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# Competing Visions of the Corporation in Catholic Social Thought

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**Abstract**

Catholic Social Thought (CST) is coherent body of principles concerning the organization of social and economic life drawing on the inspiration of natural law, Thomism, the Gospel and the tradition of Christian personalism. While valuing the creative energy of capitalism and its contributions to the production of wealth, it is often highly critical of the inequalities generated by capitalism, its tendency to promote materialistic consumerism and capital's devaluation of the dignity of work. While not easily characterizable as "right" or "left", CST thinking about corporate social responsibility and corporate governance has become split between interpretations emphasizing the importance of economic liberty to human dignity (a central CST value) and those deriving from a much more communitarian conception of that dignity. This paper contests the neoconsevative positions articulated principally by Michael Novak, and identifies the core CST premises that lead to a much more communitarian vision of the corporation. In so doing, it emphasizes affinities between that vision and secular views of the corporation derived from the critical and legal progressive traditions.

# Competing Visions of the Corporation in Catholic Social Thought

Mark A. Sargent[*]

## I. Introduction: Can Catholic Social Thought Help Us Understand Corporations and the Law of Corporations?

The threshold question for legal scholars contemplating Catholic Social Thought (CST) is whether CST can help us in our two principal tasks as legal scholars: describing the operation of the legal system and prescribing how the legal system should operate. Those of us interested in the law of corporations and other business associations,[1] and the closely-related field of securities regulation should ask whether CST can add anything to our understanding of how the relevant law operates and to the recommendations we make about that operation. In particular, we should ask whether CST provides a basis for critique of the norms operative in corporate law theory.

On a superficial level, the answer to that question is easy. CST can provide a normative framework on the basis of which we can perform our descriptive and prescriptive tasks. In that sense, CST is not *functionally* different from the other normative frameworks, either acknowledged or unacknowledged, that inform our work on legal issues, whether those frameworks are utilitarian, pragmatic, critical, "progressive" or something else. When we get down to the hard work of articulating and applying CST as a normative framework, however, the question becomes more difficult. There are conceptual and practical problems that make it difficult to explain precisely *how* CST can operate as such a framework for understanding the law of corporations.

For *Catholic* legal scholars this question of "how" is an urgent one, because for us CST is not just another possible normative framework that we can choose or not choose to take seriously based on intellectual persuasiveness, our curiosity, or fashion. CST is wound intricately into our beliefs and deeply rooted in the Gospel and Catholic natural law traditions. It is thus potentially a challenge to our assumptions about how law should operate. This does not mean that we need to treat every iteration of the social tradition as incontrovertible truth. To the contrary, CST is by definition a sphere of prudential judgment in which we try to discern the meaning of our faith for complex questions of social and economic life. It thus allows for disagreement, change and

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[*] Dean and Professor of Law, Villanova University School of Law. Many thanks to Steve Bainbridge and Barbara Wall, who provided very different but equally helpful comments on drafts. I look forward to engaging with Steve in the future on both our areas of agreement and disagreement about Catholic Social Thought. Thanks also to the participants in a workshop on Religious Values and Corporate decisionmaking sponsored by Fordham University School of Law, where I presented a version of this paper.

[1] For simplicity's sake, I will use the terms "corporation," "law of corporations" or "corporate law" to refer to all types of business association and the pertinent law.

development in understanding.[2] But CST does embody a coherent world view centered on the core principles of human dignity, the common good, the reciprocity of rights and obligations, the contingency of property rights, solidarity, subsidiarity, and the preferential option for the poor.[3] These are not merely a series of well-meaning platitudes. They have substantive content that should influence how choices are made in the real social and economic worlds. Taking those principles seriously means that Catholic corporate law scholars are faced with the challenge of understanding how CST can be translated into a normative framework for a critical understanding of current corporate law theory. Non-Catholic corporate law scholars also may find that CST principles will resonate with purely secular critiques of the dominant corporate law theoretical paradigm.

### *A. The Problem of Translation*

How does one translate the broad moral norms established in papal documents and bishops' statements into guiding legal principles for the resolution of specific legal problems in the law of corporations? While those documents and statements obviously concern themselves with the goals of economic life, the organization of economic institutions, the relationship between labor and capital, and the moral constraints upon capitalism, they operate at a level of considerable generality. They also usually avoid making specific policy recommendations, recognizing the hierarchy's limited expertise, leaving questions of application to the prudential judgment and moral discernment of the laity. While CST can provide a set of relevant moral norms, much groundwork needs to be done before we can construct a CST theory of the corporation and a CST-inspired method of resolving problems in the law of corporations. Doing that groundwork will require, however, recognition of some major disagreements within the CST tradition itself which are particularly relevant to understanding how the question of the corporation and corporation law should be approached.

### *B. Whose CST?*

One of the consequences of the general and open-ended quality of the key CST documents, and the consequent deferral to the laity's judgment in interpreting and applying CST principles to concrete problems, is a wide diversity of opinion about what CST means or requires. CST, of course, cannot be situated on a traditional left/right axis. It is a distinctive body of thought with its own goals, premises and core values. Some of its aspects tend to resonate with the left, such as its communitarian ethos and concern with the excesses of capitalism, and other aspects appeal to the right, such as its insistence on the dignity of life (including unborn life) and the way the principle of subsidiarity supports a limited conception of state power. CST arrives at those positions, however, for reasons that may have little to do with the philosophical premises of the secular political left or right. CST criticizes capitalism, for example, because its modern manifestations

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[2] For citations to sources discussing this characteristic of Catholic social thought [hereinafter referred to as CST], *see* Stephen M. Bainbridge, *The Bishops and the Corporate Stakeholders Debate*, 4 VILL. J. L. & INVEST. MGMT. 3, 4 n. 10 (2002) *at* www.law.villanova.edu/shared/joflawandinvmgmt/docs/fall2002volume4number1.pdf [hereinafter *Bishops*].

[3] For a concise summary of these core principles in their relevance to law, *see* Lucia Silecchia, *Reflections on the Future of Social Justice*, 23 SEATTLE UNIV. L. REV. 1121 (2000).

contribute to a soul-less, materialistic, isolating consumer culture violative of true human dignity, not because CST inherently favors state ownership of the means of production. CST's concept of subsidiarity, however, recognizes a vigorous role for government in promoting social justice. While not socialistic in its premises, subsidiarity insists that higher authorities (such as governments) have a responsibility to pursue justice when subordinate (i.e., private) authorities are unwilling or unable to do so. Even more important, CST resists characterization as "left" or "right," because it is a coherent, organic whole, with its unique elements intended to be interdependent and mutually reinforcing.

CST has, however, developed something that can be called left and right wings, for want of better labels. These wings result from varying emphasis on different parts of CST, and reflect the ideological predispositions brought to the understanding of CST. Sometimes the process of interpretation is little more than superficial, highly selective cherry-picking of CST concepts (or rhetoric), to buttress positions the interpreter already holds. Sometimes the tilt to the right or the left results from principled convictions about what CST (or, more generally, Catholicism or Christianity) "really" means. This can turn into a bitter controversy over which version of CST is more "authentically" Catholic, a controversy reflecting fundamental disagreements among Catholics today about what it means to be Catholic that amount to a culture war. Compare, for example, Michael Perry,[4] who noted that "authentically Christian premises do not yield Burkean social conservatism" and Paul Tillich, who stated that socialism "is the only possible economic system from the Christian point of view,"[5] with Michael Novak[6] and the writers associated with the Acton Institute,[7] who derive a profoundly anti-statist emphasis on the free market from CST and Christian principles generally.

CST's vulnerability (if that is the proper word) to highly disparate, ideologically conflicting interpretations and applications is particularly evident in the thinking about CST's meaning for the corporation and the law of corporations. Indeed, two competing visions have developed, which collectively show both the potential fruitfulness and the unsettled nature of CST as a normative framework for thinking about law. One of those visions, perhaps the one usually associated with CST, is essentially communitarian. The other rejects many of the premises of the communitarian vision, and regards them as secular, leftist intrusions into genuinely Catholic thought. It emphasizes, instead, the importance of liberty, especially economic liberty, to the flourishing of the human person. My purpose in this paper is to outline those competing visions, and to ask what the emergence of such contrasting views from CST has to tell us about the meaning of CST for the law. My conclusion will be that the vision of the corporation articulated by Michael Novak and other Catholic neo-conservatives, and put forward as a genuine, indeed the most genuine expression of CST, is actually based on a highly selective, ideologically driven and ultimately misleading reading of CST. As such, Novak's understanding of the corporation (and its relationship to the state) does not provide a reliable basis for discerning CST's meaning for

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[4] MICHAEL J. PERRY, UNDER GOD? RELIGIOUS FAITH AND LIBERAL DEMOCRACY 77 (2003).

[5] *Quoted in* MICHAEL NOVAK, CATHOLIC SOCIAL THOUGHT & LIBERAL INSTITUTIONS, FREEDOM WITH JUSTICE 12 (2d ed. 2000) [hereinafter CATHOLIC SOCIAL THOUGHT & LIBERAL INSTITUTIONS].

[6] For discussion of NOVAK, *see infra*, notes 28-55 and accompanying text.

[7] For information about the Acton Institute and links to the works of authors associated with it, see the Institute's website *at* http://www.acton.org.

corporate law. Of greater potential interest is the work of Stephen Bainbridge, who aligns himself with Novak, but who uses the analytical tools of law and economics to critique in a more sophisticated and concrete way both the communitarian norms and specific applications of CST. Whether Bainbridge has positioned himself as a critical voice *within* the social tradition, or *against* the tradition, remains to be determined. Resolving that question will be important to determining CST's potential relevance for corporate law.

## II. The Communitarian Vision

### *A. The Corporation as a Community and In the Community*

The mainstream CST vision of the corporation is communitarian. This vision derives from a cluster of CST concepts. The key concept is anthropological: an understanding of the human person as essentially social. As a social being, the person is not merely an autonomous bearer of rights, but part of a community that should be ordered toward the common good, and in which rights and duties are reciprocal. In this view, property and profits are not evil, but are not ends in themselves; they are instrumental to genuine human flourishing and for the production of the common good. These concepts are central to a notion of the corporation *as* a community, in which the profit motive, while entirely legitimate, is essentially just an "indicator that a business is functioning well."[8] In this vision, the corporation is an institution: (i) that must be dedicated to the flourishing of its employees as human beings; (ii) in which the shareholders' rights of ownership are constrained by duties to others within the corporate community; (iii) whose managers must concern themselves with the common good; and (iv) which, as a matter of Christian anthropology, must produce not just wealth, but the conditions under which human persons may flourish spiritually.[9] This approach recognizes that the corporation will still be faced with tragic choices that may result in adverse consequences for some stakeholders, but it insists that communal values, and the conditioned, reciprocal nature of rights be taken seriously as those choices are made. An image of the corporation as a human community has been developed eloquently in Professor Scott FitzGibbon's[10] work, as well as in the work of economists and business ethicists drawing on the Catholic Social tradition.[11]

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[8] POPE JOHN PAUL II, CENTESIMUS ANNUS¶35, *available at* http://www.osjspm.org/cst/ca.htm. *See also* U.S. CATHOLIC CONF., CATECHISM OF THE CATHOLIC CHURCH ¶ 2432 (2d ed. 1997) [hereinafter CATECHISM] ("Those responsible for business enterprises are responsible to society for the economic and ecological effects of their operations. They have an obligation to consider the good of persons and not only increase of profits.").

[9] J. Michael Stebbins, *Business, Faith and the Common Good*, ST. JOHN'S UNIV. REV. BUS., Fall 1997, at 5 ("The purpose of the economic order is to provide a standard of living that not only meets people's basic physical needs . . . but also facilitates their pursuit of higher values, including the highest value of all, the ultimate goal of union with God."). This notion is deeply rooted in the CST conception of work. In reflecting on Pope John Paul II's elaboration of this concept, which emphasizes that work must be understood in the subjective sense, Jean Bethke Elshtain has written that: "Human beings are intentional beings who realize their humanity in and through work. It follows that *the primary value of work cannot be measured in simple economic terms but in the fact that one is doing it as a person*." (emphasis in the original). Jean Bethke Elshtain, *Catholic Social Teaching and the Meaning of Work*, *in* PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, WORK AS KEY TO THE SOCIAL QUESTION: THE GREAT SOCIAL AND ECONOMIC TRANSFORMATIONS AND THE SUBJECTIVE DIMENSION OF WORK 31,33 (2002) [hereinafter WORK AS KEY].

[10] *See* Scott Fitzgibbon, *"True Human Community": Catholic Social Thought, Aristotelian Ethics, and the Moral Order of the Business Company*, 45 ST. LOUIS UNIV. L.J. 1243 (2001).

[11] *See*, for example, the authors who contributed to RETHINKING THE PURPOSE OF BUSINESS, INTERDISCIPLINARY

The communitarian vision is also manifest in CST conceptions of the corporation *in* the community. This conception of the corporation in the community is complex. At its most general level, it draws on Pope John Paul II's critique of capitalism.[12] To the extent that the corporation's determined pursuit of profit transforms greed into a virtue, and treats acquisition of wealth as an end in itself, it contributes to the spiritual emptiness of a materialistic culture and undermines the common good. One of the principal themes of the Pope has been the ongoing tension between modern capitalism and Christian anthropology that results from capitalism's tendency to instrumentalize human persons rather than treat them as an end in themselves.[13] The Pope's deeply personalist view of the meaning of work, which insists on the priority of the subjective experience of work, leads him to insist upon a subordination of the pursuit of profit to the creation of a participatory community.[14]

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ESSAYS FROM THE CATHOLIC SOCIAL TRADITION (S.A. Cortright & Michael J. Naughton, eds., 2002) [hereinafter RETHINKING THE PURPOSE OF BUSINESS].

[12] For an excellent summary of that nuanced critique, *see* CHARLES E. CURRAN, CATHOLIC SOCIAL TEACHING 1891-PRESENT, A HISTORICAL, THEOLOGICAL AND ETHICAL ANALYSIS 204-09 (2002) [hereinafter CATHOLIC SOCIAL TEACHING]. For discussion emphasizing the critical nature of Pope John Paul II's thinking about capitalism in relation to his critique of communism, *see* Wieslaw Piatkowski, *Ethical Foundations of the Economy in Light of the Encyclicals of Pope John Paul II*, ST. JOHN'S UNIV. REV. BUS., Fall 2001, at 29, *available at* www.stjohns.edu/pls/portal30/sjudev.retrieve_edu_img_data?img_id=1109.

[13] *See* Charles M. Clark, *Catholic Social Thought and Economic Transitions*, ST. JOHN'S UNIV. REV. BUS., Fall 2001, at 25 *available at* www.stjohns.edu/pls/portal30/sjudev.retrieve_edu_img_data?img_id=1109 ("The key distinction that CST makes is that humans can never be treated as means to an end, for they are the ends."). For elaboration on the connection between such instrumentalization and what John Paul II calls "alienation," see Jean-Yves Calvez and Michael J. Naughton, *Catholic Social Teaching and the Purpose of the Business Organization*, *in* RETHINKING THE PURPOSE OF BUSINESS, *supra* note 11, at 3.

> John Paul II describes this alienation in business as ensuring "maximum returns and profits with no concern whether the worker, through his own labor, grows or diminishes as a person." This alienation in part stems from persons' refusal to transcend themselves by instrumentalizing everything, including their own relationships, within the firm. For example, managers treat employees well not because they are created in the image of God, but because it will maximize shareholder wealth. This pervasive logic of instrumentalization within corporations today obstructs the habits of mind and heart by which persons authentically give themselves to God and others.

*Id*. at 12.

[14] *See* Curran's discussion of the encyclicals *Laborem Exercens* and *Centesimus Annus*, CURRAN, CATHOLIC SOCIAL THOUGHT, *supra* note 12, at 195, 204-09, with respect to this point. The subordination of profit in John Paul II's thinking is not a function of naive anti-capitalism or leftist bias, but an expression of his Christian personalist understanding of the meaning of work.

> Property rights are real but are not absolute and must be subordinated to a common good. John Paul calls for creative labor-management alliances, worker-sharing in management and profits, democratization of the workplace – this not so much in the interest of enhancing the bottom line of profit but of offering to the person working a broader, richer set of possible meanings of his or her work.

Elshtain, *supra* note 9, at 34. For criticism of the CST valorization of labor participation in workplace governance, *see* Stephen M. Bainbridge, *Corporate Decisionmaking and the Moral Rights of Employees: Participatory Management and Natural Law*, 43 VILL L. REV. 741 (1998) [hereinafter *Corporate Decisionmaking*]. Bainbridge argues, *inter alia*, that the emphasis on the importance of participatory rights is misplaced for several theoretical and practical reasons, including employees' lack of interest in exercising such rights. From a CST perspective, however, the important thing is the availability of such rights; that employees have varying degrees of interest in exercising them is predictable. Predictable, but lamentable. Indifference to such rights may be a sign of defects in community.

At a more specific level, the corporation's social responsibilities within the community are a major theme of the communitarian vision. Those responsibilities extend from concern for environmental stewardship to prevention of global labor inequality to non-cooperation with oppressive or racist government regimes, and include much more.[15] The vision also may include a critique of globalization, and a tendency to identify large multinational corporations as prime actors in an economic movement seen as an affront to solidarity.[16]

In short, the communitarian vision of the corporation *as* a community and *in* the community includes a critical set of assumptions about how corporations should operate. This critical posture is evident in the specific communitarian recommendations for corporate law.

### *B. Implications for Corporate Law*

The CST communitarian vision of the constitution has two major, related implications for the law of corporations. First, its sense of the corporation as an actor *in* the community encourages a robust view of corporate social responsibility. In this view, the corporation's responsibilities as a social actor extend beyond mere compliance with the external framework of laws relating to labor, the environment, safety and health regulation and the like. This view rejects the presumption that corporations should be required only to obey the laws constituting the vast (and costly) web of regulatory constraints surrounding corporations. Instead, the law of corporate governance should create structures, incentives and penalties designed to ensure corporate awareness of and accountability for its social responsibilities: a legally-constituted social conscience. Legal rules designed to foster a greater sense of corporate social responsibility, even at the expense of profit to the shareholders, are, from this perspective, essential if corporations are to contribute to the common good, rather than use their vast power to undermine it.

Perhaps the best example of this concept of corporate governance is the activity of the Catholic religious orders, who use their status as shareholders under the Securities and Exchange Commission's proxy rules[17] governing shareholder proposals to place a variety of social justice concerns (themselves derived from CST principles) on corporate management's proxy statements.[18] Such social justice resolutions rarely generate enough shareholder votes to be approved, but they have the effect of publicizing the company's involvement in questionable social practices, focusing shareholders' attention on the issue, and placing the issue more firmly on

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[15] These types of CST concern are expressed in the activism of the Catholic religious orders who attempt to place such social justice concerns on the agendas of public corporations. See *infra*, notes 17-18.

[16] The negative effects of globalization have been one of the major preoccupations of the Jesuits' Center of Concern, which in the '90s became highly critical of the International Monetary Fund and the World Bank, particularly with respect to global labor inequality. *See* the Center's website *at* http://www.coc.org.

[17] For citations to those rules and relevant SEC no-action letter and discussion of the shareholder proposal process, *see* Mark A. Sargent and Dennis R. Honabach, PROXY RULES HANDBOOK §§ 5.1-5.46 (ed. 2003).

[18] The Catholic religious orders often coordinate their use of the SEC shareholder proposal mechanism through the Interfaith Center on Corporate Responsibility. See the Center's website *at* http://www.iccr.org. Among the issues identified by the website as among its priorities are Access to Health Care; the Contract Supplier System (i.e., sweatshops, wage inequality and the lack of a sustainable living wage, unfair labor practices); Environmental Justice; Global Warming; and Violence and the Militarization of Society. Among the many Catholic orders listed as members are the Adrian Dominican Sisters, Congregation of Sisters of St. Agnes, Franciscan Holy Name Province of New York, Jesuit Conference, Maryknoll Fathers and Brothers, Missionary Oblates of Mary and Sisters of Loretto.

management's agenda. An example would be a shareholder resolution criticizing the company's environmental practices and requiring management to change them. The resolution itself expresses the CST notion of responsibility for stewardship of creation; its placement on the corporate agenda reflects the CST vision of corporate responsibility for the common good. In the communitarian vision, therefore, the SEC proxy rules are an appropriate use of government intervention to promote corporate engagement with the common good.[19]

This robust vision of the corporation's responsibilities carries with it consequences for how the corporation should be governed. It is not much of a conceptual leap from the assumption that a corporation should be governed in a way that enhances its sense of responsibility to the external community to the assumption that it should be governed as if it were itself a community. What links both assumptions is an even more fundamental one: corporations should be managed not just to maximize shareholder wealth, but to meet their external and internal communal responsibilities. In other words, the communitarian vision breaks sharply with the shareholder wealth maximization norm that prevails in current economic theory and legal doctrine.[20] In this vision,

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[19] Related to this use of the shareholder proposal mechanism are so-called "ethical" or "socially responsible" investment policies followed by some Catholic institutions and religious orders. These policies may require disinvestment in issuers who raise social justice concerns because of their investment in weapons manufacture, environmental degradation, unjust global wage practices, racism or political oppression. These policies reflect the traditional Catholic "principle of cooperation" which requires avoidance of cooperation in evil, as articulated in U.S. CATHOLIC BISHOPS, STATEMENT ON SOCIALLY RESPONSIBLE INVESTING (Nov. 1991), *available at* http://www.osjspm.org/sri-uscc.htm. The Bishop's Statement, however, does not specify exactly the scope or limits of non-cooperative investment practices, leaving it to individual Catholics and Catholic institutions to determine with which evils they should avoid cooperating. Unsurprisingly, there is a growing gap between practices that emphasize social justice concerns, and those that regard such emphases as incoherent, arbitrary, biased toward leftist concerns, overly broad in their condemnation of businesses such as arms manufacture, and insufficiently attentive to what are regarded as more fundamental Catholic moral concerns. *See* Samuel Gregg, *Investing in Morality*, 4 VILL. J. L. & INVEST. MGMT. 57, 61-63 (2002) ("Ethical investment funds rarely cater to those who believe that marriage is a basic good, that adultery is always wrong, or that intentional abortion, or formal cooperation in intentional abortion, is a mortal sin.") *at* www.law.villanova.edu.shared/joflawandinvmgmt/docs/fall2002volume4number1.pdf; Samuel Gregg, *Sister Nicole and Ethical Investing* (Acton Commentary) (Oct. 22, 2003), http://www.acton.org/policy/comment/article.php?id=161 ("The Standard lists of ethical priorities also suggests that many 'socially responsible' criteria have more to do with fashionable causes than with the objective moral life."). Such critiques of Catholic "socially responsible" investing have led to the creation of "morally responsible" funds that invest only in companies who comport with certain aspects of Catholic moral teaching. An example is the Ave Maria Mutual Funds, http://www.avemariafund.com. The Funds' investment policy is as follows:

> Our Funds take a pro-family approach to investing, with a proprietary screening process that examines corporate compliance with Catholic teaching regarding abortion, pornography, and policies that undermine the sacrament of marriage. Investments are made only in companies whose operations do not violate the core teachings of the Roman Catholic Church as determined by the Funds' Catholic Advisory Board.

http://www.avemariafund.com/avemx.htm.

[20] For the norm's application in corporate law, see FRANK H. EASTERBROOK AND DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 35-39 (1991); Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23 (Fall 1991); Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423 (1993). Disagreement over the norm, however, is at least as old as the Berle-Dodd debate from the 1930s. *See* William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737, 761-62 (2001) ("Each generation raises anew the same questions about corporate accountability because corporations continue to bear importantly on our social and political lives, and external

the corporation is governed for the benefit of a range of all the human persons involved in the corporate enterprise, which is conceptualized as a community in which stakeholders such as employees have more than a contractual claim. In this vision, furthermore, stakeholders' selfish interests do not simply replace or add themselves to shareholders' selfish interests. There is a shift in emphasis away from wealth maximization as an end in itself, and towards creating the conditions of human flourishing in a broader, relational sense. Managers must do more than mediate among interest groups; they must strive to identify and act upon what is the common good.[21]

The norm contested by this version of CST is well established. In its simplest form, the shareholder wealth maximization norm holds that corporate managers should strive to increase shareholder wealth, not that of other corporate stakeholders. Corporate law theory divides over the best means of maximizing shareholder wealth, particularly in light of the agency problem: managers' tendency to maximize their own wealth, rather than the shareholders'. There are sharp debates over the relative advantages of mandatory rules versus enabling rules in state corporate law, the need for federal regulation of public corporations, the proper limits of private contracting, whether legal rules should facilitate or hinder corporate takeovers, and whether corporate governance should be controlled by managers, directors or shareholders.[22] All these debates, however, are over a common question: how does law best maximize shareholder value? Only at

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regulation can never bring corporate results and perceived social goals into congruence.”).

[21] The CST communitarian vision thus distinguishes itself from the secular stakeholder model of corporate governance as well as the shareholder wealth maximization norm. *See*, for example, James Gordley's application of Thomistic principles to this problem:

> Although neither Aristotle nor Thomas contemplated the modern corporation, we have been proposing what one might call an Aristotelian or Thomistic model of corporate responsibility. It has an ethical foundation that both the shareholder and the stakeholder models lack: it is founded not on what each group wants for itself, but on what is normatively good for that group and for others. Unlike the stakeholder model, it explains why the duty of managers to seek a profit is different from their other obligations. Managers who do so will be behaving exactly as they should, provided that they and others are practicing virtues never mentioned by the economists.

James Gordley, *Virtue and the Ethics of Profit Seeking*, *in* RETHINKING THE PURPOSE OF BUSINESS *supra* note 11, at 65, 78. Rejection of the stakeholder norm was also crucial to the work of Monsignor John A. Ryan, who rejected the notion of the corporation as merely a collection of selfish interests, in favor of a vision of the “just” or “virtuous” corporation. For a concise discussion of Ryan's theory of corporate governance, see David W. Lutz, *Christian Social Thought and Corporate Governance*, *in* RELIGION AND PUBLIC LIFE: THE LEGACY OF MONSIGNOR JOHN A. RYAN 121 (Robert G. Kennedy, et. al., eds., 2001). On Ryan's analysis as an alternative to the stakeholder theory, *see id*. at 134. This is obviously a highly aspirational view of corporate managers, and does not grapple seriously with the problem of agency costs.

[22] For a useful critique of both managerialist and shareholder primacy models in favor of a director primacy model, *see* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, UCLA SCHOOL OF LAW RESEARCH PAPER No. 02-06, Feb. 2002, *at* http://ssrn.com/abstract=300860. Bainbridge argues that control of the corporation is vested in neither the shareholders nor the managers, but in the board of directors. The board of directors thus is not a mere agent of the shareholders, but rather a *sui generis* body (a sort of platonic guardian) serving as the nexus of the various contracts making up the corporation. Note that Bainbridge's director primacy model does not challenge the shareholder wealth maximization norm: the directors' primary responsibility is still to maximize shareholder value. It is, instead, a rejection of the notion that shareholder value in the public corporation is best maximized through shareholder dominance of corporate governance (“shareholder primacy”). Bainbridge makes this distinction at Bainbridge, *supra* note 2, at 3 n. 4.

the margins is the shareholder wealth maximization norm questioned.[23]

The communitarian vision, in contrast, questions that norm directly. By conceptualizing the corporation as a community, it posits managers' responsibility to manage the corporation for the benefit of the non-shareholder members of its community, as well as in the interest of the shareholders. This position expresses the CST concept that profits, while essential to the success of the corporation, are merely instrumental, and not the ultimate purpose of the corporation, thus implicitly rejecting, or at least de-emphasizing the shareholder wealth maximization norm.[24] Supporting devaluation of that norm is CST's understanding of shareholders' property rights as enmeshed in a web of reciprocal duties, and that protection of such rights is appropriate only to the extent that such protection contributes to the common good.[25]

The CST communitarian vision of the corporation is also at odds with the widely-accepted Coasean theory of the corporate firm as a nexus of contracts.[26] The "corporation," in this view, is a convenient legal fiction for the intersection of providers of debt and equity capital, labor, managerial services and other inputs into an enterprise that is "collective" only in an instrumental

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[23] *See, e.g.*, MARJORIE KELLY, THE DIVINE RIGHT OF CAPITAL, DETHRONING THE CORPORATE ARISTOCRACY 107-26 (2001) (arguing that corporate wealth does not legitimately belong only to stockholders, but to those who create the wealth — employees); LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY, AMERICA'S NEWEST EXPORT 84-94 (2001) (arguing that the goal of shareholder wealth maximization is not only destroying the corporation, but also the social fabric).

[24] In CST, profitability is most frequently understood through the distinction between "foundational" goods and "excellent" goods. Foundational goods are ones we need in order to obtain other goods. Examples would include corporate efficiency and profitability. Excellent goods are those that support the internal development of the person, such as friendship, moral cultivation, or knowledge of and love for God. This distinction is crucial to understanding the purpose of the corporation.

> Profitability and efficiency are worthy goals because their realization is foundational to the development of the business as a whole. Nevertheless, foundational goods are not the full story. They account neither for the ultimate motivation of our work nor for the first principles of the business organizations in which we do our work. The excellent goods of human development are what really motivate us.

HELEN J. ALFORD, O.P. & MICHAEL J. NAUGHTON, MANAGING AS IF FAITH MATTERED, CHRISTIAN PRINCIPLES IN THE MODERN ORGANIZATION 45 (2001). This limited approbation of the profit motive is typical of mainstream CST. *See, e.g.*, Curran's discussion of Pope John Paul II's conditional recognition of "the legitimate role of profit" in *Centesimus Annus*. CURRAN, CATHOLIC SOCIAL TEACHING, *supra* note 12, at 206-09.

[25] *See, e.g.*, ALFORD & NAUGHTON, *supra* note 24, at 47 ("By elevating shareholder wealth to the status of the ultimate good, the shareholder model in effect erects a 'tyranny of foundational goods,' inhibiting managers from considering more excellent goods except as instruments to increase profits.").

[26] The foundational theoretical works on the nexus of contracts theory of the corporate firm are R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA (N.S.) 386 (1937); Michael C. Jensen and William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) and Armen A. Alchian and Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972). For elaboration of the contractarian theory as applied in corporate law, *see* Frank H. Easterbrook & Daniel R.Fischel, The *Corporate Contract*, 89 COLUM. L. REV. 1416 (1989); Thomas S. Ulen, *The Coasean Firm in Law & Economics*, 18 J. CORP. L. 301 (1993). For critical analysis, *see* Melvin A. Eisenberg, *The Conception that the Corporation is a Nexus of Contracts*, 24 J. CORP. L. 819 (1999); Jeffrey Nesteruk, *Persons, Property, and the Corporation*, 39 DEPAUL L. REV. 543 (1990); William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261 (1992). For a reply in defense of the contractarian model, see Fred. S. McChesney, *Economics, Law, and Science in the Corporate Field: A Critique of Eisenberg*, 89 COLUM. L. REV. 1530 (1989).

sense, with the participants bound to each other only contractually, and bound within a firm, rather than across markets, because of the economic efficiency of organizing production in that manner. If corporate stakeholders' rights are conceived in and determined by contract, there would be little room for an argument that there are non-contractual claims derived from membership in the corporate community that managers must honor. Indeed, the belief that a corporation is *only* a nexus of contracts, and not a human community bonded by extra-contractual ties, may be regarded as the very antithesis of the CST understanding of the corporation as a community. The largest challenge for this understanding, however, is finding a meaningful way to talk about the public corporation, with its highly fluid set of stakeholders, most of which have very specific, impersonal and often transient relationships to the corporation, as a "community."

This version of CST thus has much in common with those strains of "progressive" corporate law theory[27] that emphasize the need for legal and regulatory structures that would institutionalize a broad sense of corporate social responsibility beyond mere law compliance. It would also cut through current arguments among corporate law theorists about the best way to maximize shareholder value - - enhancement of managerial discretion, board empowerment, or facilitating shareholder participation in governance - - by proposing a broader conception of the purposes of corporate enterprise and of the common good as the focus of corporate decisionmaking.

## III. The Argument From Liberty

### *A. Michael Novak's Theology of the Corporation*

What I have called the communitarian vision of CST might be called a "left communitarian" vision, although I have argued that the traditional right/left dichotomy does not fit Catholic teaching very well. We may, however, call this vision "left," because some of its sympathies and antipathies point in that direction: a comfort with restraints on the exercise of property rights and government intervention in economic decisions and a critical attitude toward the excesses of capitalism. Its character is best revealed, however, by contrast to the version of CST articulated most strongly by Michael Novak in his very different reading of the meaning of "communitarian" for economic life in general and the corporation in particular.[28] His grounding of CST in a theological, political and economic concept of the liberty of the individual produces

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[27] At the core of the "progressive" corporate law movement are critiques of the shareholder wealth maximization norm and the contractarian model. *See generally*, PROGRESSIVE CORPORATE LAW (Larry Mitchell ed., 1996); Shann Turnbull, THE CASE FOR INTRODUCING STAKEHOLDER CORPORATIONS, *at* http://ssrn.com/abstract=436400. For a critical response, *see* Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856 (1997). Rejection of the shareholder wealth maximization norm has also been central to critiques of corporate governance from the standpoint of gender theory (Marleen A. O'Connor, AMERICAN CORPORATE GOVERNANCE AND RESILIENT FAMILIES: INVESTING IN CHILDREN'S HUMAN CAPITAL IN TURBULENT TIMES, *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=439420); critical race theory (Cheryl L. Wade, *Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination*, 76 TUL. L. REV. 1461 (2002)); and queer theory (Kellye Testy, *Adding Value(s) to Corporate Law: An Agenda for Reform*, 34 GA. L. REV. 1025 (2000)).

[28] *See* NOVAK, CATHOLIC SOCIAL THOUGHT & LIBERAL INSTITUTIONS, *supra* note 5, at 195-208 (emphasizing the role of the "communitarian individual" in non-state associations, such as corporations, that mediate between the individual and the state).

not just a very different philosophical emphasis or tone in discussions of the corporation,[29] but very different policy prescriptions. Novak's body of thought is often in tension with what the bishops and other proponents of CST believe that the tradition means,[30] although he believes that his vision is deeply consistent with that of Pope John Paul II.[31]

While articulated at length in several works, Novak's basic argument is straightforward. For Novak, the corporation is an extraordinarily important invention. Indeed, it is "an invention of law that made democratic capitalism possible."[32] Democratic capitalism, he argues, is what lifted humanity out of immemorial poverty, recurrent famine and stasis by replacing traditional societies with a differentiation of society into three systems: a political system, an economic system and a moral-cultural system, each essentially independent of the other.[33] This differentiation was critical because it created the conditions of individual liberty essential to creativity, change and development. This idea:

> interprets human society as so composed by the Creator that its greatest source of social dynamism is the imagination, initiative and liberty of the human individual. It is an idea whose express purpose is to increase the material wealth of all nations, at the very least eliminating famine and poverty.[34]

Historically, the corporation was crucial to the success of democratic capitalism.

> The most original social invention of democratic capitalism, in sum, is the private corporation founded for economic purposes. The motivation for this invention was also social: to increase "the wealth of nations," to generate (for the first time in human history) sustained economic development. This effect was, in fact, achieved. However, the corporation—as a type of voluntary association—is not merely an economic institution. It is also a moral institution and a political institution. It depends upon and generates certain moral-cultural virtues; it depends upon and generates new political forms. In two short centuries, it has brought about an immense social revolution. It has moved the center of economic activity from the land to industry and commerce. No revolution is without social costs and sufferings, which must be entered on the ledger against benefits won. Universally, however, the idea of economic development has now captured the imagination of the human race. This new possibility of development has awakened the world from its

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[29] Among Novak's many writings addressing the economic and legal issues relevant to this discussion are: MICHAEL NOVAK, THE SPIRIT OF DEMOCRATIC CAPITALISM (2002); TOWARD A THEOLOGY OF THE CORPORATION (1990); ON CORPORATE GOVERNANCE, THE CORPORATION AS IT OUGHT TO BE (1997) [hereinafter ON CORPORATE GOVERNANCE]; CATHOLIC SOCIAL THOUGHT & LIBERAL INSTITUTIONS, *supra* note 5. Novak's work has been controversial in Catholic circles. For a description of some of the reactions generated by The Spirit of Democratic Capitalism, *see* ROGER VAN ALLEN, BEING CATHOLIC: COMMONWEAL FROM THE SEVENTIES TO THE NINETIES 89-94 (1993).

[30] Regarding Novak's disagreements with the American bishops and the Catholic left, *see* NOVAK, CATHOLIC SOCIAL THOUGHT & LIBERAL INSTITUTIONS, *supra* note 5, at xvi-xvii. For his analysis of the "six sources of distortion" he regards as influencing the thinking of Church leaders and theologians (both Catholic and Protestant) about corporations, *see* NOVAK, TOWARD A THEOLOGY OF THE CORPORATION, *supra* note 29 at 11-18.

[31] *See, e.g*. Part III, Chapter 13, *in* NOVAK, CATHOLIC SOCIAL THOUGHT & LIBERAL INSTITUTIONS, *supra* note 5, at 219-52 (describing John Paul II as the "Pope of Liberty, Pope of Creativity"). Novak's view of the Pope's understanding of capitalism and the corporation is controversial. *See infra, notes 91-95 and* accompanying text. Novak, however, is not alone in his views. For citations to the work of other American Catholic neo-conservatives who share his perspective on economic issues, see note 91, infra.

[32] NOVAK, TOWARD A THEOLOGY OF THE CORPORATION, *supra* note 29, at 7.

[33] *Id*. at 9-10.

[34] *Id*. at 37.

> economic slumber.[35]

This passage sounds one of Novak's principal themes: the corporation is not just a thing to be used instrumentally, for good or ill. It is a "moral institution." While Novak's language is sometimes unclear, he verges on arguing that the corporation is intrinsically good, particularly when contrasted to the state, for which Novak reserves his deepest suspicions.

> Having been the social instrument by which the bourgeoisie, in "scarce one hundred years, has created more massive and more colossal productive forces than all preceding generations together," the publicly held business corporation is arguably the most successful, transformative, and future-oriented institution in the modern world. It has been far more open, more creative, and infinitely less destructive than the nation-state, particularly the totalitarian state.[36]

The significance of the corporation for Novak, however, lies beyond its contribution to the rise of political capitalism. The corporation's real significance is theological: "the modern business corporation [is] a much despised incarnation of God's presence in the World."[37] In his principal statement of this position, *Toward a Theology of the Corporation*, he finds seven "signs of grace" in the corporation:

- *Creativity*. "The agency through which inventions and discoveries are made is the corporation. Its creativity makes available to mass markets the riches long hidden in Creation. Its creativity mirrors God's. That is the standard by which its deeds and misdeeds are properly judged."[38]

- *Liberty*. "The corporation mirrors God's presence also in its liberty, by which [Novak] mean[s] independence from the state."[39]

- *Social Motive*. "The fundamental intention of the [corporate] system from the beginning has been the wealth of all humanity."[40]

- *Social Character*. "For many millions of religious persons, the daily milieu in which they work out their salvation is the communal, corporate world of the workplace."[41]

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[35] *Id*. at 56.
[36] NOVAK, ON CORPORATE GOVERNANCE, *supra* note 29, at 3.
[37] NOVAK, TOWARD A THEOLOGY OF THE CORPORATION, *supra* note 29, at 39. It is not entirely clear what Novak means by the phrase "incarnation of God's presence." Is it meant literally to define the corporation as being as aspect of *the* Incarnation? That would require some explanation. Or, is it meant to describe the corporation as a manifestation of God's grace, and hence as a sign of God's presence in the world? If so, why is it any more such a sign than any other human creation? The corporation, like the state, has been a powerful instrument for producing the foundational goods essential for human flourishing. Whether one or the other is more of a sign of God's grace is open to question, although it is not clear that the question is an important one, given the tragic extent to which each has been treated as an end in itself in many different historical circumstances.
[38] *Id*. at 44.
[39] *Id*.
[40] *Id*. at 46.
[41] *Id*. at 47.

- *Insight*. "The primary capital of any corporation is insight, invention, finding a better way."[42]

- *Liberty and Election*. "The corporation operates in a world of no scientific certainty, in which corporate leaders must constantly make judgments about reality when not all the evidence about reality is in."[43]

In these seven ways, Novak concludes, "corporations offer metaphors of grace, a kind of insight into God's ways in history," and are places of great moral and theological, as well as historical and economic significance.

Novak's theology is more than a little wobbly. How does corporate creativity "mirror" God's grace? What precisely is "incarnational" about the corporation as distinct from any other human creation? At times, such is his enthusiasm that his "theology of the corporation" verges on an idolatry of the corporation that does not even admit the possibility of critique. Novak does, however, propose an internally coherent view of how the corporation should be viewed by Christians:

- The corporation is a crucial locus for the playing out of God-given human liberty.

- The corporation is an extraordinarily successful instrument for creatively realizing the riches of God's world for the benefit of humanity, and to "serve human needs, desires, and rational interests is also to serve human liberty, conscience, and God."[44]

- The corporation is a communal association that mediates between individuals and the state, allowing collective action while protecting liberty from the overwhelming force of the state.

- The corporation's independence from the state is crucial to its ability to perform those functions.

It should be obvious that Novak's framing of this vision is a response to socialist and Marxist theorists who, he claims, would collapse the boundaries between economic, political and moral-cultural systems essential to Novak's conception of democratic capitalism. His theology of the corporation is thus both an affirmation of the Christian nature of the capitalist world view (or the capitalist nature of the Christian world view) and a pointed critique of a socialist (or, generally, "statist") world view regarded by some as more essentially Christian.

Novak is particularly concerned with countering Catholic or Protestant thinkers (particularly clergy) who approach economic life, or criticize corporations, from standpoints that seem to him particularly misguided. They are often misguided, he frequently points out, because

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[42] NOVAK, TOWARD A THEOLOGY OF THE CORPORATION, *supra* note 29, at 47.
[43] *Id*. at 48-49.
[44] *Id*. at 31.

their education, experience and social prejudices prevent them from really knowing anything about economics or the business world. Even worse, according to Novak, they are either frankly socialist, tainted by an anti-capitalist bias common to intellectuals, afflicted by a "lingering nostalgia" for a Constantinian planned society, in thrall to antique, pre-capitalist notions of economics, or subject to guilt or sentimental notions about poverty and wealth inequality. These misconceptions, he argues, have led too many Catholic and Protestant religious leaders and intellectuals to indulge in criticism of capitalism and corporations that ignores not only their contributions to human welfare but also their identity as manifestations of God's grace.[45] His repeated condemnation of this strand of religious thought on economic life is sweeping, and ignores more nuanced religious critiques of capitalism and its effects, most notably that of CST itself. Nevertheless, he presses his attack even further.

Religious thinkers' critical attitude toward corporations, he argues, demonstrates a failure to appreciate the true meaning of community and subsidiarity. For Novak, "community" depends on the vitality of the many economic, civic, religious and private associations that constrain the power of the state and mediate between it and individuals vulnerable to its power. This anti-statist version of communitarianism (a kind of "right communitarianism") emphasizes how intermediating associations preserve the tripartite division of the economic, political and moral-cultural essential to democratic capitalism and limited government.[46] The integrity of those associations and their independence from the state is preserved by adherence to the principle of subsidiarity as an ordering principle. The business corporation, in Novak's estimation, is perhaps the most important of those associations.

Novak is concerned, however, with more than countering philosophically what he regards as the carping about soul-less capitalism emanating from religious quarters. His insistence on the importance of preserving the independence of corporations leads him to a profoundly anti-regulatory stance, opposition to conceptions of "social justice" involving legally-mandated wealth redistribution or concern for non-shareholder constituencies, and interference with the freedom of corporations to perform their economic functions. This basic stance—valorization of the corporation, rejection of regulatory or legal restraints on corporate liberty, and disdain for the state-imposed conceptions of corporate social responsibility—determines his views on how the law should (or should not) influence the management of corporations.

When focusing directly on current controversies over corporate governance, Novak has articulated a strongly managerialist position. He begins by drawing a sharp distinction between *government*, with all of the checks and balances needed to restrain its power, and *governance* of a

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[45] One of Novak's favorite complaints is about religious thinkers' lack of educational or experiential qualifications for opining about economics or business, as well as their pre-modern, socialist or statist biases about those topics. *See, e.g.*, NOVAK, CATHOLIC SOCIAL THOUGHT & LIBERAL INSTITUTIONS, *supra* note 5, at 15, 56; NOVAK, TOWARD A THEOLOGY OF THE CORPORATION *supra* note 29, at 5-6, 11-18, 59. Novak apparently regards his own view of economic life, and the significance of religion for ordering economic relations, as objective and unbiased, and reflecting a clear-eyed, unsentimental understanding of how the world really operates. Whether Novak's understanding of economics is any better than that of the wooly-minded, impractical leftist clergy he disparages so obsessively is unclear. He is as romantic about corporations and capitalism as some of them may be about the virtues of poverty or pre-modern or socialist economies.

[46] *See generally* NOVAK, CATHOLIC SOCIAL THOUGHT & LIBERAL INSTITUTIONS, *supra* note 28.

corporation, which should be designed to support the corporation's nimbleness and creativity.

> Wise persons do not want governments to act until they are carried forward, like rhinoceroses rising slowly from the mud by the hydraulic force of a very large and durable consensus. But the same wise persons want business corporations to be able to act quickly, even to turn on a dime when they are losing money or when they spot suddenly arising possibilities, to take the risks for which their investors have entrusted them with well-defined executive power.[47]

For Novak, corporate managers should be left free to do what they do best (maximize profits), and certainly should not be criticized by the envious for their allegedly "obscene" compensation, or be "played for patsies" by those who "want to socialize the corporations."[48] "Appeasement" of "movements such as environmentalism, the philosophy of stakeholders, children's rights, and some forms of feminism and gay rights"[49] would be succumbing to "former socialists [who] want to tame the business corporation, make it sit up and dance, perhaps do tricks to music."[50] Novak urges no concessions:

> *to causes dear to statists*, such as executive pay caps, incentives and mandates to cover training and layoffs, constraints on internationalization, demands for a Germanic system of "public interest" corporate directors, and other moves towards the socialization of corporate America.[51]

It is by no means easy to discern exactly who Novak is complaining about in this passage. Who exactly are his "statists," and what exactly is a statist? Are all statists "former socialists?" Would he include in the "statist" category anyone who conceives of a broader role than he does for mandatory, rather than enabling rules in corporate governance? Would the category include those who accept the shareholder wealth maximization norm, but would urge a different balance of regulatory intervention and deferral to private contracting? In Novak's Manichean universe, the common good is served only by the release of legal restraints on economic (particularly entrepreneurial) energies. Accordingly, any state-imposed rules of corporate governance that would constrain corporate behavior for any "social" purpose would divert corporations from the only goal through which they can actually serve the common good: the maximization of shareholder wealth. In any event, Novak repudiates, emphatically and unambiguously, both the general approach and specific positions associated with the left communitarian version of CST thinking about the corporation. Legal rules mandating limits on executive compensation,[52] managerial consideration of the interests of non-shareholder constituencies,[53] and broader corporate social responsibility are anathema.[54]

Novak's analysis of corporate governance nods to Coase and other aspects of economic

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[47] NOVAK, ON CORPORATE GOVERNANCE, *supra* note 29, at 7.
[48] *Id*. at 9, 20.
[49] *Id*. *Cf. supra* note 27, regarding the relevance of such considerations to corporate governance.
[50] *Id*. at 9.
[51] *Id*. at 23.
[52] *Id*. at 24-27 (regarding critiques of executive compensation as "unjust" or "unfair" as reeking of "envy").
[53] *Id*. at 3-9 (distinguishing between managerialist governance of a corporation and participatory government of a state).
[54] NOVAK, TOWARD A THEOLOGY OF THE CORPORATION, *supra* note 29, at 60-61 (arguing that "those critics of the corporation at the Interfaith Center for Corporate Responsibility" need a better theology of the corporation).

theory,[55] but it derives principally from his philosophical emphasis on the centrality of the independence of the business corporation to democratic capitalism, which he regards as essential to human liberty, flourishing and dignity. In that manner, he attempts to link a profoundly anti-statist defense of liberal economics and opposition to legal rules constraining managerial discretion, to CST theological concepts of the common good, human dignity and incarnational humanism.

Novak's encomium to capitalism and the role of the corporation within it presumes a deep affinity between capitalism and Christianity. For Novak, the communitarian interpretation of the social tradition is not an organic, authentic expression of the tradition, but a distortion spawned by leftist bias. Ultimately, he sees himself as vindicating the "real" truth of the tradition. It will be argued below that he has it exactly backwards.

### *B. Beyond Novak: Bainbridge's Integration of Law, Economics and CST*

Stephen Bainbridge has published a series of pioneering articles that seek to define the theoretical relationship between the jurisprudential school of law and economics and CST, and attempts to apply the two approaches to problems of corporate law in an integrated way that identifies both affinities and tensions between them. While Bainbridge speaks admiringly of Novak, employs his rhetoric, and believes his arguments derive from Novak's, he is actually far less dependent on grandiose and questionable theological propositions, and far more sophisticated than Novak in his critical application of economics to CST precepts on the corporation and corporate law. He thus presents a more serious challenge to the communitarian vision than Novak.

Bainbridge's understanding of law and economics rests on the principle that economic analysis can be normative, and that the key norm is wealth maximization, so that "law should seek to increase social wealth, as measured by the dollar equivalents of everything in society."[56] The threshold question, then, is whether "wealth maximization is an appropriate moral norm on which a Christian legal scholar may draw."[57] Bainbridge concludes that it indeed is. In an *apologia* for the use of law and economics analysis by a Christian scholar, Bainbridge begins with the classic defense of wealth maximization as a "rising tide [that] lifts all boats,"[58] and that "wealth maximization may be the most direct route to a variety of moral ends."[59] He follows Novak in asserting that Christian criticism of the norm is often a function of socialist or statist bias in favor of "aid and comfort to the Leviathan state."[60] He agrees, ultimately, with the proposition that "The

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[55] NOVAK, ON CORPORATE GOVERNANCE, *supra* note 29, at 12 (discussing Coase, "The Nature of the Firm," *supra* note 26). Novak's occasional nods to economic theory tend to be superficial make-weights. In using such arguments to lambaste government intervention, he offers nothing about the effect of transactional costs on the efficient allocation of resources or the problem of market failure.

[56] Stephen M. Bainbridge, *Law and Economics*: *An Apologia*, *in* MICHAEL W. MCCONNELL, ROBERT F. COCHRAN, JR., AND ANGELA C. CARMELLA, EDS., CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 208, 209 (2001) [hereinafter *Law & Economics*]. For a more critical discussion of law and economics from a Catholic perspective, *see* George E. Garvey, *A Catholic Social Teaching Critique of Law and Economics*, *in id*. at 224.

[57] *Id*.

[58] *Id*. at 210.

[59] *Id*. at 211.

[60] *See* Bainbridge, *Law & Economics*, *supra* note 56, at 211.

divine plan was indeed that we should enjoy the fruits of the earth and of our own industry, and [wealth maximization] is the best way we have yet devised to organize the latter."[61]

Bainbridge recognizes, however, that a "Christian legal scholar should approach law and economics . . . [by] viewing the normative claims of economic analysis as merely a subset of the full panoply of ethical and moral principles by which we are called to live as Christians."[62] He would thus seem to acknowledge the traditional CST distinction between "foundational" and "excellent" goods, and thus does not seem to make the kind of categorical mistake on which Novak constantly verges in his virtually unqualified approbation of the pursuit of wealth. While Bainbridge thus recognizes in theory that Christian normative values should trump the wealth maximization norm, he is suspicious of what the implementation of that theory would mean. In particular, to the extent that Christian values would impose a preference for state-imposed legal structures promoting wealth redistribution rather than wealth maximization, Bainbridge jumps ship. Bainbridge does so principally in reliance on public choice theory's premise that most legislative attempts to redistribute wealth are driven by highly effective special interest groups at the expense of larger, more diffuse and less effective groups.[63] Interpretation of Christian values as weighted toward state-mandated wealth redistribution would thus seem to him to produce perverse results. Bainbridge's public choice perspective thus leaves him with significant reservations about CST's critical posture toward the wealth inequalities generated by capitalism, as well as its assumption that law should be used to constrain capitalism's production of wealth inequality.

Bainbridge's ambivalence (or hostility) to the practical consequences of applying CST norms (particularly through government mandates) is expressed in his consideration of specific CST positions on issues of corporate governance. In an article[64] criticizing the American bishops' 1986 pastoral letter *Economic Justice for All*,[65] Bainbridge identifies and challenges well-established CST positions favoring labor participation in corporate decisionmaking. While he denies that his goal is to determine whether those positions are accurate statements of CST or Catholic doctrine generally,[66] he joins Novak in condemning the extrapolation of this particular policy recommendation from CST principles. His main goal, however, is to determine whether the CST position should be enacted into positive law, and he answers that question through arguments from economics and political theory, rather than theology. Bainbridge concludes that the arguments supporting mandatory labor participation in corporate governance are overbroad, and

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[61] *Id*. at 212, quoting Paul Johnson's defense of capitalism in Paul Johnson, *Blessing Capitalism*, COMMENTARY, May 1993, at 33, 34.

[62] *Id*. at 213.

[63] *Id*. at 216-23 (explaining rational choice theory).

[64] Stephen M. Bainbridge, *Corporate Decisionmaking*, *supra* note 14.

[65] NATIONAL CONF. OF CATHOLIC BISHOPS, ECONOMIC JUSTICE FOR ALL: A PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY (1986) [hereinafter ECONOMIC JUSTICE FOR ALL]. For a collection of varying responses to Economic Justice, *see* THE CATHOLIC CHALLENGE TO THE AMERICAN ECONOMY: REFLECTIONS ON THE U.S. BISHOPS' PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY (Thomas M. Gannon, ed., 1988). *See also* DOUGLAS RASMUSSEN AND JAMES P. STERBA, THE CATHOLIC BISHOPS AND THE ECONOMY: A DEBATE (1987) (authors agree that the bishops did not provide an adequate philosophical defense for their policy recommendations, but disagree about whether a defense is possible). On the debates over the pastoral letter among Catholic commentators, *see* VAN ALLEN, *supra* note 29, at 94-97.

[66] *See* Bainbridge, *Corporate Decisionmaking*, *supra* note 14, at 828.

give the concept a centrality it does not deserve.

He rests his conclusion partially on evidence that most workers do not want such participation and do not particularly benefit from it where it is in effect.[67] More theoretically, Bainbridge objects to the way such mandatory rules reflect social goals inconsistent with the shareholder wealth maximization norm that he regards as central to corporate law.[68] He also draws on familiar law and economics arguments to predict that mandatory labor representation on boards would increase agency costs,[69] and that firms have sufficient incentives to enter into implicit contracts protecting employees from possible exploitation by managers.[70] His primary theoretical objection to mandatory participation rules, however, is to the statist character of such intervention. In critiquing a Bishop's pastoral letter urging participatory governance, Bainbridge argued that:

> Despite its democratic rhetoric, Catholic social teaching, as preached by the Bishop's pastoral letter, has a strong statist slant. Although they do not support nationalizing industry, the Bishop's support of regulation designed to protect employees and encourage their participation in corporate governance differs only in degree, and not in kind, from collectivism.[71]

Bainbridge thus repudiates the tradition within CST that turns to the state as the source of legal rules intended to foster human dignity. Interestingly, Bainbridge does not rely on Novakian theology to make this point. He is expressing an essentially libertarian take on the proper relationship of the state and economic actors.

Having rejected the CST argument favoring mandatory participatory governance, Bainbridge turned in a later article[72] to a related problem: the American bishops' foray in *Economic Justice for All*[73] into the corporate stakeholder debate. This debate turns on the question of whether directors should (or must) consider the interests of nonshareholder constituencies.[74] Bainbridge summarized the bishops' position in this debate as follows:

> The Bishops assert that a board of directors' decisions affect a much broader class of constituency groups than merely their shareholders. Employees, managers, customers, creditors, suppliers, and communities all contribute to the enterprise, all have a stake in its success, and all are affected by its actions. Hence, their interests must be reflected in the corporate decisionmaking process. To be sure, the Bishops acknowledged

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[67] *Id*. at 817.
[68] *Id*. at 827-28.
[69] *Id*. at 822.
[70] *Id*. at 70.
[71] *See* Bainbridge, *Corporate Decisionmaking*, *supra* note 14, at 809.
[72] *See* Bainbridge, *Bishops*, *supra* note 2.
[73] *See* ECONOMIC JUSTICE FOR ALL, *supra* note 65, at 55-59, 148, 150-51.
[74] For contributions to this debate *see* Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH & LEE L. REV. 1423 (1993); Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23 (1991); Jonathan R. Macey & Geoffrey P. Miller, *Corporate Stakeholders: A Contractual Perspective*, 43 U. TORONTO L J. 401 (1993); Stephen; Alan J. Meese, *The Team Production Theory of Corporate Law: A Critical Assessment*, 43 WILLIAM & MARY L. REV. 1629 (2002); Lynda J. Oswald, *Shareholders v. Stakeholders: Evaluating Corporate Constituency Statutes Under the Takings Clause*, 24 IOWA J. CORP. L. 1 (1998); Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923 (1984); Mark E. Van Der Weide, *Against Fiduciary Duties to Corporate Stakeholders*, 21 DEL. J. CORP. L. 27 (1996).

> the directors' and officers' legal obligation to maximize shareholder wealth. They argued, however, that "morally this legal responsibility may be exercised only within the bounds of justice to employees, customers, suppliers, and the local community." In other words, corporate decisionmakers have a moral obligation to balance a decision's impact on stakeholders against its economic impact on shareholders.[75]

While acknowledging that the Bishops' letter "was not too far out of step with the mainstream,"[76] of CST, Bainbridge raises the question of whether this statement best reflects the Catholic social tradition, suggesting, as have others, that the post-1986 encyclicals *Laborem Exercens* and *Centesimus Annus*, "temper much of what was said in *Economic Justice for All*."[77] He does not dwell, however, on the question of whether the Bishop's letter represents a departure from the Catholic social tradition. Bainbridge seems mainly concerned with testing whether the bishops' position holds up when its costs and benefits are measured with the analytical tools of law and economics. This inquiry, he argues, is an exercise in determining practical reasonableness and thus entirely consistent with the anti-consequentialist premises of natural law and Christian moral philosophy.[78] He also argues that his dissent from the bishops' positions is an entirely legitimate exercise of prudential judgment in determining the meaning of Catholic doctrine for economic life,[79] a conclusion which is surely correct. Not surprisingly, Bainbridge concludes emphatically that the bishops' position constitutes bad public policy and bad corporate law.

The core of his critique is a challenge to the bishops' normative assumptions supporting their belief that non-shareholder interests should be taken as seriously by directors as shareholder interests. The bishops assume that the corporations should: (i) function democratically by allowing all corporate constituents to participate in firm decisions; and (ii) constitute an economic "community" of shared interests and reciprocal moral duties that fosters each member's human dignity. Bainbridge repudiates both normative assumptions. The democratic model, he argues, is particularly inappropriate for the large public company, which is almost invariably organized hierarchically for sound economic reasons. Even worse, the communitarian model, "strain[s] credulity past the breaking point."[80] It simply does not work, he argues, in the context of a large

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[75] *See*, Bainbridge, *Bishops*, *supra* note 2, at 10.

[76] *Id*. at 11.

[77] *Id*. For disagreement with this assertion, *see infra*¸ notes 91-95 and accompanying text.

[78] *See generally id*. at 6-8, where Bainbridge argues that efficiency-based arguments are not inconsistent with the anti-consequentialist premises of natural law theory, because we discern the "eternal enactments of divine authority" through what John Finnis calls the test of "practical reasonableness," *citing* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 10-27 (1980). Finnis, he argues, "concedes that one should seek to achieve the good by actions that are efficient for their purposes." Bainbridge, *supra* note 2, at 8. He then concludes that if "even a prominent non-consequentialist is willing to admit that cost-benefit analysis comes into play when analyzing natural law claims, it seems we may do so with some confidence." *Id*. He concedes, however, that "Finnis constrains the efficiency criterion by reference to other moral criteria." *Id*. at 8, note 20. It may be that Bainbridge is allowing the consequentialist tail to wag the anti-consequentialist dog in using Finnis' limited recognition of the value of efficiency analysis in determining the practical reasonableness of a legal or economic proposition to justify the preeminence that Bainbridge wishes to give that mode of analysis. While such analysis is indeed relevant in the process of moral discernment, it by no means trumps other moral concerns, and can only play an inherently limited part in determining morally correct policies.

[79] *See* Bainbridge, *Bishops*, *supra* note 2, at 4, where Bainbridge correctly cites the Catechism to the effect that lay initiative is encouraged in discerning the means for permeating social, economic and political realities with Christian doctrine. CATECHISM, *supra* note 8, ¶892.

[80] Bainbridge, *Bishops*, *supra* note 2, at 15.

public corporation, quoting Roberta Romano, who has observed that "[communal] characteristics cannot survive within large hierarchal corporations, whose dynamics undermine and destabilize the egalitarian basis of social relationships."[81] The communitarian model is also theoretically unsound, he concludes, because it is flatly inconsistent with law and economics' understanding of the corporation as a nexus of contracts.[82]

Perhaps even more important to Bainbridge is his belief that the equation of non-shareholders interests with shareholder interests would undermine the shareholder wealth maximization norm. Because that norm is central to the legal regime within which the corporation has made "its valuable social contributions,"[83] the communitarian model would produce conceptual confusion. Moreover, a legal system that attempted to force consideration of the interests of non-shareholders into corporate decisions also would produce more than a theoretical problem; it would produce the practical problems of increased agency costs to the benefit of neither shareholder nor other stakeholders.[84]

Bainbridge's critique of the bishops' position in the stakeholder debate using the analytical tools of law and economics is thus unremittingly negative, and that critique is the core of his argument. He also insists, however, that government-mandated consideration of non-shareholder constituencies would be an affront both as a matter of political philosophy (citing principally Paul Johnson and Russell Kirk)[85] and what he regards as the essential principles of CST. Drawing on Novak, he regards such government intervention in private decisionmaking as inconsistent with both the concern for human freedom expressed in *Centesimus Annus* (as Novak understands it) and the principle of subsidiarity that protects associations from interference from above.[86] While Bainbridge's attempt to harmonize the premises and methodology of law and economics (as applied to corporate law) with those of CST (and Catholic thought generally) is the least developed part of his critique, he does make the Novakian point that a shared concern with human freedom and economic liberty creates a deeper affinity between economics and CST than does the "collectivist" left communitarian vision.[87]

The contrast between the Novak/Bainbridge argument from economic liberty and the more mainstream communitarian vision of CST is stark. But what does that conflict mean for our understanding of CST and, specifically, its significance for corporate law?

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[81] *Id*. at 15 (quoting Romano, *supra* note 74, at 948).

[82] *Id*. at 14. ("The economists' contractual understanding is not communitarian in nature.")

[83] *Id*. at 27.

[84] *Id*.

[85] Bainbridge, *Bishops*, *supra* note 2, at 26.

[86] *Id*. Whether Novak is correct in his description of the concept of human freedom expressed in *Centesimus Annus* is disputable. For Pope John Paul II, human liberty is best understood in the ancient Catholic (and particularly Augustinian) tradition as the freedom to do the good. When liberty is understood in that sense, it plays a different role in the Catholic value system than it does in Novak's. Furthermore, while John Paul II in *Centesimus Annus* is acutely aware of the inhibiting effects of excessive government intervention in economic life, his position on the proper role of government is far more nuanced (and permissive) than Novak's, and reflects a less one-sided application of the principle of subsidiarity.

[87] Bainbridge elaborates this point forcefully in his contribution to this symposium, Stephen M. Bainbridge, *Catholic Social Thought and the Corporation*, 1 J. CATHOLIC SOCIAL THOUGHT (forthcoming May 2004).

## IV. The Meanings of the Conflict

In trying to determine what the conflict between those two competing visions means, I am not going to offer judgments about Bainbridge's positions in the secular debates over the wealth maximization norm, the theory of the firm as a nexus of contracts, labor participation in corporate governance, or corporate directors' responsibilities for non-shareholder constituencies, even though his positions in these debates lead him to reject mainstream CST positions on the corporation and economic life. Suffice it to say for purposes of this discussion that his positions on those issues are controversial in purely secular terms. I will argue, however, that the conflict between the communitarian vision and Novak's and Bainbridge's related, but different critiques indicates that much fundamental theoretical and practical analysis remains to be done before CST can be a useful normative framework for understanding corporate law. I reach this conclusion in view of two problems that emerge from the conflict.

First, Novak's approach represents, at best, an outlier position in the Catholic social tradition. It creates fundamental theoretical tensions, and it proposes policies that do not serve the goals of the tradition. His core principles—the centrality of economic liberty, the social beneficence of the pursuit of profit, and implacable hostility to government intervention into economic life ("statism")—are deeply rooted in the classical liberal tradition. They also resonate in CST to the extent that the tradition, and particularly Pope John Paul II, recognize the importance of economic liberty to human liberty and dignity, the legitimacy of the profit motive in the exercise of human creativity in the production of socially beneficial wealth, the crucial function of private associations as mediating institutions, and the moral dangers of the welfare state. But these principles are understood conditionally in the CST tradition in a way foreign to Novak and other Catholic neoconservatives.

For example, in *Sollicitudo Rei Socialis* Pope John Paul II recognizes the value of "the right of economic initiative," particularly in its importance to the creation of greater wealth, but insists that such "wealth must be distributed in accord with the demands of human solidarity and distributive justice."[88] This emphasis on distributional justice is central to Catholic social teaching, but is usually viewed with suspicion by Novak, because he usually sees distributionist goals as naive, expressions of leftist bias, or tied to statist intervention.[89] Pope John Paul II also expresses his ambivalence about economic liberty and profit-seeking in *Centesimus Annus*. As Charles Curran explains:

> On one hand, John Paul II affirms the importance of "initiative and entrepreneurial ability" and recognizes "the legitimate role of profit." On the other hand, the state "has the task of determining the juridical framework within which economic affairs are to be conducted;" the free market alone cannot satisfy fundamental human needs. Although profit plays a legitimate role, other human and moral factors also have roles to play.[90]

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[88] CURRAN, CATHOLIC SOCIAL TEACHING, *supra* note 12, at 195.

[89] *See, e.g.*, NOVAK, TOWARD A THEOLOGY OF THE CORPORATION, *supra* note 29, at 12-17, 29; 30; NOVAK, CATHOLIC SOCIAL THOUGHT & LIBERAL INSTITUTIONS, *supra* note 5, at 12-15.

[90] CURRAN, CATHOLIC SOCIAL TEACHING, *supra* note 12, at 207. Novak certainly agrees with John Paul II's criticism of "economism" as a perspective that makes the "science" of economics into an ideology through which human life is judged by economic criteria alone. NOVAK, CATHOLIC SOCIAL THOUGHT & LIBERAL INSTITUTIONS,

Novak and others[91] are thus overstating their case when they assert that "In *Centesimus annus* Rome has assimilated American ideas of economic liberty."[92] As David Hollenbach has pointed out, "It would be a serious mistake to think that the Pope has blessed the form of capitalism existing in the United States today. In fact, the encyclical is a major challenge to much recent U.S. economic and social policy."[93] Furthermore, the Pope's criticism of the modern welfare state is not a criticism of state intervention *per se* or the goals of social assistance; it is a critique of the state for relying on impersonal bureaucracies rather than helping foster a more participatory community.[94] Indeed, John Paul II's *Laborem Exercens*, with its emphasis on the common good, the social mortgage on private property, and joint ownership of the means of work, sets out a "vision of a just social order that is best described as a modified form of socialism, built on a new view of human rights, political and economic democracy, and a demand for moral self-consciousness and realization, grounded in political/economic rights."[95] This description of the Pope's vision as "socialism" underestimates his appreciation of private economic initiative, and Novak is correct in asserting that the Pope and the CST tradition strongly support democratic capitalism, but it does suggest that Novak is incorrect insofar as he de-emphasizes the Pope's and the tradition's robustly communitarian message.

Novak and Bainbridge's critique of *Economic Justice for All* is an example of the profound division in Catholic circles that the Bishops' letter generated. The Letter exposed the deep disagreement between the Catholic right and left over the meaning of the faith for economic policy. Both sides staked out antithetical positions on the question of whether the Bishops had departed from the Catholic social tradition, indulging their leftist, statist biases in their theoretical assumptions and practical prescriptions. To my mind, the letter is firmly within CST's communitarian tradition as it evolved in the late twentieth century United States. Even Bainbridge acknowledges that the pastoral letter "was not too far out of step with the mainstream of Catholic social thought."[96] *Economic Justice for All* is but one in a series of statements by the American bishops that aligned them with democratic capitalism and against Marxism and socialism, but which were also strongly pro-labor and pro-social welfare legislation, and which favored

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*supra* note 5, at 7, 24. He recognizes that CST "sees a large role" for morality in governing economic practices. *Id*. Novak thus would deny that he is practicing "economism." That may be true, but it does not mean that Novak has accurately assessed the Pope's economic thought.

[91] *See* Bainbridge, *Bishops*, *supra* note 2, at 11; Richard John Neuhaus, *An Argument About Human Nature*, *in* A NEW WORLDLY ORDER: JOHN PAUL II AND HUMAN FREEDOM 123, 124 (George Weigel, ed., 1992). Father Neuhaus and Weigel join Novak as leading proponents of an American neo-conservative version (or critique) of CST

[92] Michael Novak, *Tested by Our Own Ideals*, *in* JOHN PAUL II AND MORAL THEOLOGY: READINGS IN MORAL THEOLOGY, 325 (Charles E. Curran and Richard A. McCormick, eds., 1998), Curran has acknowledged that Novak "rightly points out" that John Paul II attempted to correct the imbalance in CST between emphasis on the distribution of wealth and insufficient emphasis on the production of wealth. Curran, *supra* note 10, at 194. Curran goes on to show, however, that the Pope's defense of "the right of economic initiative" is tempered by an insistence that the wealth created by such initiative "must be distributed in accord with the demands of human solidarity and distributive justice." *Id*. at 195.

[93] David Hollenbach, *The Pope and Capitalism*, AMERICA, June 1, 1991, at 591.

[94] CURRAN, CATHOLIC SOCIAL TEACHING, *supra* note 12, at 209.

[95] GEORGE E. MCCARTHY & ROYAL W. RHODES, ECLIPSE OF JUSTICE: ETHICS, ECONOMICS AND THE LOST TRADITIONS OF AMERICAN CATHOLICISM 178 (1992).

[96] Bainbridge, *Bishops*, *supra* note 2, at 11.

co-partnership between labor and capital in the governance and ownership of the means of production, broad sharing in economic development, and amelioration of the gross inequalities in the distribution of wealth.[97] Historically, these positions linked the institutional Church in the United States with the New Deal[98] and political progressives' willingness to involve the state in producing social and economic justice. The bishops' identification of racism and poverty as "sinful social structures"[99] also provided a philosophical basis for the shareholder activism of Catholic religious orders who find common ground with political progressives.

The bishops' long-standing concerns, furthermore, do not express a leftist-materialist obsession with broader distribution of wealth. Their concerns embody a Christian anthropology that defines wealth as merely instrumental, as merely a means of creating the material conditions under which spiritual goods can flourish. While Novak and Bainbridge presumably would agree with that distinction, they would disagree with the corollary assumption that human flourishing is bound up with policies supporting participatory corporate governance and prioritization of the subjective experience of work, particularly when the state has anything to do with them. The ubiquity of those propositions in both the encyclicals and the bishops' statements shows that they are not the expression of secular leftist biases imported into or grafted onto CST, but rather are an organic expression of a particular vision of the meaning of work and the nature of the human person in community. Indeed, in all fairness, it is the strong classical liberal and libertarian biases that Novak and Bainbridge bring to their reading of CST that is anomalous and inorganic. The normative framework they employ for determining questions of corporate policy and law is thus more of a challenge to than an expression of the Catholic social tradition. A corporate law scholar seeking to employ CST's normative framework in approaching problems of corporate law and policy thus will find their work useful and provocative, but ultimately not satisfactory.

That problem, however, reveals a second problem. While Catholic business ethicists and economists have begun to formulate a conception of the corporate community centered on the notion of the common good, rather than either the shareholder or stakeholder models of corporate governance, and while Catholic activists have used the shareholder proposal mechanism to engage corporations with pursuit of the common good, a CST/communitarian version of corporate law is yet to emerge. A broad frame of reference exists, but translation of the abstract theological and moral principles of CST into legal theory and specific recommendations for legal reform has not really begun.[100] There remains an element of the platitudinous about the CST communitarian

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[97] For analysis of the American bishops' twentieth-century statements on the economy, *see* MCCARTHY & RHODES, *supra* note 95, at 18-29. McCarthy and Rhodes contest the claim that *Economic Justice for All* departs from the bishops' own tradition of emphasizing individual virtue by endorsing partisan political programs. *Id*. at 26.

[98] The contributions of Monsignor John A. Ryan, one of the architects of the American CST tradition, to the New Deal, are well-known. *See* FRANCIS L. BRODERICK, RIGHT REVEREND NEW DEALER: JOHN A. RYAN (1963). *See also* JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM 150-57 (2003) (describing the 1930s as a high point of the Catholic-liberal alliance on economic issues despite ongoing disagreements over sexuality).

[99] *See* MCCARTHY & RHODES, *supra* note 95, at 24-25 (describing bishops' statements focusing on structural problems of poverty and racism).

[100] For a provocative discussion of how CST, despite its thinking about the proper distribution of rewards for work, has provided little guidance for thinking about the moral significance of risk-taking by investors in a business enterprise, *see* Edmond Malinvaud, *A Gap in the Social Doctrine of the Church Regarding the Priority of Labor Over Capital: The Proper Role of Finance*, *in* WORK AS KEY, *supra* note 9, at 129. Malinvaud asks, quite properly, "how could the Church take position in the debate between stockholder and stakeholder value if she is not better

vision that needs to be transformed into something more concrete. How, as Bainbridge has pointed out, can a large public corporation be conceptualized and actualized as a community, given the transient nature of the various kinds of interest in the corporation and its hierarchal economic structure? If the stakeholder and shareholder models are both just different ways of actualizing selfish interests, and do not focus on the common good that should be the corporate goal, how do we define the nature and limits of that good, and how do we operationalize it as a goal, recognizing the unavoidable problems of agency costs? How do we use regulatory intervention or mandatory legal rules to achieve a reorientation of corporate governance or corporations' sense of social responsibility without producing perverse results? Bainbridge, in particular, has made the valuable contribution of showing the difficulties with implementation of CST/communitarian goals in corporate law. There is a great need for theoretical imagination and practical ingenuity in finding ways to overcome those difficulties, if CST is going to be anything other than a challenging, but ultimately irrelevant set of religious reflections on business organization and behavior.

I have argued that Bainbridge's reliance on the shareholder wealth maximization norm and the contractual theory of the firm fits awkwardly with CST. His work represents, however, an escape from the platitudinous. He has shown, in particular, how difficult it is to derive specific guidance from CST's theological propositions and moral norms for corporate law. His criticism of the Bishops' letter may be most valuable in the way it shows how the move from general CST principles to highly specific policy recommendations and prescriptions for legal change is inherently problematic, because such recommendations and prescriptions are subject to disagreement on prudential grounds even among people who share a Catholic perspective. Nevertheless, if CST is going to be meaningful, it must provide a means for moving from the general to the specific. Bainbridge has led the way in showing how that might be done in corporate law theory. His critique of the Bishops' letter and CST doctrine on participatory governance, however, may be more of a fundamental criticism of basic CST precepts themselves rather than a prudential disagreement with specific applications of those precepts. There are versions of corporate law theory more congruent with CST's communitarian vision than Bainbridge's. While wholly secular in inspiration, those versions of corporate law theory that emphasize broader participation in corporate governance, stronger mechanisms of corporate accountability, legal structures for corporate social responsibility, and, ultimately, rethinking of the shareholder wealth maximization norm, provide a set of analytical tools that would help CST move from moral exhortation to a concrete agenda for change. In return, CST would provide corporate law theory a normative framework that would give its reform agenda greater moral and spiritual weight and conviction.

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informed about what is meant in reality by this debate?" *Id*. at 129.