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## Between Sin and Redemption: Duty, Purpose, and Regulation in Religious Corporations

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# Between Sin and Redemption: Duty, Purpose, and Regulation in Religious Corporations

Brett H. McDonnell\*

## *Table of Contents*

I. Introduction .....	1043
II. Contractarian and Communitarian Approaches .....	1049
A. Contractarianism.....	1050
B. Communitarianism.....	1052
III. Religious Views of Human Nature and Collective Action .....	1055
A. Rauschenbusch .....	1055
B. Novak.....	1058
C. Niebuhr.....	1060
IV. Implications for Corporate Duty and Purpose .....	1063
A. Corporate Duty .....	1063
B. Corporate Purpose.....	1071
V. Regulation and Pluralism.....	1077
A. The Promise and Peril of Regulation .....	1077
B. Pluralism and Religious Accommodation .....	1083
VI. Conclusion.....	1086

## *I. Introduction*

Lyman Johnson has made major contributions in thinking about both duty and purpose in corporations.<sup>1</sup> He has also been

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1. See, e.g., Lyman P.Q. Johnson, *Corporate Officers and the Business*

one of the very few corporate law scholars to write about the role of religious belief in motivating both corporations collectively and individual officers and directors within corporations.<sup>2</sup> These various contributions are interlinked. Johnson has a vision of corporations pursuing plural visions of collective goods, not limited by the shareholder value maximization norm that has come to prevail in thinking about American corporate law. A strong moral vision rooted in religious belief underlies that project.

This project is worth exploring from a variety of perspectives. After all, the dominant economic approach to corporate law is not exactly known for the depth or subtlety of its understanding of human psychology and the common good. Religious thought has a vast cumulative reservoir of reflection on human good and evil, individual and collective. What can we learn by examining corporate law from a religious point of view? How does a religious understanding of human nature affect an analysis of how directors and officers are likely to respond to their fiduciary duties? How does a religious understanding of collective action and enterprise affect our vision of corporate purpose? If our answers to those questions change our understanding of how corporations may (or may not) pursue the public interest, how does that in turn reflect an analysis of how the state should regulate business, and in particular, how it should regulate religiously-guided businesses whose core beliefs may in some ways conflict with some legal regulations? This Article addresses those questions by drawing on three different theologians with differing perspectives: Walter Rauschenbusch, Michael Novak,

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*Judgment Rule*, 60 BUS. LAW. 439, 440 (2005) (arguing that the business judgment rule “does not and should not be extended to corporate officers in the same broad manner in which it is applied to directors”); Lyman Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles*, 2009 MICH. ST. L. REV. 847, 849 [hereinafter Johnson, *Counter-Narrative*] (discussing the “story” told by corporate law through a “master narrative” and “equity’s counter-narrative”); Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 408 (2013) [hereinafter Johnson, *Unsettledness*] (exploring “fundamental issues” of corporate law relating to the business judgment rule and mandated corporate purpose).

2. See Lyman Johnson, *Re-Enchanting Corporate Law*, 1 WM. & MARY BUS. L.J. 83, 87 (2010) (exploring the “possible implications of continuing, widespread religious enchantment for the modern corporation”).

and Reinhold Niebuhr. The first two of these figures resemble—but deepen—perspectives already widely developed with contemporary corporate law scholarship.<sup>3</sup> The third figure, Niebuhr, is more novel, and poses some hard questions for corporate law scholars of varying perspectives.<sup>4</sup>

The Article proceeds as follows: Part II outlines the two broad leading secular perspectives that dominate corporate law scholarship.<sup>5</sup> Most significant is the contractarian approach.<sup>6</sup> This approach assumes individual self-interest as the leading motivation of corporate directors, officers, and employees, and emphasizes how contractual and market mechanisms can help constrain and harness self-interest to produce social benefits with only light regulation.<sup>7</sup> The contractarian approach has dominated American corporate law scholarship since the 1980s.<sup>8</sup> A subordinate but still significant alternative is what I will call the communitarian approach.<sup>9</sup> This approach takes a more optimistic view of individuals but a less optimistic view of corporations. It posits that individuals can be motivated by more other-regarding reasons to act, up to a point.<sup>10</sup> And it is a good thing too, because the approach argues that markets frequently do not work as well to harness individual greed as the contractarian approach

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3. See *infra* Part III.A–B (reviewing the contributions of Walter Rauschenbusch and Michael Novak).

4. See *infra* Part III.C (distinguishing Reinhold Niebuhr’s work from the other scholars).

5. See *infra* Part II (outlining the contractarian and communitarian approaches to corporate law).

6. I will sometimes call this the libertarian approach when I want to emphasize its normative thrust. It is also commonly called the law and economics approach. See Scott R. Peppet, *Contractarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation*, 82 TEX. L. REV. 227, 230 (2003) (referring to the “contractarian law and economics” approach).

7. See *infra* note 51 and accompanying text (providing that the most compelling social task of business is to maximize profits).

8. See *generally* FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1996) (providing the leading classical statement of this approach in a relatively pure version).

9. I will sometimes call this the progressive approach when I want to emphasize its normative thrust.

10. See *infra* notes 57–59 and accompanying text (discussing historical and modern evaluations of the communitarian approach).

supposes. This suggests both an important role for corporate social responsibility, but also for state regulation to guard against harms.<sup>11</sup>

Part III introduces the three religious perspectives.<sup>12</sup> It compares and contrasts those perspectives in their understanding of individual and collective behavior.<sup>13</sup> Walter Rauschenbusch was the leading figure of the Social Gospel movement of the early twentieth century.<sup>14</sup> He emphasized the social nature and goals of religion, and reacted strongly against what he perceived as major social injustices brought on by industrialization and the growth of big businesses during his time.<sup>15</sup> He saw persons as sinners but able to improve themselves and work for the public good if the social environment is reformed.<sup>16</sup> The Social Gospel movement was closely tied to the Progressive movement in politics, and supported the regulatory reforms of Progressivism. I argue that this vision fits pretty closely with the modern corporate communitarian vision that Lyman Johnson has helped develop. Michael Novak is a contemporary Catholic philosopher best known for his book *The Spirit of Democratic Capitalism*.<sup>17</sup> He gives a religious defense of a relatively conservative, free-market approach to economics and corporations.<sup>18</sup> Although humans are far from purely selfish, markets and free enterprises can usefully harness self-interest to benefit the public good in ways that economists since Adam Smith have analyzed in detail.<sup>19</sup>

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11. A leading source for this approach is PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995).

12. See *infra* Part III (exploring concepts of “individual personality and sin, the relationship between individuals and the community, and on the role of corporations in society”).

13. *Infra* Part III.

14. See *infra* notes 74–78 and accompanying text (describing the influence and import of the Social Gospel movement).

15. See *infra* note 72 and accompanying text (detailing the focuses of the Social Gospel movement).

16. See *infra* note 77 and accompanying text (discussing Rauschenbusch’s conceptions of sin and salvation in terms of corporate practice).

17. MICHAEL NOVAK, *THE SPIRIT OF DEMOCRATIC CAPITALISM* (1982) [hereinafter NOVAK, SPIRIT].

18. See *id.* at 28 (“Democratic capitalism is neither the Kingdom of God nor without sin. Yet all other known systems of political economy are worse.”).

19. See *id.* at 113 (discussing Adam Smith’s writings and contribution to economic discourse).

Corporations are a part of this system, though they also rely upon and generate social norms and behavior. A healthy respect for seeking profit is fine with Novak, who thus fits pretty well with the contractarian vision.

Our third figure, Reinhold Niebuhr, is harder to peg politically and analytically. His Christian realism sees self-centered pride as a central feature of human existence.<sup>20</sup> Persons can and do strive to rise above such selfishness, but they can never fully succeed. They rise above themselves by acting within groups, including economic enterprises, but such collective action is morally ambiguous: the groups themselves often become quite grasping and greedy vis-à-vis other groups. Niebuhr is thus less optimistic about individual character and political organization than Rauschenbusch and less optimistic about emergent market outcomes than Novak.

Part IV applies the ideas of these three thinkers to questions of corporate duty and purpose.<sup>21</sup> As for duty, Rauschenbusch provides some support for the communitarian emphasis on norms to guide fiduciaries to act faithfully. Novak suggests that internal needs and constraints will tend to guide managers, and is skeptical about state intervention in the affairs of business.<sup>22</sup> Niebuhr suggests reasons why prideful CEOs may conflate their own interests with those of the corporation, without a lot of reason to suspect state intervention will change that.<sup>23</sup> As for purpose, Rauschenbusch gives some reason to hope that managers can become stewards to promote the general public good (though plenty of reason to be skeptical, too).<sup>24</sup> Novak gives some reason to believe that a norm of faithfully pursuing the long

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20. See *infra* note 108 and accompanying text (outlining Niebuhr's moral philosophy).

21. See *infra* Part IV (evaluating the implications of Novak, Rauschenbusch, and Niebuhr's work on corporate purpose and duty).

22. See NOVAK, SPIRIT, *supra* note 17, at 131–33 (discussing the importance of managers' understandings of the operations of a corporation).

23. See REINHOLD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY 274–75 (1932) [hereinafter NIEBUHR, MORAL MAN] (“The interests of the individuals are, in other words, never exactly identical with those of their communities.”).

24. See WALTER RAUSCHENBUSCH, CHRISTIANITY AND THE SOCIAL CRISIS 386 (1907) [hereinafter RAUSCHENBUSCH, SOCIAL CRISIS] (opining on government interference and whether such interference is an effective method to promote moral behavior).

term interests of shareholders will benefit the general public.<sup>25</sup> Niebuhr suggests that expecting managers to genuinely pursue the general public good is probably expecting too much, while a norm of shareholder wealth maximization could push managers to harm other interests beyond what is actually even good for shareholders.<sup>26</sup>

Part V considers regulation and pluralism.<sup>27</sup> All three perspectives support at least some regulation to constrain corporate actions, with Rauschenbusch generally supporting the most regulation and Novak the least.<sup>28</sup> Niebuhr's position seems rather indeterminate: internal corporate restraint and market incentives are unlikely to lead to good behavior most of the time, but the political process is not necessarily trustworthy to lead to improvements through regulation.<sup>29</sup>

As the regulatory state expands, we see more conflicts between well-meant rules and the religiously-guided actions of some enterprises in a pluralistic world with competing visions of the good.<sup>30</sup> To what extent should the state provide regulatory accommodations when such conflicts arise? That is the issue

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25. See NOVAK, SPIRIT, *supra* note 17, at 93 (discussing how shareholder self-interest acts as a vehicle for maintaining the integrity of a corporation).

26. See NIEBUHR, MORAL MAN, *supra* note 23, at 117–18 (discussing how those with privilege justify their self-interest by pointing to the necessity of their skills while also denying lower classes opportunities to advance). It is perhaps already becoming clear that Christian realism could well be labeled Christian pessimism.

27. See *infra* Part V (considering how the approaches of Novak, Niebuhr, and Rauschenbusch affect regulations and pluralism as methods of controlling corporate behavior).

28. Compare MICHAEL NOVAK, TOWARD A THEOLOGY OF THE CORPORATION 26 (1981) (“The economic system must not become subordinate to the political or religious system.”), with RAUSCHENBUSCH, SOCIAL CRISIS, *supra* note 24, at 386 (“The present movement for federal and state interference and control over corporations . . . is an effort to reassert the ownership and mastership of the people and to force these stewards of public powers back into the position of public servants.”).

29. See NIEBUHR, MORAL MAN, *supra* note 23, at 20–21 (arguing that the power of government would merely replace the power of corporations).

30. See David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1377–81 (1993) (addressing the corporate approach of shareholder primacy in comparison to an approach focusing on increasing public good).

raised so contentiously in the *Hobby Lobby* case.<sup>31</sup> How would our three thinkers answer that question? I suspect Novak would support fairly expansive accommodation; the answers of Rauschenbusch and Niebuhr are less clear, though I find elements in the thought of each that supports the position favoring some accommodation that both Johnson and I have defended.<sup>32</sup>

Part VI concludes that we have much to learn from Rauschenbusch, Novak, and Niebuhr, and we need not choose just one over the other two. In many important ways they complement each other. Rauschenbusch and Novak provide fewer truly original arguments for corporate law scholars, as they each fit pretty neatly within one of the current prevailing perspectives.<sup>33</sup> Niebuhr does not fit as well, which makes him more interesting.<sup>34</sup> I think he suggests that we should be less confident that either markets, morals, or rules can prevent corporations from imposing major harms on internal or external constituents.<sup>35</sup> Rather, we should perhaps put greater focus on an additional set of governance strategies, giving affected persons (especially employees) a direct say in decisions that affect them.

## II. Contractarian and Communitarian Approaches

To understand how the differing theological perspectives both fit with and contrast with existing dominant understandings of corporate law, it helps to briefly outline the two leading schools of thought—contractarian and communitarian. For each school of

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31. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014) (deciding whether the Department of Health and Human Services may require closely held corporations to provide insurance for contraception in violation of the religious beliefs of the owners of those companies).

32. See *infra* Part IV.A (summarizing each theorist's opinions on changes to the corporate law system).

33. See *infra* Part III.A (detailing Rauschenbusch's communitarian approach); *infra* Part III.B (outlining the contractarian views of Novak).

34. See *infra* Part III.C (describing Niebuhr's approach as "Christian realism").

35. See *infra* Part IV.A (suggesting that Niebuhr takes a pessimistic approach in that he distrusts power as a whole, rather than one individual source of power).



thought the analysis starts by considering core assumptions about individual interest-seeking behavior. It then moves on to consider how each approach understands the regulation of self-seeking behavior internally, and how individual behavior typically translates into collective outcomes.

### A. Contractarianism

The dominant way that most American scholars today understand corporate law is the contractarian approach, often called the law and economics approach, and which I will also occasionally refer to as the libertarian approach when I want to emphasize its normative thrust. Rooted in Ronald Coase's classic article on the theory of the firm,<sup>36</sup> this approach began to get traction in corporate law scholarship in the sixties with several articles and books by Henry Manne.<sup>37</sup> It picked up with articles by a variety of scholars in the seventies and eighties, getting a classic early statement in *The Economic Structure of Corporate Law* by Frank Easterbrook and Daniel Fischel.<sup>38</sup> In varied stronger and more diluted forms, the contractarian approach now suffuses most American corporate law scholarship.<sup>39</sup>

The contractarian approach starts with a vision of the individual as rationally seeking to advance her own preferred interests.<sup>40</sup> At its true core, those interests are assumed to be

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36. See generally R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937) (arguing that corporations replace contract-based market transactions only when doing so would decrease transaction costs).

37. See generally HENRY G. MANNE, *INSIDER TRADING AND THE STOCK MARKET* (1966) (focusing in part on the effects of different legal rules on trading and the difficulty of policing those rules); Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 *J. POL. ECON.* 110 (1965) (arguing that market forces, more than governmental antitrust regulations, decrease the negative impacts of mergers).

38. See EASTERBROOK & FISCHEL, *supra* note 8, at 1–39 (discussing the molding of the corporate form and its reliance on contract analysis).

39. See Millon, *supra* note 30, at 1377 (noting an increase in scholarship debating a potential shift from the current shareholder-primacy approach).

40. See EASTERBROOK & FISCHEL, *supra* note 8, at 6 (summarizing the dynamic of the corporate form as beginning with self-interested managers and investors).

purely selfish, often focused on financial interests.<sup>41</sup> More abstract versions of the theory allow for a very broad range of interests, which can include promoting the well-being of others.<sup>42</sup> But the self-centered version of the theory typically guides thinking within corporate law scholarship. Persons are assumed to pursue their interests rationally and effectively, although more nuanced versions of the theory allow for various imperfections.<sup>43</sup>

In considering agency problems within businesses, this approach focuses on properly aligning incentives, so that self-interested agents will not unduly subordinate the interests of the business to their own.<sup>44</sup> Compensation, monitoring, governance, and reputational mechanisms, along with other contractual and market means, help guard against excessive opportunity.<sup>45</sup> Governmental regulation can help, but can easily go too far or not properly align incentives.<sup>46</sup> Fiduciary duty is a leading form of such regulation, but contractarian purists think duty should be a default but not mandatory rule.<sup>47</sup>

As far as advancing public goods goes, the contractarian approach in essence believes in the invisible hand of Adam Smith.<sup>48</sup> The selfish pursuit of profit by individual actors in the market will tend to benefit all.<sup>49</sup> Indeed, the contractarians go

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41. *See id.* (noting that entrepreneurs are driven by the desire to prevent personal loss).

42. *See* Millon, *supra* note 30, at 1378 n.19 (explaining that contractarian opinions vary widely on their opinions of social rights and government interference in the corporate context).

43. *See id.* (identifying Rawls as one contractarian whose views would “resonate strongly with the rights-based views of corporate law communitarians”).

44. *See* EASTERBROOK & FISCHER, *supra* note 8, at 9 (suggesting that unless an employee receives “all the rewards of success and penalties of failure,” he may lack incentive to fully support the corporation’s venture).

45. *See id.* (“Another way around the difficulty of monitoring the work of the firm’s employees is to give each the right to some profits from the firm’s success. Each will then work hard and monitor the work of colleagues, lest their subpar performance reduce his rewards.”).

46. Millon, *supra* note 30, at 1382.

47. *See* EASTERBROOK & FISCHER, *supra* note 8, at 90 (noting that corporations are “enduring contracts” and that if a contract is written well enough, fiduciary duties become unnecessary).

48. *See* ADAM SMITH, *THE WEALTH OF NATIONS* 37–43 (Seven Treasures Publications 2009) (describing how the market limits individual greed).

49. *See* EASTERBROOK & FISCHER, *supra* note 8, at 4 (“Managers may do

beyond Smith in believing this remains true, even adding corporations as collective actors within the market system—Smith himself thought agency problems within joint stock companies were generally disabling.<sup>50</sup> The full, pure vision tying individual self-interest, corporate profit maximization, and the general public good is well laid out in Milton Friedman’s classic article, *The Social Responsibility of Business is to Increase Its Profits*.<sup>51</sup>

Even Friedman did not believe in a purely laissez-faire system.<sup>52</sup> There will always be some externalities not captured by market prices, so that pure profit seeking will impose some harms on others.<sup>53</sup> Some governmental regulation is needed to address those externalities.<sup>54</sup> But believers in the contractarian approach think that regulation will not be needed in many areas, and that political processes too frequently tend to lead to unnecessary, inefficient legal rules.<sup>55</sup>

### B. Communitarianism

Opposing the dominant approach is the loyal opposition, the communitarian approach. In its current version in American law it was given important articulation in a volume of essays edited by Larry Mitchell called *Progressive Corporate Law*.<sup>56</sup> A related

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their best to take advantage of their investors, but they find that the dynamics of the market drive them to act as if they had investors’ interests at heart. It is almost as if there were an invisible hand.”).

50. See Gary M. Anderson & Robert D. Tollison, *Adam Smith’s Analysis of Joint-Stock Companies*, 90 J. POL. ECON. 1237, 1254 (1982) (“The basic problem with the joint-stock firm in Smith’s analysis was poor adaptability due to agency cost problems.”).

51. Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 1970.

52. See *id.* (warning against government intervention, but admitting, “I do not see how one can avoid the use of the political mechanism altogether”).

53. *Id.*

54. *Id.*

55. See Millon, *supra* note 30, at 1377–78 (noting that contractarians would instead leave decision-making to the parties to corporate contracts).

56. See generally MITCHELL, *supra* note 11 (arguing that corporations can no longer be viewed as private institutions, but must instead be viewed as having public obligations).

influential theory is the team production theory of Margaret Blair and Lynn Stout.<sup>57</sup> A more recent major statement of elements of this approach is Kent Greenfield's book, *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities*.<sup>58</sup>

The communitarian approach differs both in its theory of persons and of collective action.<sup>59</sup> Stated briefly, it tends to believe that persons are better and markets are worse than the contractarian approach assumes.<sup>60</sup> Though self-interest is certainly an important motivator for virtually all persons, the communitarian approach believes that persons are more sociable, and their preferences are more malleable, than is typically presumed by contractarians.<sup>61</sup> Social norms of faithfulness and pursuing the public good can play a major role in guiding behavior.<sup>62</sup> That is not to say that humans can become super-humanly virtuous, but they can become humanly virtuous. Social circumstances crucially affect the quality and strength of norms. Thus, creating social institutions—including business associations—that encourage positive norms becomes an important goal of public policy.

Norms thus become an important focus in addressing agency problems within corporations. Incentives tied to self-interest matter too, no question, but if persons believe they are working in just institutions, they will in many circumstances faithfully pursue the best interests of those institutions even where not

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57. See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 265–69 (1999) (analyzing corporate law through the lens of a venture designed to maximize the welfare of the entirety of the business team, rather than individual investors).

58. See generally KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* (2006) (cataloging the past failures of corporate law and proposing change).

59. See Millon, *supra* note 30, at 1378 (defining communitarians as those who rely more heavily on legal rules to mitigate harmful effects experienced by non-shareholders).

60. See *id.* at 1378 n.20 (“[I]t is possible to retain a commitment to the moral value of individual autonomy and choice while nevertheless rejecting the market as a sufficient solution to all problems.”).

61. See *id.* at 1379 (distinguishing communitarians as focusing on the public effects of corporate behavior, rather than on internal corporate relationships).

62. See Johnson, *Counter-Narrative*, *supra* note 1, at 855 (recognizing that the norms of officers and directors largely guide their behaviors).

doing so could personally enrich the agents.<sup>63</sup> Norm-based internalization of the good of the institution is more efficient than the use of costly incentive mechanisms.<sup>64</sup> Law, including fiduciary duty law, can play a significant role in shaping strong norms.

Through a similar argument, communitarians believe that corporate officers and directors can and should consider the best interests of a variety of corporate stakeholders, not just shareholders, in deciding how the corporation should act.<sup>65</sup> Communitarians tend to think that externalities are severe and widespread.<sup>66</sup> Corporate behavior deeply affects the interests of all sorts of persons and groups, and market prices cannot fully capture all of those effects by a long shot.<sup>67</sup> A significant degree of regulation is needed to stop corporations from imposing harms on others, but the more that corporations faithfully pursue a broad stakeholder vision, the less need there will be for intrusive regulations.<sup>68</sup> And there will also be less need to exercise expensive enforcement of what regulations are still needed, because stakeholder corporate managers will be more likely to voluntarily comply with legal rules without the threat of being caught in violations. Some versions of communitarian theory also stress the benefits from involving groups other than shareholders, especially employees, involved in making corporate decisions, at various levels.<sup>69</sup>

Of course, not all writing on corporate law falls neatly into one or the other of these two approaches. Not even all writing with a strong normative dimension falls into one or the other.

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63. See Millon, *supra* note 30, at 1382 (asserting that communitarians will feel a sense of obligation in the absence of contract, through merely their membership in a community).

64. See Johnson, *Counter-Narrative*, *supra* note 1, at 857.

65. See Millon, *supra* note 30, at 1379 (illustrating this point by noting that Time Inc. rejected an offer that would have largely benefitted shareholders because it would have had such a negative impact on Time employees).

66. *Id.* at 1382.

67. *Id.* at 1379.

68. See Johnson, *Counter-Narrative*, *supra* note 1, at 857 (alluding to moral standards of corporations as the appropriate method to reduce corporate self-interest and promote public service).

69. See GREENFIELD, *supra* note 58, at 163 (suggesting that if employees can trust that a business cares about them, they will be more likely to obey company rules).

There is much disagreement and variation within each approach, with some scholars articulating purer and more extreme versions of their approaches than others. Some writing contains significant elements of each approach, and other writing does not fit into either category.<sup>70</sup> Still, much contemporary writing on corporate law can be usefully classified as following one or the other of these two approaches.<sup>71</sup>

### *III. Religious Views of Human Nature and Collective Action*

I now move to a consideration of our three religious thinkers. In this Part, I lay out the core ideas of each concerning individual personality and sin, the relationship between individuals and the community, and on the role of corporations in society. In Part IV, I will apply those core ideas to issues of fiduciary duty, corporate purpose, and regulation.

#### *A. Rauschenbusch*

Let us start with the religious thinker who is closest to Lyman Johnson's work, and to the communitarian approach in corporate law. Walter Rauschenbusch was the leading figure in the Social Gospel movement of the early twentieth century. The Social Gospel movement tried to move the focus of Christian churches from questions of individual morals and salvation to the pressing social issues of the time, including mass industrialization and growing inequality.<sup>72</sup> Of Rauschenbusch's two leading books, the first, *Christianity and the Social Crisis*, focused on a historical account of Christianity culminating in extended analysis of the economic problems of his time.<sup>73</sup> The

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70. Compare NOVAK, *THEOLOGY*, *supra* note 28 (discussing contractarianism), and RAUSCHENBUSCH, *SOCIAL CRISIS*, *supra* note 24 (detailing communitarianism), with NIEBUHR, *supra* note 26 (casting doubt on both theories).

71. See Millon, *supra* note 30, at 1377 (characterizing the two competing ideals as creating a "rift" of disagreement).

72. See WALTER RAUSCHENBUSCH, *A THEOLOGY FOR THE SOCIAL GOSPEL* 1–9 (1917) [hereinafter RAUSCHENBUSCH, *SOCIAL GOSPEL*] (introducing the social gospel as a novel movement placing more emphasis on service to others).

73. See generally RAUSCHENBUSCH, *SOCIAL CRISIS*, *supra* note 24.

second, *A Theology for the Social Gospel*, tried to give a more philosophically and theologically grounded argument for the Social Gospel.<sup>74</sup>

For Rauschenbusch, sin is putting one's selfish gains over the good of mankind.<sup>75</sup> Profit-seeking does not come out looking good.

We love and serve God when we love and serve our fellows, whom he loves and in whom he lives. We rebel against God and repudiate his will when we set our profit and ambition above the welfare of our fellows and above the Kingdom of God which binds them together.<sup>76</sup>

If sin is selfishness, and salvation is serving others, then the Social Gospel focuses Christianity's attention on improving the state of society.

As soon as the desire for salvation becomes strong and intelligent enough to look beyond the personal sins of the individual, and to discern how our personality in its intake and output is connected with the social groups to which we belong, the problem of social redemption is before us and we can never again forget it.<sup>77</sup>

And this is not just about each individual saving themselves by striving to do good—the justice of social institutions themselves is critical. Rauschenbusch explains, “[i]t is not enough to think of the Kingdom as a prevalence of good will. The institutions of life must be fundamentally fraternal and co-operative if they are to train men to love their fellowmen as coworkers.”<sup>78</sup>

As we have seen above and will discuss more below, the communitarian approach to corporate law focuses on the role of social norms in encouraging pro-social behavior.<sup>79</sup>

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74. See RAUSCHENBUSCH, *SOCIAL GOSPEL*, *supra* note 72, at 1 (“The social gospel needs a theology to make it effective; but theology needs the social gospel to vitalize it.”).

75. See *id.* at 47 (“The definition of sin as selfishness furnishes an excellent theological basis for social conception of sin and salvation.”).

76. *Id.* at 48.

77. *Id.* at 24.

78. *Id.* at 54.

79. See generally Johnson, *Counter-Narrative*, *supra* note 1 (advocating for a normative approach to corporate law).

Rauschenbusch does as well.<sup>80</sup> And he stresses that those norms are themselves social constructs.<sup>81</sup>

A theology for the social gospel would have to say that original sin is partly social. It runs down the generations not only by biological propagation but also by social assimilation.

....

In the main the individual takes over his moral judgments and valuations from his social class, profession, neighbourhood, and nation, making only slight personal modifications in the group standards.<sup>82</sup>

Rauschenbusch's emphasis on social institutions and seeking the good of others leads to a political program that is somewhere between the progressivism of his time and full-fledged socialism. He frequently focuses on workers and their mistreatment by the corporations of his time.<sup>83</sup> As we shall discuss in more detail below, sometimes he calls for better behavior by managers, but other times he calls for labor unions, cooperatives, and state ownership to boost the power of labor and limit the power of capital.<sup>84</sup> Thus, Rauschenbusch suggests a variety of possible ways to limit corporate power, but he most certainly does not believe a la Friedman that largely unregulated profit-seeking corporations will mostly lead to outcomes that benefit mankind and society.<sup>85</sup>

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80. See RAUSCHENBUSCH, SOCIAL GOSPEL, *supra* note 72, at 57–68 (discussing sin as a barrier to social advancement).

81. See *id.* (suggesting that instead of dismissing sinful behavior as forces of evil, which tends to idealize immoral behavior, society could improve by promoting behavior that meets religious norms).

82. *Id.* at 61.

83. See RAUSCHENBUSCH, SOCIAL CRISIS, *supra* note 24, at 406–07 (discussing the continuing struggle of the working class to gain only nominal advancement in comparison to corporate owners).

84. See, e.g., *id.* at 400–11 (calling for a movement of the working class while also recognizing a need for cooperation between workers and owners).

85. Compare *id.* at 386–87 (referring to government regulation and Christian stewardship as two ways to reassert public rights in corporations), with Friedman, *supra* note 51 (suggesting that a free-enterprise, market approach will most effectively promote positive social ends).



*B. Novak*

For a religious thinker who comes much closer to Friedman's vision, we turn to Michael Novak. Novak is a Catholic philosopher, whose major work is *The Spirit of Democratic Capitalism*.<sup>86</sup> Also quite relevant for our topic is *Toward a Theology of the Corporation*.<sup>87</sup> Novak defends a pluralistic vision of capitalism.<sup>88</sup> He has a much more benign view than Rauschenbusch of the role of corporations in our capitalist system.<sup>89</sup>

Like Rauschenbusch, Novak recognizes the self-centeredness of human beings that is at the core of the Christian concept of sin.<sup>90</sup> However, he recommends quite different political strategies for addressing that self-centeredness. For one, he sees it as an argument for pluralism and the value of multiple power centers within a society.<sup>91</sup> Novak argues that "[t]he perception of each of us is regularly more self-centered than our ideal selves can plausibly commend. We are not often as objective as we would like to be. That is why the separation of systems is appropriate to our weakness."<sup>92</sup> He fears socialism because it centralizes power in the state.<sup>93</sup>

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86. See generally NOVAK, *SPIRIT*, *supra* note 17 (viewing the ideal of democratic capitalism through a religious lens).

87. See generally NOVAK, *THEOLOGY*, *supra* note 28 (seeking to further a debate about religion as a force in world affairs through a discussion of Christianity in corporations).

88. See NOVAK, *SPIRIT*, *supra* note 17, at 49 (acknowledging that pluralism distinguishes democratic capitalism from other forms of political economies).

89. Compare *id.* at 92–93 (advancing the theory that market forces may adequately control corporate behavior and benefit society), with RAUSCHENBUSCH, *SOCIAL CRISIS*, *supra* note 24, at 386–87 (calling for government regulation with an eye toward social interests).

90. See NOVAK, *SPIRIT*, *supra* note 17, at 92 (“A system committed to the principle that individuals are best placed to judge their real interests for themselves may be accused of institutionalizing selfishness and greed . . .”).

91. See *id.* at 91–92 (identifying family, work, laws, and factions as necessities to democratic capitalism).

92. *Id.* at 353.

93. *Id.* at 190–91.

Novak also follows Adam Smith in arguing that selfishness can be usefully harnessed to benefit the public within a free market system.<sup>94</sup>

Yet if one keeps uppermost in mind the material needs of the poor, the hungry, and the oppressed, rather than one's own state of feelings, one asks: What is the most effective, practical way of raising the wealth of nations? What causes wealth? I have come to think that the dream of democratic socialism is inferior to the dream of democratic capitalism, and that the latter's superiority in actual practice is undeniable.<sup>95</sup> Toward the desired moral outcome, the exercise of rational self-interest on the part of every citizen is, in the real world of historical examples, a far more successful means than the exercise of other motivations.<sup>96</sup>

But Novak does not see humans in capitalist society as purely self-centered and self-seeking—far from it.<sup>97</sup> In fact, he thinks commerce and life within corporations actually generates much regard for the interests of others.<sup>98</sup> Novak maintains that “[s]uccessful management in a large firm depends upon an ability to understand people, to inspire, and to draw the best out of them.”<sup>99</sup> Additionally, he advocates that “[t]he ideals of democratic capitalism are not purely individualist, either, for the corporation draws upon and requires highly developed social skills like mutual trust, teamwork, compromise, cooperation, creativity, originality and inventiveness, and agreeable management and personnel relations.”<sup>100</sup> Indeed, for many workers, corporations are a central source of community. Novak explains, “For many millions of religious persons the daily milieu in which they work out their salvation is the communal, corporate world of the workplace. For many, the workplace is a

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94. See *id.* at 79–80 (suggesting that “[i]n the real world, moral motives do not suffice”).

95. *Id.* at 26.

96. *Id.* at 79.

97. See *id.* at 93 (“The real interests of individuals . . . are seldom merely self-regarding.”).

98. See *id.* (identifying family, community, and sympathy as other motivators).

99. *Id.* at 47.

100. NOVAK, THEOLOGY, *supra* note 28, at 52.

kind of second family. Even those who hate their work often like their co-workers.”<sup>101</sup>

Like Friedman, Novak believes that there is some need for state regulation of the economy to prevent corporations from imposing harms on others.<sup>102</sup> But also like Friedman, he believes that the need for regulation is limited.<sup>103</sup>

In some areas, no doubt, the political system will wish to have its say in economic affairs. Smith gave many examples in which he judged such political intervention useful and commendable. There can be no doubt, however, about the main thrust of Smith’s argument: that markets as free as possible from governmental and religious command best serve the common good. Such a system frees the intelligence, imagination, and enterprise of individuals to explore the possibilities inherent in world process . . . .<sup>104</sup>

Thus, Novak’s general philosophy of democratic capitalism is closely related to, and draws upon, the contractarian approach to corporations.

### *C. Niebuhr*

Our final religious thinker is Reinhold Niebuhr, with his philosophy of Christian realism. Niebuhr’s early book, *Moral Man and Immoral Society*,<sup>105</sup> is perhaps his most striking and influential foray into social analysis, while *The Nature and Destiny of Man*<sup>106</sup> is the most comprehensive statement of his theology.

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101. *Id.* at 41.

102. *See* NOVAK, SPIRIT, *supra* note 17, at 80 (admitting that self-interest alone may not be sufficient).

103. *See id.* at 84 (warning against the politicization of moral and cultural issues).

104. *Id.* at 79.

105. *See generally* NIEBUHR, *supra* note 26 (suggesting that individuals have the capacity to act morally, but that entering into social groups reduces the ability to refrain from self-interested behavior).

106. *See generally* 1 REINHOLD NIEBUHR, THE NATURE AND DESTINY OF MAN (1941) [hereinafter NIEBUHR, NATURE] (purporting to provide a theory of human nature from a Christian perspective); 2 REINHOLD NIEBUHR, THE NATURE AND DESTINY OF MAN (1943) [hereinafter NIEBUHR, DESTINY] (analyzing Christian concepts of redemption and human destiny).

Like so many, Niebuhr sees self-centeredness and pride as the fundamental source of sin.<sup>107</sup> Humans can and do strive to see and act beyond themselves, but these efforts are always imperfect. Worse, they are typically more imperfect than we know them to be. Niebuhr proposes that “[i]t is characteristic of human nature, whether in its individual or collective expression, that it has no possibility of exercising power, without running the danger of overestimating the purity of the wisdom which directs it.”<sup>108</sup>

One would think that acting together in communal groups would then be a critical element in moving beyond self-centered sin, as Rauschenbusch believed.<sup>109</sup> And there is indeed something to that. But for Niebuhr, there is a cruel paradox in collective organizations. The very focus of energy that takes the participants beyond themselves makes them more suspicious and hostile towards those outside the collective.<sup>110</sup> “In every human group,” he notes, “there is less reason to guide and to check impulse, less capacity for self-transcendence, less ability to comprehend the needs of others and therefore more unrestrained egoism than the individuals, who compose the group, reveal in their personal relationships.”<sup>111</sup> He asserts, “The moral obtuseness of human collectives makes a morality of pure disinterestedness impossible. There is not enough imagination in any social group to render it amenable to the influence of pure love.”<sup>112</sup> Hence the title of Niebuhr’s most famous book, with the attempts of moral men leading to an immoral society. It is the opposite of the dynamic asserted by Smith and Novak, whereby individual pursuit of self-interest leads to good social outcomes.<sup>113</sup>

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107. See NIEBUHR, *supra* note 26, at 60 (noting that religion condemns selfishness).

108. REINHOLD NIEBUHR, *THE IRONY OF AMERICAN HISTORY* 132 (1952).

109. See RAUSCHENBUSCH, *SOCIAL CRISIS*, *supra* note 24, at 402 (promoting cooperation among social classes to move away from self-interest and toward social gain).

110. See NIEBUHR, *supra* note 26, at 272 (“The selfishness of human communities must be regarded as an inevitability.”).

111. *Id.* at xi.

112. *Id.* at 272.

113. See *supra* Part III.B (comparing the contractarian views of Smith and Novak).

The contractarian position could be summed up as “immoral man and moral society,” but Niebuhr posits the reverse.<sup>114</sup>

The immorality of groups flows in significant part from the behavior of their leaders. Those leaders naturally tend to see their power as justified by their virtues, more than is in fact the case (even if it is somewhat true, it is less true than the leaders want to believe).<sup>115</sup> Niebuhr notes that “[t]he simple religious insight which underlies these prophetic judgments is that the men who are tempted by their eminence and by the possession of undue power become more guilty of pride and of injustice than those who lack power and position.”<sup>116</sup>

Although Niebuhr is thus far less optimistic than Novak that collective corporate action within markets will lead to socially optimal outcomes, he is also less optimistic than Rauschenbusch about the potential for political intervention, either via regulation or socialist ownership.<sup>117</sup> When the oppressed organize to improve their lot and succeed, the logic of collective action will cause them in turn to oppress others, and their leaders to take advantage of their positions.<sup>118</sup>

A too simple social radicalism does not recognize how quickly the poor, the weak, the despised of yesterday, may, on gaining a social victory over their detractors, exhibit the same arrogance and the same will-to-power which they abhorred in their opponents and which they were inclined to regard as a congenital sin of their enemies.<sup>119</sup>

By now, one may have noticed that Niebuhr’s Christian realism could just as well, and maybe better, be labeled Christian pessimism. Niebuhr is harder to fit within existing corporate law

114. See generally NIEBUHR, MORAL MAN, *supra* note 26, at xi (positing the theory that societal competition can create immorality even among moral individuals).

115. See *id.* at 272–74 (discussing the effect of individual morality on group leaders).

116. NIEBUHR, NATURE, *supra* note 106, at 223.

117. See NIEBUHR, DESTINY, *supra* note 106, at 40 (stating one religious criticism of legalism is that “[l]aw cannot restrain evil; for the freedom of man is such that he can make the keeping of the law the instrument of evil”).

118. See NIEBUHR, NATURE, *supra* note 106, at 226 (“[M]oral pride among the weak will accentuate their arrogance when the fortunes of history transmute their weakness into strength.”).

119. *Id.*

scholarly orthodoxy than either Rauschenbusch or Novak. He is neither communitarian nor contractarian. He is a skeptic about all of the leading prescriptions about what corporate, and other law, should or should not do to constrain corporate behavior.<sup>120</sup>

#### IV. *Implications for Corporate Duty and Purpose*

We have now briefly examined the core philosophies of our three religious thinkers, Rauschenbusch, Novak, and Niebuhr. Each approaches the relationship between individual self-centeredness and collective action in organizations like corporations quite differently. Each has a different take on how well corporations will typically pursue the collective good, and on the wisdom of extensive state intervention to correct corporate behavior. We now turn to consider how these differing understandings of individuals and collectives can provide differing perspectives on corporate duty and corporate purpose.

##### A. *Corporate Duty*

Most corporate law scholarship—at least since the time of Berle and Means<sup>121</sup>—has focused on the principal-agent problem as the core issue that corporate law aims to address.<sup>122</sup> And most attention has focused on fiduciary duty as a way to discipline directors and officers who put their own interests in financial gain or leisure over the interests of the corporation.<sup>123</sup> Lyman Johnson has used a religious perspective to provide a distinctive slant on the potential for fiduciary duty to shape behavior.<sup>124</sup>

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120. See NIEBUHR, *MORAL MAN*, *supra* note 26, at 40–41 (discussing the limited ability of morality and reason to overcome egoistic behavior).

121. See generally ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932) (discussing the separation of ownership and control in the corporate setting).

122. See *id.* at 112–16 (recalling the emergence of managers as agents with control in business settings).

123. See *id.* at 196–206 (addressing the legal position of management as fiduciaries to the corporation).

124. See Johnson, *Counter-Narrative*, *supra* note 1, at 857 (comparing fiduciary duties to the “Golden Rule” of the New Testament).

Most scholarship assumes a law and economics approach to duty.<sup>125</sup> The possibility of being sued for a duty violation imposes a potential cost on enriching oneself at the expense of one's company, and rational agents balance that expected cost against the gains of violating their duty, and will be deterred if the expected costs of a duty violation are high enough relative to the gains.<sup>126</sup> Moving beyond the economic paradigm, Johnson suggests a major role for morality and norms.<sup>127</sup> Religiously-guided business leaders may adhere to an "ethics of stewardship" that prevents them from enriching themselves even when doing so would be economically rational assuming personal financial gain as the primary goal.<sup>128</sup>

Johnson further argues, in an important paper, that fiduciary duty court opinions can help shape ethical norms.<sup>129</sup> Building on the work of Edward Rock,<sup>130</sup> Johnson says that judges write in judgmental language that resembles sermons and parables.<sup>131</sup> The tie to religious narrative and persuasion pervades Johnson's entire analysis.<sup>132</sup>

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125. See, e.g., EASTERBROOK & FISCHER, *supra* note 8, at 1 (describing the contract-based approach to corporate management common in corporate law).

126. See *id.* at 1–4 (discussing the potential for misconduct among managers and how duty and incentives through appropriate contracts will discourage this conduct).

127. See Johnson, *supra* note 2, at 93 ("Perhaps 'faith-based' initiatives in the private sector . . . warrant serious consideration as an approach to upgrading corporate morality.").

128. See *id.* at 98 (refuting the contractarian theory that private actors must be self-seeking, instead suggesting they may value integrity and a commitment to serving others).

129. See Johnson, *Counter-Narrative*, *supra* note 1, at 851 ("Delaware courts expound on the fiduciary duties of directors through 'fact-intensive, normatively saturated' descriptions of saintly and sinful conduct.").

130. See generally Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009 (1997) (differentiating between standards and rules by comparing Delaware court opinions to parables or sermons). Note the title—Rock too is influenced by religious thought. Claire Hill and I have explored similar ideas concerning the role of duty cases in influencing norms in *Penumbra*. See Claire Hill & Brett McDonnell, *Executive Compensation and the Optimal Penumbra of Delaware Corporation Law*, 4 VA. L. & BUS. REV. 333, 336 (2009) (discussing "why law on the books and as enforced cannot properly deal with structural bias").

131. See Johnson, *Counter-Narrative*, *supra* note 1, at 850–51 (warning that these parables are weakened if not properly retold).

132. See generally *id.* (analyzing corporate law through the lens of Christian

Rauschenbusch provides some support for the ability of moral suasion to persuade managers to behave in ethical ways that puts the interests of their companies over their own selfish interests.<sup>133</sup> That support is far from total, given the structural reality of capitalist corporations. Rauschenbusch was quite critical of the corporate management of his time.<sup>134</sup> “Corporate management,” Rauschenbusch notes, “eliminates personal sympathy and the individual sense of honor to a degree which many of us hardly understand. The moral code of the business man is largely shaped for him by the moral code of his class.”<sup>135</sup>

But Rauschenbusch did think there was hope that a movement of moral regeneration could persuade corporate managers to act differently.<sup>136</sup> They could repent and convert. He argues that “[t]he fundamental step of repentance and conversion for professions and organizations is to give up monopoly power and the incomes derived from legalized extortion, and to come under the law of service, content with a fair income for honest work.”<sup>137</sup> This can of course happen individually, manager by manager, but Rauschenbusch hoped for a broader movement.

In the last resort the only hope is in the moral forces which can be summoned to the rescue. If there are statesmen, prophets, and apostles who set truth and justice above selfish advancement; if their call finds a response in the great body of the people; if a new tide of religious faith and moral enthusiasm creates new standards of duty and a new capacity for self-sacrifice; if the strong learn to direct their love of power to the uplifting of the people and see the highest self-assertion in self-sacrifice—then the intrenchments of vested wrong will melt away; the stifled energy of the people will leap forward . . . .<sup>138</sup>

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norms and comparing judicial opinions to “sermons”).

133. See RAUSCHENBUSCH, *SOCIAL CRISIS*, *supra* note 24, at 313 (observing that enlightened businessmen see self-serving policies as immoral and shameful).

134. See *id.* (arguing against the notion that “unfettered operation of self-love” benefits all).

135. *Id.* at 360.

136. See RAUSCHENBUSCH, *SOCIAL GOSPEL*, *supra* note 72, at 117 (suggesting that salvation was possibly by “coming under the law of Christ”).

137. *Id.*

138. RAUSCHENBUSCH, *SOCIAL CRISIS*, *supra* note 24, at 285.



But Rauschenbusch was far from convinced that such a moral regenerative movement was likely within the structural confines of the capitalist corporation.<sup>139</sup> Greed is a powerful force, and the shareholder-owned corporation puts the focus on the interests of the capitalist class that provides money. Corporate managers in this structure are likely to reflect the interests and mentality of that class.<sup>140</sup> Rauschenbusch thus focused much of his attention on alternatives outside the shareholder-owned corporation, including worker cooperatives and state ownership.

If a man wants to lead and direct, he can not do it by money power; he must do it by character, sobriety and good judgment . . . . Consequently the co-operatives develop men and educate a community in helpful loyalty and comradeship. This is the advent of true democracy in economic life.<sup>141</sup>

Thus, Rauschenbusch straddles the communitarian and the regulatory wings of progressive thought.

Novak has a more optimistic view of managers in the corporations of his time.<sup>142</sup> He does think that a significant amount of egoistic self-interest exists, and follows the contractarians in arguing that corporations, and the capitalist economy generally, work well in good part because they effectively harness that selfishness.<sup>143</sup>

Any social order that intends to endure must be based on a certain realism about human beings and, therefore, on a theory of sin and a praxis for dealing with it. However sin is defined, its energies must be given shape, since sinful energies overlooked in theory are certain to find outlets in practice. Thus some hypothesize that democratic capitalism is based on self-interest, greed, acquisitiveness, [and] egotism.<sup>144</sup>

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139. See RAUSCHENBUSCH, SOCIAL GOSPEL, *supra* note 72, at 111 (claiming that capitalism tends to promote private profit and materialism over public service).

140. See RAUSCHENBUSCH, SOCIAL CRISIS, *supra* note 24, at 406–07 (discussing the two-class system of modern capitalism).

141. RAUSCHENBUSCH, SOCIAL GOSPEL, *supra* note 72, at 112.

142. See NOVAK, SPIRIT, *supra* note 17, at 132–33 (highlighting cooperation among corporate managers). Novak's time is decades later than that of Rauschenbusch. This may help explain some of the differences between them.

143. See *id.* at 113–15 (adopting Adam Smith's "invisible hand" theory to describe the order behind choices motivated by self-interest).

144. NOVAK, THEOLOGY, *supra* note 28, at 28.

Novak frequently cites Adam Smith on this insight.

But Novak also thinks that self-ordering within capitalist corporations will in many important ways develop an ethic of cooperation.<sup>145</sup> On this point, his argument fits within but notably expands upon the analysis of corporate law contractarians.<sup>146</sup> He frequently stresses how commerce, especially within corporations, is fundamentally cooperative, and persons involved in commerce will naturally develop norms of cooperation.<sup>147</sup>

The ethic of commerce furnishes a school of virtue favorable to democratic governance. This ethic is not pretentious in its conception of reason and human nature. It enhances the cooperative spirit, since economic tasks cannot be accomplished by one person alone. It increases attention to law. It singles out the self-determination of the individual as the main source of social energy. It places limits on the state and other authorities. It incites imagination and industry. It disciplines all to common sense.<sup>148</sup>

This cooperative spirit shines through particularly when working in businesses.

Operating from rational self-interest, defined as each participant chooses through faith, reason and virtue to define it, many participants seek satisfactions from their work that are far from monetary, selfish, or materialistic. The social order is much enhanced by such choices. Philanthropy, the arts, education, research, and many other altruistic activities are expected to flower and do in fact flower under democratic capitalism.<sup>149</sup>

“For many millions of religious persons,” Novak explains, “the daily milieu in which they work out their salvation is the

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145. See NOVAK, SPIRIT, *supra* note 17, at 133 (likening corporations to communities with similar social cohesion).

146. See Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 871–73 (1997) (book review) (citing Novak as agreeing that the pure selfishness posited by much economic argument is an abstraction, and that real people are more complex).

147. See NOVAK, SPIRIT, *supra* note 17, at 116–22 (arguing that commerce ultimately unites societies, as profit is often contingent upon mutual satisfaction).

148. *Id.* at 117–18.

149. NOVAK, THEOLOGY, *supra* note 28, at 11.

communal, corporate world of the workplace. For many, the workplace is a kind of second family. Even those who hate their work often like their co-workers.”<sup>150</sup>

This spirit of cooperation, according to Novak, does not appear simply among lower level workers.<sup>151</sup> It is critical for most successful corporate managers too.<sup>152</sup> After all, managers must manage people. To do so, they must understand those people and find ways to get them to work together effectively for the interests of the cooperation. That involves both carrots and sticks, but carrots often work better. For example, “suppose that some autocrats still function in various spheres of authority today, including business. What sanctions are available to autocrats within a corporation? Leadership in all spheres today seems to depend upon large areas of consensus; leaders seem to ‘manage’ more than they ‘command.’”<sup>153</sup>

It is a much more optimistic vision of corporations, and of the role of managers within corporations, than we see in Rauschenbusch.<sup>154</sup> There may be some role for state regulation to deter managerial abuse; however, Novak believes that both instrumental and moral mechanisms that corporations develop within themselves will for the most part work well to encourage managers to focus on the needs of their shareholders and employees.<sup>155</sup>

Niebuhr provides more pessimistic insights. He is less inclined to think that either moral suasion by the courts or preachers or internally-generated norms of cooperation that flow from working with others are likely to tame the rapacious interests of corporate managers.<sup>156</sup> He does not deny some role for

150. *Id.* at 41.

151. *See* NOVAK, SPIRIT, *supra* note 17, at 132 (pointing to some amount of association at each level of a corporation’s structure).

152. *See id.* at 132–33 (remarking on the cooperative spirit of corporate managers).

153. NOVAK, THEOLOGY, *supra* note 28, at 43.

154. *Compare* NOVAK, SPIRIT, *supra* note 17, at 79 (agreeing with Adam Smith’s “invisible hand” theory), *with* RAUSCHENBUSCH, SOCIAL CRISIS, *supra* note 24, at 370–71 (refuting the idea that success depends on commercialism rather than a focus on societal values).

155. *See* NOVAK, SPIRIT, *supra* note 17, at 79 (“[M]arkets as free as possible from governmental and religious command best serve the common good.”).

156. *See* NIEBUHR, *supra* note 26, at 234 (“[H]uman society will probably

self-restraint, but he thinks that role is inevitably limited.<sup>157</sup> Niebuhr explains that “it will always be necessary to rely partly upon the honesty and self-restraint of those who are not socially restrained. But here again, it will never be possible to insure moral antidotes sufficiently potent to destroy the deleterious effects of the poison of power upon character.”<sup>158</sup>

That reference to the “poison of power” flows from a central insight of Niebuhr’s philosophy. The sin of self-centeredness and pride lies deep in human character.<sup>159</sup> Even where we try to break free of it by acting with and for others, the pull of pride is deep.<sup>160</sup> We give ourselves too much credit for acting morally and selflessly than we really deserve.<sup>161</sup> And that is even truer for the powerful.<sup>162</sup> They have done well in the world, and are inclined to think their success flows from their natural merit.<sup>163</sup> They are surrounded by peers who share that belief and by subordinates who toady and dare not express doubts about the innate virtue of men with the power to fire them.<sup>164</sup> “Capitalists,” according to Niebuhr, “are not greater sinners than poor labourers by any natural depravity. But it is a fact that those who hold great economic and political power are more guilty of pride against God

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never escape social conflict, even though it extends the areas of social co-operation.”).

157. See *id.* at 21 (advocating for a combination of social strategies in order to advance society).

158. *Id.*

159. See *id.* at 60 (discussing the difficulty of judging self-interest, as it hides behind hidden motives and may not be externally observable).

160. See *id.* at 47 (suggesting that even a man acting in the best interest of family may be self-aggrandizing by projecting his own success as a husband and father).

161. See *id.* at 45 (arguing that “there is no miracle by which men can achieve a rationality high enough” to eliminate self-interest).

162. See *id.* at 8 (noting that while men with power and wealth attempt to justify social inequality, “it is impossible to justify the degree of inequality which complex societies inevitably create”).

163. See *id.* (“If superior abilities and services to society deserve special rewards it may be regarded as axiomatic that the rewards are always higher than the services warrant.”).

164. See NIEBUHR, NATURE, *supra* note 106, at 225 (“[S]ocio-economic conditions actually determine to a large degree that some men are tempted to pride and injustice, while others are encouraged to humility.”).

and of injustice against the weak than those who lack power and prestige.”<sup>165</sup>

One place where one sees this misplaced confidence in one’s own merit and virtue is in executive compensation.<sup>166</sup> Boards set the compensation of top managers, but boards consist of other top managers.<sup>167</sup> Of course their high pay reflects the great contributions they make to the success of the business.<sup>168</sup> Niebuhr is skeptical. Some incentive pay is needed to motivate managers, but almost certainly less than we actually observe.<sup>169</sup> The rich and powerful must justify their pay to themselves and others, and they get creative.<sup>170</sup> Niebuhr explains that “since inequalities of privilege are greater than could possibly be defended rationally, the intelligence of privileged groups is usually applied to the task of inventing specious proofs for the theory that universal values spring from, and that general interests are served by, the special privileges which they hold.”<sup>171</sup>

Niebuhr’s insights on the propensity of the powerful to see their powers and privileges as naturally ordained and justified is closely related to a point about corporate governance that Claire Hill and I have called a “pernicious golden rule.”<sup>172</sup> Outside directors closely identify with the interests of the officers they are supposed to monitor, and they make decisions for those they monitor that they would hope those who are in turn monitoring them would make in their own corporations.<sup>173</sup>

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165. *Id.*

166. See Hill & McDonnell, *supra* note 130, at 335 (“[D]irectors may simply see the world from the same vantage point as the officers do, a vantage point from which the executive compensation packages we have seen are reasonable and appropriate.”).

167. See *id.* at 366–67 (noting that executives largely set compensation, and boards made of like-minded executives likely will not change this trend).

168. See *id.* at 367 (pointing to an “efficiency-based justification”).

169. See *id.* at 369 (discussing the difficulty of measuring appropriate compensation).

170. See NIEBUHR, *supra* note 26, at 8 (“Most rational and social justifications of unequal privilege are clearly afterthoughts.”).

171. *Id.* at 117.

172. Claire A. Hill & Brett H. McDonnell, *Disney, Good Faith, and Structural Bias*, 32 J. CORP. L. 833, 838 (2007).

173. See *id.* (“The outside directors may thus make decisions that favor those officers and themselves even if doing so is not the best course for the corporation as a whole.”).

Thus, for Niebuhr, power and hierarchy poison relations much more than the cooperative vision we see in Novak, and the chances of moral suasion removing that poison are less than possibly Rauschenbusch, and certainly Johnson, suggest.<sup>174</sup> Does that mean more intrusive state regulation is needed? Possibly, but as we have already noted and will discuss in more detail later, Niebuhr is also skeptical about that.

### B. Corporate Purpose

An ongoing debate in corporate law, dating back at least to the Berle-Dodd dialogue of the early thirties, concerns the proper purpose that corporations are expected to pursue.<sup>175</sup> The previous subpart concerned how to ensure that officers and directors pursue the corporation's interests rather than their own, but what are the corporation's interests? Contractarians believe the proper purpose is to maximize shareholder value, while communitarians think the proper purpose balances the interests of various stakeholders, including employees, creditors, the local community, and the environment in addition to stakeholders.<sup>176</sup>

Lyman Johnson has argued for the communitarian/stakeholder position in a series of papers.<sup>177</sup> His

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174. Compare NIEBUHR, MORAL MAN, *supra* note 23, at 21 (discussing the “poison of power” and the difficulty of abolishing injustice), with NOVAK, SPIRIT, *supra* note 17, at 129–34 (arguing that the social hierarchy within corporations leads to greater cooperation), and RAUSCHENBUSCH, SOCIAL CRISIS, *supra* note 24, at 110–17 (suggesting that corporations may find redemption by converting to Christian values).

175. See generally Adolf A. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); E. Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).

176. See *id.*

177. See, e.g., Lyman Johnson, *Relating Fiduciary Duties to Corporate Personhood and Corporate Purpose*, in RESEARCH HANDBOOK ON FIDUCIARY LAW (Andrew Gold & Gordon Smith, eds.) (forthcoming 2017); Lyman Johnson, *Law and the History of Corporate Responsibilities: Corporate Governance*, 10 U. ST. THOMAS L.J. 974, 975 (2013) (focusing on the emergence of the benefit corporation); Johnson, *Unsettledness*, *supra* note 1, at 405 (recommending a pluralistic approach to corporate purpose, accounting for both public and shareholder benefit); Lyman Johnson, *Reclaiming an Ethic of Corporate Responsibility*, 70 GEO. WASH. L. REV. 957, 975 (2002) (discussing how to “reconcile the interests of the individual with those of the group”).

religious perspective plays an important role in grounding his arguments for that position.<sup>178</sup> Communitarians want corporations to pursue the public good and, in many cases, religious faith inspires corporate leaders to do just that.<sup>179</sup>

What do the thoughts of our three religious thinkers have to say about corporate purpose? Rauschenbusch certainly endorses the communitarian vision of corporate purpose.<sup>180</sup> He is highly critical of the corporations of his time on this point. He asserts, “Our industrial establishments are institutions for the creation of dividends, and not for the fostering of human life. In all our public life the question of profit is put first.”<sup>181</sup> He believes this focus on profit goes against the proper purpose of corporations.<sup>182</sup> According to Rauschenbusch, “[o]ur public-service corporations exist for the public, but we know how these our servants have become our masters, so that the public exists for their dividends.”<sup>183</sup> Note the phrase “public-service corporations.”<sup>184</sup> Rauschenbusch frequently uses it, and it embodies his vision of proper corporate purpose.<sup>185</sup>

Expanding on this point a bit further, he says:

Our public service corporations exist because the community grants them the use of public property and exercises the sovereign right of eminent domain on their behalf. They are stewards of public property and powers. But we have all seen in recent years that they have been very close to forgetting that they are stewards and have acted as if they were the owners.<sup>186</sup>

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178. See Johnson, *Counter-Narrative*, *supra* note 1, at 853 (drawing parallels between corporate law and the biblical narrative).

179. See Johnson, *supra* note 2, at 102 (“[F]or many business people such other-regarding behavior flows from religious faith.”).

180. See RAUSCHENBUSCH, *SOCIAL CRISIS*, *supra* note 24, at 370 (disagreeing with the contention that profit-seeking should come before health and happiness).

181. *Id.* at 370.

182. See *id.* (arguing that instead of asking how people may boost corporate profits, people should ask how corporations may improve society).

183. *Id.* at 186.

184. *Id.*

185. See *id.* at 385 (providing an explanation of why these are “public-service” corporations).

186. *Id.*

The notion of stewardship is critical for Rauschenbusch. Corporations may be private entities, but they are enabled by the state in order to further a public purpose, and corporate leaders should always remember that and make the public good the objective that they are always pursuing.<sup>187</sup>

As we have seen, though, Rauschenbusch is far from convinced that simply positing this corporate purpose and linking the duty of corporate directors and officers to it will be enough to guarantee that those managers do indeed generally pursue the public good.<sup>188</sup> Sometimes he does call for a moral regeneration which will inspire managers to pursue the public good.<sup>189</sup> But sometimes he calls for more structural changes that will cause corporations to focus on their proper purpose.<sup>190</sup> As noted above, he called for worker cooperatives and state ownership as other solutions to the problem of an excessive focus on profit.<sup>191</sup>

Novak, by contrast, appears to think that the fiduciary duty of corporate directors and officers does run to shareholders.<sup>192</sup> And he seems to agree with Friedman and Smith that this will, through the magic of the market, tend to lead to socially beneficial results.<sup>193</sup> However, Novak also stresses another point frequently made by contractarians, namely, that the long-run profitability of a corporation is typically enhanced by responding

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187. *See id.* (noting that rate regulations are a way for the public to remind corporations that the public retains control).

188. *See id.* at 382 (recognizing that as society becomes more complex, corporate “trustees” may be more tempted to succumb to self-interest).

189. *See id.* at 220 (calling for social regeneration “if our Christian civilization is to stand and advance”).

190. *See id.* at 401 (analogizing the working class to army that must become organized to fight for its cause).

191. *See supra* Part III.A (describing Rauschenbusch’s calls for reorganization).

192. *See* NOVAK, SPIRIT, *supra* note 17, at 93 (arguing that firms owe fiduciary duties to shareholders). For an extended analysis of why that might indeed be socially beneficial, written by a Catholic corporate law scholar who shares much of Novak’s vision of the spirit of democratic capitalism, see Bainbridge, *supra* note 146, at 858 (proposing “a conservative variant on the basic contractarian model”).

193. *See* NOVAK, SPIRIT, *supra* note 17, at 93 (suggesting that market forces will tend to weed out greedy corporate actors while rewarding those with integrity).



to the needs and concerns of other corporate stakeholders.<sup>194</sup> Thus, in practice the shareholder and stakeholder visions are really not that different in what they imply for actual behavior.<sup>195</sup> Novak says:

Apart from internal restraints, the system itself places restraints upon greed and narrowly construed self-interest. Greed and selfishness, when they occur, are made to have their costs. A firm aware of its long-term fiduciary responsibilities to its shareholders must protect its investments for future generations. It must change with the times. It must maintain a reputation for reliability, integrity, and fairness.<sup>196</sup>

Elaborating further on this point, Novak argues:

[T]here is a difference between maximization of profit and optimization of profit. To aim at maximizing profit—that is, to obtain the greatest profit possible out of every opportunity—is to be greedy in the present at the expense of the future. The profit maximizer demands too much for products that can be produced more cheaply by somebody else and in the process narrows his market and destroys his reputation. Inevitably, he damages himself and, in time, destroys himself . . . . By contrast, to optimize profit is to take many other factors besides profit into account, including long-term new investment, consumer loyalty, and the sense of a fair service for a fair price.<sup>197</sup>

Thus, Novak again thinks that the social nature of the corporation will tend to smooth out conflicts and problems.<sup>198</sup> Corporate managers must work with and anticipate the needs of

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194. See *id.* (noting that greedy behavior will affect not only shareholders, but customers, employees, competitors, and the public). I discuss the literature on long-versus short-run profit and its relationship to the proper purpose of corporations in Claire A. Hill & Brett H. McDonnell, *Short and Long-Term Investors (and Other Stakeholders Too): Must (and Do) Their Interests Conflict?*, in RESEARCH HANDBOOK ON MERGERS AND ACQUISITIONS 396 (Claire A. Hill & Steven Davidoff Solomon eds., 2016).

195. See NOVAK, SPIRIT, *supra* note 17, at 93 (observing that limiting self-interested behavior would improve corporations and personal life).

196. *Id.* at 1554.

197. NOVAK, THEOLOGY, *supra* note 28, at 45–46.

198. See *id.* at 50 (“While corporations spring from some of our most cherished ideals about liberty, initiative, investment in the future, cooperation, and the like, they must also be judged in light of our ideals.”).

many different groups, and good managers will work to pursue the interests of those different groups as a way of advancing the interests of their businesses and themselves. In contrast, Novak thinks that the democratic promise of cooperatives, cited approvingly by Rauschenbusch, looks beguiling but in fact is not a good idea:

To organize industry democratically would be a grave and costly error, since democratic procedures are not designed for productivity and efficiency. Poor management may not recognize that workmen on the line are fertile in figuring out new and better ways of doing things; but good management does. The more a corporation embodies the principle of subsidiarity in its organization, the closer to its work force it becomes.<sup>199</sup>

Again, Steve Bainbridge provides a more extended economic defense of this claim.<sup>200</sup>

Niebuhr once again throws some cold water on both positions. He is skeptical about how broadly corporate leaders can cast their sympathies.<sup>201</sup> Can they really, honestly commit themselves to a broad pursuit of the public good? They may think they can and do, but as usual Niebuhr suspects that most will have an underlying partial and self-centered picture of the world that is less noble than they believe themselves to be.<sup>202</sup> They flatter themselves, as do those around them, but when push comes to shove, they care most about the bottom line of their own well-being.

The man of power, though humane impulse may awaken in him, always remains something of the beast of prey . . . . His philanthropy is a perfect illustration of the curious compound of the brutal and the moral which we find in all human behavior; for his generosity is at once a display of his power and an expression of his pity. His generous impulses freeze

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199. NOVAK, SPIRIT, *supra* note 17, at 178–79.

200. See Bainbridge, *supra* note 146, at 878 (“The theory seems to hold that having a say in corporate decisionmaking leads workers to view their efforts as part of a collaborative undertaking, rather than as just a job.”).

201. See NIEBUHR, MORAL MAN, *supra* note 23, at 14–15 (arguing that with the “increased centralization of economic power” economic power “has become the significant coercive force of modern society”).

202. See *id.* (“The moral attitudes of dominant and privileged groups are characterized by universal self-deception and hypocrisy.”).

within him if his power is challenged or his generosity are accepted without grateful humility.<sup>203</sup>

So much for the hope of an ethic of stewardship.

It is more plausible to believe that corporate directors and officers can indeed become firmly devoted to the interests of shareholders. Modern compensation ties their own pecuniary self-interest firmly to share price. Moreover, a focus on just shareholders involves less complexity and imaginative projection, and most shareholders belong to the same class as managers, with shared identities and values. So perhaps then the link between long term shareholder value and helping other stakeholders, emphasized by Novak and others, will cause managers to behave in a way that advances the public good, at least much of the time.

But there too Niebuhr has an argument that casts serious doubt. Imagine a corporate manager genuinely committed to shareholder value maximization, facing a decision between making a healthy profit now versus foregoing that profit now to do something that has a good chance of bringing much more profit in the future, but where the link to the future is quite uncertain. Perhaps if the manager were the sole shareholder, acting on her own behalf, she would believe the risk is worth it. But will she think that if she is acting on behalf of a large number of shareholders? Niebuhr suggests no. He argues that “[a]n individual may sacrifice his own interests, either without hope of reward or in the hope of an ultimate compensation. But how is an individual, who is responsible for the interests of his group, to justify the sacrifice of interests other than his own?”<sup>204</sup>

This suggests that an ethic of shareholder value maximization may cause managers to do things that do not in fact really best promote shareholder interests in the long run, because the long run effects are hard to quantify, squishy, and uncertain.<sup>205</sup> A genuine sense of responsibility makes them loath to take that risk, even where they would do so acting for themselves, and even where the shareholders themselves, if

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203. *Id.* at 13–14.

204. *Id.* at 267.

205. *See id.* (“But how is an individual, who is responsible for the interests of his group, to justify the sacrifice of interests other than his own?”).

surveyed, might think the risk is worth taking.<sup>206</sup> I suspect that a dynamic like this is an important element in understanding the effects of the growing dominance of the shareholder value norm in recent decades.

As with Niebuhr on duty, so too here with Niebuhr on purpose; perhaps the conclusion is that promoting more pro-social behavior by corporate managers is not the solution, and that greater state regulation is needed. If we cannot trust corporations to pursue the social good on their own where that good goes against the dictates of profit (and sometimes even when the public good and the dictates of profit are consistent, but only in an overly indeterminate future), then maybe we need to legally require corporations to act better through various specific laws addressing specific sources of social harm that businesses cause. We turn to that question next, and we shall see that Niebuhr is also skeptical about this answer.

### *V. Regulation and Pluralism*

The previous Part focused on the implications of the thought of our three religious thinkers for internal regulation by and of corporations—essentially, how to think about motivating the behavior of corporate directors and officers. We now turn to the implications of their thought for questions of external regulation and pluralism. How much need there is for external regulation depends in part upon how well you think corporations will be internally motivated to care about the effects they have upon various internal and external stakeholders, which we have just explored. It also depends upon how severe you think the potential effects of corporate harms are, and upon how well you think state actors will be able to formulate and enforce effective rules.

#### *A. The Promise and Peril of Regulation*

As we have seen, Rauschenbusch is ambivalent about the ability of capitalist corporations, and those who run them, to reform themselves and serve the public interest as they are

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206. *Id.*

meant to.<sup>207</sup> He holds out some hope of a moral movement that transforms the vision of corporate leaders.<sup>208</sup> But he was skeptical about the prospects.<sup>209</sup> Managers and shareholders made huge profits under the existing system; getting them to forego a significant chunk of those profits is hard to do.

Rauschenbusch hoped to persuade corporate managers to change, but contemplated other strategies if they refused:

The present movement for federal and state interference and control over corporations . . . is an effort reassert the ownership and mastership of the people and to force these stewards of public powers back into the position of public servants. The next decade will probably show whether they are willing to take the position of well-paid servants and cease from ousting the owner. If not, the people will have to say, "Render the account of thy stewardship, for thou canst no longer be steward."<sup>210</sup>

Rauschenbusch advocated a variety of alternative strategies. We have already seen that he championed worker cooperatives and labor unions.<sup>211</sup> He also advocated direct socialism, including state ownership of at least some leading corporations, and regulation of others.<sup>212</sup> He thought that democratic politics inspired by spiritual ideals had great promise. According to Rauschenbusch, "[i]f men conceive of political duties as a high religious service to man and God, the State can be a powerful

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207. See generally RAUSCHENBUSCH, SOCIAL CRISIS, *supra* note 24; see also RAUSCHENBUSCH, SOCIAL GOSPEL, *supra* note 72, at 113 ("Whenever capitalism has invaded a new country or industry, there has been a speeding up in labor and in the production of wealth, but always with a trail of human misery, discontent, bitterness, and demoralization.").

208. See RAUSCHENBUSCH, SOCIAL CRISIS, *supra* note 24, at 386 (arguing that state and federal interference with corporations may force corporate leaders to become more conscientious and serve the public); see also *id.* at 285 (hoping for a broader movement of "religious faith" and "moral enthusiasm").

209. See RAUSCHENBUSCH, SOCIAL GOSPEL, *supra* note 72, at 111 (claiming that the structure of capitalism limits the desire for individuals to engage in public service).

210. RAUSCHENBUSCH, SOCIAL CRISIS, *supra* note 24, at 386.

211. *Id.* at 400–11 (advocating for the benefits of a working class movement, as well as a movement to promote cooperation between workers and owners).

212. *Id.* at 406–07 (advocating for a workers' movement and lamenting the continuing struggle of the working class to gain advancement).

agent in the bettering of human life.”<sup>213</sup> Additionally, he argues that “[t]he social body needs moral innervation; and the spread of men who combine religious faith, moral enthusiasm, and economic information, and apply the combined result to public morality, promises to create a moral sensitiveness never yet known.”<sup>214</sup> Rauschenbusch is of course aware of the difficulty of overcoming the political power of the dominant capitalist class.<sup>215</sup> However, he has faith that a democratic movement can succeed.<sup>216</sup>

And he asks no questions about possible abuses if such a movement did succeed. In part this reflects the time period in which Rauschenbusch wrote. *Christianity and the Social Crisis*<sup>217</sup> appeared before World War I, and *A Theology for the Social Gospel*<sup>218</sup> appeared as that war ended. Thus, the world had not yet experienced communism in power in the Soviet Union and elsewhere, nor had the United States yet experienced the full welfare and regulatory state that would be put in place under the New Deal.<sup>219</sup> Our other two writers had that additional experience, and it affected their thinking about politics significantly.

As we have seen, Novak is much more sanguine about corporations than Rauschenbusch. He believes that both the market system and the internal logic of cooperation will cause corporations to mostly pursue the public good quite effectively.<sup>220</sup>

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213. *Id.* at 183.

214. *Id.* at 357.

215. *See id.* at 186 (“In so far as [the Church] is loyalty to [things as they ought to be], it must be in perpetual but friendly conflict with the State . . .”).

216. *See id.* at 286 (“It will depend almost wholly on the moral forces which the Christian nations can bring to the fighting line against wrong, and the fighting energy of those moral forces will again depend on the degree to which they are inspired by religious faith and enthusiasm.”).

217. *Id.*

218. RAUSCHENBUSCH, *SOCIAL GOSPEL*, *supra* note 72.

219. *See* John Braithwaite, *The Regulatory State?*, in *OXFORD HANDBOOK OF POL. INSTS.* 219–20 (2011) (describing the rise of the regulatory state).

220. *See* NOVAK, *SPIRIT*, *supra* note 17, at 93 (noting that individuals are often influenced by community, family, and sympathy in addition to their own self interest, and arguing that corporate management will act in accordance with those values to draw the best out of their employees).

There will still be some need to regulate to protect the public, but the need is quite limited.<sup>221</sup>

In some areas, no doubt, the political system will wish to have its say in economic affairs. Smith gave many examples in which he judged such political intervention useful and commendable. There can be no doubt, however, about the main thrust of Smith's argument: that markets as free as possible from governmental and religious command best serve the common good. Such a system frees the intelligence, imagination, and enterprise of individuals to explore the possibilities inherent in world process . . . .<sup>222</sup>

Beyond thinking that state intervention is mostly not needed, Novak also thinks that state power is quite dangerous, and needs to be limited.<sup>223</sup> His key works were written in the seventies and eighties.<sup>224</sup> The Soviet Union still loomed large, and the deregulation of the Reagan years was just beginning. Novak worried greatly about tyranny if state power was unchecked.<sup>225</sup> In describing the spirit of democratic capitalism, Novak conceived of it as a system with three major components: political, economic, and cultural.<sup>226</sup> Each exercises a great deal of power, and each helps check the other two.<sup>227</sup> This pluralistic system prevents any one of the three components from becoming too powerful.

This differentiation of systems sets individuals possessed of the will-to-power on three separate tracks. Political activists may compete for eminence in the political system, economic activists in the economic system, religious activists and intellectual in various parts of the moral-cultural system. But the powers of each of the three systems over the others, while in each case substantial, are firmly limited. It is not likely that

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221. See *id.* at 80 (determining that self interest alone may not be sufficient to prevent corporations from imposing harm on others).

222. *Id.*

223. *Id.* at 231–32.

224. For example, Novak's *Democratic Capitalism, id.*, was written in 1982.

225. See *id.* at 79 (illustrating that a market system free from governmental commands liberates intelligence and imagination, allowing individuals to explore possibilities of interest).

226. See *id.* at 172–86 (discussing the presence of three different systems—economic, political, and cultural—as the driving forces behind democratic capitalism).

227. See *id.* at 185 (illustrating the tension between the cultural system and the political and economic systems).

one person or party can gain complete dominance over all three systems, and should such misfortune come to pass, there remain plural roads by which offended forces may attack each pretender at his weakest points.<sup>228</sup>

Thus, socialist ownership of large businesses or extensive regulation by powerful administrative agencies risks both squashing the innovative energy of private enterprise while giving too much power to politicians and bureaucrats.

We have seen that Niebuhr is more skeptical than Novak, or even Rauschenbusch, that shareholder-owned corporations generally pursue the public interest, or that their leaders can be persuaded to do so by a moral reform movement.<sup>229</sup> Does he then turn to either socialist ownership or extensive state regulation as a way to stop corporations from harming the public? He was a political liberal during the New Deal and post-World War II era, so he did advocate more state intervention than Novak prefers.<sup>230</sup> However, Niebuhr shared Novak's concerns about the threat of concentrated political power.<sup>231</sup> He found socialists like Rauschenbusch naïve about what would happen after the state took over business enterprises.

They seem to believe that it will be easy to create perfect social mutuality by destroying inequality of power. But can they destroy economic power without creating strong centres of political power? And how may they be certain that this political power will be either ethically or politically restrained? We have seen that it is difficult to prevent the centralization of economic power without giving the political state tremendous authority. A powerful state necessitates dangerous concentrations of political power in the hands of a few individuals and a small group. There is no certainty that this

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228. *Id.* at 56.

229. *See supra* note 106 and accompanying text (describing Niebuhr's theory on the morality of man and his capability to act for the benefit of the public interest).

230. *Compare* NIEBUHR, MORAL MAN, *supra* note 26 (advocating for more state state intervention), *with* NOVAK, SPIRIT, *supra* note 17 (advocating for restraint on the part of the State).

231. *See* NIEBUHR, MORAL MAN, *supra* note 26, at 192 (arguing that concentrated political power may be overbearing on the populace). *See generally* NOVAK, SPIRIT, *supra* note 17.



new power can be brought under either perfect ethical or social restraint.<sup>232</sup>

Niebuhr's deep distrust of both economic and political power flows from his core vision of the immense difficulty of rising above our inherent self-centered nature.<sup>233</sup> When we do try to do so in collective organizations, those organizations themselves become overly focused on their group interests, and their leaders are filled with pride. That is as true for socialist politicians as it is for capitalist managers.

That leaves Niebuhr with a tough balancing act, and more pessimism about the likely outcomes of collective action through either economic or political organizations. He does, like Rauschenbusch, support cooperatives and labor unions as a form of power to counterbalance corporations without posing as much of a threat as a large state power.<sup>234</sup> Of course, the union and cooperative movements looked more promising in the mid-twentieth century than they do today. But perhaps this provides some insight in thinking about the new social enterprise movement. To date, legal reforms like the low-profit LLC and the benefit corporation have focused mainly on purpose and duty as ways to help encourage enterprises to pursue the public good along with profit.<sup>235</sup> Perhaps more attention should be focused on issues of ownership, voting, and representation.<sup>236</sup> If we want businesses to reflect the interests of employees, customers, local communities, and the environment, giving those stakeholders a

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232. NIEBUHR, MORAL MAN, *supra* note 26, at 192.

233. See *supra* note 26 and accompanying text (outlining Niebuhr's concerns about the selfishness of human nature).

234. See NIEBUHR, MORAL MAN, *supra* note 26, at xi (arguing that social competition can create immorality among even moral individuals); see also RAUSCHENBUSCH, SOCIAL CRISIS, *supra* note 24, at 400–11 (advocating for the benefits of a working class movement, as well as a movement to promote cooperation between workers and owners).

235. See Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 597 (2011) (citing that benefit corporation statutes are created for the purpose of allowing entities to pursue the general public benefit).

236. See generally Brett McDonnell, *Benefit Corporations and Public Markets: First Experiments and Next Steps*, 39 SEATTLE U. L. REV. 263 (2016); Alicia E. Plerhoples, *Nonprofit Displacement and the Pursuit of Charity Through Public Benefit Corporations*, GEO. LAW (2016), <http://scholarship.law.georgetown.edu/facpub/1783>.

more direct say over decisions, or who makes decisions, may make sense, if we cannot trust corporate leaders to adequately internalize the interests of others.

*B. Pluralism and Religious Accommodation*

In a world in which regulations have proliferated to address a wide variety of harms that business enterprises impose, the possibility of businesses pursuing the public good according to their own understandings but nonetheless running into conflicts with some regulations becomes increasingly common. Both government and enterprises pursue many different public goods, with varying and sometimes conflicting value systems by which they evaluate those goods. When, if ever, should regulations give way to allow private organizations to pursue their own versions of the good in ways that might conflict with those regulations?

This question has recently become a highly visible controversy for corporations with a religiously-grounded purpose following the Supreme Court decision in *Burwell v. Hobby Lobby Stores, Inc.*<sup>237</sup> In that case, a provision of the Patient Protection and Affordable Care Act required employers to provide insurance coverage for their employees that included providing for contraception.<sup>238</sup> The plaintiff companies were for-profit corporations owned by families with strong religious beliefs opposing certain forms of contraception that can function as abortifacients.<sup>239</sup> The companies sued, invoking the Religious Freedom Restoration Act (RFRA) to argue that this provision substantially burdened their free exercise of religion.<sup>240</sup> The Court agreed with the plaintiffs, holding that under some

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237. See generally *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (illustrating a clash between the ideals of a government regulation mandating certain health-care related packages, and the private corporation's ideals).

238. *Id.* at 2754.

239. *Id.* at 2755; see also Brett H. McDonnell, *The Liberal Case for Hobby Lobby*, 57 ARIZ. L. REV. 777, 783–87 (2015) (outlining the legal and factual background of the *Hobby Lobby* case).

240. *Hobby Lobby*, 134 S. Ct. at 2754.

conditions for-profit business corporations can be persons with standing to claim the protections of RFRA.<sup>241</sup>

What would our three religious thinkers say about *Hobby Lobby*? Novak's opinion would seem the easiest to guess.<sup>242</sup> Novak puts great stress on the importance of pluralism. His pluralism in part rests on a healthy respect for diverse beliefs, and the value of giving much legal and social space for persons and organizations to both express and act upon their individual and collective beliefs.<sup>243</sup> His pluralism also rests upon a suspicion of letting the government have too much power.<sup>244</sup> Both grounds suggest that Novak would welcome the majority opinion in *Hobby Lobby*.<sup>245</sup>

What would Rauschenbusch say about *Hobby Lobby*? I am less sure about him. One variant of the communitarian/progressive approach sees corporations as a strong source for achieving the public good, in many instances as a preferred substitute to regulation.<sup>246</sup> Publicly-oriented corporations are preferred to regulation in part because of a recognition of the existence and validity of plural notions of the public good. Lyman Johnson (writing with David Millon) has made that argument in support of the *Hobby Lobby* decision.<sup>247</sup>

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241. *Id.* at 2773.

242. As Novak died very recently, presumably he in fact had an opinion on the *Hobby Lobby* case itself, unlike Rauschenbusch and Niebuhr (well, I suppose I am making assumptions about the consequences of death that perhaps I should not be making in a paper on the theology of the corporation). I have been unable to find a public expression by Novak on the case, however.

243. I find the following quote a quite elegant statement of a religious argument for the value of respecting diverse beliefs. "Aquinas once wrote that humans are made in the image of God but that since God is infinite He may be mirrored only through a virtually infinite number of humans. No concept of Him is adequate." NOVAK, SPIRIT, *supra* note 17, at 53.

244. *See id.* at 56 (arguing that the division of power between the economic, cultural, and governmental system adequately distributes power between the three so one system does not overpower the others).

245. Although, insofar as Novak supports the shareholder wealth maximization norm, that could conceivably push him in the opposite direction. *See* McDonnell, *supra* note 239, at 790 (illustrating that for-profit corporations are only allowed one purpose, to maximize returns for shareholders).

246. *See* RAUSCHENBUSCH, SOCIAL CRISIS, *supra* note 24, at 402 (arguing that promoting cooperation between classes and movement toward social gain can be done voluntarily through corporations, rather than through regulation).

247. *See generally* David Millon & Lyman Johnson, *Corporate Law After*

But a different version of the progressive vision puts more emphasis on regulation and state action as a way to achieve the public good. This version is more skeptical of attempts by individual corporations to get out of generally applicable regulation. Many progressive corporate law scholars fall within this camp and oppose the *Hobby Lobby* decision.<sup>248</sup> Would Rauschenbusch side with Johnson and Millon or with the many progressive law scholars on the other side of the opinion? I am not at all sure, although I suspect his sympathies might lie more with the employees potentially denied access to contraceptive care rather than with the shareholders wanting to deny that access.<sup>249</sup>

And what of Niebuhr? There again I am unsure. Might he say a pox on both your houses, unhappy with both the wealthy shareholder families trying to impose their values on the health plans of their employees and also with the politicians and government bureaucrats trying to score political points on a deeply sensitive moral dilemma? Might he see this as yet another example where the egoism of groups clashing in politics creates conflict with no good and fair resolution? If so, he would certainly have a point.

Personally, I side with Novak and Johnson on this one. RFRA is an important statement of the value of religious liberty and diversity of belief and action. In a world of extensive regulation covering most elements of business and commerce, RFRA provides a safety valve protecting religiously-motivated behavior that goes against prevailing moral norms. It expresses humility about our ability to craft wise rules in a complex world with competing, sometimes irreconcilable visions of the right and

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Hobby Lobby, 70 BUS. LAW. 1 (2015).

248. This includes many, probably most, of the scholars who signed the Brief for Corporate and Criminal Law Professors as Amicus Curiae Supporting Petitioners. See *Burwell v. Hobby Lobby Stores Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-345, 13-356), [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs-v3/13-354-13-356\\_amcu\\_cclp.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/13-354-13-356_amcu_cclp.authcheckdam.pdf).

249. See Grant Hayden & Matthew Bodie, *Who Controls Corporate Culture?*, ST. LOUIS POST-DISPATCH, July 16, 2014, [http://www.stltoday.com/news/opinion/columns/who-controls-corporate-culture/article\\_5dbb9b4c-8c6e-500e-9c3f-2a2a4abe18c3.html](http://www.stltoday.com/news/opinion/columns/who-controls-corporate-culture/article_5dbb9b4c-8c6e-500e-9c3f-2a2a4abe18c3.html) (last visited Apr. 25, 2017) (offering a powerful articulation of this perspective) (on file with the Washington and Lee Law Review).

the good. The *Hobby Lobby* case extends that protection of religious exercise to business corporations, thereby recognizing that corporations can be not simply profit-making machines, but rather organizations devoted to various ideals of the good and human flourishing.<sup>250</sup>

### VI. Conclusion

We don't necessarily need to choose. Rauschenbusch, Novak, and Niebuhr all provide many insights of much value. We can learn from each of them. And there is significant overlap in their visions of individuals and society. All understand that human beings have a fundamental self-centeredness that we can struggle to overcome, individually and within groups, but most of us will never fully succeed. Social institutions like the corporation must take this egoism into account, while also helping to develop the more social elements of our nature. Through both the invisible hand of the market and through both enlightened long-run self-interest and some other-regarding norms, corporations will often act in ways that benefit the public as well as their managers and their shareholders. But sometimes they will not, and for at least some matters state regulation will be needed to limit corporate harms. Of course, our three figures differ frequently in how much they emphasize these different points, and in the balance of policy choices they advocate.<sup>251</sup>

Where they differ, some of their differences may be due to when they lived and wrote. Rauschenbusch wrote during the height of the initial burst of industrialization in the early twentieth century, when society faced many problems, and

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250. See McDonnell, *supra* note 239, at 809 (arguing that progressive corporate law envisions corporations as “ways for like-minded persons to come together to pursue shared goals to advance a shared vision of the common good in ways to go beyond simply complying with the law”).

251. Compare RAUSCHENBUSCH, SOCIAL CRISIS, *supra* note 24, at 386 (arguing that state and federal interference with corporations may force corporate leaders to become more conscientious and serve the public), with NOVAK, SPIRIT, *supra* note 17, at 93 (reasoning that market forces will weed out greedy corporate actors, and that as a result governmental regulation may not be effective), and NIEBUHR, MORAL MAN, *supra* note 26, at 192 (balancing a distrust for centralized power and collective action, with a desire to encourage cooperative movements).

regulation to address those problems was just beginning to be enacted. The world as yet had no experience with communism in power. Rauschenbusch advocated vigorous action to address problems caused by new markets and large corporations, and did not dwell on potential downsides to his proposed solutions. Niebuhr wrote starting at the beginning of the New Deal, continuing through World War II and the post-war era. Originally a socialist, he gradually came to support the New Deal, in part as it showed success, in part as fascism became a dominant threat, and in part in response to the failures of communism. Novak wrote his major work in the eighties. The failures of communism were impossible to ignore, and the highly regulated welfare state was struggling, with political and intellectual energy lying with pro-market reformers.

Which of them has the most to add to thinking about duty and purpose in corporate law today? As we have seen repeatedly, Rauschenbusch and Novak, for the most part, fit comfortably within the communitarian and contractualist approaches, respectively, although each has distinctive insights they bring to bear within those visions.<sup>252</sup> In our time, the pendulum has swung from the deregulation trend of the eighties, and economic inequality has become a threat closer to what it was in the early twentieth century than it has been since World War II ended. All that may make Novak's analysis somewhat dated. And yet, neither the socialism nor the worker cooperatives and labor union activism that Rauschenbusch championed seem politically viable major options in our moment.

Does Niebuhr present an alternative? He certainly had a more unique perspective that does not fit as easily within existing approaches to corporate law. His realism that can be somewhat hard to distinguish from pessimism seems on point in our time. Contractualism and communitarianism, director primacy and shareholder primacy, managerialism and shareholder activism—all have grown intellectually stale, all have serious problems, none seem to offer a clear path for an American economy that has

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252. See, e.g., RAUSCHENBUSCH, *SOCIAL CRISIS*, *supra* note 24, at 370 (endorsing the communitarian vision of corporate purpose, namely that profit seeking should not come before health and wellness); see also NOVAK, *SPIRIT*, *supra* note 17, at 93 (arguing that successful management will draw out ideals of teamwork, cooperation, and creativity).

become less innovative, offers less robust job growth, and spurred a growing divide between the very rich and everyone else. Niebuhr suggests deep skepticism that markets, morals, or fiddling with corporate law rules within the existing structure of business corporations are likely to move us very far in pushing business enterprises to more actively pursue the public interest.<sup>253</sup>

Less stale is the movement towards social enterprise, including new legal forms like the benefit corporation. But here too, Niebuhr (and to a significant extent Rauschenbusch as well) suggests that the focus so far has been too much on fiddling with the rules of corporate purpose and duty.<sup>254</sup> We should instead be looking at voting and representation: who has actual authority, or the ability to choose those with actual authority, in a corporation? What might that mean?

That's a topic for another day.

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253. See *supra* note 106 and accompanying text (discussing that law is perhaps an inadequate approach to making business enterprises actively pursue the public good because the immorality of man can and will leech into the law itself).

254. See RAUSCHENBUSCH, SOCIAL CRISIS, *supra* note 24, at 406–07 (discussing the two-class system of modern capitalism); see also NIEBUHR, MORAL MAN, *supra* note 26, at 60 (arguing that self interest, greed, and pride are too deeply engrained into human character to be rooted out by laws and regulations).