



4-1-2017

Confident Pluralism in Corporate Legal Theory

Robert K. Vischer

University of St. Thomas School of Law

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Business Organizations Law Commons](#)

Recommended Citation

Robert K. Vischer, *Confident Pluralism in Corporate Legal Theory*, 74 Wash. & Lee L. Rev. 1179 (2017).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol74/iss2/21>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Confident Pluralism in Corporate Legal Theory

Robert K. Vischer*

Writing against the background of the mid-twentieth century's cataclysm of all-encompassing political ideologies, Isaiah Berlin warned that the "notion of the perfect whole, the ultimate solution, in which all good things coexist, seems to be not merely unattainable . . . but conceptually incoherent."¹ Human beings are "doomed to choose" among goods as they structure their lives, and "every choice may entail an irreparable loss."²

Berlin helped illuminate the dangers of insisting on the possibility of a perfectly coherent and ordered hierarchy of moral values.³ By championing value pluralism, he strengthened the conceptual foundation for legal and political frameworks that permit—even celebrate—the living out of conflicting worldviews and moral commitments among citizens.⁴ The alternative is to elevate one value over all others, which is a recipe for catastrophe.⁵ He reminded us that "[b]oth liberty and equality are among the primary goals pursued by human beings through many centuries: but total liberty for wolves is death to the lambs."⁶

Perhaps more than any other scholar, Lyman Johnson has brought Berlin's bracingly skeptical mindset to corporate law, pushing back against the monolithic embrace of shareholder

* Dean and Mengler Chair in Law, University of St. Thomas School of Law (Minnesota).

1. ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY* 13 (Henry Hardy ed., 1990).

2. *Id.*

3. *See generally id.* (discussing concerns that dogmatism leads to political tyranny, and finding pluralism as the answer).

4. *See id.* at 14 (stating that obtaining a perfect state is not a proper goal).

5. *See id.* (noting that to choose would lead to suffer irreparable loss).

6. *Id.* at 13.

wealth maximization, pointing out its harmfulness and its lack of legal mandate.⁷ He has cautioned that, “Without the openness of corporate law to a broad range of corporate objectives . . . we run the risk of an unhealthy monoculture in which a fanatical devotion to profitmaking crowds out other goals, not because of law but because of custom and habit.”⁸ There are no morally neutral conceptions of corporate purpose, for “all businesses necessarily have some moral vision, recognized or not, healthy or infirm.”⁹ The law permits broad choices, but corporate theory, Lyman points out, “lags behind law and practice in addressing this range of action.”¹⁰

Lyman has been a prime mover in bringing pluralism to corporate legal theory. He embraces the pluralist label, noting its importance as to both corporate form and corporate purpose.¹¹ Relying on work regarding mediating structures, Lyman notes that there is “no reason why, with respect to business corporations, there cannot be a pluralism of market-oriented entities designed to advance different purposes,” recalling Robert Nisbet’s emphasis on how mediating structures grow out of “shared ‘communities of purpose.’”¹² He insists that “the law should facilitate, not impede, the design of ever more refined firm structures.”¹³ Pluralism is important to his work.¹⁴

But Lyman is not just a corporate legal theory pluralist; he’s also a Christian.¹⁵ In his calling as a Christian law professor, it

7. See Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 274 (2012) (“[T]he better view is that the law is (and should be) agnostic on the subject of corporate purpose.”).

8. Lyman Johnson, *Law, Agape, and the Corporation*, in AGAPE AND LAW 14 (R. Cochran & Z. Calo eds., Cambridge Univ. Press) (2015).

9. *Id.*

10. *Id.*

11. See Johnson, *Pluralism in Corporate Form*, *supra* note 7, at 280 (recalling history and examining the current corporate structure to conclude that “[p]luralism is important at the individual level as well as the institutional level”).

12. *Id.* at 280.

13. *Id.*

14. See *id.* at 273 (noting that “[t]his author and others have addressed the law of corporate purpose before, and this author currently is preparing more extensive articles on that specific subject”).

15. See *generally Resume of Lyman Johnson* (explaining that Professor Johnson is involved in his church and leads a bible study for students),

matters not just that he champions pluralism, it matters how he does so. In John Inazu's recent book, *Confident Pluralism*, he charts a path by which we can and should engage one another in the midst of our polarized and increasingly toxic political culture.¹⁶ Inazu identifies three key attributes for effective engagement today: tolerance, patience, and humility.¹⁷

I doubt that corporate legal theory was the impetus for Inazu's book, but Lyman's work exemplifies the spirit of the book's recommendations. He has pushed academic, policymaking, and practitioner conversations about corporate purpose forward in productive ways without alienating those who disagree with him or drawing lines that make future collaborative efforts more treacherous. A brief word about each of the attributes deemed essential for effective engagement in a pluralist society:

Tolerance. Lyman's work on corporate social responsibility is not about elevating or foreclosing particular corporate purposes, though I am sure that Lyman has views on what purposes are most central to the common good. He does not advocate for specific ends, but for space to pursue varied ends.¹⁸

Patience. Lyman resists easy legal shortcuts. For example, he rejects any effort to avoid the tension among visions of corporate purpose by segmenting and categorizing them. Speaking of the new benefit corporation statutes, he writes:

Broadly liberating as these new types of statutes are—and thus highly conducive to business strategies animated by agape—they should not be construed to alter the continuing freedom of *traditional* business corporations to pursue mixed purposes or to pursue profits in a compassionate manner, lest such agapic efforts become “ghettoized” in benefit corporations only.¹⁹

<https://www.stthomas.edu/media/schooloflaw/facultystaff/cvpdf/JohnsonCV.pdf>.

16. See generally JOHN D. INAZU, *CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE* (2016).

17. See *id.* (discussing how society can cohabitate peacefully and embrace pluralism).

18. See, e.g., Lyman Johnson, *Law and the History of Corporate Responsibility: Corporate Governance*, 10 U. ST. THOMAS L.J. 974, 975–78 (2013) (tracing the history of efforts to address corporate responsibility through corporate governance reform).

19. Johnson, *Law, Agape, and the Corporation*, *supra* note 8, at 1.

We can't accommodate pluralism simply by creating a new rigid classification. Pluralism within categories is harder and takes longer, but it's the best path toward real and lasting change.

Humility. The arguments that spring from Lyman's faith are not the grand theological close-out, effectively ending debate by divine fiat. He works to mine faith traditions for accessible insights that are not dependent on the truth of the underlying theological claim.²⁰ His aim is not the religious takeover of corporate life, but creating space for alternative visions and insights.²¹

Lyman notes, for example, that modern legal theory struggles to explain the function and purpose of groups at a conceptual level, but Christian thought "provides a powerful, cohesive metaphor—the body."²² As the Apostle Paul explains about the corporate church, "we who are many form one body, and each member belongs to all others."²³ This image, Lyman suggests:

[R]adically reorients our thought because it emphasizes both the unity of the many and the rightful place of each to all others; both unity and belonging are underscored. One does not simply relate to the corporate body itself in a sort of bilateral contract; one has a rightful place, a just ordering, in relationship to all others as well.²⁴

Paul the Apostle thus:

[O]pens a moral dimension to relationships within the group because, being connected to a larger whole, its various parts, however different their function, should have equal concern for each other. In this way, a truly *corporate* moral vision and an overarching organic unity can be achieved through the

20. See Lyman Johnson, *A Role for Law and Lawyers in Educating (Christian) Business Managers About Corporate Purpose* 28 (2008) (U. of St. Thomas Legal Studies, Research Paper No. 08-22), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1260979 ("By infusing the notion of faithfulness with moral instruction gained from religious faith, for example, business students and managers may more clearly see how the performance of their responsibilities involves a deeper moral as well as a legal obligation.").

21. See *id.* at 5 (noting faithfulness may be a way to bridge religious convictions and business conduct).

22. Johnson, *Law, Agape, and the Corporation*, *supra* note 8, at 9.

23. *Id.* at 19.

24. *Id.*

participants' shared commitment to a common purpose of service to others.²⁵

In building upon his faith tradition's wisdom, Lyman thus provides a substantive vision of how the corporation can function as more than a nexus of contracts.

For humility's sake, it is important to recognize that, even if Lyman's insights were to gain traction in corporate boardrooms, his vision is restrained. He proposes that:

[D]iscourse within the corporation may continue to be secular in nature because senior decision-makers may choose, for the most part, to think and speak in secular terms. It may, on the other hand, under the prodding of those who appreciate the breadth of managerial discretion and urge the value of faith in guiding its exercise, become a more mixed and bi-vocal discourse, part secular and part religious in nature.²⁶

His work is not a Trojan Horse-bearing theocracy—it is a fully transparent attempt to enrich our understanding of the corporation in terms marked by humility.

These three attributes—tolerance, patience, and humility—are essential, as Inazu recognizes, but I don't think they're enough, and they don't quite capture the value of Lyman's contributions to modeling engagement in a pluralist world. I've supplemented John Inazu's three attributes with three more of my own.

Expertise. Effective engagement must display humility, patience, and tolerance. But to be effective, it also must be taken seriously, which means it must display deep knowledge and expertise on the topic. Law professors have occasionally displayed a tendency to weigh in on a staggeringly large number of topics, some of which have only the thinnest connection to any real expertise they possess. We are good at talking, so we do not hesitate to do so. Lyman engages on what he knows and no further. He is methodical in his scholarship—it's not suitable for expression in 140 characters or less. He has credibility because he demonstrates his knowledge.

25. *Id.* at 19–20 (internal quotations omitted).

26. Lyman Johnson, *Faith and Faithfulness in Corporate Law*, 56 CATH. U. L. REV. 1, 4 (2006).

Connecting to a bigger story. When Lyman writes about corporate purpose or fiduciary duty or benefit corporations, he's not just writing about those topics, he's writing about what it means to be human.²⁷ We have all probably read more than our share of law review articles that prompt us to think, "wow, this author is really clever." But our take away point goes no further than that. Scholarship can be an amazing display of technical proficiency, but the scholarship that we remember—that our students remember, that practicing attorneys remember, that reform-minded advocates remember—is the scholarship that resonates with us at a deeper level. We long to be part of a story that is bigger than ourselves, and effective engagement recognizes that. Lyman writes from a bigger story.

For example, in his article *Re-Enchanting the Corporation*, Lyman notes that "corporate law theory paints a fairly dreary picture of the self and human interaction within the corporate form of business: relationships with others essentially are 'bargains' struck by wary, self-seeking individuals largely motivated by the hope for personal financial gain."²⁸ However, "much of religious thinking . . . regards human self-centeredness . . . as a hindrance to be overcome, not a quality to be lauded or passively accepted."²⁹ A more accurate account of human behavior and aspiration "would forthrightly recognize the possibility that some—perhaps many—business leaders regard adherence to an ethics of stewardship as integral to what they do in the world of commerce."³⁰ Lyman's work doesn't just explain, it inspires, and it inspires because it resonates with the shared experience of, and longing for, a life that transcends the maximization of self-interest.

A mindset of service. As accomplished a scholar as he is, Lyman has never lost sight of the fact that his primary

27. See Johnson, *Law and the History of Corporate Responsibility*, *supra* note 18 ("A 2013 study by the Conference Board, for example, traces the rise of women and ethnic minorities serving on the boards of nonfinancial companies, and notes that about one-half of large companies now have a formal policy on board diversity.").

28. Lyman Johnson, *Re-Enchanting the Corporation*, 1 WM. & MARY BUS. L. REV. 83, 93 (2010).

29. *Id.* at 95.

30. *Id.* at 99.

responsibility is to teach lawyers how to be better at what they do, which will in turn advance the common good of society. Effective engagement requires an other-centeredness that is far from universal in academic circles. Even in his rich theoretical work on fiduciary duty, Lyman aims to equip lawyers. For example, he explains that:

[Altering] the prevailing business discourse and norm of self-interest requires a viable alternative vocabulary, and it requires managers brave enough—and faithful enough—to invoke it. Doing so can, over time, especially if instilled by respected teachers during the formative education period, alter beliefs and norms about the appropriateness and usefulness of such language. This, in turn, can alter institutional practice and make such language and modes of thought pervasive. This will not eradicate the deep, self-interested impulses of fallen humanity, but it will allow Christian managers to frame, and argue for, a redemptive counterpoise to those impulses.³¹

To aid this effort, he has drafted model fiduciary duty advice for lawyers to use in counseling corporate officers and managers—actually telling them exactly how to do it based on his belief that:

[P]ersons who, in strong language, are told by a respected figure, such as legal counsel, that they owe a special responsibility to protect and advance the interests of others are more likely to refrain from negative conduct, and engage in positive conduct, than are people who believe they can solely advance their own interests.³²

In the end, Lyman's scholarship aims to equip others to teach truths about the corporation's capacity for good.

Lyman's work shines with the sense that the practice of law is a noble calling, and there is no greater purpose that we can serve as law professors than to help lawyers do excellent work that will make the world a better place. He does this by pushing scholars, courts, attorneys, and students to recognize that we

31. Johnson, *A Role for Law and Lawyers in Educating (Christian) Business Managers About Corporate Purpose*, *supra* note 20, at 30–31.

32. Lyman Johnson, *Having the Fiduciary Duty Talk: Model Advice for Corporate Officers (and Other Senior Agents)*, 63 *BUS. LAW.* 147, 155 (2007).

have too often failed to unlock the full potential of the corporate form to contribute to human flourishing.