Williams Act*, *supra* note 9).

(who, by the way, overwhelmingly reject shareholder primacy),<sup>48</sup> moral philosophers, and business persons themselves? Yes, but it also is an issue those in corporate law must contend with. We recognize that corporate law, like all fields of inquiry, requires boundaries and an organizing paradigm, but for several reasons we set corporate purpose squarely within those boundaries and paradigm. A glance at continental Europe reveals that there is no inevitability to a purely shareholder-centric scheme of corporate governance.<sup>49</sup>

There are many reasons for our thinking, but I will briefly provide just three of them. First, as to the state of positive law, quite clearly shareholder wealth maximization is not the default rule in the thirty plus states with constituency statutes, which permit corporate directors to consider a broad array of noninvestor interests in making decisions.<sup>50</sup> Whatever lawyers and scholars think of those laws—and I know they are decried as shameless, toothless rent-seeking legislation—and however little deployed, they are the law, and I think they comport with widely shared business practices and social norms. The Supreme Court acknowledged as much in the *Hobby Lobby* case.<sup>51</sup>

As to Delaware, one can squeeze the *Revlon* and *Gheewalla*<sup>52</sup> opinions like legal lemons,<sup>53</sup> but a broad, general shareholder maximization mandate does not emerge from those special

48. See generally Hasko Von Kriegstein, *Shareholder Primacy and Deontology*, 120 BUS. & SOC'Y REV. 465 (2015) (critiquing shareholder primacy model that prioritizes shareholder profit maximization over all other corporate goals).

49. See generally Sofie Cools, *The Real Difference in Corporate Law Between the United States and Continental Europe: Distribution of Powers*, 30 DEL. J. CORP. L. 697 (2005).

50. See JAMES COX & THOMAS HAZEN, TREATISE OF THE LAW OF CORPORATIONS § 4.10, at 245 (2010) (describing how constituency statutes authorize directors to consider the interests of “employees, creditors, bondholders, suppliers, communities, . . . state or national economic[s] . . . as well as broader societal interests” when making decisions).

51. See *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2770 (2014) (explaining that a corporation’s business practices “fall comfortably within” the exercise of religion).

52. *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007).

53. *Id.*; *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

setting cases. Delaware Supreme Court decisional law certainly supports a director duty to “enhance” monetary goals in order to “benefit” shareholders,<sup>54</sup> but not to “maximize” shareholder wealth.

Second, empirically, whether the objective of shareholder wealth maximization is ever achieved by a corporation is simply unknowable, because *ex post* the course of conduct actually chosen can never be compared to those courses not chosen *ex ante*. As with the pursuit of the ever elusive and never attained mirage in the desert, so too the shareholder wealth maximand. It may be in the nature of a quest, but it is not a measurably attainable goal. Relatedly, many close businesses do not even try to focus solely on shareholder wealth; nor, on pluralism grounds, should we prefer a business monoculture that does so over a more diverse business ecosystem.

Perhaps public company managers, by way of contrast, truly are unable to reconcile shareholder demands with societal expectations for corporate social responsibility in the broader community, given shareholder voting rights, activist shareholder and hedge fund pressures for corporate sales, stock buybacks, higher dividends and debt loads, and management’s own internalizing of a shareholder primacy norm. If so, such companies must enlist dependable long-term shareholder allies—such as passive index funds<sup>55</sup>—to resist short-term investor

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54. *Revlon*, outside the sale or break-up context, referred only to “benefit accruing to stockholders,” 506 A.2d at 173, similar to the “benefit of its shareholder . . . owners” language of *Gheewalla*. 930 A.2d at 101. The Delaware Supreme Court in its *Paramount v. Time, Inc.*, 571 A.2d 1140 (Del. 2010), decision, spoke only of “enhancing,” not “maximizing,” and the court stressed “corporate” profitability, not a share price metric. *Id.* at 1150.

In a recent article, Professor George Mocsary argues at length that there is a positive law duty to maximize stockholder wealth, but, like many others who take that (wrong) position, he cites to no Delaware Supreme Court cases actually stating that there is such a duty; instead he cites only to decisions recognizing a director’s duty to pursue “benefit” for stockholders. See George A. Mocsary, *Freedom of Corporate Purpose*, 2016 BYU L. REV. 1319, 1355 (2016) (“Delaware’s Supreme and Chancery Courts have affirmed that [corporate directors] . . . have a legal responsibility to manage the business of a corporation for the benefit of its shareholder owners.” (citing *Gheewalla*, 930 A.2d at 101)).

55. See Sarah Krouse et al., *Passive Funds Embrace Their New Power*, WALL ST. J., Oct. 25, 2016 at A1 (describing the increased investment activity in passive index funds).

pressures, or I predict they will find themselves more and more heavily regulated from outside corporate law, a trend we have witnessed over recent years.<sup>56</sup>

Finally, and there are other reasons too, it is demeaning to people who work to suggest that their whole reason for rolling out of bed every morning is to enrich shareholders. Such a view—described recently by a former Wells Fargo sales employee as “soul crushing”<sup>57</sup>—rings hollow in our society and likely does not enjoy broad public support, particularly with growing economic inequality and polarization, and bleak prospects for many young workers. Of course, wealth must be produced, but humans work for many reasons. Financial capital, moreover, is not inherently more important than human capital, and our legal discourse should preserve human dignity by not reducing work to a commodity-like “resource,” or a production “input,” or simply a “means to an end” of shareholder well-being.

## 2. *The Religious Perspective in Corporate Law*

This is where my interest in religious faith intersects with corporate law. But it is also where I am puzzled, religion aside, that constructive criticism of the corporation and calls for corporate reform and greater corporate responsibility seem to come largely from the political left and social progressives. Conservatives should care deeply about business and legal norms and practices that relentlessly tear at social groups and that elevate the individual over the common good while, at the same time, reducing the individual to a shrewdly calculating, free-roving, bargain-happy caricature. [This is why David and I agree on corporate purpose, albeit from very different vantage points; but I strongly prefer internal self-reform over externally imposed legal mandates.]

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56. See Johnson, *Corporate Responsibility*, *supra* note 27, at 980 (discussing congressional regulation of corporations in the early twenty-first century); *supra* note 27 and accompanying text (same).

57. See Chris Arnold, *Former Wells Fargo Employees Describe Toxic Sales Culture, Even at HQ*, NPR (Oct. 4, 2016, 5:04 AM), <http://www.npr.org/2016/10/04/496508361/former-wells-fargo-employees-describe-toxic-sales-culture-even-at-hq> (last visited Apr. 6, 2017) (describing a Wells Fargo employee’s experience) (on file with the Washington and Lee Law Review).

In corporate theory and business practice, too little attention is given to the role of altruism or to other admirable human traits, such as compassion, benevolence, and trust, that precede and permit (and might be damaged by) an ethos of unfettered self-interest.<sup>58</sup> None of these traits or qualities originates in private bargain, or in positive law, or by dint of government decree. In fact they can wither when we expect law to do the work of more empathetic personal and organizational norms.<sup>59</sup> Yet, at the corporate theory level, people are simplistically regarded as “individuals,” who although individuated from others, are not conceived of as fully-formed “persons” who, drawing on the “better angels of their nature,”<sup>60</sup> sometimes behave sacrificially as well as selfishly.<sup>61</sup> And this is likely true as well of those humans who stand behind the institutional investors who hold large blocks of public company stock.

In contrast, much religious thinking fully acknowledges human shortcomings such as an undeniable inclination toward self-centeredness, but regards these as hindrances to be overcome, not qualities to be passively accepted. In corporate theory, however, the workings of markets and competition, fueled by human self-interest and occasionally checked by noncorporate law rules, supposedly serve as sufficient impersonal (and ironic) substitutes for empathy and benevolence.

As a result, altruism, sacrifice, and gift—impulses in abundance throughout human society—simply are not part of the heavily monetized lexicon of mainstream corporate thought and business practice. If benevolence is about the “give” in human dealings, business emphasizes the “get,” creating for many a profound dissonance between what is valued in life generally and what is demanded in business. This gnawing sense of alienation

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58. See Lyman Johnson, *Re-Enchanting the Corporation*, 1 WM. & MARY BUS. L. REV. 83, 93 (2010) [hereinafter Johnson, *Re-Enchanting*] (explaining that current corporate law theory assumes self-seeking individuals).

59. See *id.* at 95 (arguing that the role of religious convictions in corporate life should be addressed by corporate scholars).

60. President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861).

61. This is developed in *Rethinking How Business Purpose Is Taught in Catholic Business Education*. See generally Lyman Johnson et al., *Rethinking How Business Purpose Is Taught in Catholic Business Education*, 32 J. CATH. HIGHER EDUC. 59 (2013).

from one's deeper set of beliefs leads to a "divided life" where matters of spirit ("thine") and finance ("mine") are said to occupy wholly separate spheres.<sup>62</sup> As Pope John Paul II noted, a company's financial accounts may be in good order, and yet people within the business may be humiliated and have their dignity offended.<sup>63</sup>

Corporate theory's descriptive account, faulty as it is, then magnifies the problem because it can take on an insidious prescriptive force with many business persons believing they *should* be self-serving.<sup>64</sup> Business actors who perceive that senior management is self-interested and motivated by personal financial gain may themselves, acting pragmatically, be more likely to misbehave.<sup>65</sup> This outcome flows from social identity dynamics whereby an individual conforms to group norms and internalizes the values and behavior that are institutionally lauded. The result can be entire corporate cultures characterized by, because they prominently reward, rampant self-aggrandizement. I think we can all identify recent (and past) examples, and we all know the enormous damage that results.

This quality of human selfishness and the total absence of grace in corporate interactions is, in corporate theory, assumed a priori. Yet, there is no legal rule requiring such behavior, and the empirical reality of self-sacrifice abounds. Corporate theory should of course take a clear-eyed, realistic account of self-centered behavior in business matters, while also paying greater

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62. See Johnson, *Re-Enchanting*, *supra* note 58, at 92 (discussing the "divided life" as described by scholars Helen Alford and Michael Naughton).

63. John Paul II, Encyclical Letter, *Centesimus Annus* 1, 28 (May 1, 1991), [http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_01051991\\_centesimus-annus.pdf](http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus.pdf) ("It is possible for the financial accounts to be in order, and yet for the people—who make up the firm's most valuable asset—to be humiliated and their dignity offended.").

64. See Lyman Johnson, *Law, Agape, and the Corporation*, in *AGAPE, JUSTICE, AND LAW: HOW MIGHT CHRISTIAN LOVE SHAPE LAW?* (R. Cochran & Z. Colao eds., forthcoming 2017) (manuscript at 4) (finding that corporate theory relies on an "impoverished account" of corporate individuals, ignoring human capacity and desire to "give sacrificially") (on file with Washington & Lee Law Review).

65. See Gary R. Weaver, *Encouraging Ethics in Organizations: A Review of Some Key Research Findings*, 51 AM. CRIM. L. REV. 293, 307–11 (2014) (discussing how "leaders—both high-level executives and lower-level supervisors—have major influence on ethical behavior").

attention to the many counter-examples in the corporate sector where neither individual nor corporate monetary goals are paramount, including those companies where religious faith has played a formative role in business strategy, such as Chick-fil-A, Service Master, Hobby Lobby, and many other successful businesses.

Moving from how I think we need a better anthropological understanding of the individual in corporate law to the corporation itself as a social institution, courts in the 1980s wisely sidestepped the issue of corporate purpose and left it somewhat nebulous.<sup>66</sup> Unfortunately, law aside, many in the corporate business world are now steeped in the language and norms of a trope-like shareholder primacy, as advocated by many finance-focused theorists bent on disregarding the corporation as an institution in its own right.<sup>67</sup>

Because we have criticized an overly sharp shareholder primacy focus, David and I appreciate that it is one thing for corporations, like humans, not to be sick, but another matter to make them well. Here, my own recent thinking is this: The predominant corporate law paradigm today, ironically, has little to say about the corporation, the Latin root of which means “body,” and corporate “bodies” have many parts which form one unit. The corporate body today, however, is essentially ignored in favor of focusing exclusively on shareholders and directors. This is unfortunate, and it is a subject I intend to keep working on. We should take the corporation seriously and reclaim it as a subject of study for corporate law. It is not just a distinct legal “person” today,<sup>68</sup> it is a pervasive, powerful, rights bearing, socio-economic

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66. See Johnson, *Meaning of Corporate Life*, *supra* note 19, at 923 (summarizing the Delaware judiciary’s position on corporate purpose as “vague and unknowable”).

67. For example, a 2011 Brookings Institute study noted that the top twenty law schools and top twenty business schools in the United States routinely teach that maximizing shareholder wealth is (and should be) the primary purpose of the corporation. Darrell M. West, *The Purpose of the Corporation in Business and Law School Curricula*, BROOKINGS INST. 17–18 (2011), <https://www.brookings.edu/research/the-purpose-of-the-corporation-in-business-and-law-school-curricula/> (last visited Apr. 6, 2017) (on file with the Washington and Lee Law Review).

68. See Johnson & Millon, *Hobby Lobby*, *supra* note 45, at 1 (noting that corporations were persons for the purposes of Religious Freedom Restoration Act).

institution and political actor, with responsibilities to the larger society in which it operates, quite apart from the natural persons associated with it.<sup>69</sup> Just as human persons are expected to do more than comply with the minimal demands of law to be regarded as “responsible” persons, so too for corporate persons. Boards of directors should direct corporate business and affairs accordingly.

Thus, corporate purpose is simply the particular institutional objective(s) sought to be achieved by cooperative human endeavor through the corporate entity. Corporations, like other social groups such as universities, teams, unions, and clubs, thus can have commitments at the collective level that are not necessarily equivalent to those of its associated persons. And corporations take actions that, both philosophically and legally, “cannot be directly ascribed to the individual members.”<sup>70</sup> These distinctive *corporate* commitments to overarching *corporate* goals support recognition of the corporation as a distinctive person, to which directors owe fiduciary duties.

It would be exceedingly helpful, of course, if as a matter of positive law a clear and capacious default rule as to purpose was specified, or if business corporations were required to explicitly state *what* their purpose is, so as to provide all associated persons with greater clarity concerning the precise goal of their combined contributions and give them a shared understanding of institutional identity. Hedge funds and Chick-fil-A should not be assumed to be pursuing the same goals.

On this point stakeholder-oriented theories of the corporation err as surely as do pure stockholder primacy theories. Both theories, in opposite directions, focus on the corporation existing to serve one or more constituencies and ignore the overarching organizational mission to which those constituencies contribute and from which they benefit but which is distinct from their own individual goals and interests.

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69. See *id.* at 31 (concluding that corporations can exercise a variety of functions and purposes after *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014)).

70. Kendy M. Hess, *The Free Will of Corporations (and Other Collectives)*, 168 PHIL. STUD. 241, 243 (2014).

### 3. Corporate Officers

Let me say just a few words about a more mundane subject, corporate officers—beyond noting corporate law’s stunning neglect of them.<sup>71</sup> Although corporate officers frequently are the chief cause of corporate mischief and worse,<sup>72</sup> they receive little attention in corporate law (unlike in federal securities law), probably because boards of directors typically settle up with them on their way out the door.

As a result, certain issues remain unsettled and need clarifying: For example,

a) What exactly, theoretically, are corporate officers?

David and I have written of them as agents of the corporation,<sup>73</sup> and Rob Ricca and I have explored various aspects of officer duties.<sup>74</sup> But if they are agents, do they owe fiduciary duties to shareholders? Why—if they are agents of the corporation, and not agents of shareholders? What exactly is the nature of their relationship to shareholders? Can shareholders bring a direct claim against officers?

b) And of course, as Delaware has yet to decide the standard of care applicable to officers. Is it gross negligence or ordinary negligence?

c) Finally, does the Business Judgment Rule apply to officers? How?<sup>75</sup>

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71. See Lyman Johnson & Dennis Garvis, *Are Corporate Officers Advised About Fiduciary Duties?*, 64 BUS. LAW. 1105, 1105 (2009) (“Corporate law’s treatment of officers is like the weather: everybody talks about it but nobody does anything about it.”).

72. See *id.* at 1105–06 (discussing the disastrous leadership of business executives at Enron, Tyco, and WorldCom).

73. See Lyman Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1601 (2005) (“The thesis of this Article is that corporate officers are fiduciaries because they are agents.”).

74. See *Dwindling*, *supra* note 41, at 170–71 (discussing three unresolved questions relating to officer duties in corporations).

75. See, e.g., *Palmer v. Reali*, No. 15-994-SLR, 2016 WL 5662008, at \*8 n.8 (D. Del. Sept. 29, 2016) (“Defendants have cited to no cases where a Delaware court has held that the business judgment rule applies to corporate officers; therefore, the court will not address the business judgment rule . . .”).

I have argued that the business judgment rule should not be applied to officers, or at least not as broadly as applied to directors,<sup>76</sup> a position some agree with<sup>77</sup> and others dispute.<sup>78</sup> The Delaware Supreme Court, in a careful 2009 opinion by Justice Jack Jacobs, left the issue undecided.<sup>79</sup> This too is a topic I plan to keep working on.

#### IV. Conclusion

David and I have been allies in trying to keep a conversation going in corporate law that many, prematurely, wanted to end. We found common ground, but arrived there from different directions. The purpose of corporate endeavor should be a subject of ongoing discussion, not just in our larger society, but in corporate law itself.

David and I have long anticipated that the tide would turn our way. I think within the scholarly community it may be turning somewhat. I hope too that the Delaware judiciary will do today what it wisely did in the 1980s—stay its hand and let the subject of purpose keep percolating.<sup>80</sup> This approach certainly is not easy with a relentless shareholder activism bound by no recognized duties to the corporation and facing no larger, compelling counter vision to resist it. Delaware's courts should

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76. See Lyman Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439, 440 (2005) (“This Article argues that the business judgment rule—a cornerstone concept in corporate law—does not and should not be extended to corporate officers in the same broad manner in which it is applied to directors.”).

77. See generally Deborah DeMott, *Corporate Officers as Agents*, 74 WASH. & LEE L. REV. 813 (2017) (agreeing that corporate officers’ duty should rest in agency law and that officers should not be protected by the business judgment rule).

78. See Lawrence Hamermesh & A. Gilchrist Sparks, *Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson*, 60 BUS. LAW. 865, 866 (2005) (arguing that rejecting the application of the business judgment rule to corporate officers “is contrary to both established law and sound policy”).

79. See *Gantler v. Stephens*, 965 A.2d 695, 708–09 (Del. 2009) (holding that the fiduciary duties of care and loyalty are the same for directors and officers, but refraining from analyzing the defendant officers’ conduct under the business judgment rule).

80. See *supra* Part II (discussing the significant, stabilizing role played by the Delaware judiciary during the corporate turmoil of the 1980s).

permit further democratic grappling on this subject and await the development of the good work of many young scholars in the field.

Without David's collaboration, my own work on these matters would be far less, both in output and quality. But this collaborative process itself showed me the appeal and importance of humane, shared, dignifying work at a place (W&L) that long valued individual effort as supportive of its own larger institutional "corporate" goal of educating for the future.

Getting up to go do work one enjoys in a supportive setting where one's efforts are valued is not something, regrettably, that everyone—maybe very many people—will experience. But for those with influence over work and corporations, and how we talk about them, including corporate law scholars, lawyers, and judges, it is worth aiming for others; and, if we find it, being grateful for it, as I am.

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