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Lyman Johnson's Invaluable Contribution to Delaware Corporate Jurisprudence

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I. Introduction

Professor Lyman Johnson is not the first, nor will he be the last, legal scholar to analyze, conceptualize, and publicize his insights about Delaware corporate law. But, among those who have made invaluable and enduring contributions to that important space, Lyman ranks among the highest, measured by

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what academics value: influencing the development of Delaware's corporate law. There is solid evidence of that influence, which this article is intended to develop. Along the way, we pay tribute to one of legal academia's finest.

This Article proceeds in three Parts, linked together by the concept of prophecy. The first will demonstrate the influence of Lyman Johnson's—we believe prophetic—efforts to maintain the integrity of Delaware corporate law principles.[1] Those include the business judgment rule and its fiduciary duties of care and loyalty; and also the proper separation of substantive fiduciary duties and the standards by which observance of those duties should be reviewed.[2] The second part identifies Professor Johnson's galvanizing insights into the subject of officer fiduciary duties, and the attention that those insights have engendered.[3] The third and final part focuses on Professor Johnson's policy view that, consistent with its wealth-producing objective, corporate law should also serve the welfare of society.[4]

II. Lyman Johnson's Contribution to Doctrinal Sensibility

Although lawyers, judges, and professors may occupy different positions on the legal spectrum, all would—or should—agree upon the importance of doctrinal clarity and integrity. Without it, lawyers could not advise clients with confidence how best to conform their conduct to the law, judges could not pronounce what the law commands in a way that makes sense to the parties and the public, and academics would be unable to discharge their role of bringing analytical predictability and clarity to the overall endeavor. For business enterprise law in particular, doctrinal coherence is highly consequential[5] because of

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1. *Infra* Part II.
2. *Id.*
3. *Infra* Part III.
4. *Infra* Part IV.
5. *See* Lyman Johnson, *Rethinking Judicial Review of Director Care*, 24 DEL. J. CORP. L. 787, 789 (1999) [hereinafter Johnson, *Rethinking Director Care*] ("Coherence in legal doctrine is an appealing idea, especially in areas plagued by conceptual complexity.").

what is so often at stake—multi-billion dollar transactions that have national economic impact.

Lyman Johnson's contribution to the clarity and coherence of Delaware corporate law doctrine finds its most eloquent and enduring expression in three articles that he wrote almost two decades ago: *Rethinking Judicial Review of Director Care,*[6] *The Modest Business Judgment Rule,*[7] and *After Enron: Remembering Loyalty Discourse in Corporate Law*.[8] In his first two articles, Professor Johnson persuasively advocated that on two bedrock doctrinal issues, the business judgment standard of review and the fiduciary duty of care, Delaware Supreme Court jurisprudence had gone astray and needed a fundamental course correction.[9] In his third article, Professor Johnson raised the question of whether the supposed conceptual distinction between care and loyalty is as clear as widely believed and whether the duty of loyalty should be more formally recognized as having, in addition to its "non-betrayal aspect," an "affirmative devotion dimension."[10] Given the influential impact of these writings, it is useful to retrace their ancestry and the insights that underlie them, which to us resonate as strongly today as they did sixteen years ago.

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6. *Id.*

7. Lyman Johnson, *The Modest Business Judgment Rule*, 55 BUS. LAW. 625 (2000) [hereinafter Johnson, *The Modest BJR*].

8. Lyman Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. L. 27 (2003) [hereinafter Johnson, *Remembering Loyalty*].

9. *See* Johnson, *Rethinking Director Care*, *supra* note 5, at 832–33 (seeking a more generalized duty of care for directors to act with reasonable prudence, even in the special category of cases where business judgment is exercised); *see also* Johnson, *The Modest BJR*, *supra* note 7, at 651

> [B]etween the two concepts [the duty of due care and the business judgment rule], the business judgment rule should be the more modest construct; that it, not due care, is the better choice to "freeze," leaving due care with its concise, but fluid, "reasonable" and "prudent" elements as the superior candidate for remaining what it should be—a highly adaptive precept in the hands of common law and equity judges.

10. *See* Johnson, *Remembering Loyalty*, supra note 8, at 30 (articulating the different meanings of loyalty within the corporate law context and the intersectionality of loyalty and care).

The *casus belli* was a Delaware Supreme Court decision handed down in 1993: *Cede & Co. v. Technicolor, Inc.*[11] There, Technicolor, a Delaware corporation, was acquired by MacAndrews & Forbes, Inc. (MAF) in a negotiated two-step transaction for a price of $23 per share, the first step being a tender offer and the second being a cash-out merger.[12] The plaintiff shareholders initially filed an appraisal action in the Court of Chancery against Technicolor.[13] They later brought a plenary breach of fiduciary duty class action against Technicolor, its directors, and MAF, claiming (among other things) that the second step merger was not entirely fair to the minority (non-MAF) shareholders.[14]

In the fiduciary duty action, former Chancellor Allen made what the Delaware Supreme Court later described as "presumed findings"[15] that the Technicolor directors had failed "to reach an informed decision in approving the sale of the company."[16] The Supreme Court described that finding as "presumed," because the Chancellor had found it unnecessary to make that finding formally since, despite the Court's "grave doubts"[17] about whether the directors had acted with due care in deciding to approve the transaction, the plaintiffs had not proved that the directors' conduct had caused the shareholders any injury.[18] The reason was that the $23 deal price exceeded the $21 per share "fair value" that the Court of Chancery had previously determined in the earlier companion appraisal action.[19] Applying the traditional

11. 634 A.2d 345 (Del. 1993).

12. *See id.* at 349 (discussing the relevant transactions and merger leading to the case at issue).

13. *See id.* at 349 (stating the pertinent procedural history, beginning with the appraisal action and personal liability action).

14. *See id.* at 349–50 (explaining Cinerama's dissent from the second stage merger in conjunction with the plaintiff's additional claims).

15. *See id.* at 370–71 ("We adopt, as clearly supported by the record, the Chancellor's presumed findings of the directors' failure to reach an informed decision in approving the sale of the company.").

16. *Id.* at 369–70.

17. *Id.* at 358.

18. *See id.* at 370 ("[T]he Court of Chancery concluded that Cinerama was not entitled to relief because it had failed to present evidence of injury caused by the defendants' negligence.").

19. *See id.* at 350 ("By unreported decision . . . dated October 19, 1990, the

tort principle of "no harm no foul," and the teaching of cases such as *Barnes v. Andrews*,[20] the Chancellor concluded that the Technicolor directors were not liable because their conduct had caused no harm to the shareholders.[21]

On appeal, the Supreme Court reversed on the ground that the trial court had employed an incorrect mode of analysis.[22] Specifically, the Supreme Court held that the business judgment rule, not the common law of torts, was the proper framework within which to analyze both the fiduciary duties owed by corporate directors in the transactional setting, and the standards for reviewing claims that those duties were breached:

> To rebut the [business judgment] rule, a shareholder plaintiff assumes the burden of providing evidence that directors, in reaching their challenged decisions, breached any one of the *triads* of their fiduciary duty—good faith, loyalty or due care . . . . If a shareholder plaintiff fails to meet this evidentiary burden, the business judgment rule attaches to protect corporate officers and directors and the decisions they make, and our courts will not second-guess their business judgments . . . . If the rule is rebutted, the burden shifts to the defendant directors, the proponents of the challenged transaction, to prove to the trier of fact the "entire fairness" of the transaction to the shareholder plaintiff.[23]

Insofar as the Supreme Court ruling addressed duty of care claims, it turned the pre-*Technicolor* law on its head.[24] Before *Technicolor*, if a plaintiff proved that directors failed to exercise due care but the failure had caused no harm, the court would apply traditional tort analysis and dismiss the claim.[25] After

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Chancellor found the fair value of the dissenting shareholders' Technicolor stock to be $21.60 per share, as of . . . the date of the merger.").

20. 298 F. 614 (S.D.N.Y. 1924).

21. *See* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 370 (Del. 1993) (stating the Chancellor's application of *Barnes* and the finding that Cinerama was not entitled to relief for lack of evidence indicating injury to the shareholders).

22. *See id.* at 370–71 (explaining how the Chancellor's conclusion was misguided and thus incorrect).

23. *Id.* at 361 (citing Nixon v. Blackwell, 626 A.2d 1366, 1376 (Del. 1993)).

24. *See id.* at 371 ("In sum, we find the Court of Chancery to have committed fundamental error in rewriting the Delaware business judgment rule's requirement of care.").

25. *See id.* at 370 ("While *Barnes* may still be 'good law,' *Barnes*, a tort

Technicolor, an adjudicated breach of the duty of care in those circumstances would have a quite different effect, namely: (1) it would shift the standard of review to entire fairness—the standard traditionally reserved solely for determining whether a director had violated his or her fiduciary duty of loyalty; and (2) it would shift the burden of proving entire fairness to the directors.[26]

That was revolutionary because no court had ever previously held in a duty of care case that the directors must carry the burden of establishing the entire fairness of a transaction that they had approved.[27] Because Professor Johnson believed that *Technicolor* had confused fundamental precepts of American corporate law, he embarked on a mission to untangle the resulting doctrinal confusion that impacted the substance of the fiduciary duties of care and loyalty, as well as the relationship between those duties and the standards of judicial review. Because the above-cited three law review articles were the pillars of that mission,[28] we next discuss the contributions of those articles to the development of Delaware corporate law.

A. Rethinking Due Care

In his first article, *Rethinking Director Care*, Professor Johnson criticized *Technicolor* on numerous grounds, starting with the Supreme Court's failure to elaborate policy rationales for

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action, does not control a claim for breach of fiduciary duty.").

26. *See id.* at 361 ("Under the entire fairness standard of judicial review, the defendant directors must establish to the court's satisfaction that the transaction was the product of both fair dealing and fair price." (citing Nixon v. Blackwell, 626 A.2d 1366, 1376 (Del. 1992))).

27. *See* Johnson, *The Modest BJR*, *supra* note 7, at 642 (explaining the Delaware Supreme Court's decision to employ the entire fairness standard in relation to the court's 1985 decision in *Smith v. Van Gorkom*).

28. *See* Johnson, *Rethinking Director Care*, *supra* note 5, at 789–90 (proposing a general director duty of entire care in Delaware to resolve the unsettled law regarding the duty of corporate directors); Johnson, *The Modest BJR*, *supra* note 7, at 625–26 (advocating a stronger duty of care and a more modest formulation of the business judgment rule); Johnson, *Remembering Loyalty*, *supra* note 8, at 30 (discussing the unclear nature of the duty of loyalty, advocating a clearer structure to actually affect corporate doctrine and practice, and coining the term "due loyalty").

reviewing care claims in the manner reserved for loyalty claims.[29] The rationale for requiring entire fairness review in the loyalty context is that the directors by definition are conflicted, and therefore are presumed not to be acting in the interests of the shareholders that they have a fiduciary duty to protect.[30] There being no one to protect the shareholders' interest, the Court becomes by default their only safeguard.[31] To discharge that function, the Court must use the most stringent weapon available to it—imposing the entire fairness standard of review upon the fiduciaries.[32] Importantly, however, there is no such presumption of adversity where directors are not conflicted, even though they may have acted without due care.[33] Accordingly, Professor Johnson urged, no adverse interest presumption should be triggered, for which reason *Technicolor* was flawed because it did not recognize, let alone address, the basic underlying policy difference between these quite distinct fiduciary duties and why they are reviewed by different standards.[34]

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29. *See* Johnson, *Rethinking Director Care*, *supra* note 5, at 801.

> The failure by the *Cede* court to elaborate policy rationales for stringently reviewing care claims in the manner of loyalty claims may simply be because adjudicated breaches of the duty of care have been so rare in Delaware that the courts have had little occasion to develop more nuanced standards for addressing them.

30. *See id.* at 819 ("A director—who may receive little of the financial payoff from undertaking a risk project—will be more risk averse than shareholders may rationally desire . . . .").

31. *See id.* at 809 (explaining that a director may act with care without acting out of care for the shareholders' interests and thus requiring court supervision).

32. *See id.* at 792 ("Under the entire fairness standard of review . . . the court itself must be satisfied as to the entire fairness of a challenged transaction. Understandably, this stringent review standard is the standard most desired by plaintiffs.").

33. *See id.* at 801 ("Director carelessness does not doctrinally, logically, or policy-wise, necessitate that a burden of proof shift to the defendants accompanied by close scrutiny of the quality or merits of a business decision." (citing Murphy v. Wakelee, 721 A.2d 1181, 1186 (Conn. 1998) (rejecting the claim that proving negligence in a fiduciary's administration of an estate would shift to the fiduciary the burden to prove fairness and holding that this burden shift would necessitate a prior showing of fraud, self-dealing, or conflict of interest))).

34. *See id.* at 799

> [N]one of the authority cited in either *Cede II* or *Cede III* supports the novel proposition that, in a duty of care case, a director must carry

A second criticism leveled by Professor Johnson was that *Technicolor*'s "quest for rhetorical [doctrinal] coherence" is unworkable because "the business judgment rule is ill-equipped to serve as the umbrella concept for analytically linking director duties (care, loyalty, and good faith) with standards of judicial review."[35] The duties of care and loyalty govern corporate directors whether or not the directors make a business decision, but the business judgment review standard applies only in cases where directors actually make such a decision.[36] To make the narrow business judgment standard the framework for unifying the judicial analysis of fiduciary conduct, and in particular the duty of care, "will either be to mistakenly contract the pervasive duty of care to fit the business judgment rule framework, or eventually to regard the new framework as considerably less-encompassing than might initially appear."[37]

Professor Johnson reserved his most trenchant criticism of *Technicolor* for its misconception and treatment of the fiduciary duty of care. First, he argued, the Delaware Supreme Court "[faultily equated] a director's informedness with a director's duty of care (thereby not grasping the genuine fullness of a due care inquiry)."[38] The duty of care, he explained, is far broader, and includes not only the element of being informed, but also "the larger process of directors subsequently acting with 'requisite care in the discharge of their duties.'"[39] By improperly formulating due care, Professor Johnson urged, the *Technicolor*

> the burden of proving the entire fairness of a challenged transaction . . . . [T]he Delaware Supreme Court decisions cited in *Cede II* to support the proposition that in a duty of care case the defendant directors have the burden of proving the entire fairness of a transaction, all involved director self-interest, thus . . . implicating loyalty and not merely care.

35. *Id.* at 802.

36. *See id.* ("Both the duty of care and the duty of loyalty govern corporate directors whether or not directors make business decisions, while the business judgment rule applies only when directors do make such decisions.").

37. *Id.* at 803. Professor Johnson cites, as one example, the case where a duty of care breach results from faulty director monitoring (a *Caremark* claim). Such a claim does not fit into a formulation "that analytically subsumes the richer duty of care under the important but more confined business judgment rubric." *Id.*

38. *Id.* at 801.

39. *Id.* at 806 (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)).

court shrunk the duty and deprived it of its proper place in corporate jurisprudence.[40] Therefore, he argued, the Delaware courts need to "restor[e] due care as a meaningful cornerstone of Delaware law" by requiring "the plaintiff (and the court) to address not only the directors' state of informedness, but also, critically, whether directors acted with due care in light of that information."[41] *Rethinking Director Care* then proceeded to elaborate more finely the nature and proper application of the duty of care concept, emphasizing that due care analysis should focus on the soundness of the director decision-making process[42]—not on the result—and, moreover, that even if that process were deficient, no liability should attach unless the due care violation is shown to have harmed the corporation or its shareholders.[43] In other words, Professor Johnson argued, Chancellor Allen got it right in his *Technicolor* trial court opinion that the Supreme Court later disapproved.[44]

Lastly, Professor Johnson circled back to the *Technicolor* "burden shift and entire fairness approach to duty of care breaches," which "not only finds no doctrinal support . . . [but] also cavalierly negates longstanding rationales for divergent standards of judicial review in the care and loyalty areas."[45] Johnson reemphasized that

> [c]are cases, unlike loyalty cases, do not deprive corporations of 'neutral decision-makers' . . . . Consequently, a care breach, contrary to what [*Technicolor* holds], should not result in a judicial review of *substance* . . . . In the care setting, the proper inquiry is whether an undoubtedly neutral decision-maker acted in the proper *manner*; that inquiry does not ever necessitate or warrant judicial inquiry into the substantive

40. *See id.* at 807 (calling for differentiation of being informed from the notion of care itself in order to "avoid a wrong belief that the larger care analysis is exhausted with the informedness inquiry under the business judgment rule").

41. *Id.*

42. *See id.* at 814 ("The key judicial inquiry is the soundness of a board's overall decision-making process . . . .").

43. *See id.* at 826 ("Damages may be nonexistent or limited if . . . as it turns out, that little or no harm was caused by director carelessness.").

44. *See* Cede & Co. v. Technicolor, 634 A.2d 345, 370 (overruling Chancellor Allen's requirement of proving that the board's gross negligence caused monetary loss to Cinerama).

45. Johnson, *Rethinking Director Care*, *supra* note 5, at 824.

> merits of a decision, only into the process by which it was made.[46]

B. The Modest Business Judgment Rule

In his second article, *The Modest BJR*, Professor Johnson continued his critique of *Technicolor,* but focused more specifically upon the business judgment rule itself.[47] Here again, Johnson argued, the Delaware courts, in *Technicolor* and other cases, had improperly "formulate[d] the business judgment rule and unsoundly [made] it the centerpiece of corporate fiduciary analysis."[48] Although the duty of care and the business judgment rule "oftentime seem hopelessly entangled," they require untangling for the sake of doctrinal clarity and good policy.[49]

> [T]he business judgment rule is not usefully regarded as either a substantive standard for affirmatively guiding judicial review of director conduct, or a process-oriented standard for guiding judicial review; and, finally, it is not at all designed for fulfilling the task assigned in [*Technicolor*]—organizing judicial fiduciary analysis into an overarching, seemingly coherent framework.
>
> Properly understood, the business judgment rule is simply a policy of judicial *non-review* . . . . A more modest expression of the sound statutory and policy bases underlying this judicial deference to director decisions—as embodied in the business judgment rule—is, therefore as follows:
>
> "[W]here money damages or equitable relief is sought, the business judgment rule is a judicial policy of not reviewing the substantive merits of a board of directors' business decision for the purpose of determining whether directors breached or fulfilled their duty of care."[50]

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46. *Id.* at 822–23.

47. *See* Johnson, *The Modest BJR*, *supra* note 7, at 625 ("The business judgment rule . . . is better understood as a narrow-gauged policy of *non-review* than as an overarching framework for affirmatively shaping judicial review of fiduciary performance.").

48. *Id.*

49. *See id.* at 650–51 (calling for distinction between the duty of due care and the business judgment rule as a matter of good policy).

50. *Id.* at 628–31 (footnotes omitted).

Professor Johnson argued that untangling the duty of care from the business judgment rule is best accomplished by refocusing on the original policy purpose of these distinct corporate law concepts, and then reformulating and applying those concepts consistent with that purpose.[51] Thus, he reasoned:

> If [a] plaintiff proves [that] a director did *not* act with due care, whether from nonfeasance or misfeasance, that alone is a breach of fiduciary duty and, absent statutory exoneration, he or she should be held liable for all damages proximately caused thereby. It is not the case, as [*Technicolor*] held, that a proven breach of care somehow "overrides" the policy of non-review embodied in the business judgment rule—a policy the [*Technicolor*] court must regard as highly contingent—and that the rule somehow "falls away" in [case of] a breach . . . thereby freeing the judiciary to examine . . . the substantive quality of a carelessly rendered business decision.[52]

The fundamental conceptual error propagated by *Technicolor*, Professor Johnson explained, was to conflate a standard of conduct (the fiduciary duty of care) with a standard of judicial review (the business judgment rule).[53] The former standard dictates what conduct is required of the fiduciary; the latter prescribes how a court should go about determining whether liability should attach for a breach of the standard of conduct (if any there was).[54] It is critical that courts distinguish

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51. *See id.* at 651 ("[T]he duty of due care, in formulation and function, should be differentiated from the single-focus policy expressed in the business judgment rule.").

52. *Id.* at 634. On this point, Professor Johnson concludes by adding:

> The contrary [*Technicolor*] position, making the intensity of judicial review toward the merits of the directors' business judgment contingent on whether directors fulfilled or breached the due care duty, is unprecedented on doctrinal grounds, faulty on a policy basis, and utterly counter to the deference embodied in a modest, but consistently-applied, business judgment rule.

Id. at 635.

53. *See id.* at 651 (stating that the standard of conduct [the fiduciary duty of care] is a pre-condition to the standard of review [the business judgment rule]).

54. *See id.* at 647

> Understanding the duty of care as a vital and independent duty of directors, not merely a "component" of the [*Technicolor*] business judgment rule, will led to breaches of that duty being treated as

between these two concepts, for the reasons previously elaborated in Professor Melvin A. Eisenberg's classic article Professor Johnson cited in *The Modest BJR*.[55]

C. Remembering Loyalty

Perhaps recognizing that a critical component had been left out of his earlier critiques of the duty of care and the business judgment rule as formulated by the Delaware courts, Professor Johnson remedied the oversight in a third article, *Remembering Loyalty*.[56] There, Professor Johnson aimed his laser-like focus on the overly narrow and incomplete expressions of the fiduciary duty of loyalty, in both the Delaware court decisions and in the scholarship of certain law and economics academics.[57] Johnson's central thesis was that the duty of loyalty embraces more than the negative requirement that directors, as fiduciaries, must refrain from bringing their personal, economic interest into conflict with, and from betraying, the interest of their stockholder beneficiaries.[58] Rather, loyalty also encompasses a moral element, which he described as an "affirmative [duty] of devotion"[59] to the interests of those beneficiaries, even where the fiduciaries have no conflicting financial or other economic self-interest. That

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> wrongs in and of themselves, not simply as triggers for effecting a burden shift and a concomitant dropping of judicial inhibitions against examining the merits of business decisions.

55. *See* Melvin A. Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 467 (1993)

> [S]tandards of review, which govern liability and validity, are not themselves standards of conduct. A director or officer who engages in self-interested conduct without having dealt fairly has acted wrongly, even though he is protected against liability by the relevant standard of review. A director or officer who makes an unreasonable decision has acted wrongly, even though he is protected against liability under the business-judgment rule.

56. *See* Johnson, *Remembering Loyalty*, *supra* note 8.

57. *See id.* at 47–55 (criticizing the law and economics approach to fiduciary duty judicial decision making).

58. *See id.* at 38 (differentiating between the concepts of maximum and minimum conditions of loyalty by defining minimum condition as a negative duty) (citing GEORGE P. FLETCHER, LOYALTY—AN ESSAY ON THE MORALITY OF RELATIONSHIPS 9 (1993)).

59. *Id.*

broader component of devotedness, he explained, should be formally recognized by the courts of Delaware.[60] Professor Johnson's call for courts to broaden their articulation of fiduciary loyalty (like his earlier call for courts to broaden their expression of fiduciary care) was carefully supported by reasoned arguments.[61] Because two of those tropes turned out to be prophetic, we summarize them here.

First, Professor Johnson acknowledged that the dividing line between loyalty and care was less than sharp, and that "the *concept* of care remains an integral part of corporate law through the *doctrine* of loyalty . . . [and] is an attractive and philosophically compelling position."[62] Nonetheless, he argued, to conflate the two concepts would be "a dangerous strategy because it risks a rhetorical obliteration of any conceptually sharp boundary line between care and loyalty—two notions often thought to occupy separate spheres."[63] As a strictly legal matter, Johnson argued, judges must "differentiate loyalty from care for the purpose of interpreting [8 Del. C.] section 102(b)(7) and similar corporate statutes in other states."[64]

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60. *See id.* at 40–42 (detailing the extensive support for an affirmative duty of loyalty and advocating for its adoption by the Delaware courts).

61. *See id.* (outlining various examples accepting the affirmative and maximum condition of loyalty in corporate law discourse, including not only by the American Law Institute's Principles of Corporate Governance, but by the Delaware Supreme Court itself in *Guth* v. *Loft, Inc.*, 5 A.2d 503 (Del. Ch. 1939)).

62. *Id.* at 32.

63. *Id.*

64. *Id.* at 42. As Johnson further explained,

> Corporate law's binary liability scheme . . . as manifested in section 102(b)(7) and similar statutes in other states, contemplates no such ill-defined dividing line between the two duties. Supposedly, Delaware law is clear in that directors face no personal liability for breach of 'care' claims, only for breach of 'loyalty' claims.

Further elaborating the need for a bright line, Professor Johnson urged that

> Courts . . . must say with greater precision what sort of director conduct implicates loyalty (allowing damages) and what sort implicates only care (prohibiting damages). Before enactment of section 102(b)(7), it was enough to find a fiduciary breach of some sort, at least for purposes of awarding damages, whether it was grounded in care, loyalty, or both.

Id. at 58–59.

Second, *Remembering Loyalty* recognized, although obliquely, that the duty to act in "good faith," although described in *Technicolor* as a fiduciary duty separate and apart from the duties of care and loyalty, is more properly regarded as an element of the duty of loyalty.[65] Reasoning from Chancellor Allen's insight in *Caremark* that "a sustained or systematic failure of the board to exercise oversight . . . will establish the lack of good faith that is a necessary condition to liability,"[66] Professor Johnson presciently concluded that "a 'sustained or systematic failure' of oversight is a failure to 'take care of' or properly 'care for' the interests of the corporation and its stockholders [and] [i]n this respect . . . is a breach of the affirmative dimension of loyalty."[67]

D. Lyman Johnson's Contribution to Delaware Corporate Law Doctrine

That Professor Johnson's writing has profoundly affected Delaware corporate law doctrine is a proposition that borders on axiomatic. Not long after the aforementioned seminal articles were published, then-Vice Chancellor (now Chief Justice) Leo E. Strine, Jr. echoed Lyman Johnson's criticism of *Technicolor* in *In re Gaylord Container Corp. Shareholders' Litigation*.[68] There, Vice Chancellor Strine, citing and quoting with approval *The Modest BJR*, argued that it made little sense for Delaware courts to employ the business judgment rule ("a policy of judicial *non*-review")[69] as an overall principle of doctrinal unification.[70]

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65. *See id.* at 69 (explaining that good faith is itself a requirement of the director's duty of loyalty) (citing *In re* Gaylord Container Corp. S'holders Litig., 753 A.2d 462, 475–76 n.41 (Del. Ch. 2000)).

66. *In re* Caremark Int'l Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996).

67. Johnson, *Remembering Loyalty*, *supra* note 8, at 46 n.112. As support for his conclusion, Professor Johnson cited then-Vice Chancellor Strine's pronouncements to that effect in *In re* Gaylord Container Corp. S'holders Litig., 753 A.2d 462, 475–76, n.4 (Del. Ch. 2000) and Nagy v. Bistricer, 770 A.2d 43, 48–49 n.2 (Del. Ch. 2000).

68. 753 A.2d 462 (Del. Ch. 2000).

69. *Id.* at 475 n.39.

70. *See id.* at 477 n.46 ("[I]t might also be clearer to reformulate the *Unocal* test so that it incorporates the concept of due deference to board judgment

Focusing specifically upon the structural oddity of the Delaware Supreme Court's formulation of the *Unocal* standard of review, the Vice Chancellor urged that *Unocal* should be a free-standing test of the propriety of board defensive anti-takeover measures.[71] But, under the current doctrinal formulation:

> *Unocal's* purpose and application have been cloaked in a larger, rather ill-fitting doctrinal garment. Once the court applies the *Unocal* test, its job is, as a technical matter, not over. If, upon applying *Unocal*, the court finds that the defendants have met their burden of demonstrating the substantive reasonableness of their actions, the court must then . . . reimpose on the plaintiffs the burden of showing "by a preponderance of the evidence" that the business judgment rule is inapplicable . . . . It is not at all apparent how a plaintiff could meet this burden in a circumstance where the board met its burden under *Unocal*. To the extent that the plaintiff has persuasive evidence of disloyalty (for example, that the board acted in a self-interested or bad-faith fashion), this would fatally undercut the board's *Unocal* showing. Similarly, it is hard to see how a plaintiff could rebut the presumption of the business judgment rule by demonstrating that the board acted in a grossly careless manner in a circumstance where the board had demonstrated that it had acted reasonably and proportionately. Least of all could a plaintiff show that the board's actions lacked a rational business purpose . . . where the board had already demonstrated that those actions were reasonable, i.e., were rational.[72]

The Vice Chancellor's criticisms were a precursor to a more comprehensive doctrinal critique set forth in an article co-authored by former Chancellor William T. Allen and then-Vice Chancellors Jack B. Jacobs and Leo Strine and published one year later in *The Business Lawyer*.[73] From the article itself, it is facially evident that it was influenced by Professor Johnson's

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articulated in *Unocal* and *Unirtrin* without confusing burden-shifting required to tie everything to the business judgment and entire fairness standards.").

71. *See id.* at 474–75 ("[T]he *Unocal* test is a straightforward analysis of whether what a board did was reasonable.").

72. *Id.* at 475–76.

73. William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287 (2001) [hereinafter Allen et al., *Function Over Form*]. Professor Hamermesh was actively involved the drafting of *Function Over Form,* having provided helpful comments on the pre-publication draft.

writings, which the authors cited liberally in advocating that Delaware's corporate law standards of review be rationalized and simplified.[74] Thus, the authors in *Function Over Form* argued (among other things) that:

- There is no policy or practical reason for judicial assessment of the substantive fairness of a board's business, where the claim is that the board breached its duty of care.[75] In such cases, "[a]ny claim that the duty was breached would be reviewed under the gross negligence standard, and if a breach of duty and resulting harm were found, then liability would follow[;]"[76] and that
- The attempted linkage of the business judgment, intermediate "reasonableness," and entire fairness review standards is "analytically and functionally unnecessary. Judicial review under *Unocal/Unitrin* should stand on its own, 'decoupled' from 'second step' review under [the business judgment or entire fairness] review standards."[77]

Professor Johnson's concepts of judicial review influenced Delaware case law as well.[78] In *Brehm v. Eisner*,[79] the Delaware Supreme Court echoed his cautionary observation that judicial review of director due care is properly restricted to process, not substance.[80] As then-Chief Justice Veasey put it:

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74. *See id.* at 864 ("In our view, a rigorous functional evaluation of existing corporate law standards of review will clarify their application, reduce their number, and facilitate the task of corporate advisors and courts.").

75. *See id.* at 876 ("In the due care context, the plaintiff should be able to identify whatever harm flowed from the neutral decision-makers' alleged breach of care, and thereby obviate any need for judicial assessment of the substantive fairness of the board's business decision.").

76. *Id.*

77. *Id.* at 884.

78. *See In re* Gaylord Container Corp. S'holders Litig., 753 A.2d 462, 475 (Del. Ch. 2000) (citing Professor Johnson in support of the business judgment rule and its purpose).

79. 746 A.2d 244 (Del. 2000).

80. *See* Johnson, *The Modest BJR*, *supra* note 7, at 631 (arguing that the proper formulation of the business judgment rule is: "[W]here money damages or equitable relief is sought, the business judgment rule is a judicial policy of not reviewing the substantive merits of a board of directors' business decision for the purpose of determining whether directors breached or fulfilled their duty of care."); *see also* Johnson, *Rethinking Director Care*, *supra* note 5, at 825 ("The

> As for the plaintiffs' contention that the directors failed to exercise "substantive due care," we should note that such a concept is foreign to the business judgment rule. Courts do not measure, weigh or quantify directors' judgments. We do not even decide if they are reasonable in this context. Due care in the decisionmaking context is *process* due care only.[81]

Similarly influenced were the courts in the epic *Disney*[82] litigation, which required the Delaware courts to explore the relationship between the fiduciary duties of care, good faith and loyalty, and to demarcate the boundary that separates them.[83] In his post-trial decision, then-Chancellor Chandler accurately observed that Delaware case law up to that point was "far from clear with respect to whether there is a separate fiduciary duty of good faith" as distinguished from the duty of loyalty.[84] On appeal the Delaware Supreme Court, in affirming the Chancellor's decision and echoing Professor Johnson's reasoning in *Remembering Loyalty*, stated unambiguously that the duties of care, loyalty and good faith, while perhaps similar from a psychological or philosophical standpoint, must be conceptually and legally separate and distinct.[85] And although the *Disney* Court did not address the issue—foreshadowed by *Remembering Loyalty* and the decisions and articles described above—of whether or not the duty of loyalty and the duty of good faith were one and the same, that issue was addressed front and center later that same year by the Delaware Supreme Court in *Stone v. Ritter*.[86] There, the Court determined that there was no separate,

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substantive quality of any action whether taken or not—whether described as 'rational,' 'reasonable,' or 'fair'—is not an issue in a care case because only the *manner* of conduct is at issue.").

81. *Brehm*, 746 A.2d at 264.

82. *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 760 (Del. Ch. 2005), *aff'd.* 906 A.2d 27 (Del. 2006).

83. *See id.* (citing *Remembering Loyalty* and referring to Johnson's discussion therein of care, loyalty, and good faith).

84. *Id.* at 753.

85. *See* Brehm v. Eisner (*In re* Walt Disney Co. Derivative Litig.), 906 A.2d 27, 65 n.104 (Del. 2006) ("Although the coexistence of both states of mind may make them indistinguishable from a psychological standpoint, the fiduciary duties that they cause the director to violate—care and good faith—are legally separate and distinct.").

86. *See* 911 A.2d 362, 369–70 (Del. 2006) ("The failure to act in good faith may result in liability because the requirement to act in good faith 'is a

freestanding duty of good faith, a breach of which could result in liability. Rather, good faith is a "subsidiary element[,] i.e., a condition, 'of the fundamental duty of loyalty.'"[87] Thus, the Court held:

> [A]lthough good faith may be described colloquially as part of a "triad" of fiduciary duties that includes the duties of care and loyalty, the obligation to act in good faith does not establish an independent fiduciary duty that stands on the same footing as the duties of care and loyalty. Only the latter two duties, where violated, may directly result in liability, whereas a failure to act in good faith may do so, but indirectly.[88]

Lyman Johnson's insights into fiduciary law and doctrine were undoubtedly developed in solitude and were the product of a scholar's inner dialogue with himself. We doubt that Lyman, being a quintessentially modest person, had any motive or reason to anticipate that those insights would be as widely influential or prophetic as they turned out to be. But they were, and in the process he did himself, Washington and Lee University School of Law, and the larger corporate community proud.

III. Lyman Johnson and the Fiduciary Duties of Corporate Officers

Among the main subjects in Professor Johnson's formidable scholarly repertoire are the fiduciary duties of corporate officers and the standards by which the courts are to judge whether officers have fulfilled those duties.[89] He has repeatedly striven to elevate those duties in the consciousness of officers and those who

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subsidiary element[,]' i.e., a condition, 'of the fundamental duty of loyalty.'" (quoting Guttman v. Huang, 823 A.2d 492, 506 n.34 (Del. Ch. 2003))).

87. *Id.* at 370.

88. *Id.*

89. *See* Johnson, *Rethinking Director Care*, *supra* note 5 (discussing the appropriate standard of care within the business judgment rule); Johnson, *The Modest BJR*, *supra* note 7 (exploring Delaware's current standard under the business judgment rule and directors' fiduciary duty and proposing a separation of the business judgment rule and the duty of due care); Johnson, *Remembering Loyalty*, *supra* note 8 (separating directors' duties of care and loyalty and expanding on the latter duty and its importance in corporate governance).

advise them.[90] In so doing, Professor Johnson once again proved himself prophetic: after years of uncertainty in which inferior courts could only guess that officers owed fiduciary duties equivalent to those owed by directors,[91] the Delaware Supreme Court, in 2009, finally so held explicitly.[92]

Professor Johnson's work on the fiduciary duties of officers has propagated a wave of scholarship that has undoubtedly sensitized the Delaware courts to the issues surrounding that subject.[93] From examination of officers' fiduciary duties generally[94] to inquiries into officers' fiduciary duty of disclosure,[95]

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90. *See generally* Lyman P.Q. Johnson & Robert Ricca, *Reality Check on Officer Liability*, 67 BUS. LAW. 75 (2011) (differentiating between the fiduciary duty obligations of corporate officers and directors and the need for a complete development of the fiduciary duties of each); Lyman P.Q. Johnson & Robert V. Ricca, *(Not) Advising Corporate Officers About Fiduciary Duties*, 42 WAKE FOREST L. REV. 663 (2007) (articulating the unsettled law concerning the responsibilities of corporate officers need for said officers to understand their fiduciary duties); Lyman P.Q. Johnson, *Having the Fiduciary Duty Talk: Model Advice for Corporate Officers (And Other Senior Agents)*, 63 BUS. LAW. 147 (2007) (highlighting the lack of instruction regarding corporate officers' fiduciary duty and proposing a model for lawyers to use when advising corporate officers); Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597 (2005) (criticizing the failure to distinguish fiduciary duties of corporate officers and directors and advocating a separation to promote structure within corporate governance and to further director-officer relations within public corporations); Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439 (2005) [hereinafter Johnson, *Corporate Officers*] (arguing that the business judgment rule should not be extended to corporate officers in the same manner as it applies to corporate directors and calling for closer judicial scrutiny of officer conduct).

91. *See In re* Walt Disney Co. Derivative Litig., 2004 Del. Ch. LEXIS 132, at *14 (Del. Ch. Sept. 10, 2004) ("To date, the fiduciary duties of officers have been assumed to be identical to those of directors.").

92. *See* Gantler v. Stephens, 965 A.2d 695, 708–09 (Del. 2009) ("In the past, we have implied that officers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and that the fiduciary duties of officers are the same as those of directors. We now explicitly so hold.").

93. *Infra* notes 94–97.

94. *See generally* Amitai Aviram, *Officers' Fiduciary Duties and the Nature of Corporate Organs*, 2013 U. ILL. L. REV. 763 (2013); Deborah A. DeMott, *Inside the Corporate Veil: The Character and Consequences of Executives Duties*, 19 AUSTL. J. CORP. L. 251, 252–54 (2006); Paul Graf, *A Realistic Approach to Officer Liability*, 66 BUS. LAW. 315 (2011); Aaron D. Jones, *Corporate Officer Wrongdoing and the Fiduciary Duties of Corporate Officers Under Delaware Law*, 44 AM. BUS. L.J. 475 (2007); Megan W. Shaner, *The (Un)Enforcement of Corporate Officers' Duties*, 48 U.C. DAVIS L. REV. 271 (2014).

officers' duty of obedience,[96] and the application to officers of the business judgment rule,[97] Professor Johnson's work has been the intellectual catalyst for much of the scholarly analysis generated since he entered the field. And his work will remain an important voice in the disposition of questions of Delaware corporate law not yet resolved. As the Delaware Court of Chancery has noted:

> The Delaware Supreme Court has not addressed the standard of review that a court should use when evaluating officer decision making. A lively debate exists regarding the degree to which decisions by officers should be examined using the same standards of review developed for directors.[98]

Professor Johnson's contribution to making the debate about the application of the business judgment rule to officer conduct "lively" can hardly be overstated. Focusing on a relatively dated practitioner article that drily reviewed the case law on the subject and concluded that the business judgment rule does, in fact, apply to officers, at least to a large extent,[99] Professor Johnson sharply questioned the precedential support for that position and, more importantly, advanced a trenchant policy analysis of the issue (prompting the practitioners to up their game and respond more fully on a policy basis as well).[100] As then-Vice Chancellor

95. *See generally* Z. Jill Barclift, *Senior Corporate Officers and the Duty of Candor: Do the CEO and CFO Have a Duty to Inform?*, 41 VAL. U. L. REV. 269, 270 (2006); Donald C. Langevoort, *Agency Law Inside the Corporation: Problems of Candor and Knowledge*, 71 U. CIN. L. REV. 1187 (2003).

96. *See generally* Megan W. Shaner, *Restoring the Balance of Power in Corporate Management: Enforcing an Officer's Duty of Obedience*, 66 BUS. LAW. 27 (2010).

97. *See generally* Deborah H. DeMott, *Corporate Officers as Agents*, 74 WASH. & LEE L. REV. 813 (2017); Lawrence A. Hamermesh & A. Gilchrist Sparks III, *Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson*, 60 BUS. LAW. 865 (2005).

98. Chen v. Howard-Anderson, 87 A.3d 648, 666 n.2 (Del. Ch. 2014) (citing Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439 (2005)); Lawrence A. Hamermesh & A. Gilchrist Sparks, III, *Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson*, 60 BUS. LAW. 865 (2005)).

99. *See* A. Gilchrist Sparks, III & Lawrence A. Hamermesh, *Common Law Duties of Non-Director Corporate Officers*, 48 BUS. LAW. 215, 237 (1992) ("The business judgment rule is almost universally applied to officers.").

100. *See* Johnson, *Corporate Officers*, *supra* note 90, at 443 ("Existing commentary does not make—or even attempt to make—a very compelling policy case for extending the business judgment rule to officers but, instead, largely

Strine noted in a 2010 opinion, "[t]here are important and interesting questions about the extent to which officers and employees should be more or less exposed to liability for breach of fiduciary duty than corporate directors."[101] It is Professor Johnson who deserves thanks for bringing out those "important and interesting" policy questions.

IV. Lyman Johnson's Contribution to the Proper Focus of Corporate Purpose

Much ink has been spilled on the subject of corporate purpose,[102] but on this subject Lyman Johnson does not spill ink: rather, he aims it precisely and pointedly, and usually hits his target. In this section we pay our respects to instances where we believe that Professor Johnson's comments may have hit the mark; but from our perspective as members of the Delaware corporate law community, we note a respectful disagreement with the prophet—a point on which, if past is prologue, we may well end up being proven wrong about (or perhaps already have been).

At the risk of repeating what others are contributing to this symposium,[103] we begin our review of Professor Johnson's contribution to the analysis of corporate purpose by tracing the

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recites case law. That case law, it turns out, is actually quite 'sparse.'").

101. Hampshire Grp., Ltd. v. Kuttner, 2010 Del. Ch. LEXIS 144, at *35 (Del. Ch. July 12, 2010).

102. For notable entries in this debate, see generally KENT GREENFIELD, THE FAILURE OF CORPORATE LAW 127–30 (2006); William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 265 (1992) ("The corporation's purpose is to advance the purposes of these [stockholder-owners], and the function of directors, as agents of the owners, is faithfully to advance the financial interests of the owners."); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932); David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1374 (1993); Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course? The Tension Between Conservative Theory and Citizens United*, 100 CORNELL L. REV. 335 (2015); Lynn A. Stout, *Bad And Not-So-Bad Arguments For Shareholder Primacy*, 75 S. CAL. L. REV. 1189 (2002).

103. *See generally* Ronald J. Colombo, *Religious Conceptions of Corporate Purpose*, 74 WASH. & LEE L. REV. 813 (2017); Brett H. McDonnell, *Between Sin and Redemption: Duty, Purpose, and Regulation in Religious Corporations*, 74 WASH. & LEE L. REV. 1043 (2017); Robert K. Vischer, *Confident Pluralism in Corporate Theory*, 74 WASH. & LEE L. REV. 1179 (2017).

development of his scholarship on that subject. We begin with his 2003 article urging a more robust view of the duty of loyalty,[104] in which he challenged the prevailing academic view that fiduciary duties "have no moral footing," and are merely "the same sort of obligations, derived and enforced the same way, as other contractual undertakings."[105] In that article, we see Professor Johnson plead that "corporate law must decide whether the director, to whom the duties of loyalty and care attach, is to be regarded as a full-fledged, human, moral actor."[106] Reflecting his belief that "judges can and should infuse fiduciary law with widely-shared cultural norms," that article "applauds" the embrace of moral norms and rhetoric in defining the duty of loyalty.[107] Professor Johnson's relatively expansive view of the duty of loyalty found expression in Chancellor Chandler's 2005 opinion in the Walt Disney/Ovitz stockholder litigation describing the concept of "good faith" as requiring "not simply the duties of care and loyalty . . . but all actions required by a true faithfulness and devotion to the interests of the corporation and its shareholders."[108]

Three years after *Remembering Loyalty* appeared, Professor Johnson developed a claim that pointed to extending the broader, morally-centered conception of corporate law to all corporate actors, not just directors.[109] Citing the work of non-legal scholars, Johnson noted a criticism of "shareholder primacy," with its focus "exclusively on a corporation's financial return" to investors, as "a

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104. *See* Johnson, *Remembering Loyalty*, *supra* note 8, at 72–73 (urging for a renewed focus on the importance and necessity of the duty of loyalty in the aftermath of the Enron scandal).

105. *Id.* at 47 (quoting Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty,* 36 J. L. & ECON. 425, 427 (1993)).

106. *Id.* at 48.

107. *Id*. at 53.

108. *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 755 (Del. Ch. 2005), *aff'd* 906 A.2d 27 (Del. 2006). In the Chancery Court opinion, Chancellor Chandler acknowledges the Court's intellectual debt to Professor Johnson, describing *Remembering Loyalty* as "about the richer historical and literary understanding of loyalty and care, beyond their narrower 'non-betrayal' and 'process' uses in contemporary jurisprudence." *Id.* at 760 n.487.

109. *See* Lyman P.Q. Johnson, *Faith and Faithfulness in Corporate Theory,* 56 CATH. U. L. REV. 1, 4 (2006) (arguing that "neither discourse within the corporate institution itself nor within corporate law theory must be wholly secular").

foundational good" that should nonetheless be considered only "as a means to higher, more excellent goods, not an end in itself."[110] At the same time, he noted (and decried) the relative paucity of corporate law scholarship that "examines the corporation from a religious vantage point."[111] In this article Johnson advocated a non-regulatory approach that "honors the reality of managerial discretion by leaving to corporate decision-makers themselves, and their legal counsel—not legislators—the task of deciding whether and how to translate legal responsibilities into specific courses of action based on religious belief."[112] As Professor Johnson conceived it, a "faith-based conception of faithfulness" would "allow managers to frame, and argue for, a redemptive counterpoise" to the "prevailing discourse and norm of self-interest" pervading corporate legal scholarship.[113] A few years later, in *Re-Enchanting the Corporation*,[114] Professor Johnson even more sharply articulated his beef with that "prevailing discourse" in corporate law scholarship. His analysis in that piece began with what surely is a modest but unassailable proposition: "If religious faith—for some people—forms the very fiber and foundation of who they are (their self-concept) and how they interact with others (their relationships), we should expect faith to influence behavior in the corporate world."[115] Professor Johnson recognized, of course, that this unassailable proposition still left open the question of whether and to what extent corporate law—and its articulation of corporate purpose—permits corporate actors to exercise their authority to conduct the corporation's business in order to promote that faith at the expense of shareholder wealth maximization.[116] In particular, he recognized that "legal freedom necessarily is a critical predicate

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110. *Id.* at 14–15.

111. *Id.* at 17.

112. *Id.* at 20.

113. *Id.* at 34.

114. Lyman P.Q. Johnson, *Re-Enchanting the Corporation*, 1 WM. & MARY BUS. L. REV. 83 (2010) [hereinafter Johnson, *Re-Enchanting*].

115. *Id.* at 90–91.

116. *See id.* at 96 (observing that companies vary in how they balance profit-motivated actions with other pursuits, such as the well-being of associates or employees).

to any call for more ethical and socially responsible conduct in the private sector."[117]

Does that "legal freedom" exist? To answer that question, Lyman asserts—again, unassailably—that "humans both value and reward cooperative behavior in others," and that "[t]his more well-rounded conception of people is at odds with standard, oversimplified assumptions in neoclassical economic theory—uncritically embedded in much corporate theory . . . ."[118] We agree wholeheartedly with that view, and with Lyman's further point that "there need not be a monistic model in a market system, as opposed to a more pluralistic approach."[119] We also agree with his approving citation of a 2009 papal encyclical urging that "there must be room for commercial entities based on mutualist principles and pursuing social ends to take root and express themselves."[120]

Professor Johnson reiterated these views even more clearly in a 2013 article on the relatively new legal construct of benefit corporations.[121] Based on the view that "[m]any persons—whether out of philosophical or religious convictions or other beliefs—seek work (and a workplace) where meaning beyond material gain for investors can be pursued and where vocation puts principles into practice,"[122] Lyman again urged that "as to capital providers themselves, law should acknowledge the possible heterogeneity of preferences rather than assume a shared taste for 'maximizing' at all costs."[123] As Professor Johnson explained, "there is no reason why, with respect to business corporations, there cannot be a pluralism of market-oriented entities designed to advance different purposes."[124] We

117. *Id.* at 100.

118. *Id.* at 90.

119. *Id.* at 96.

120. *Id.* (quoting *Encyclical Letter Caritas in Veritate*, LIBRERIA EDITRICE VATICANA (June 29, 2009), http://w2.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate.html (last visited Mar. 23, 2017) (on file with the Washington and Lee Law Review)).

121. Lyman P. Q. Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269 (2013) [hereinafter Johnson, *Pluralism in Corporate Form*].

122. *Id.* at 280–81.

123. *Id.* at 281.

124. *Id.* at 280.

agree with that claim, and with his proposition that benefit corporation legislation—recently adopted in Delaware in 2013[125]—"usefully advances pluralism in corporate forms of organization," even if it remains to be seen whether and to what extent investors embrace the benefit corporation form and benefit corporations are able to effectively promote the public good.[126] The benefit corporation's ability to serve as a vehicle for investors interested in promoting public goods moves us to support legislation—particularly the Delaware public benefit corporation statutes—that enables the creation of such vehicles.

So far, we are in lock step with Professor Johnson on the utility of pluralism in corporate form, and with his aspiration that the availability of divergent corporate forms will enable investors and managers to effectuate motivations to serve the public good and not merely the goal of wealth maximization. At this point, however, we come to our parting of the ways with Lyman's views—a move we make with reluctance, given his extraordinarily capable and deep analysis of the subject of corporate purpose. We are from Delaware. And like most of our fellow citizens who have written on this subject, either in judicial opinions or published articles,[127] we maintain that for an investor who has not expressly manifested a contrary preference, the purpose of the Delaware business corporation is maximization of the wealth of its stockholders. We further maintain that this is at

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125. *See generally* DEL. CODE ANN. tit. 8, §§ 361–368 (2013).

126. Johnson, *Pluralism in Corporate Form*, *supra* note 121, at 293–97.

127. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) ("A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders."); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) (lauding craigslist, Inc. for desiring to serve a community, but finding that as a for-profit Delaware corporation, the company is bound by the duties to shareholders that accompany the corporate form); Strine, *supra* note 102, at 351–352

> [Conservative corporate theory] recognizes that the only thing that is common to all stockholders who hold a pure long position in the corporation should be a desire to see the corporation increase its profits and stock price. . . . [W]hen the corporation begins to pursue as an end other values, there is no rational reason to believe that the stockholders are of one mind on those issues, and much less that they invested to have the board of directors choose one perspective on the matter to pursue with the corporation's funds.

least the default rule, and earnestly doubt that this rule could be changed even in the certificate of incorporation of a traditional corporation. We take that position in part for reasons that Professor Johnson acknowledges: "exclusively investor-oriented goals are widely accepted due to deeply-ingrained business lore and strong social norms . . . ."[128] In light of that wide acceptance, we find it compelling that a reasonable investor in shares of a business corporation would expect it to be managed so as to maximize shareholder profit, within the constraints of the law. We therefore submit, as former Chancellor Chandler said in *eBay*, that

> [h]aving chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that.[129]

We hasten, however, to avoid overstating our position. Professor Johnson is right that the shareholder wealth maximization norm is not codified in the Delaware General Corporation Law.[130] Nor is there a Delaware Supreme Court opinion, outside the sale of the company context, enshrining that principle even as a default rule, let alone a mandatory one.[131] Lyman also rightly observed that other states' statutes (particularly the so-called "other constituency" statutes) expressly establish a more pluralistic

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128. Johnson, *Re-Enchanting*, *supra* note 114, at 90; *see also* Lyman P.Q. Johnson & David Millon, *Corporate Law After* Hobby Lobby, 70 BUS. LAW. 1, 28 (2015) [hereinafter Johnson & Millon, *Corporate Law After* Hobby Lobby] ("[I]t is likely safe to describe profit-maximizing behavior as a 'norm' or 'common practice' in the corporate realm . . . . The profit maximization norm . . . is a product of deep-seated business lore and practices, market pressures, and professional education, not law.").

129. *eBay Domestic Holdings, Inc.*, 16 A.3d at 34 (Del. Ch. 2010).

130. *See* Johnson & Millon, *Corporate Law After* Hobby Lobby, *supra* note 128, at 10 ("Delaware corporate law, the most influential body of law for United States publicly held corporations, does not mandate shareholder wealth maximization. The statute says no such thing. There is virtually no judge-made precedent to that effect.").

131. *See id.* (asserting that there are no Delaware Supreme Court decisions mandating shareholder wealth maximization, and citing the statute which allows a corporation to be organized to pursue "any lawful business or purpose").

notion of corporate purpose,[132] and that even traditional Delaware corporations may engage in acts of corporate selflessness, in the form of "reasonable" charitable contributions.[133] Indeed, the business judgment rule affords a great deal of play in the joints that permits regard for the interests of non-stockholder interests.[134] And, just as stockholders, by unanimous consent, can validate an action that would otherwise constitute a waste of corporate assets,[135] they can, by unanimous consent, forego any claim that the corporation should be managed for the sole purpose of maximizing stockholder gain.[136]

Despite all that, we adhere to the view that the "deeply-ingrained business lore and strong social norms"[137] that, as

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132. *See, e.g.*, Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 16 (1992) (discussing statutes that "purport to expand the traditional view" that directors must make decisions primarily to maximize shareholder wealth).

133. *See* DEL. CODE ANN. tit. 8, § 122(9) (2016) (granting corporations the power to make donations for the public welfare); *see also* Kahn v. Sullivan, 594 A.2d 48, 61 (Del. 1991) ("[Section 122(9)] has been construed 'to authorize any reasonable corporate gift of a charitable or educational nature.'" (quoting *Theodora Holding Corp. v. Henderson*, 257 A.2d 398, 405 (Del. Ch. 1969))).

134. *See* Johnson & Millon, *Corporate Law After* Hobby Lobby, *supra* note 128, at 11 n.69 ("When director decisions are reviewed under the business judgment rule, this Court will not question rational judgments about how promoting non-stockholder interests . . . ultimately promote stockholder value." (quoting eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010))).

135. *See, e.g.*, Schreiber v. Bryan, 1978 Del. Ch. LEXIS 500, at *3 (Nov. 6, 1978) ("[A] waste of corporate assets is incapable of ratification without unanimous stockholder consent." (citing Saxe v. Brady, 184 A.2d 602, 605 (Del. Ch. 1962))); Harwell Wells, *The Life and Death of Corporate Waste*, 74 WASH. & LEE L. REV. [PAGE NUMBER] (2017) ("The property and funds of a corporation . . . cannot be devoted to any use which is not in accordance with their chartered purposes, except by unanimous consent." (citing VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS 399 (1886))).

136. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 36 (1991) ("[T]hose who came in at the beginning consented, and those who came later bought stock [at a price that] reflected the corporation's tempered commitment to a profit objective . . . then no one should be allowed to object."); *see also* David A. Wishnick, *Corporate Purposes in a Free Enterprise System: A Comment on* eBay v. Newmark, 121 YALE L.J. 2405, 2412 (arguing that shareholders should be allowed to consent to forgo maximization of shareholder profits).

137. Johnson, *Re-Enchanting*, *supra* note 114, at 99.

Professor Johnson acknowledges, embrace the wealth maximization principle require that a departure from that principle be must sanctioned by stockholder consent. The form that consent should take, however, is an intriguing question.[138] Professors Johnson and Millon urge that the determination of corporate purpose is simply part of the "business and affairs" of the corporation and therefore is a matter that presumptively can be established by the board of directors.[139] In support of that position, one could argue that stockholders inherently consent in advance to such a determination: the governing statute invests broad powers in the board of directors, so stockholders consent, at the outset of their investment (the argument would run), to board action to establish the purpose of the corporation.[140] That, however, is not our understanding of Delaware law: if the board of directors enjoyed that kind of power to determine corporate purpose, the Delaware Supreme Court in *Revlon* would not and could not have rejected the board's choice of a sale transaction based on its choice to promote the interests of noteholders as well as stockholders.[141]

Could the requisite consent to an alternate or supplemental corporate purpose be manifested in a provision of the certificate

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138. *See* Lawrence A. Hamermesh, *Consent in Corporate Law*, 70 BUS. LAW. 161, 164–65 (2014) [hereinafter Hamermesh, *Consent in Corporate Law*] (questioning the nature of shareholder consent in a situation involving board-adopted bylaws).

139. *See* Johnson & Millon, *Corporate Law After* Hobby Lobby, *supra* note 128, at 30 ("[U]nder standard corporate governance rules it is the board of directors that charts a firm's strategic direction. And the board is free to advance the corporation's mixed objectives over the objections of shareholders and at the expense of strict shareholder primacy.").

140. *See* ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 560 (Del. 2014) (finding that the enforceability of a facially valid bylaw may turn on the circumstances of its enactment and use, but that if directors have been empowered to enact bylaws, stockholders will be bound by those bylaws); Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 955 (Del. Ch. 2013) (upholding the facial validity of director-adopted bylaws imposing forum selection and fee-shifting rules on all stockholders, based upon stockholders' advance consent to charter provisions authorizing the board of directors to adopt any bylaw within the broad subject matter purview of 8 *Del. C.* § 109(b)).

141. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 185 (finding that concern for various corporate constituencies is proper when addressing a takeover threat, but that this principle is limited by the requirement that there be some related benefit to the stockholders).

of incorporation? Clearly such a provision would be legally effective in a public benefit corporation.[142] But would it be effective in a traditional corporation even if adopted by a majority of the shares over the objection of minority stockholders? Would it be effective in a traditional corporation even if included in the certificate of incorporation before the issuance of shares? Although we believe that the answer is more likely to be affirmative in the latter case,[143] we are unable to express an unqualified opinion on either question.[144]

And that uncertainty brings this subject to a close: it is in the nature of a prophet to challenge conventional wisdom, which Professor Johnson has repeatedly done, and with great intellectual clarity. He and David Millon may well be regarded by posterity as prophetic in their identification of an "ongoing shift in the norms of corporate purpose to align with broad societal expectations of corporate behavior."[145] The merits of that aspirational norm are indisputable. What remains to be worked out is the means by which that objective is to be achieved.

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142. *See* DEL. CODE ANN. tit. 8, § 362(a) ("[A] public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation.").

143. *See* Hamermesh, *Consent in Corporate Law*, *supra* note 138, at 169 (noting that consent is more likely to be manifested where a charter provision is in place prior to investment and is fully disclosed and readily understandable).

144. Indeed, that uncertainty may well have motivated the adoption of public benefit corporation statutes.

145. Johnson & Millon, *Corporate Law After* Hobby Lobby, *supra* note 128, at 25.