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Lyman P.Q. Johnson

Washington and Lee University School of Law, johnsonlp@wlu.edu

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ARTICLES

FAITH AND FAITHFULNESS IN CORPORATE THEORY

Lyman P.Q. Johnson⁺

“[T]he duties traditionally analyzed as belonging to corporate fiduciaries, loyalty and care, are but constituent elements of the overarching concepts of allegiance, devotion and faithfulness”¹

“Who then is the faithful and wise manager, whom the master puts in charge . . . ?”²

I. INTRODUCTION

Discourse in corporate law theory is highly secular. This quality both reflects, and shapes, the nature of discourse within corporations themselves.³ Virtually nontheoretical until the mid-1970s, corporate law scholarship has been deeply influenced in the last thirty years by neoclassical economic analysis,⁴ and, more recently, it has been enriched by a

+ Robert O. Bentley Professor of Law, Washington and Lee University Law School. The Frances Lewis Law Center provided financial support for this project. I am grateful for comments from Sam Calhoun, Faith Kahn, and David Millon, and from participants in the Georgetown conference on Socio-Economics and in the 2006 AALS annual meeting of the section on Socio-Economics and from a faculty workshop at the University of St. Thomas Law School. Matthew Trinidad and Aaron Wilson contributed excellent research assistance. Luanita embodies the quality of faithfulness, for which I am especially grateful.

1. *In re Walt Disney Co. Deriv. Litig. (Disney)*, No. Civ.A. 15452, 2005 WL 2056651, at *36 (Del. Ch. Aug. 9, 2005), *aff'd*, No. 411,2005, 2006 WL 1562466 (Del. June 8, 2006).

2. *Luke 12:42* (New International).

3. Sociologist Alan Wolfe has described how the language of economics in the corporation attributes “to the impersonal logic of the market” conduct that many employees find disloyal. ALAN WOLFE, *MORAL FREEDOM* 30 (2001). Framing workplace relations purely in financial terms may mean “the emphasis on putting one’s own interest first . . . in the economy” carries over into the realm of family and other social relations. *Id.* at 48. The nature of discourse in theory, therefore, can shape corporate practice, which, in turn, can alter our larger social reality, which scholars may then believe corresponds to theory.

4. The seminal work is by Judge Frank Easterbrook and Professor Daniel Fischel. See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991).

host of other perspectives. These contributions draw broadly on behavioral economics,⁵ socioeconomics,⁶ psychology,⁷ sociology,⁸ feminism,⁹ critical race theory,¹⁰ history,¹¹ and various “progressive” vantage points.¹² Although vast differences in theoretical outlook and prescriptive thrust characterize modern corporate scholarship, virtually all such scholarship shares a common feature: it is a secular discourse, both in grammar and focus, notwithstanding that the larger society in which the corporate institution is situated continues to be a very religious society.¹³

The vocabulary of corporate law theory may be secular because that which is observed—the corporation—is thought to be a wholly secular institution best understood solely in secular terms,¹⁴ or because the over-

5. E.g., Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. DAVIS L. REV. 581 (2002); Symposium, *Behavioral Analysis of Corporate Law: Instruction or Distraction?*, 10 LEWIS & CLARK L. REV. 1 (2006).

6. E.g., LYNN L. DALLAS, *LAW AND PUBLIC POLICY: A SOCIOECONOMIC APPROACH* (2005).

7. E.g., James D. Cox & Harry L. Munsinger, *Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion*, 48 LAW & CONTEMP. PROBS. 83 (1985); Daniel J. H. Greenwood, *Discussing Corporate Misbehavior: The Conflicting Norms of Market, Agency, Profit and Loyalty*, 70 BROOK. L. REV. 1213 (2005).

8. E.g., Gerald F. Davis, *New Directions in Corporate Governance*, 31 ANN. REV. SOC. 143 (2005); Lyman Johnson, *Individual and Collective Sovereignty in the Corporate Enterprise*, 92 COLUM. L. REV. 2215 (1992) (reviewing ROBERT N. BELLAH ET AL., *THE GOOD SOCIETY* (1991); EASTERBROOK & FISCHER, *supra* note 4).

9. E.g., Kellye Y. Testy, *Capitalism and Freedom—For Whom?: Feminist Legal Theory and Progressive Corporate Law*, 67 LAW & CONTEMP. PROBS. 87 (2004); Andrew C. Wicks et al., *A Feminist Reinterpretation of the Stakeholder Concept*, 4 BUS. ETHICS Q. 475 (1994).

10. E.g., Cheryl L. Wade, *Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination*, 76 TUL. L. REV. 1461 (2002).

11. E.g., Reiner Kraakman, Henry Hansmann & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335 (2006); Symposium, *Understanding Corporate Law Through History*, 63 WASH & LEE L. REV. (forthcoming 2006).

12. E.g., PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995); Symposium, *New Directions in Corporate Law*, 50 WASH. & LEE L. REV. 1373 (1993).

13. See RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE 21* (2d ed. 1986) (“[I]n sociological fact, the values of the American people are deeply rooted in religion.”). A recent poll of 1004 Americans reveals that 64% describe themselves as religious, 64% pray every day, 57% describe spirituality as very important in their daily life, and 45% say they attend worship services at least weekly. *Where We Stand on Faith*, NEWSWEEK, Aug. 29/Sept. 5, 2005, at 48, 48-49; see also George H. Gallup, Jr. & Byron R. Johnson, *New Index Tracks “Spiritual State of the Union,”* GALLUP POLL, Jan. 28, 2003, <http://poll.gallup.com/content/default.aspx?ci=7657> (noting that 69% of Americans “feel the need to experience spiritual growth in their daily lives”). A recent study confirms that entering college students, with some variance along gender and ethnic lines, remain highly religious. Stacy A. Teicher, *Of Gender, Race and Spirituality*, CHRISTIAN SCI. MONITOR, Oct. 13, 2005, at 13, 13-14.

14. A recent piece on accommodating religious beliefs in law school class discussions probably captures accurately what many legal scholars think about the irrelevance of relig-

arching conceptual framework of most scholars is itself exclusively secular, thereby overlooking the corporation's religious dimension. A business corporation, however, is not, and need not be, inherently secular in nature. Rather, in various ways, its affairs can reflect religious views of both the larger society in which it functions and the senior decision-makers who direct its activities. Before elaborating, it should be noted at the outset that there is no constitutional impediment to this view of the corporation. Although the corporation is an important social institution—as are the family, private schools, clubs, and a boundless array of other voluntary groupings—it is not an arm of the state. Consequently, First Amendment concerns about the “separation of church and state” do not mandate a “separation of faith and corporation.” The absence of religious language in scholarly and business discourse, therefore, reflects a social practice, not a legal requirement.

Modern corporate theory, although secular in voice, conceives corporate relations in such a way as to be open to the potential influence of religious faith on corporate conduct. This is true whether one adheres, descriptively, to the highly individualistic, contractarian conception of the corporation, or to a more organic, communitarian view. It holds true as well whether one believes, prescriptively, that decision-makers should exclusively pursue, on the one hand, shareholder welfare or, on the other hand, the well-being of the corporate enterprise itself, the interests of various stakeholders, or both. This is so because, whatever their different theoretical approaches or normative commitments might be, corporate scholars uniformly acknowledge that a central feature of corporate life is broad managerial discretion.¹⁵ Discretion exists, within limits, both as to what goals the corporation should pursue and how it does so. The exercise of that discretion will be influenced by the actor's understanding of which social norms and moral convictions are relevant to business decisions. The question of which norms and convictions should play a role in the business setting is one that, in turn, may reflect core religious beliefs.

A corporate actor without religious beliefs will, of course, formulate his or her actions without looking to faith for guidance. A corporate actor with religious beliefs, however, may not look to them for guidance—or may not readily state that they are being looked to—for a variety of reasons. The actor may consider the beliefs to be a permitted but unhelpful source of guidance. Or, an actor may find religious beliefs helpful but

ion to corporations. Robert L. Palmer, *Is God on Your Seating Chart?: Discussing Religious Beliefs in Class*, LAW TCHR., Fall 2005, at 1. Professor Palmer states that “[students’ religious] beliefs often stay far below the surface, in part because religious concepts are not readily applicable to much of the law school curriculum. Contracts, property, tax courses, *business organizations*, and civil procedure fall into this category.” *Id.* (emphasis added); see also *infra* notes 118-20 and accompanying text.

15. See *infra* notes 25, 47-48 and accompanying text.

believe that drawing on them is forbidden, due to a misunderstanding of law or by interpreting social norms as frowning on such guidance. Finally, an actor may actively draw on religious beliefs but not use religious language to express that influence, choosing instead to “translate” the rationales for the decision into secular language. As an empirical matter, we know relatively little about how corporate officers and directors actually draw on religious faith in forming decisions,¹⁶ or whether they believe it inappropriate to do so, and, if so, why. Religious faith and religious discourse may or may not be playing a significant role in corporate decision-making.

This Article addresses the nature of corporate discourse. It argues that neither discourse within the corporate institution itself nor within corporate law theory must be wholly secular. Current conceptions of corporateness do not exclude—indeed, they invite—introduction of religious faith into corporate decision-making. At the same time, existing theories of corporateness cannot and do not mandate the use of religious faith by decision-makers, and this Article does not so advocate. Such use, however, is permitted where it does not conflict with antidiscrimination laws. As to whether religious faith will more significantly inform corporate decision-making in the years ahead, the answer will depend on senior decision-makers themselves. They can, but need not, draw on and express themselves in ways influenced by faith. That is precisely the upshot of discretion. Discourse within the corporation may continue to be secular in nature because senior decision-makers may choose, for the most part, to think and speak in secular terms. It may, on the other hand, under the prodding of those who appreciate the breadth of managerial discretion and urge the value of faith in guiding its exercise, become a more mixed and bi-vocal discourse, part secular and part religious in nature.

The subject of religious talk in American society remains controversial. By arguing for a more prominent religious voice within corporate discourse, this Article seeks to alleviate this larger controversy, not compound it. The argument proceeds in several steps. Part II summarizes one key issue where corporate law scholars fundamentally disagree and another key issue where there appears to be broad consensus. Scholars continue to differ, as do many in society at large, as to the basic question of corporate purpose—many argue for unbridled shareholder primacy, while others seek to include the welfare of the enterprise itself and various stakeholders within the corporate scope. By contrast, scholars agree, and corporate law confirms, that directors and officers possess very broad

16. We do have some important empirical work on how faith influences managers. *E.g.*, MARC GUNTHER, *FAITH AND FORTUNE* (2004); LAURA L. NASH, *BELIEVERS IN BUSINESS* (1994). These studies and other, non-legal scholarship will be treated in Part III.A.

decision-making latitude, a latitude only imperfectly constrained by markets, norms, and law. The upshot is that senior decision-makers have significant freedom in charting how modern corporations behave and whose interests they advance.

Part III considers scholarly treatments of the role religious faith might play in guiding and constraining corporate managers. Scholarship outside the legal academy is far more plentiful on this subject. Recently, within corporate law, a few pioneering scholars have begun asking how Catholic social thought might usefully contribute to an understanding (and reform) of corporate conduct.¹⁷ Professor Susan Stabile has gone further and advocates external legal change,¹⁸ a direction this author rejects in favor of a voluntary approach aimed at altering the nature of discourse *within* the corporation.

Part IV shows how, without any further legal reform, religious faith can constructively influence corporate law and discourse by shedding light on a concept recently invoked by Chancellor William Chandler in the high-profile *Disney* litigation.¹⁹ That concept is the obligation of faithfulness, which Chancellor Chandler, in his treatment of good faith, characterized as “overarching” the traditional fiduciary duties of care and loyalty.²⁰ Faithfulness is a term decidedly absent from the financial/economic vocabulary that has so powerfully shaped corporate theory since the 1970s.²¹ As directors and officers—and their legal counsel—struggle to understand and implement the mandate of faithfulness, they can usefully turn to religious faith, where the notion of faithfulness has rich meaning, as shown in Part V. This is especially important now as the Delaware Su-

17. These scholars are Dean Mark Sargent and Professors Susan Stabile and Stephen Bainbridge. See Stephen M. Bainbridge, *Catholic Social Thought and the Corporation*, 1 J. CATH. SOC. THOUGHT 595 (2004) [hereinafter Bainbridge, *Catholic Social Thought*]; Stephen M. Bainbridge, *Law and Economics: An Apologia*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 209 (Michael W. McConnell et al. eds., 2001) [hereinafter Bainbridge, *Apologia*]; Stephen M. Bainbridge, *The Bishops and the Corporate Stakeholder Debate*, 4 VILL. J.L. & INV. MGMT. 3 (2002) [hereinafter Bainbridge, *Bishops*]; Mark A. Sargent, *Competing Visions of the Corporation in Catholic Social Thought*, 1 J. CATH. SOC. THOUGHT 561 (2004) [hereinafter Sargent, *Competing Visions*]; Mark A. Sargent, *Utility, the Good and Civic Happiness: A Catholic Critique of Law and Economics*, 1 J. CATH. LEGAL STUD. 35 (2005) [hereinafter Sargent, *Utility*]; Susan J. Stabile, *A Catholic Vision of the Corporation*, 4 SEATTLE J. FOR SOC. JUST. 181 (2005) [hereinafter Stabile, *Catholic Vision*]; Susan J. Stabile, *Using Religion to Promote Corporate Responsibility*, 39 WAKE FOREST L. REV. 839 (2004) [hereinafter Stabile, *Using Religion*]; see also Robert Ashford, *Using Christian Principles to Enhance Economic Theory and Practice: Louis Kelso's Binary Economics as the More Christian and Scientific Way* (Nov. 9, 2002) (on file with *Catholic University Law Review*), available at <http://cog.kent.edu/lib/Ashford.pdf>.

18. Stabile, *Using Religion*, *supra* note 17.

19. *In re Walt Disney Co. Deriv. Litig.*, No. Civ.A. 15452, 2005 WL 2056651, at *36 (Del. Ch. Aug. 9, 2005), *aff'd*, No. 411,2005, 2006 WL 1562466 (Del. June 8, 2006).

20. *Id.*

21. See *infra* Part II.

preme Court, in affirming the trial court decision in *Disney*, noted that the concept of good faith is “not a well-developed area . . . [and] is, up to this point relatively uncharted.”²² The concept of faithfulness thus presents a rare opportunity to explore the overlap of corporate and religious discourses. Part V uses, as an example, biblical treatments of faithfulness. These instances are, it bears emphasizing, illustrative, as each faith tradition may have its own teaching on faithful managerial conduct.

The larger point assuredly is not that fiduciary duty law—or any other dimension of corporate law—is or must be grounded in religious faith. The point, rather, is that senior business leaders *can* (but are not required to) draw on their faith tradition’s rendering of faithfulness to augment their understanding of how to be legally faithful. Moreover, they not only can do so, they are free to (and should) *say* they are doing so and explain its relevance and helpfulness. This voluntary, non-legislative approach leaves to the individual, exercising his or her discretion, whether to seek guidance on the meaning of faithfulness in his or her faith.

Part VI elaborates the several benefits to be gained from enriching corporate theory and corporate practice with religious discourse. These benefits include, at a minimum, providing a persuasive ground for religious business elites to avoid using corporate positions primarily to promote self-interest, and, more affirmatively, may provide some leaders with a more secure foundation for pursuing socially responsible corporate conduct. Others, to be sure, may conclude that greater faithfulness means that stricter allegiance to investor interests is called for. How understandings of faith will influence corporate conduct has no predetermined normative endpoint. Its outcome, rather, will depend on how leaders themselves—who should be representative of the larger society—interpret the teachings of their faiths. In a pluralist society, the viewpoints of directors and officers drawn from a cross-section of society will likely mirror the range of views on the larger question of the role of religion in a liberal democracy.

Other benefits of de-secularizing corporate discourse include the likelihood of overcoming a manager’s unhealthy sense of dividedness between work and faith, introducing viewpoint diversity into the upper reaches of corporations, and serving as a “safe place” to experiment—free of constitutional concerns—with an approach that encourages, rather than frowns on, the invocation of religion in debates over matters of social and public significance.²³ Lessons learned from permitting and encouraging religious discourse in the corporate venue, an important institution standing be-

22. *In re Walt Disney Co. Deriv. Litig.*, 2006 WL 1562466, at *24.

23. Professor Noah Feldman proposes a relaxing of concern over the use of religious speech on matters of public policy. NOAH FELDMAN, *DIVIDED BY GOD: AMERICA’S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 236-39 (2005).

tween the individual and the state, not only will change the ethos of corporate culture, they may reduce anxiety concerning the use of such discourse in larger public debates.

II. DISCORD AND AGREEMENT IN CORPORATE THEORY

Corporate law scholars continue to vehemently disagree on a basic prescriptive subject—the purpose of corporate endeavor²⁴—while widely agreeing (more or less) on a key descriptive feature of corporate life: the existence of broad managerial discretion.²⁵ The descriptive reality of managerial discretion is, in fact, what makes possible the normative disagreement on corporate purpose. Unless business leaders possess at least some freedom to choose one course of action over another, any moral or policy debate about corporate purpose lacks practical significance. This Part first briefly sketches the unresolved controversy over corporate purpose, and then develops at somewhat greater length the claim that managerial discretion remains a central, and seemingly inescapable, feature in corporate law. Both points are critical components of the argument—developed in Parts III through VI—that religious faith can usefully guide the exercise of discretion as managers make decisions about proper corporate conduct and purpose.

A. Competing Conceptions of Corporate Purpose

To the consternation of many corporate law scholars,²⁶ the near century-long debate about the purpose(s) of corporate endeavor shows no sign of abating.²⁷ Many corporate scholars, perhaps most, believe it is socially desirable for directors and officers to attend first and foremost to

24. For a collection of legal scholarship favoring shareholder wealth maximization as the exclusive corporate purpose, see Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 736 n.1, 745 n.12 (2005) (collecting scholarship). Elhauge challenges this view at length, developing several arguments in favor of permitting managers to consider the public interest at the expense of profits in making decisions. *Id.* at 783-814. For the views of scholars opposing an exclusive focus on shareholder wealth, see *supra* note 12 (collecting scholarship).

25. See Elhauge, *supra* note 24, at 763-77 (describing reasons for managerial discretion to sacrifice profits). For one of many scholarly treatments of managerial authority and discretion, see Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2002).

26. See, e.g., Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 859-60 (1997) (book review); Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 LAW & CONTEMP. PROBS. 109, 109 (2004) (describing the debate over corporate purpose).

27. See, e.g., William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737, 754-57 (2001); Kent Greenfield, *New Principles for Corporate Law*, 1 HASTINGS BUS. L.J. 87, 87-89 (2005). See generally *supra* notes 5-12 (collecting views of various scholars).

the interests of shareholders.²⁸ Under this “shareholder primacy” conception of corporate purpose, rooted in the contractarian theory of corporate relations,²⁹ directors and officers owe fiduciary duties primarily, perhaps exclusively, to shareholders. The interests of other non-shareholder constituent groups, such as employees, creditors, suppliers, or local communities in which the corporation operates, are not thought by these scholars to be the proper focus of fiduciary duties.³⁰ Rather, these “stakeholders” are best protected, under this view, by private contract or special purpose legislation.³¹

A significant number of corporate scholars, probably still a minority, believe directors and officers should take a more expansive view of their fiduciary duties, and appropriately consider the interests of the company itself and all its constituents, both shareholders and non-shareholders.³² This conception—often dubbed a “communitarian” or “progressive” outlook³³—is longstanding in corporate law³⁴ and business ethics literature,³⁵ and it is informed by an interest in encouraging socially responsible corporate conduct.³⁶ It gained new life in the 1980s when many scholars grew alarmed over the perceived damage caused to non-shareholders by an unfettered, shareholder-enriching takeover market fueled by slavish adherence to a pro-investor normative model.³⁷ This “contrarian” school

28. See Stephen M. Bainbridge, *Director Primacy in Corporate Takeovers: Preliminary Reflections*, 55 STAN. L. REV. 791, 798 & n.35 (2002) (“Today, most corporate law scholars embrace some variant of shareholder primacy.”); Elhauge, *supra* note 24, at 736 n.1 (collecting scholarship).

29. See generally EASTERBROOK & FISCHER, *supra* note 4, at 1-39. Mark Roe has described this contractarian model, which “focuses on the three-player game of allocating decisionmaking authority among managers, the board, and shareholders[,] . . . [and which] is the model that has dominated corporate law scholarship and that continues to dominate it.” Mark J. Roe, *Can Culture Constrain the Economic Model of Corporate Law?*, 69 U. CHI. L. REV. 1251, 1252 (2002).

30. See Elhauge, *supra* note 24, at 736 n.1; Winkler, *supra* note 26, at 110.

31. Winkler, *supra* note 26, at 119-23.

32. See *supra* note 12. For an extensive comparison of this school of thought and the contractarian model, see David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 220-31 (1990); see also Greenfield, *supra* note 27.

33. See *supra* note 12.

34. See Bratton, *supra* note 27, at 760-62; Lyman Johnson, *Corporate Takeovers and Corporations: Who Are They For?*, 43 WASH. & LEE L. REV. 781, 789-93 (1986).

35. E.g., Christine A. Hemingway & Patrick W. Maclagan, *Managers’ Personal Values as Drivers of Corporate Social Responsibility*, 50 J. BUS. ETHICS 33 (2004) (describing literature). For a business ethicist’s assessment of stakeholder interests in the business corporation, see Kenneth E. Goodpaster, *Business Ethics and Stakeholder Analysis*, 1 BUS. ETHICS Q. 53 (1991) (arguing for moral but non-fiduciary obligations to stakeholders).

36. Hemingway & Maclagan, *supra* note 35, at 36-41 (noting importance of managerial discretion for socially responsible conduct).

37. See Johnson, *supra* note 8, at 2245-48; Lyman Johnson, *New Approaches to Corporate Law*, 50 WASH. & LEE L. REV. 1713, 1715-17 (1993).

of thought was long hampered by the lack of affirmative models of corporate relationships, with much of the scholarly work largely arguing against a full-fledged shareholder primacy model. The “team production” theory advanced by Professors Margaret Blair and Lynn Stout,³⁸ and other recent efforts,³⁹ represent efforts to develop more robust models of corporate interaction.

At the doctrinal level, developments since the late 1980s suggest support for a conception of fiduciary duties that permits consideration of both non-shareholder and shareholder interests. This is seen in statutory law, where all corporate statutes permit charitable donations,⁴⁰ and approximately thirty states in the 1980s enacted statutes expressly empowering boards of directors to consider an array of interests other than shareholders.⁴¹ No statute, by way of contrast, mandates that only shareholder interests are to be advanced.⁴² In case law, Delaware requires an exclusive focus on shareholder welfare only in the important, but nevertheless limited, change of control (*Revlon*) setting.⁴³ In other contexts, directors are free to consider non-shareholder interests.⁴⁴ Many states, moreover, have rejected the *Revlon* approach, either by statute⁴⁵ or case law.⁴⁶

38. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 320-28 (1999).

39. See, e.g., Greenfield, *supra* note 27 (articulating new principles for corporate law).

40. JESSE H. CHOPER ET. AL., CASES AND MATERIALS ON CORPORATIONS 39 (6th ed. 2004).

41. See 1 AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS §§ 2.01 reporter’s note 8, 6.02 cmt. a (1994) (collecting statutes). For an analysis of these statutes, see, for example, Lyman Johnson & David Millon, *Missing the Point about State Takeover Statutes*, 87 MICH. L. REV. 846, 847-56 (1989), and David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223, 240-48 (1991).

42. Elhauge, *supra* note 24, at 763.

43. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (noting that the board is obligated to obtain highest share price in corporate breakup); *Paramount Commc’ns, Inc. v. QVC Network, Inc. (In re Paramount Commc’ns, Inc. S’holders Litig.)*, 637 A.2d 34, 43-45 (Del. 1994) (clarifying duty to maximize share price in sale). *But see* Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1203-04 (2002) (noting the limited reach of *Revlon*).

44. *Paramount Commc’ns, Inc. v. Time Inc. (In re Time Inc. S’holder Litig.)*, 571 A.2d 1140, 1143 (Del. 1990); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955-56 (Del. 1985); *see also* Roe, *supra* note 29, at 1267 (describing how non-shareholder interests might influence judges).

45. Statutes permitting consideration of non-shareholder interests necessarily reject *Revlon*. See *supra* note 41 and accompanying text. In a recent Conference Board poll of 25,000 people in twenty-three countries, “two-thirds said they want business to ‘expand beyond the traditional emphasis on profits and contribute to broader social objectives.’” Jane Lampman, *Trend-watcher Sees Moral Transformation of Capitalism*, CHRISTIAN SCI. MONITOR, Oct. 3, 2005, at 13.

46. See, e.g., *Willard ex rel. Moneta Bldg. Supply, Inc. v. Moneta Bldg. Supply, Inc.*, 515 S.E.2d 277, 284 (Va. 1999) (rejecting *Revlon* duty in sale of corporation’s control).

At the moment, the enduring question of corporate purpose has not been definitively resolved either in corporate theory or corporate doctrine. If anything, corporate doctrine at present is far more receptive to a broad conception of fiduciary duties than orthodox corporate theory acknowledges. This is due, in large measure, to the vast discretion possessed by corporate decision-makers.

B. Managerial Discretion

Unlike the normative question of corporate purpose, there is broad consensus that, as a descriptive matter, corporate law accords directors and officers wide latitude to act.⁴⁷ Even theorists believing that various markets more or less effectively constrain corporate conduct acknowledge a significant amount of managerial discretion.⁴⁸ Where scholars disagree is over the degree of discretion,⁴⁹ and over what, if anything, should be done to encourage or mandate better use of discretion and more effectively constrain its misuse.⁵⁰

Professor Einer Elhauge recently developed at length both the descriptive and prescriptive case for “bounded” managerial discretion to sacrifice corporate profits in the public interest.⁵¹ Professor Elhauge offers a number of theoretical reasons as to why profit-sacrificing behavior is desirable.⁵² These include the argument that shareholder welfare is actually increased when managers are free to sacrifice profits because a legally enforceable duty to maximize profits would mean substantial litigation over operational decisions.⁵³ Courts are unable to accurately ascertain either whether specific decisions did or did not maximize profits in the short run, or whether any sacrifice of profits would yield larger long-run profits due to increased corporate goodwill.⁵⁴ Furthermore, litigation *ex post* over the substantive wisdom of corporate decisions may carry its own significant error rate and is likely to be quite costly.⁵⁵ Moreover, Elhauge argues, discretion that sacrifices profits *ex post* may enhance profits *ex ante* by inducing various non-shareholder constituents to invest in a company while expecting managers to reciprocate later by sacrificing

47. For a good overview, see STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 35-38, 192-208 (2002).

48. See, e.g., Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1263-64 (1982).

49. See, e.g., Roe, *supra* note 29, at 1256-60 (exploring how discretion might be constrained by culture).

50. See BAINBRIDGE, *supra* note 47, at 37-38 (noting tradeoff between increased discretion and reduced accountability, and vice versa).

51. Elhauge, *supra* note 24, at 745, 776-818.

52. *Id.* at 776-818.

53. *Id.* at 777.

54. *Id.* at 777-79.

55. *Id.* at 778.

profits *ex post*.⁵⁶ In addition, such profit-sacrificing behavior may reflect the public interest views of most shareholders, though shareholders themselves, often caricatured as wealth-obsessed, cannot directly express those social views due to collective action problems.⁵⁷ Even where managers do deviate from shareholder views about corporate purpose, relying on social sanctions and internalized moral norms to guide the exercise of management discretion—rather than an enforceable legal duty—may lead to corporate conduct more congruent with widespread social and moral norms.⁵⁸

Whatever theoretical justifications for managerial discretion might be offered, and whether or not such discretion is thought to be socially desirable, it clearly exists as a matter of positive law. One important reason it exists is that, under corporate statutes, shareholders elect directors,⁵⁹ but do not elect officers,⁶⁰ and neither directors nor officers are obligated to do what shareholders want. Another reason directors and officers have discretion is that, as fiduciaries, they are not obligated to act only in the best interests of shareholders,⁶¹ but rather, are to act “in the best interests of the corporation,”⁶² or, in Delaware, in the best interests of “the corporation and its shareholders.”⁶³ What is in the interests of the “corporation” on any particular matter depends almost entirely on the judgment of directors and officers. Finally, courts pay homage to this allocation of decision-making power through the business judgment rule,⁶⁴ the

56. *Id.* at 779-81.

57. *Id.* at 783, 793-96. Fifteen years ago, Professor Goodpaster similarly argued that “[w]hat we must understand is that the responsibilities of management toward stockholders are of a piece with the obligations that *stockholders themselves* would be expected to honor in their own right.” Goodpaster, *supra* note 35, at 68. He called this the “Nemo Dat Principle” from the Latin proverb *nemo dat quod non habet*—“nobody gives what he doesn’t have.” *Id.* Goodpaster considers this “a formal requirement of consistency in business ethics” and summarizes it as follows: “Investors cannot expect of managers (more generally, principals cannot expect of their agents) behavior that would be inconsistent with the reasonable ethical expectations of the community.” *Id.*; see *supra* note 45, for evidence of social support for a broader conception of corporate purpose.

58. Elhauge, *supra* note 24, at 796-805.

59. *DEL. CODE ANN.* tit. 8, § 211(b) (2001); *MODEL BUS. CORP. ACT ANN.* § 7.28 (2005).

60. *DEL. CODE ANN.* tit. 8, § 142(b) (2001); *MODEL BUS. CORP. ACT ANN.* § 8.40.

61. See *supra* note 42 and accompanying text.

62. *MODEL BUS. CORP. ACT ANN.* § 8.30(a).

63. *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984). Delaware’s formulation of the business judgment rule is expressed as a presumption that directors acted in the best interests of the corporation. *Id.* at 812. Decisions long have made clear, however, that the intended beneficiaries of director fiduciary duties are the corporation and its stockholders. See, e.g., *id.* at 811; *Loft, Inc. v. Guth*, 2 A.2d 225, 238 (Del. Ch. 1938), *aff’d*, 5 A.2d 503 (Del. 1939).

64. For a description of the Delaware business judgment rule, see Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 *BUS. LAW.* 439, 454-55 (2005).

cornerstone doctrine in corporate law.⁶⁵ Although variously formulated, the central tenet of the business judgment rule is that, absent a loyalty or good faith concern, courts review only the decision-making process, not the substantive merits of business decisions.⁶⁶ Relatedly, the fiduciary duty of care has no substantive thrust, but is only procedural in nature.⁶⁷ The upshot of the business judgment rule is strong judicial endorsement of broad managerial discretion.⁶⁸ The recent *Disney* case bears this out.⁶⁹

Few cases in corporate law over the past decade have been as long-awaited as the trial court opinion in *In re Walt Disney Co. Derivative Litigation*.⁷⁰ After an attention-grabbing pre-trial order in 2003 refused to dismiss a complaint alleging breach of good faith,⁷¹ the case went to trial in late 2004. Chancellor William Chandler found for the defendants in handing down his lengthy opinion in August 2005, the culmination to what the Chancellor described as “a public spectacle.”⁷² In June 2006, the Delaware Supreme Court affirmed Chancellor Chandler’s decision.⁷³

The legal issue centered on whether the directors and certain executive officers of the Disney Company had breached their fiduciary duties in connection with the hiring and termination of Michael Ovitz as president.⁷⁴ Ovitz served as president for only about fourteen months, yet he received approximately \$130 million in severance compensation.⁷⁵ Shareholders brought a derivative action in which they asserted, essentially, breach of the fiduciary duties of due care and good faith in the way the Disney directors and officers handled Ovitz’s hiring and termina-

65. *Id.* at 453 (describing the business judgment rule as “the cornerstone concept in the judicial review of corporate conduct”).

66. *In re Walt Disney Co. Deriv. Litig. (Disney)*, No. Civ.A. 15452, 2005 WL 2056651, at *31-33 (Del. Ch. Aug. 9, 2005), *aff’d*, No. 411,2005, 2006 WL 1562466 (Del. June 8, 2006). Various policy rationales underlie the deference of the business judgment rule. See Johnson, *supra* note 64, at 455-58.

67. *Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000) (“Due care in the decisionmaking context is *process* due care only.”).

68. Elhauge, *supra* note 24, at 770-75; see also Mark J. Roe, *On Sacrificing Profits in the Public Interest, in ENVIRONMENTAL PROTECTION AND THE SOCIAL RESPONSIBILITY OF FIRMS* 88, 97 (Bruce L. Hay et al. eds., 2005) (concluding that “the business judgment rule is probably central . . . [in] giving managers ample discretion”).

69. *Disney*, 2005 WL 2056651.

70. For example, a group of law professors was organized in advance of the opinion’s release to offer “instant” analysis. Posting of Gordon Smith to Conglomerate, http://www.theconglomerate.org/conglomerate_forum_disney/index.html (July 19, 2005).

71. *In re Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 291 (Del. Ch. 2003) (denying motion to dismiss), *judgment entered for defendants*, No. Civ.A. 15452, 2005 WL 2056651 (Del. Ch. Aug. 9, 2005), *aff’d*, No. 411,2005, 2006 WL 1562466 (Del. June 8, 2006).

72. *Disney*, 2005 WL 2056651, at *2.

73. *In re Walt Disney Co. Deriv. Litig.*, 2006 WL 1562466, at *1.

74. *Disney*, 2005 WL 2056651, at *1.

75. *In re Walt Disney Co. Deriv. Litig.*, 2006 WL 1562466, at *1.

tion.⁷⁶ Due to a standard provision in the corporate charter absolving directors of monetary liability for breaches of due care, the liability issue turned on whether directors had fulfilled their obligation of good faith.⁷⁷

Chancellor Chandler reflected at length as to what good faith means, but concluded that, on the *Disney* facts, it meant as one standard (not the only one) that of not engaging in “intentional dereliction of duty” or a “conscious disregard for one’s responsibilities.”⁷⁸ In applying that standard, Chancellor Chandler repeatedly rebuked the directors for how they had proceeded in hiring and firing Ovitz. For example, the Chancellor stated: “As I will explain in painful detail hereafter, there are many aspects of defendants’ conduct that fell significantly short of the best practices of ideal corporate governance.”⁷⁹ Noting the value of director shortcomings for providing an object lesson, Chancellor Chandler stated that “many lessons of what not to do can be learned from defendants’ conduct here.”⁸⁰ Specifically, Chancellor Chandler highlighted Michael Eisner’s chief responsibility “for the failings in process that infected and handicapped the board’s decisionmaking abilities,”⁸¹ and observed that “the board’s collective kowtowing in regard to Ovitz’s hiring is also due to Eisner’s desire to surround himself with yes men.”⁸² And finally, though Chancellor Chandler laced his opinion with additional harsh criticism, he noted that “Eisner’s actions . . . should not serve as a model . . . His lapses were many. . . . [His] actions fall far short of what shareholders expect and demand [and] do[] not comport with how fiduciaries of Delaware corporations are expected to act.”⁸³

For all the public scolding of Eisner, “especially at having enthroned himself as the omnipotent and infallible monarch of his personal Magic Kingdom,”⁸⁴ Chancellor Chandler concluded that Eisner had acted in good faith, and had not acted with gross negligence.⁸⁵ The basis for this conclusion was a finding that Eisner met the legal standard because he subjectively believed that his “actions were in the best interests of the [c]ompany,” and because his actions did “not represent a knowing viola-

76. *Disney*, 2005 WL 2056651, at *1.

77. With respect to Michael Ovitz, there also was an issue as to whether he had discharged the duty of loyalty, but Chancellor Chandler found Ovitz did not breach that duty, *id.* at *37-38, a finding affirmed by the Supreme Court. *In re Walt Disney Co. Deriv. Litig.*, 2006 WL 1562466, at *12-13.

78. *Disney*, 2005 WL 2056651, at *36.

79. *Id.* at *1.

80. *Id.* at *39.

81. *Id.* at *40.

82. *Id.* at *40 n.488.

83. *Id.* at *41.

84. *Id.*

85. *Id.*

tion of law or evidence a conscious and intentional disregard of duty.”⁸⁶ A similar legal conclusion was reached as to every other director.⁸⁷ In affirming, the Supreme Court of Delaware approved Chancellor Chandler’s definition of good faith and quoted his reference to “faithfulness,”⁸⁸ but stated that it need go no further in elaborating on good faith.⁸⁹

The *Disney* opinion demonstrates how relatively little is required of corporate decision-makers to avoid breaching their fiduciary duties. It reveals, as well, the vast gulf between what the law requires and what shareholders and others in society expect and demand. In short, because of the strong protection offered by the business judgment rule, managerial discretion is only lightly regulated by the risk of legal sanction; and the opinion illustrates the broad scope of this discretion. What influence then might guide and curb such far-ranging freedom?

III. FAITH AS CONSTRAINING AND GUIDING DISCRETION

This Part addresses what scholars say about the role of religious faith in influencing decisions by senior corporate leaders. Selected non-legal scholarship is first described and then the emergent scholarship on faith in corporate law is examined. The former is a much more developed body of scholarship.

A. Faith and Non-Legal Scholarship

Outside the legal academy, the role that religious faith can and does play in influencing corporate decision-making has received thoughtful, if limited, attention. Professors Helen Alford and Michael Naughton challenge the belief, engendered, they suggest, by the modern university,⁹⁰ that “faith is in a category completely separate from our work.”⁹¹ They begin by describing various models within the Catholic social tradition for integrating faith and work, including what they call the natural law, faith-based, and prophetic approaches.⁹² They then offer a critique of both the shareholder primacy and the stakeholder conceptions of corporate purpose.⁹³ They criticize the former for focusing exclusively on a

86. *Id.*

87. *Id.* at *42-43, *47.

88. *In re Walt Disney Co. Deriv. Litig.*, No. 411,2005, 2006 WL 1562466, at *27 (Del. June 8, 2006) (quoting *Disney*, 2005 WL 2056651, at *36).

89. *Id.*

90. HELEN J. ALFORD & MICHAEL J. NAUGHTON, *MANAGING AS IF FAITH MATTERED: CHRISTIAN SOCIAL PRINCIPLES IN THE MODERN ORGANIZATION* 16-18 (2001).

91. *Id.* at 1.

92. *Id.* at 21-32.

93. *Id.* at 46-60.

corporation's financial return. Such a focus, they argue, is rightly regarded as a foundational good, but should be considered primarily as a means to higher, more excellent goods, not an end in itself.⁹⁴ They criticize the stakeholder model as simply adding additional groups whose interests, along with shareholders, should be maximized by managers, thereby ignoring the overall "common good."⁹⁵ After next developing how corporate activity can contribute to spiritual development,⁹⁶ they offer specific guidance on what job design, wages, corporate ownership, and marketing would look like if shaped by Christian principles.⁹⁷ In short, these authors seek a principled, but practical, approach to blending faith and corporate life at the senior management level.

Professor Laura Nash takes a more anthropological approach to investigating faith and business.⁹⁸ Nash notes that, on the one hand, most discussions of secular business ethics neglect personal religious belief,⁹⁹ and, on the other hand, much of Christian religious thought ignores the corporation.¹⁰⁰ Nash interviewed over eighty-five evangelical Christian CEOs and other top executives to learn how corporate managers understand business responsibility in light of their Christian faith.¹⁰¹ Classifying executives into three groups—generalists, justifiers, and seekers—Nash found that the first two groups either ignore or rationalize potential conflicts between business demands and Christian ethics.¹⁰² The third type of executive, the seeker, openly confronts the recurrent tension between the demands of faith and business and, although rejecting business success as the highest goal, seeks to guide the corporation to economic success while doing so in a way that is one more expression of religious convictions.¹⁰³

94. *Id.* at 46-49.

95. *Id.* at 55-57. Dean Sargent also contrasts the common good as articulated in a communitarian vision of the corporation with an approach that merely mediates stakeholder interests. Sargent, *Competing Visions*, *supra* note 17, at 570 n.21.

96. ALFORD & NAUGHTON, *supra* note 90, at 70-95.

97. *Id.* at 99-100, 125-26, 152-53, 177-78; *see also* RETHINKING THE PURPOSE OF BUSINESS: INTERDISCIPLINARY ESSAYS FROM THE CATHOLIC SOCIAL TRADITION (S.A. Cortright & Michael J. Naughton eds., 2002); BUSINESS AS A CALLING: INTERDISCIPLINARY ESSAYS ON THE MEANING OF BUSINESS FROM THE CATHOLIC SOCIAL TRADITION (Michael J. Naughton & Stephanie Rumpza eds., 2005).

98. NASH, *supra* note 16.

99. *Id.* at ix. Professor Timothy Fort also believes that "[t]he field of business ethics has not paid sufficient attention to the questions of why a person would want to be ethical." Timothy L. Fort, *Religious Belief, Corporate Leadership, and Business Ethics*, 33 AM. BUS. L.J. 451, 452 (1996). He also observes that "[m]any people believe that religious convictions have no appropriate role in business decision making." *Id.* at 451.

100. NASH, *supra* note 16, at 29.

101. *Id.* at xii. For recent examples of how top corporate managers mix business and faith, see Phred Dvorak, *Managing by the (Good) Book*, WALL ST. J., Oct. 9, 2006, at B1.

102. NASH, *supra* note 16, at 40, 44-45.

103. *Id.* at 45-47.

Nash found that this effort to blend faith and work led to more meaningful work experiences for the individuals themselves, higher ethical standards, and more humane employee practices at the company level.¹⁰⁴

Drawing on the work of Professor Nash, as well as the scholarship of theologian Max Stackhouse, Dennis McCann, and others, Kihyoung Shin, working in the Christian Reformed tradition, has developed a “covenantal interpretation” of the corporation.¹⁰⁵ Shin contrasts a covenantal understanding of corporations with the widely accepted contractarian theory, arguing that a covenantal interpretation is superior.¹⁰⁶ The two models differ in their perception of social relations (emphasizing moral commitment to others versus a focus on calculative self-interest), and in assumptions about human nature (relational versus autonomous and self-defining).¹⁰⁷ Ultimately, Shin believes a covenantal model both better situates the corporation in a wider social context and more promisingly links corporate endeavor to widely shared beliefs about social purpose, moral values, and religious belief.¹⁰⁸ In short, to paraphrase a favorite metaphor of orthodox corporate law theory, Shin advocates a conception of corporateness understood more as “nexus of covenants” than “nexus of contracts.”

Recently, Marc Gunther, a senior writer for *Fortune* magazine, sought to chronicle how faith and spiritual values have influenced such companies as UPS, Timberland, Starbucks, Southwest Airlines, and Herman Miller.¹⁰⁹ Gunther adopts a considerably broader conception of faith than do Alford and Naughton, Nash, and Shin, noting that some business leaders have faith in God, while others do not.¹¹⁰ He believes, however, that senior leadership in the companies he studied are all guided by spiritual values, which he defines as “a set of beliefs that are shared by the world’s great religious traditions.”¹¹¹ Gunther’s ecumenical definition of faith encompasses a broad set of companies where managers are guided by his inclusive notion, though for persons seeking to live from more fixed and particularized religious conviction, his conception may be too thin to be of much individual guidance. Still, the company stories do show the leav-

104. *Id.* at xv.

105. KIHYOUng SHIN, *THE COVENANTAL INTERPRETATION OF THE BUSINESS CORPORATION* 1-3 (2001). Nash briefly addresses a covenantal approach as well. NASH, *supra* note 16, at 95-99.

106. SHIN, *supra* note 105, at viii.

107. *Id.* at 3.

108. *Id.*

109. GUNTHER, *supra* note 16.

110. *Id.* at 1.

111. *Id.* at 4.

ening effect that a focus on non-economic values can have in corporate culture.¹¹²

What lies unspoken beneath these, and other,¹¹³ efforts to explore the relationship of faith and the corporation is the assumption that managers possess sufficient discretion to make moral choices. A recent article by Professors Christine Hemingway and Patrick Maclagan makes explicit the fact that managerial discretion is the critical avenue by which personal moral values can shape corporate conduct toward greater social responsibility, whether those values are grounded in religious conviction or other sources of moral authority.¹¹⁴ The presence or absence of discretion, therefore, is essential to whether managers can draw on religious faith to shape corporate policy. Since, as shown in Part II, it is clearly settled in corporate law that managers possess broad discretion, has corporate law theory acknowledged how faith might influence its exercise?

B. Faith and Corporate Law Scholarship

Unlike the case with scholarship in the business and business ethics fields, very little corporate law scholarship examines the corporation from a religious vantage point. Recently, a few scholars working from a Catholic social thought perspective have connected religious outlook to issues raised by the business corporation.¹¹⁵ The general lack of attention to the role of religious faith in corporate law is surprising, given that corporate law, like other areas of law, has been assessed from a host of other standpoints.¹¹⁶ Much of the “silence” in corporate scholarship may, as noted earlier,¹¹⁷ simply stem from a lack of interest in religion on the part of legal scholars or from a belief that religion is irrelevant to modern corporate theory. It may also reflect adherence to a “norm” among legal academics generally, to the effect that religion and legal scholarship do not mix. Professor Vincent Di Lorenzo studied legal literature on corporate social responsibility for the period from 1995 to 2000 and found that a mere three of forty-four articles discussed the viewpoints of religious groups and leaders, only one of which was written by a writer with a legal

112. Interestingly, Gunther describes an earlier article he wrote about the Walt Disney Company, in which he “argued that Michael Eisner’s leadership style . . . damaged the company, its employees and its shareholders.” *Id.* at 15.

113. Cf. Fort, *supra* note 99, at 452-53.

114. Hemingway and Maclagan, *supra* note 35, at 39; see also Michael Bommer et al., *A Behavioral Model of Ethical and Unethical Decision Making*, 6 J. BUS. ETHICS 265, 268 (1987) (“[M]anagerial decisions will correspond more closely to the humanistic, religious, cultural, and societal values of society-at-large only when these values are made part of the job environment.”).

115. See *supra* note 17 and accompanying text.

116. See *supra* notes 4-12 and accompanying text.

117. See *supra* note 14 and accompanying text.

background.¹¹⁸ Di Lorenzo concludes that religious viewpoints in corporate law “are either overlooked or deliberately ignored.”¹¹⁹ His findings confirm what Professor William Stuntz, at a more general level, has noted about legal discourse: “It is probably fair to describe the conventional wisdom among legal academics as follows: religious convictions should be kept out of debates about law and politics”¹²⁰

Dean Mark Sargent and Professors Susan Stabile, Scott Fitzgibbon, and Stephen Bainbridge recently have begun considering the relevance of Catholicism to corporate law.¹²¹ Stabile has explored how religion—not simply Christianity—might be used to promote corporate responsibility,¹²² and she separately has sketched a “Catholic vision” of the corporation.¹²³ In the former article, Stabile explicitly argues for the role of law in mandating certain “responsible” corporate conduct.¹²⁴ To do that without “attempting to claim that the belief system of any one particular religion should hold sway,”¹²⁵ she canvasses religious thought broadly to find what “is common to many religions.”¹²⁶ Her aim is to develop a somewhat general, but religiously grounded, view of human personhood and human relations. In her “vision” piece,¹²⁷ she works more directly from Catholic tradition in suggesting both direct legal regulation and non-law alternatives for gaining more socially responsible conduct.

Stabile’s work contributes importantly in linking religion and corporate law. At the same time, the first article suffers from the need to be general and non-denominational in order to obtain sufficient political consensus to pass, or at least allay concerns about, the legislation Stabile seeks.¹²⁸ This need (or desire) to appeal to many faith traditions may, ironically, make Stabile’s approach less compelling to adherents of any particular religion, each such religion having what philosopher George

118. Vincent M. Di Lorenzo, *Legislative and Public Policy Debate: Should the Social Viewpoints of Religious Groups Play No Role?*, 1 MARGINS 489, 490-91 (2001).

119. *Id.* at 492.

120. William J. Stuntz, *Christian Legal Theory*, 116 HARV. L. REV. 1707, 1711 (2003) (book review).

121. See *supra* note 17 and accompanying text; see also Scott Fitzgibbon, “True Human Community”: *Catholic Social Thought, Aristotelean Ethics, and the Moral Order of the Business Company*, 45 ST. LOUIS U. L.J. 1243, 1267-68 (2001) (contrasting the utility-affiliation and the closely-bonded types of companies).

122. Stabile, *Using Religion*, *supra* note 17, at 846-47.

123. Stabile, *Catholic Vision*, *supra* note 17, at 181.

124. Stabile, *Using Religion*, *supra* note 17, at 879 & n.157 (“My focus, here . . . is on the role of the law.”).

125. *Id.* at 896.

126. *Id.*; see also *id.* at 895 n.227 (“[T]he religious view I espouse here . . . is fundamental to so many world religions.”).

127. Stabile, *Catholic Vision*, *supra* note 17, at 181.

128. Stabile, *Using Religion*, *supra* note 17, at 879-81. In the United States, however, a Christian majority could probably pass her proposed legislation.

Santayana called “a marked idiosyncrasy.”¹²⁹ Moreover, as will be developed later, no changes in positive law are needed to introduce religious perspectives into corporate law. Managerial discretion today is broad enough to enable religious beliefs to shape corporate conduct. Unlike Stabile, who seeks more from the law, i.e., legislative expression of *general* religious views, this author seeks nothing new from the law, asking only that law not forbid giving free voice to *particular* religious views within corporate law and practice as they now exist. The difference stems from a belief that it is not law—where managerial discretion is broad, though still constrained by fiduciary duties—that silences the religious voice within corporations. Rather, it is the secularization of corporate law discourse itself, along with social norms and linguistic practices within corporations themselves, that hinder free expression and therefore need reforming.

Dean Sargent has offered both a Catholic critique of law and economics and a comparison of competing Catholic conceptions of corporateness.¹³⁰ In the latter work, he criticizes Michael Novak’s work as overly concerned with economic liberty and as wrongly regarding wealth maximization as the sole legitimate goal in the economic sphere.¹³¹ He finds less rigidity in Bainbridge’s work¹³²—even though Bainbridge is a firm proponent of a contractarian conception of corporateness, descriptively, and the goal of shareholder wealth maximization, prescriptively¹³³—and even though Bainbridge rejects communitarianism and finds little of promise for corporate law in Catholic social thought.¹³⁴ According to Sargent, Bainbridge perceptively holds that the calculative, self-interest maximizing conduct ascribed to humans by law and economics scholars describes people as they really are—i.e., “fallen” and sinful—not as they can or should be.¹³⁵ Sargent objects, however, that Bainbridge’s assessment neglects the possibility of redemption, a central teaching of the Christian faith.¹³⁶

Sargent, like Stabile, holds out more hope than Bainbridge that Catholic social thought can contribute to more socially responsible corporate

129. GEORGE SANTAYANA, *Reason in Religion*, in *THE LIFE OF REASON* 179, 180 (Charles Scribner’s Sons 1954). Santayana also stated, just before the phrase quoted in the text, that: “The attempt to speak without speaking any particular language is not more hopeless than the attempt to have a religion that shall be no religion in particular.” *Id.*

130. See generally Sargent, *Utility*, *supra* note 17; Sargent, *Competing Visions*, *supra* note 17.

131. Sargent, *Competing Visions*, *supra* note 17, at 574-81.

132. *Id.* at 581-88.

133. See Bainbridge, *Apologia*, *supra* note 17, at 209.

134. Bainbridge, *Bishops*, *supra* note 17, at 15-16.

135. Sargent, *Utility*, *supra* note 17, at 47-48.

136. See *id.* at 51.

conduct.¹³⁷ Nonetheless, he realistically acknowledges “how difficult it is to derive specific guidance from [Catholic social thought]’s theological propositions and moral norms for corporate law.”¹³⁸ He appreciates that “a [Catholic social thought]/communitarian version of corporate law is yet to emerge.”¹³⁹ The challenge ahead, Sargent believes, is to “provide a means for moving from the general to the specific.”¹⁴⁰

The remainder of this Article responds to that challenge and provides a way forward. The concept of faithfulness developed here offers, first, a means for being more specific about how to connect faith and the corporation, but does not purport to provide the only means; nor does it derive from Catholic social thought. Second, it works within corporate law as it is, seeking, unlike Stabile, no reform of positive law; it seeks, instead, a new understanding of what current law both requires and permits, especially after the recent *Disney* decision. Those desiring introduction of religious voice into corporate theory and practice need less from the law than Stabile asks, and already have more in the law than Bainbridge allows. Third, the approach offered here honors the reality of managerial discretion by leaving to corporate decision-makers themselves, and their legal counsel—not legislators—the task of deciding whether and how to translate legal responsibilities into specific courses of action based on religious belief. This less hierarchical means for leavening corporate law with religious outlook is not only more politically pragmatic at this juncture, it also is more decentralized and eclectic in approach than that of Stabile. At the same time, this approach is fully congruent with the principle of “subsidiarity,”¹⁴² and with what Dean Sargent has observed about papal documents and bishops’ statements: “They also usually avoid mak-

137. Bainbridge cautions that “the rules must not be defined in ways that effectively require every citizen to be a practicing Christian.” Bainbridge, *Apologia*, *supra* note 17, at 222. He also objects to the teachings of Catholic social thought as having “a strong statist slant.” Stephen M. Bainbridge, *Corporate Decisionmaking and the Moral Rights of Employees: Participatory Management and Natural Law*, 43 VILL. L. REV. 741, 809 (1998). Bainbridge’s concern about “rules” and “statist” approaches assumes legal imposition, a predicate relevant to Stabile’s proposal but not to the approach advocated in this Article.

138. Sargent, *Competing Visions*, *supra* note 17, at 593.

139. *Id.* at 592.

140. *Id.* at 593.

142. As stated in a 1986 letter by the National Conference of Catholic Bishops: “[G]overnment should undertake only those initiatives which exceed the capacity of individuals or private groups acting independently.” NAT’L CONFERENCE OF CATHOLIC BISHOPS, ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY 62 (1986).

ing specific policy recommendations, recognizing the hierarchy's limited expertise, leaving questions of application to the prudential judgment and moral discernment of the laity."¹⁴³

IV. THE DUTY OF FAITHFULNESS

How might the religious perspective be introduced into corporate law and practice without legislating it, as Stabile advocates, or relying on sheer volunteerism? This Part suggests that the concept of faithfulness, recently invoked by both Chancellor Chandler and the Supreme Court of Delaware in the *Disney* opinion,¹⁴⁴ is a rich, evocative term that, having currency both in the legal sphere and in the larger social-moral realm, invites corporate decision-making to be informed by religious faith. Before developing the argument, and to provide a richer context for the argument, the way in which corporate theory treats managerial discretion will be briefly addressed.

A. *Curbing Managerial Discretion*

As noted earlier, corporate theorists do not disagree on the existence of significant managerial discretion, though they do disagree on its extent and what, if anything, to do about it.¹⁴⁵ Many scholars, especially those deeply influenced by neo-classical economics, believe that, except perhaps in regulating the hostile takeover market, the law permits competitive forces within markets to work fairly well to limit the abuse of discretion.¹⁴⁶ These markets include not only product, service, labor, and capital markets,¹⁴⁷ but also the "market" for law, that is, rivalry among states for corporate charters, as influenced by the threat of federal intervention.¹⁴⁸ To compete effectively in these various markets, the argument goes, managers must maximize profits and take good care of shareholders.¹⁴⁹ Many theorists, believing such market forces fail to fully constrain the undesirable use of discretion, advocate government regulation of various kinds.¹⁵⁰ The Sarbanes-Oxley Act is just one especially prominent and recent example of this approach.¹⁵¹ Where specific regulation exists,

143. Sargent, *Competing Visions*, *supra* note 17, at 563.

144. *See supra* note 1 and accompanying text.

145. *See supra* Part II.B.

146. Roe, *supra* note 29, at 1252 (stating that articles in recent symposiums of which his is a part "fit this tradition").

147. *See id.* at 1254.

148. For a recent treatment of competition in the production of corporate law, see Mark J. Roe, *Delaware's Politics*, 118 HARV. L. REV. 2491 (2005).

149. EASTERBROOK & FISCHER, *supra* note 4, at 4-5.

150. *See, e.g.*, Stabile, *Using Religion*, *supra* note 17, at 879-80.

151. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15, 18 & 28 U.S.C.). For a description of that important federal legisla-

companies must comply with the particular mandates of law, but that is all. Other theorists, including some market-centered scholars, acknowledge the need for the law to impose fiduciary duties on corporate decision-makers to inhibit undesirable conduct not subject to precise *ex ante* delineation.¹⁵² Finally, the important role of non-legal, social, and moral norms in shaping corporate conduct has been recognized.¹⁵³ Here, more than compliance with the minimal demands of positive law is expected; compliance with prevailing social conventions also comes into play. For this Article, the role of fiduciary duties and norms in shaping managerial behavior is especially important.

B. Norms and Fiduciary Duties

1. Norms

Professor Elhauge recently developed a way in which social and moral norms augment economic and legal constraints in business, stating that “optimizing conduct has always required supplementing legal and economic sanctions with social and moral processes. . . . [T]hese processes work by subjecting business owners to the usual set of social and moral sanctions that attend antisocial behavior even when it is legal.”¹⁵⁴ In the corporate structure, shareholders of public companies are largely insulated from the full working of these processes, due to a lack of information necessary for moral guilt and through enjoying an anonymity that screens them from exposure to social sanctions.¹⁵⁵ Consequently, corporate managers, by being responsive to social and moral sanctions, can counteract shareholder immunity to such sanctions. Many corporate managers, according to Elhauge, do in fact temper a full-bored shareholder wealth maximization approach to corporate decisions by weighing the interests of various non-shareholders as well.¹⁵⁶ This view both countenances managerial discretion and makes it imperative that to channel such discretion in a socially desirable manner, managers appropriately decipher, reflect, and respond to the influence of a society’s social and moral norms.

Societies differ, of course, both as to what norms hold wide influence and as to the source and strength of those norms. In the United States,

tion and how it may influence state corporate law, see Lyman P.Q. Johnson & Mark A. Sides, *The Sarbanes-Oxley Act and Fiduciary Duties*, 30 WM. MITCHELL L. REV. 1149 (2004).

152. See, e.g., EASTERBROOK & FISCHER, *supra* note 4, at 90-93.

153. See Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1640-41 (2002).

154. Elhauge, *supra* note 24, at 797.

155. *Id.* at 798-99.

156. *Id.* at 803-04.

both historically and currently, religious faith has played, and still plays, a significant role in shaping social, moral, and even political outlook.¹⁵⁷ As recently noted by Professor Noah Feldman: “Secularists must accept the fact that religious values form an important source of political beliefs and identities for the majority of Americans.”¹⁵⁸

Within the business world, religious convictions also play a meaningful role in guiding business decisions for many people.¹⁵⁹ Certainly nothing in law prohibits that practice, but, likewise, nothing mandates it either. It simply is permitted. It would seem, then, that the appropriateness of drawing on such convictions is itself likely to be influenced both by social norms as to the propriety of linking faith and business and by personal moral convictions. If drawing on religious beliefs—and saying so—is socially approved (or, at least, is accepted), it is more likely to be done than if it is frowned upon. Even if socially frowned on, persons who believe that their convictions *require* appropriate expression in business may draw on them notwithstanding social stigma.

Currently, though we probably know less about this than we should, the predominant mode of discourse within most business circles is a highly secular discourse. Certainly, the prevailing discourse in corporate legal theory is decidedly secular. This would seem, both in practice and in theory, to leave the invocation of faith, as a factor germane to making and justifying business decisions, wholly within the discretion of the individual, to be guided solely by the individual’s understanding of prevailing social norms and the demands of personal moral-religious beliefs themselves. One limiting factor, however, on this highly individualistic account of how faith might bear on corporate law and practice is the mandate of fiduciary duties; specifically, the question of how faith itself might influence one’s understanding of binding fiduciary duties.

2. *Fiduciary Duties*

Corporate decision-makers cannot exercise their discretion in whatever way they want. Even apart from the constraints imposed by market forces, specific legal regulation, and social-moral norms, directors and officers are subject to the fiduciary duties of care and loyalty. The duty of care, admittedly, constrains corporate decision-makers rather loosely, at least as to the legal sanction of damages.¹⁶⁰ For corporate directors

157. See *supra* note 13 and accompanying text.

158. FELDMAN, *supra* note 23, at 251.

159. See *supra* text accompanying notes 98-111.

160. See Lyman Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. L. 27, 30-31 & n.11 (2003) (explaining that breaches of the duty of care do not lead to damages under most corporate statutes).

(but not officers),¹⁶¹ care is process-oriented, lacks substantive content,¹⁶² and, since the mid-1980s, its breach is unlikely to result in money damages due to widespread statutory exculpation.¹⁶³ That leaves only the duty of loyalty to serve as a meaningful constraint on managerial discretion, at least *ex post*. Many scholars and courts, however, emphasize only the “negative” dimension of loyalty, that is, the aspect that forbids betrayal.¹⁶⁴ The affirmative dimension of loyalty, that is, the thrust that also mandates devotion to corporate interests, is often neglected.¹⁶⁵ This legal rendering of loyalty as mere nonbetrayal is, of course, considerably narrower than the richer historical and social-moral understanding of that notion. Read narrowly, loyalty in corporate law too often serves only to prohibit improper conflicts of interest and wrongful use or misappropriation of corporate information or opportunities, not mandate affirmatively advancing corporate well-being.

With the duty of care lacking legal “bite,” and the duty of loyalty largely limited to policing self-dealing conduct, the role of fiduciary duties in curbing managerial discretion seemed in jeopardy in the 1990s. This led Delaware courts and corporate scholars to explore whether the notion of good faith might cover a broader range of misconduct than loyalty,¹⁶⁶ while offering, unlike care, the prospect of money damages as a remedy for its breach.¹⁶⁷ Interest in good faith, whether as a stand-alone fiduciary duty or as a component of the duty of loyalty, rose greatly in 2003, when Chancellor Chandler denied a motion to dismiss the complaint in the *Disney* case,¹⁶⁸ where breach of good faith was the central claim. The case went to trial for thirty-seven days in late 2004, and Chan-

161. Much confusion exists as to how and why officer duties might differ from those of directors. See generally Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597 (2005) (differentiating director and officer duties).

162. See *supra* text accompanying note 67.

163. See Johnson, *supra* note 160, at 31 & nn.11-12. Directors, but not officers, typically are exculpated by these statutes. But see VA. CODE ANN. § 13.1-692.1 (2006) (permitting exculpation of both officers and directors).

164. See Johnson, *supra* note 160, at 34-35.

165. A few cases in Delaware capture the affirmative demands of loyalty. See *id.* at 36, 56-59.

166. See *id.* at 37-39, 48-50.

167. See Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 13-15 (2005); E. Norman Veasey with Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1439-54 (2005) (reviewing decisional law and scholarship); see also *In re Walt Disney Co. Deriv. Litig.*, No. 411,2005, 2006 WL 1562466, at *34 & n.99 (Del. June 8, 2006) (collecting recent scholarship on good faith).

168. *In re Walt Disney Co. Deriv. Litig.*, 825 A.2d 275, 291 (Del. Ch. 2003) (denying motion to dismiss), judgment entered for defendants, No. Civ.A. 15452, 2005 WL 2056651 (Del. Ch. Aug. 9, 2005), *aff'd*, No. 411,2005, 2006 WL 1562466 (Del. June 8, 2006).

cellor Chandler issued his long-awaited (and lengthy) opinion on August 9, 2005.¹⁶⁹

Chancellor Chandler entered judgment for the defendants on all claims.¹⁷⁰ He wrote an opinion that, as noted earlier, severely criticized defendants and catalogued their distressing departure from corporate “best practices.”¹⁷¹ He also discussed social norms,¹⁷² urged directors and officers to employ best practices,¹⁷³ and, importantly, elaborated on the notion of “good faith.”¹⁷⁴ In doing so, he invoked, repeatedly, the words “faithful” and “faithfulness.”¹⁷⁵ The evocative term “faithfulness,” referenced by both the chancery court and the supreme court, may provide a linguistic entry point for allowing decision-makers to discharge legal duties while drawing on faith-based understandings of those duties.

C. Faithfulness

In his five-page introduction, Chancellor Chandler used the word “faithful” (or “faithfully”) five times,¹⁷⁶ once as part of the phrase “faithful servants.”¹⁷⁷ He expressly premised the “wide latitude” given to corporate decision-makers by corporate law on those actors acting “faithfully.”¹⁷⁸

The heart of Chancellor Chandler’s opinion addressed the issue of whether each of the defendants had acted in good faith under Delaware law. Before measuring their conduct against that standard, he sought to explain what good faith meant in the fiduciary duty context.¹⁷⁹ The issue

169. *In re Walt Disney Co. Deriv. Litig. (Disney)*, No. Civ.A. 15452, 2005 WL 2056651, at *1 (Del. Ch. Aug. 9, 2005), *aff’d*, No. 411,2005, 2006 WL 1562466 (Del. June 8, 2006). The trial court’s slip opinion is 174 pages and contains 591 footnotes.

170. *Id.* at *52.

171. See *supra* text accompanying notes 79-84.

172. *Disney*, 2005 WL 2056651, at *1-2.

173. *Id.* at *1.

174. See *infra* text accompanying notes 177-96.

175. See *infra* text accompanying notes 177-96. The Supreme Court of Delaware quoted approvingly Chancellor Chandler’s description of “‘good faith’” as requiring “‘faithfulness.’” *In re Walt Disney Co. Deriv. Litig.*, 2006 WL 1562466, at *27 (quoting *Disney*, 2005 WL 2056651, at *36).

176. *Disney*, 2005 WL 2056651, at *1-2.

177. *Id.* at *2. This famous phrase, now widely used in common parlance, is found in biblical teaching on being faithful. See *Matthew* 25:21, 23 (New International); see also 1 *Corinthians* 4:2 (New International). For example, President Bush recently described former Pope John Paul II as “‘a good and faithful servant of God.’” Daniel Williams & Alan Cooperman, *John Paul II Dies at 84*, WASH. POST, Apr. 3, 2005, at A1.

178. *Disney*, 2005 WL 2056651, at *1. The following discussion will focus on the chancery court opinion because it provides a fuller treatment of faithfulness and because the supreme court upheld, in a briefer discussion, Chancellor Chandler’s definition of good faith and quoted his reference to “‘faithfulness.’” *In re Walt Disney Co. Deriv. Litig.*, 2006 WL 1562466, at *27 (quoting *Disney*, 2005 WL 2056651, at *36).

179. *Disney*, 2005 WL 2056651, at *35.

arose because of a basic awkwardness in Delaware's doctrinal constructs on the subject of corporate fiduciary duties. On the one hand, Delaware long has recognized that directors owe two fiduciary duties, those of due care and loyalty.¹⁸⁰ On the other hand, the Delaware business judgment rule, the key analytical tool used in judicially reviewing fiduciary conduct, while not itself a substantive rule of law, is phrased as a "presumption that . . . directors . . . acted . . . in good faith."¹⁸¹ In addition, the Delaware statute permitting exculpation of directors from liability for money damages expressly excepts from permissible exculpation director conduct "not in good faith."¹⁸² Thus, the relationship of good faith to care and loyalty has emerged as a key issue in Delaware jurisprudence.

Chancellor Chandler acknowledged that Delaware decisions "are far from clear with respect to whether there is a separate fiduciary duty of good faith,"¹⁸³ and characterized the law as "[s]hrouded in the fog of . . . hazy jurisprudence."¹⁸⁴ In seeking to harmonize these fiduciary concepts, Chancellor Chandler asserted that good faith must be understood as "inseparably and necessarily intertwined with the duties of care and loyalty."¹⁸⁵ After offering various nonexclusive renderings of good faith,¹⁸⁶ Chancellor Chandler, acknowledging that "a definitive and categorical definition" of good faith "would be difficult, if not impossible,"¹⁸⁷ described good faith as requiring "honesty of purpose [and acting] in the best interests . . . of the corporation."¹⁸⁸ He also stated that "intentional dereliction of duty [or] a conscious disregard for one's responsibilities, is an appropriate (although not the only) standard for . . . good faith."¹⁸⁹

Chancellor Chandler did not stop with these rather modest assertions, however. In a fascinating tour de force, the Chancellor conceptually re-ordered the relationship between care, loyalty, and good faith. He recast the traditional duties of care and loyalty as

but constituent elements of the overarching concepts of allegiance, devotion and faithfulness that must guide the conduct of every fiduciary. The good faith required of a corporate fiduciary includes not simply the duties of care and loyalty, in the narrow

180. *Id.* at *31.

181. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

182. *See Johnson*, *supra* note 160, at 31 n.12 (quoting DEL. CODE ANN. tit. 8, § 102(b)(7) (2000)).

183. *Disney*, 2005 WL 2056651, at *35.

184. *Id.* The Supreme Court of Delaware noted that colorful description. *In re Walt Disney Co. Deriv. Litig.*, No. 411,2005, 2006 WL 1562466, at *24 & n.98 (Del. June 8, 2006).

185. *Disney*, 2005 WL 2056651, at *31.

186. *Id.* at *35-36.

187. *Id.* at *36.

188. *Id.*

189. *Id.* (emphasis omitted).

sense that I have discussed them above, but all actions required by a true faithfulness and devotion to the interests of the corporation and its shareholders.¹⁹⁰

Shortly thereafter, he again subsumed care and loyalty under good faith, referring to “the loyalty or care aspects of good faith.”¹⁹¹ Chancellor Chandler elaborated further on the idea of faithfulness as the overarching hallmark of good faith when he described Michael Eisner’s conduct.¹⁹² Appreciating that care is process-oriented and that loyalty is frequently understood as only having the negative dimension of forbidding conflicts of interests, he worried that such duties, traditionally understood, “may not be aggressive enough to protect shareholder interests.”¹⁹³ Good faith, he noted, may “fill this gap” between care and loyalty.¹⁹⁴ Citing an article by this author arguing that loyalty should be understood more expansively to require affirmative attention and devotion,¹⁹⁵ Chancellor Chandler noted that such a conception would “fit comfortably within the concept of good faith (or vice versa) as a constituent element of the overarching concept of faithfulness.”¹⁹⁶

What emerges, repeatedly, is the concept of faithfulness, understood as “devotion” and “allegiance,” as well as its opposite, the notion of faithless conduct.¹⁹⁷ Chancellor Chandler himself, in an earlier opinion, had described a fiduciary’s obligation of “remaining faithful to the fiduciary duties owed.”¹⁹⁸ His predecessor, William Allen, also had referred to faithful (and faithless) conduct,¹⁹⁹ as had Vice Chancellor Noble,²⁰⁰ Vice Chancellor Strine,²⁰¹ and the Delaware Supreme Court itself.²⁰² While more will be learned about the contours of this emerging concept of faithfulness in future cases, it seems clear, after the Delaware Supreme Court’s affirmance in *Disney*, that Delaware directors are subject to more than just the traditional demands of care and loyalty. They now are re-

190. *Id.* The Delaware Supreme Court prominently quoted this language in its opinion. *In re Walt Disney Co. Deriv. Litig.*, No. 411,2005, 2006 WL 1562466, at *27 (Del. June 8, 2006).

191. *Disney*, 2005 WL 2056651, at *36 n.463.

192. *See id.* at *39-41.

193. *Id.* at *40 n.487.

194. *Id.*

195. *Id.* (citing Johnson, *supra* note 160).

196. *Id.* (citing Johnson, *supra* note 160).

197. *Id.* at *36.

198. *Baring v. Condrell*, No. Civ.A. 516-N, 2004 WL 2340047, at *2 (Del. Ch. Oct. 18, 2004).

199. *In re Caremark Int’l. Inc. Deriv. Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996).

200. Official Comm. of Unsecured Creditors of Integrated Health Servs., Inc. v. Elkins, No. Civ.A. 20228-NC, 2004 WL 1949290, at *17 (Del. Ch. Aug. 24, 2004).

201. *Guttman v. Huang*, 823 A.2d 492, 506 & n.34-35 (Del. Ch. 2003).

202. *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1048-49 & n.16 (Del. 2004).

quired to act with faithfulness, and corporate lawyers must now so advise directors.²⁰³

To what source(s) will lawyers and decision-makers turn for enlightenment? The legal concept of faithfulness certainly cannot be understood by self-reference. Nor is faithfulness a well-developed idea in other areas of secular law, to which corporate law could look for meaningful guidance. Rather, the richest, most fully formed understandings of “faithfulness” are likely to be drawn from non-legal sources. Upon being advised that one is under a legal duty to act with faithfulness,²⁰⁴ or that one must be faithful or devoted to the best interests of the corporation and its shareholders, directors can bring to these evocative legal terms their own rich and varied recollection of faithfulness, as drawn from teaching, literature, drama, and religious texts and instruction where that concept is portrayed. By infusing the notion of faithfulness with moral instruction gained from religious faith, for example, directors may more clearly see the performance of their responsibilities as involving a moral as well as a legal obligation. The result may be that they act in a way that exceeds the minimum level needed to avoid legal sanction, striving also to fulfill a higher moral charge.

V. FAITH INFORMING FAITHFULNESS

Fiduciary duties retain a moral and spiritual quality even in the highly secularized discourse of twenty-first century corporate law.²⁰⁵ The Latin root of fiduciary—“fides”—means “faith,” as in trust, reliability, or faithfulness, not as in religious faith.²⁰⁶ It is fitting, therefore, for both judges and legal counsel to remind corporate *fiduciaries* that they must act *faithfully*. Moreover, to the extent that religious faith traditions make faithfulness a moral teaching, they can offer substantial guidance on the meaning of faithful managerial conduct and its importance to a healthy

203. The role of lawyers in transmitting judicial rulings (and other legal developments) to directors and officers is critical. This author has gathered empirical data as to what lawyers say to officers about fiduciary duties. See Lyman Johnson & Rob Ricca, (*Not Advising Corporate Officers About Fiduciary Duties*, 42 WAKE FOREST L. REV. (forthcoming 2007).

204. Incoming members of the Board of Trustees at the author's home institution are required to take an oath of office wherein they swear that they “will faithfully discharge the duties of the office to which I have been elected.” Board of Trustees Oath of Office, Washington and Lee University (on file with author).

205. Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 829-30 (1983) (“Courts regulate fiduciaries by imposing a high standard of morality upon them. This moral theme is an important part of fiduciary law. Loyalty, fidelity, faith, and honor form its basic vocabulary.”).

206. E-mail from Kevin M. Crotty, Professor of Classics, Washington & Lee Univ. to author (Sept. 13, 2005) (on file with author). Fides was a Roman goddess, considered the deification of faith and honesty. *Id.*

corporate ethos.²⁰⁷ As an example, the Christian faith gives this quality a prominent place in ethical conduct, and recalling what it says can refresh a director's or officer's understanding of the moral imperative lying beneath a secular concept.²⁰⁸

A. Biblical Teaching on Faithfulness

The Bible itself says it is to be looked to for instruction.²⁰⁹ Thus, believers should turn to the Bible for an understanding of faithfulness. The Bible describes God himself as being faithful.²¹⁰ Moreover, in several places, it commands the quality of human faithfulness toward others. In Jesus' "Parable of the Shrewd Manager,"²¹¹ in his "Parable of the Talents,"²¹² as well as in his story of the faithful servant,²¹³ Jesus makes clear that when working for another, or when entrusted with another's property, "faithfulness" is highly valued. Interestingly, the famous teaching on not being able to serve two masters²¹⁴—a passage that undergirds the fiduciary duty of loyalty and which was regularly cited by judges into the early twentieth century²¹⁵—immediately follows a strong teaching on the

207. This assumes, of course, that believers within a faith tradition understand its core moral teachings. More than one commentator has expressed concern that, even though the United States is a religious country, too few Americans "can engage with any sophistication in biblically inflected arguments" because too many citizens are "religious illiterates." Stephen Prothero, Op-Ed, *A Nation of Religious Illiterates*, CHRISTIAN SCI. MONITOR, Jan. 20, 2005, at 9.

208. Addressing the need to recall the "moral core" of the corporation, theologian Max Stackhouse stated:

What then is the moral core of the corporation? It is not in economics, nor alone in the relative efficiencies it can introduce. It is in the ethos, and it appears in the practices of many who live according to the deepest principles already incarnate in business. But these practices themselves are framed by theological and social forces that are extrinsic and prior to business. The guidance of modern economic systems, the renewal of our political economy, the moral fabric of the twenty-first century toward which we are limping and lurching will depend in substantial measure on whether we can grasp and refresh the theological foundations on which the ethos and these practices rest—especially since they have now become nearly universal in secular form, without consciousness of their moral and spiritual roots. Without this consciousness, the roots dry up; Baal triumphs and Mammon wins—at least for a moment. But with this guidance, the moral and spiritual foundations for moral business practice can become self-conscious and thereby self-critical and self-reconstructive once more, to the glory of God.

Max L. Stackhouse, *The Moral Roots of the Corporation*, 5 THEOLOGY & PUB. POL'Y 29, 38 (1993).

209. 2 Timothy 3:16 (New International).

210. See, e.g., Psalm 36:5 (New International); Isaiah 25:1 (New International).

211. Luke 16:1-13 (King James).

212. Matthew 25:14-30 (New International).

213. Luke 12:35-48 (New International).

214. Luke 16:13 (King James).

215. See Johnson, *supra* note 160, at 53 n.150.

quality of faithfulness.²¹⁶ This provides a fascinating historical antecedent to Chancellor Chandler's subsuming of loyalty within the overarching concept of faithfulness. The Apostle Paul also lauds the faithful steward,²¹⁷ and describes "faithfulness" as one of the "fruit[s]" of the Holy Spirit.²¹⁸ Faithfulness in biblical teaching, therefore, although described as a spiritual quality, is to be manifested in practical allegiance to the interests of another.²¹⁹ The stance of faithfulness toward others is to grow out of a more general stance of unselfishness in relating to others, also taught by the Bible.

B. Biblical Teaching on Serving Others

As corporate leaders recall biblical teachings on faithfulness, they can recall as well that Christianity (and other religions) has a great deal to say about interacting with others. Better understanding what faith traditions say about faithfulness can usher in the habit of more frequently looking to faith for moral guidance in business. In Christianity, for example, believers are taught not to pursue only their self-interest,²²⁰ or to love money.²²¹ Instead, believers are commanded to love their neighbor as much as themselves,²²² and pointedly are told to seek the good of others. These qualities of unselfishness and compassion are clearly taught in the "Parable of the Good Samaritan,"²²³ and in the "Parable of the Unmerci-

216. *Luke* 16:1-12 (King James).

217. *1 Corinthians* 4:2 (New International).

218. *Galatians* 5:22-23 (New International).

219. For example, the Proverbs, designed to give guidance for practical living, describe the straightforward honesty of a faithful friend. *Proverbs* 27:6 (New International). Also, in his teaching on "The Wise and Foolish Builders," Jesus said that the person "who hears these words of mine and puts them into practice is like a wise man who built his house on the rock." *Matthew* 7:24 (New International).

220. *1 Corinthians* 10:24 (New International); *Philippians* 2:4 (New International). As philosopher Samuel Gregg reminds us, Christians need to be careful in thinking about self-interest:

We thus see that the issue of self-interest is more complex than one might initially suppose. Self-interest need not necessarily be equated with *selfishness*. Here Christians may have something to learn from Jewish and Muslim traditions, neither of which tends to cast quite the negative light upon the term *self-interest* as do some Christians. In these traditions, Michael Novak reminds us, self-interest is understood as a commonsense duty to oneself. In this context, the Christian commandment to "Love thy neighbor as *oneself*" assumes new meaning. A fundamental and proper love of self is no cause for moral unease.

SAMUEL GREGG, *ECONOMIC THINKING FOR THE THEOLOGICALLY MINDED* 15 (2001) (footnote omitted).

221. See, e.g., *1 Timothy* 6:9-10 (New International).

222. A Christian is commanded to "[l]ove your neighbor as yourself." *Matthew* 22:39 (New International); see Ashford, *supra* note 17, at 4-5 (elaborating on the "essential principles of Christianity").

223. *Luke* 10:25-37 (New International).

ful Servant.”²²⁴ They apply in the work setting—work being regarded by God as good²²⁵—where believers are to work as though working for God,²²⁶ and are to treat servants (employees) rightly and fairly.²²⁷ These teachings show that, although Christians believe humankind to be, as Bainbridge notes, fallen,²²⁸ nonetheless, kind, redemptive behavior toward others is both possible and required, as Dean Sargent urges.²²⁹ Moreover, humans are not to regard themselves as self-made and autonomous, but instead, they should appreciate how they are vitally connected to, and dependent on, other people in their lives.²³⁰

VI. ENRICHING CORPORATE THEORY AND PRACTICE WITH RELIGIOUS DISCOURSE

If persons serving as directors and officers sincerely hold religious beliefs, whether drawn from a Christian, Jewish, Muslim, Hindu, or Buddhist outlook, it would be odd if those deepest, most meaningful convictions did not influence how they think and act. Yet, within the corporate world—as in corporate law theory—we see a secularization and demoralizing of discourse itself, largely due to the hegemony of finance language. The result is a predominant, though not universal,²³¹ norm that only secular speech, not sacred, is permitted at the highest echelons of corporate life. That norm will change only by altering practice, just as corporate charity, now the norm but controversial several decades ago, resulted from a gradual change in practice over many years.²³² Practice itself will change only if, spurred by the legal obligation to be “faithful” fiduciaries, corporate leaders feel free to revive the use of helpful religious concepts and discourse in corporate decision-making. This approach, voluntary but prompted by a legal duty, is at once more modest than the legislative approach offered by Stabile,²³³ and, in a pluralist society adhering to a norm of self-restraint on religious talk, potentially more disquieting. Doing so, however, provides several significant benefits, not only for corporations and corporate participants, but also for the state of religious discussion in society at large.

224. *Matthew* 18:21-35 (New International).

225. *See Genesis* 2:5, 15 (New International).

226. *Colossians* 3:23 (New International).

227. *Colossians* 4:1 (New International).

228. *See supra* text accompanying note 135.

229. *See supra* text accompanying note 136.

230. 1 *Corinthians* 12:12-27 (New International). Stabile makes this point very compellingly. Stabile, *Using Religion*, *supra* note 17, at 849-51.

231. *See supra* note 98 and accompanying text.

232. Elhauge, *supra* note 24, at 763; Winkler, *supra* note 26, at 117-18 & nn.51-61.

233. *See supra* notes 122-26 and accompanying text.

A. *Beyond Self-Interest*

A core, almost talismanic tenet of neo-classical economics holds that humans predominantly are motivated by maximizing their own self-interest,²³⁴ and that such individual conduct, in aggregate, produces socially optimal results.²³⁵ As a social theory, this model for reconciling individual and group welfare has wide and growing academic currency.²³⁶ When corporate law imported economic theory,²³⁷ so too it adopted this “canonical assumption.”²³⁸ This conception of human behavior now powerfully, almost invisibly, influences the language, social norms, and design of institutional and management practices within business corporations.²³⁹ In this way, when ideas, such as that self-interest predominantly motivates human conduct, are routinely assumed in a particular discipline—economics and, later, corporate legal theory—they can become self-fulfilling “because, through their effect on actions and decisions, they produce a world that corresponds to the assumptions and ideas themselves.”²⁴⁰ Consequently, the terms of discourse within corporate law theory, and within the corporate institution itself, powerfully shape what is and is not considered right conduct. As stated by Robert Bellah: “Institutions are very much dependent on language: what we cannot imagine and express in language has little chance of becoming a sociological reality.”²⁴¹ Moreover, language, like power, abhors a vacuum. Bellah attributes the rise of the “market maximizer” paradigm of human motivation to the dramatic weakening of the languages of biblical religion and civic

234. Dale T. Miller, *The Norm of Self-Interest*, 54 AM. PSYCHOLOGIST 1053, 1053 (1999) (noting that self-interest has been “enthroned as the cardinal human motive”); Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317, 317 & n.1 (1977) (“[T]he first principle of Economics is that every agent is actuated only by self-interest.” (quoting F.Y. EDGEWORTH, MATHEMATICAL PSYCHICS: AN ESSAY ON THE APPLICATION OF MATHEMATICS TO THE MORAL SCIENCES 16 (1881))). For strong critiques of the self-interest principle, see Sunmantra Ghoshal, *Bad Management Theories Are Destroying Good Management Practices*, 4 ACAD. MGMT. LEARNING & EDUC. 75, 79 (2005); Henry Mintzberg et al., *Beyond Selfishness*, 44 MIT SLOAN MGMT. REV. 67, 67 (2002).

235. Fabrizio Ferraro et al., *Economics Language and Assumptions: How Theories Can Become Self-Fulfilling*, 30 ACAD. MGMT. REV. 8, 12 (2005) (“The presumption in much economic theory is that, under certain conditions such as competitive markets, the pursuit of self-interest produces socially optimal results.”).

236. See *id.* at 10-11; Ghoshal, *supra* note 234, at 84.

237. See generally EASTERBROOK & FISCHER, *supra* note 4; Johnson, *supra* note 8, at 2235-48 (criticizing this development).

238. Joseph Henrich et al., *In Search of Homo Economicus: Behavioral Experiments in 15 Small-Scale Societies*, 91 AM. ECON. REV. 73, 73 (2001).

239. Ferraro et al., *supra* note 235, at 10-11.

240. *Id.* at 12; see also *supra* note 3.

241. BELLAH ET AL., *supra* note 8, at 15.

republicanism.²⁴² Bellah's observation draws on Alan Wolfe's suggestion that the teachings of economics (and corporate theory) aspire to the status of moral philosophy or a new religion, precisely by virtue of decline in other sources of authority: "When neither religion, tradition, nor literature is capable of serving as a common moral language, it may be that the one moral code all modern people can understand is self-interest."²⁴³ Such a belief system provides, to use Isaiah Berlin's phrase,²⁴⁴ "a single intelligible structure" for comprehensively ordering social reality, seeking to displace accounts earlier provided by religion and moral philosophy.

Religious language, emphasizing the command to serve others and the duty to be faithful to the interests of others,²⁴⁵ can counter the *lingua franca* of rampant self-interest. Sacrificial service long has been hallowed in civil society, thanks to religious and moral traditions acclaiming such behavior. And as observed by Laura Nash and Marc Gunther, genuine service to others (not as disguised egoism) can influence business behavior.²⁴⁶ A key ingredient for those seeking more other-regarding conduct is to facilitate it via accessible language. The notion of faithfulness, drawn from fiduciary duty discourse as seen in the *Disney* case,²⁴⁷ permits a person of faith to "map" from the conceptual domain of religion—where faithfulness is lauded—to the domain of business, where it can subdue the natural impulse and prevailing norm of self-interest. Recalling the "Parable of the Good Samaritan" or the "Parable of the Faithful Steward," among others stories or teachings, can powerfully counter an inclination toward self-centeredness.

Corporate law does not prohibit faith-based rationales or justification. Many shareholders expressly act from religious convictions.²⁴⁸ Many managers do as well, though fewer probably say they do.²⁴⁹ Section 2.01 of the ALI's Principles of Corporate Governance broadly states that, "[e]ven if corporate profit and shareholder gain are not thereby en-

242. Robert N. Bellah, *The Church in Tension with a Lockean Culture*, NEW OXFORD REV., Dec. 1990, at 10, 14.

243. ALAN WOLFE, WHOSE KEEPER? SOCIAL SCIENCE AND MORAL OBLIGATION 36 (1989).

244. ISAIAH BERLIN, THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS 312-13 (Henry Hardy & Roger Hausheer eds., 1998).

245. See *supra* Part V.

246. See generally NASH, *supra* note 16; GUNTHER, *supra* note 16.

247. See *supra* notes 177-78, 190-96 and accompanying text.

248. For example, the Interfaith Center on Corporate Responsibility "is an association of 275 faith-based institutional investors . . . [that] press[es] companies to be socially and environmentally responsible." Interfaith Center on Corporate Responsibility, Homepage, <http://www.iccr.org> (last visited Sept. 28, 2006).

249. NASH, *supra* note 16, at 246 (finding that executives reported "suppressing religious language while keeping the essential moral stance of their faith").

hanced,” corporate decision-makers “[m]ay take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business.”²⁵⁰ The Reporter’s comment notes that “[c]orporate officials are not less morally obliged than any other citizens to take ethical considerations into account,”²⁵¹ so long as such “considerations are reasonably regarded as appropriate to the responsible conduct of business.”²⁵² Such ethical considerations, moreover, are appropriate if they “have significant support although less-than-universal acceptance.”²⁵³ In America, where stewardship and altruistic values “are deeply rooted in religion,”²⁵⁴ faith can provide a grounding and grammar for such ethical considerations.

A faith-based conception of faithfulness can provide a moral footing for managers seeking to fulfill their legal obligation of faithfulness, as expressed in *Disney*.²⁵⁵ Many calls for socially responsible conduct, whether merely anti-contractarianism or more fully rendered communitarian visions, lack a compelling moral framework. For religious believers, the notion of faithfulness provides a foundation for constructing, or at least a lens for envisioning, a more ethical corporation. Moreover, to alter the prevailing discourse and norm of self-interest requires a viable alternative vocabulary, and it requires managers brave enough—and faithful enough—to invoke it. Doing so can, over time, alter beliefs and norms about the appropriateness and usefulness of such language. This, in turn, can alter institutional practice and make such language and modes of thought more pervasive. This will not eradicate the deep, self-interested impulses of fallen humanity, but it will allow managers to frame, and argue for, a redemptive counterpoise to those impulses. Managers might then more fully appreciate that, like other humans, they have at least some freedom to choose, and therefore some freedom (and duty) to make moral choices for the common (corporate) good. Corporate scholars, for their part, must go on, in theoretical work, to make room for the presence of the religious voice within the corporation. Without that voice, corporate law theory will too narrowly conceive the business organization as presenting “a negative problem of preventing ‘bad’ people from doing harm,”²⁵⁶ rather than also “enabling ‘good’ people to do good.”²⁵⁷

250. 1 AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(b) (1994).

251. *Id.* § 2.01 cmt. h.

252. *Id.*

253. *Id.*

254. See NEUHAUS, *supra* note 13, at 21.

255. See *supra* notes 190-96 and accompanying text.

256. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 12 (1982).

257. *Id.*

B. Avoiding the Divided Self

Professors Alford and Naughton note the assertion of Tom Peters, co-author of the best-selling book *In Search of Excellence*,²⁵⁸ that religious talk “has no place in the ‘secular corporation.’”²⁵⁹ They believe this reflects a widely held view that “‘religion by its nature is a private affair, to be left at home.’”²⁶⁰ This too was the earlier assessment of sociologist Peter Berger who declared in 1969, that, in America, “religion has become privately meaningful and publicly irrelevant.”²⁶¹ That dramatically changed in the larger political and cultural arena in the late 1970s,²⁶² a change we still live with in the early twenty-first century. Within the evangelical Christian community, renewed social awareness may reflect the influence of theologian Carl Henry, whose stinging critique of fundamentalism assailed its failure to engage society,²⁶³ instead focusing solely on personal conversion.²⁶⁴ As Nash notes, however, many devout Christians, although becoming more politically and socially engaged in the latter part of the twentieth century, have ignored one key institution in what they decry as an overly secular culture—the business corporation.²⁶⁵ The failure of Christian thought to attend specifically to the linking of faith and work leads managers, Alford and Naughton observe, to live “a divided life,” where matters of spirit and business occupy wholly separate spheres.²⁶⁶

In recent years, greater attention has been given to the connection between faith and vocation. To use a term coined by Professor Noah Feldman in another context, at least some “‘values evangelicals’” have discovered the cultural significance of the corporation.²⁶⁷ This, of course, can be beneficial for the corporation itself, leading to healthy, ongoing debate over the purpose of business in a democratic society. The blending of faith and work also, however, has great significance to the individual by helping him or her to regain a sense of meaning and spiritual

258. THOMAS J. PETERS & ROBERT H. WATERMAN, JR., *IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA’S BEST-RUN COMPANIES* (1982).

259. ALFORD & NAUGHTON, *supra* note 90, at 11 (quoting Tom Peters, *Spiritual Talk Has No Place in Secular Corporation*, MINNEAPOLIS STAR TRIB., Apr. 6, 1993, at D2).

260. *Id.* (emphasis omitted).

261. NASH, *supra* note 16, at 19 (citation omitted).

262. For a full account, see generally NEUHAUS, *supra* note 13.

263. CARL F. H. HENRY, *THE UNEASY CONSCIENCE OF MODERN FUNDAMENTALISM* 15-34 (1947).

264. See Alister McGrath, *Calvin and the Christian Calling*, in *THE SECOND ONE THOUSAND YEARS: TEN PEOPLE WHO DEFINED A MILLENNIUM* 66, 74 (Richard John Neuhaus ed., 2001).

265. NASH, *supra* note 16, at 29.

266. ALFORD & NAUGHTON, *supra* note 90, at 12.

267. FELDMAN, *supra* note 23, at 7 (defining values evangelicals as “those who insist on the direct relevance of religious values to political life.”).

wholeness through work. As noted by Thierry Pauchant, who teaches ethical management at the HEC Montreal Business School: “‘It was taboo for so many years to talk about workers’ spirituality’ . . . ‘But people are suffering by not being able to address that part of themselves and lead a more integrated life.’”²⁶⁸ Other graduate business schools, including Columbia, Stanford, and Notre Dame, are adding courses that use literature and religious readings to acquaint students with the spiritual and religious aspects of work in their lives.²⁶⁹ For many people of faith, the whole point of work means to be called into the everyday world to serve God in his creation,²⁷⁰ thereby dissolving the supposed distinction between sacred and secular work. As expressed by Oxford theologian Alistair McGrath: “Work is, quite simply, an act of praise—a potentially productive act of praise. Work glorifies God, it serves the common good, and it is something through which human creativity can express itself.”²⁷¹

Senior corporate decision-makers need a vocabulary appropriate for bridging legal and religious modes of discourse, for linking fiduciary duties and faith. The notion of faithfulness nicely conveys both a legal obligation to advance the interests of others and a moral command grounded in religious belief and tradition. The enormous deference accorded directors and officers means they have great latitude in choosing whether and how, in particular settings addressing specific issues, they give content to the notion of faithfulness. This allows, by habitual exercise, the development of moral conscience and ethical practice in business context. The emphasis here, however, is not on how doing so will alter the language, norms, and practices of the corporation itself, but how doing so will transform the outlook of the individual decision-maker. Directors and senior officers will be freed from the psychological and spiritual burden of keeping two distinct moral frames of reference, one for work and the other for the rest of life. Instead, they will face the formidable challenge of determining how to advance the common corporate good by drawing on understandings of faithfulness derived from deeper sources of authority, including religious conviction. This deliberative, integrative mode of thinking can be demanding, and one may be tempted to find refuge in the “divided life” and in the simplifying pursuit of self-interest. The quest for

268. Ronald Alsop, *M.B.A. Track/Focus on Academics, Careers and Other B-School Trends*, WALL ST. J., Jan. 11, 2005, at B6.

269. *Id.* Patricia Aburdene, the author of a new book on spiritual trends in corporate culture, *Megatrends 2010: The Rise of Conscious Capitalism*, believes that “[p]eople no longer want that spiritual part of themselves to be abandoned when they work and are searching for meaning and morals in the workplace.” Lampman, *supra* note 45.

270. See McGrath, *supra* note 264, at 71-73.

271. *Id.* at 72. This idea is captured as well in the Benedictine motto “to pray is to work, to work is to pray.” See José H. Gomez, *All You Who Labor: Towards a Spirituality of Work for the 21st Century*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 791, 804 (2006).

wholeness in outlook, honestly expressed, however, will bring both personal and corporate gain. Only with practice will such reflection become a moral habit as well as an institutional norm.

C. Diversity of Viewpoint

A sound decision-making process, the essence of the fiduciary duty of due care,²⁷² would seem to dictate consideration of an array of viewpoints. Opinions may differ not only as to what, ultimately, is the best course of action, but also as to supporting rationales and justificatory approach. Drawing on Cass Sunstein's argument on the value of dissent in social groups,²⁷³ including corporate boards,²⁷⁴ Kent Greenfield recently argued for stakeholder representation on boards of directors.²⁷⁵ Although making more of an argument for positional diversity than for a diversity of underlying beliefs, Greenfield rightly notes that better group decision-making results from weighing a wider range of views: "We recognize in legislative bodies, administrative agencies, school faculties, and non-profit boards that diversity of viewpoints and people increases the likelihood that dissent will be welcomed, important perspectives will be heard, and decisions will be more fully vetted."²⁷⁶

Although recent discussions about diversity within the legal academy have centered on gender, race, and ethnicity,²⁷⁷ there is no reason to think a religious perspective thoughtfully and civilly brought to bear on corporate issues would not usefully supplement and enrich a wholly secular discourse, and lead to the usual benefits associated with pluralism. Alford and Naughton make this point as well, arguing that "[i]n an age of diversity and multiculturalism, Christians can make the business world more diverse precisely by infusing their explicit, Christian beliefs into the

272. See *supra* note 67 and accompanying text.

273. See generally CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* (2003).

274. *Id.* at 27-28 ("The highest-performing companies tend to have extremely contentious boards that regard dissent as a duty and that 'have a good fight now and then.'" (quoting Jeffrey A. Sonnenfeld, *What Makes Great Boards Great*, 80 HARV. BUS. REV. 106, 111 (2002))).

275. Greenfield, *supra* note 27, at 115-18.

276. *Id.* at 117-18; see also Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363 (2002) (arguing for diverse perspectives on corporate boards of directors). For a critical assessment of business rationales, as opposed to moral and social rationales, for board diversity, see Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795, 797 (2005).

277. See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) ("[C]lassroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'" (citations omitted)); *Gratz v. Bollinger*, 539 U.S. 244, 249-51 (2003); see also Timothy L. Hall, *Educational Diversity: Viewpoints and Proxies*, 59 OHIO ST. L.J. 551, 573-74 (1998) (describing the argument that the diversity rationale for affirmative action uses race as a proxy for distinctive viewpoint).

work they do.”²⁷⁸ To hold otherwise is to think that discourse in corporate practice and corporate theory must, for some unexplained reason, be wholly secular, or to believe that the value of including varied viewpoints uniquely breaks down, thereby requiring exclusion, when religious perspective occasions the diversity.

If anything, a faith-based perspective, by invoking a strikingly different frame of reference, affords an even more diverse lens on business issues than do a variety of purely secular outlooks. As philosopher George Santayana observed about a religion’s particularity:

Thus every living and healthy religion has a marked idiosyncrasy. . . . The vistas it opens and the mysteries it propounds are another world to live in; and another world to live in—whether we expect ever to pass wholly into it or no—is what we mean by having a religion.²⁷⁹

This difference is well evidenced in the “creative tension” found by Nash to characterize the fertile interplay between faith and business for serious believers.²⁸⁰ She concludes her case study by noting that one of her most important discoveries was the importance “of an example or a metaphor to” succinctly capture that interplay.²⁸¹ Religious writings, notably the Bible in the Western world,²⁸² have long enriched literature and everyday discourse as a lavish storehouse of such stories, metaphors, and illustrations for conveying moral wisdom and common knowledge.²⁸³ As noted earlier, the concept of faithfulness in religious faith abounds with rich, instructive illustrations, including many stories and parables.²⁸⁴ These scriptural allusions, when called to mind, shed light on, and so enhance, a decision-maker’s understanding of what it means to act faithfully. Urging individual corporate leaders to draw on, and describe, religious reckonings of faithfulness can usefully expand both their own and their colleagues’ understanding of that ideal.

278. ALFORD & NAUGHTON, *supra* note 90, at 29.

279. SANTAYANA, *supra* note 129, at 180.

280. See NASH, *supra* note 16, at xiii, 45.

281. *Id.* at 277. For an intriguing argument by Edward Rock that the Delaware courts transmit fiduciary standards of conduct by means of “stories” and “parables,” see Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work*, 44 UCLA L. REV. 1009, 1016 (1997). My argument is not inconsistent with Rock’s, but it is the opposite argument: recalling stories and parables from outside the law actually helps directors and officers better understand their legal obligations.

282. See THE BIBLE AND ITS INFLUENCE (Cullen Schippe & Chuck Stetson eds., 2006).

283. *Id.* at 10-11, 24-25 (noting the pervasive influence of the Bible on such public figures as Abraham Lincoln and Martin Luther King, Jr. and on numerous writers and artists); see also Samuel W. Calhoun, *Grounding Normative Assertions: Arthur Leff’s Still Irrefutable, but Incomplete, “Sez Who?” Critique*, 20 J.L. & RELIGION 31, 93 (2005) (“[T]he Bible does incontrovertibly state many of mankind’s most basic moral precepts.”).

284. See *supra* Part V.A.

D. A Safe Place for Religious Discourse

This Article seeks neither the joinder nor the separation of law and religion. It argues, rather, for the good to be gained by adding the religious voice to corporate discourse, both in legal theory and business practice. There is good to be gained for corporations, for senior decision-makers, for those who depend on the corporate institution, and for the state of religious discourse itself in a free, pluralistic society. Currently, there is sharp disagreement over the place of religion in public discourse.²⁸⁵ Debate largely centers on the propriety of various kinds of governmental involvement in matters touching on religion, due to well-founded constitutional concerns.²⁸⁶ The fallout from that altogether fitting legal debate, regrettably, has spilled over into other institutions forming part of our civil society, where no constitutional issue arises. We now observe an awkward uncertainty as to whether, how, and where religious beliefs may inform, and be expressed on, matters of public (but non-governmental) moment. Where, in other words, in the vast social sphere called civil society lying between home and the statehouse, can religious and not just secular discourse be drawn on? That discourse within corporate law theory and corporations remains so highly secular may be just one instance of this larger perplexity.

Within corporate law theory and practice, it is widely acknowledged that directors and officers have broad latitude, by virtue of certain structural features of the public corporation, corporate statutes, and the business judgment rule.²⁸⁷ In a governance arrangement ordained by law, senior decision-makers wield, within the corporation, a discretion eerily akin to that of lawmakers themselves. The law, through fiduciary duties, seeks to curb somewhat the full play of that liberty and draws, especially in the notions of loyalty and faithfulness, on concepts also (but not only) carrying religious significance. This is not to say that the concept of “faithfulness” articulated in *Disney* is bottomed on a religious foundation, though “originalist” notions of loyalty within corporate law very likely were shaped by scripture.²⁸⁸ Instead, in an ironic twist to the longstanding “religious foundations of law” debate,²⁸⁹ fiduciary duty law, rather than grounding law on religion, invites decision-makers to understand their legal obligation by drawing on religion. In short, rather than moving from religion *to* law, corporate law permits (but does not obligate) decision-makers to move from law *to* religion as a way to better

285. FELDMAN, *supra* note 23, at 6-8 (describing a “divided” America).

286. *Id.*

287. *See supra* Part II.B.

288. *See supra* notes 213-14 and accompanying text.

289. *See, e.g.,* Martin E. Marty, *The Religious Foundations of Law*, 54 EMORY L.J. (SPECIAL EDITION) 291 (2005).

understand their legal duty. The values of liberty and pluralism prevail in this arrangement—religion of one's own choosing may or may not be availed of in guiding the exercise of broad discretion only loosely constrained by law. In a society where many are religious, one would expect such a turning, provided the decision-makers themselves believe it is helpful and proper to do so.²⁹⁰

Limited empirical work suggests a reticence on the part of business elites to use religious terms in describing the rationales for business decisions.²⁹¹ Much of the scholarship on religious discourse in American society addresses non-business discourse, though Timothy Fort, assessing the work of Thomas Nagel, Michael Perry, and Kent Greenawalt on the role of religion in public policy debates,²⁹² argues strongly that business people should be able to rely on religious justification for moral positions.²⁹³ Addressing what this Article earlier called the “divided self” problem,²⁹⁴ Fort believes “there is no inherent reason to force a business person . . . to compartmentalize the motivations that dictate her or his [ethical] treatment of others.”²⁹⁵ He adds to this, moreover, a concern that prohibiting religious discourse leads to dishonesty because managers who in fact may have looked to faith for guidance state otherwise when describing the basis for their views.²⁹⁶ Honesty is an odd casualty when more ethical conduct is being sought in the corporate world. Moreover, self-imposed silence denies other participants in the decision-making process full knowledge about the motivations and rationales of their colleagues.²⁹⁷ Methodologically, this does not make for informed decisions.

Even stronger warrant for seeking guidance in faith can be found in the legal obligation to act faithfully. Senior business leaders, being fully advised by counsel of that post-*Disney* legal responsibility, will seek, one hopes, to make sense of that term. Some will turn, no doubt, to literary or historical sources, peer guidance, or personal experiences, while others will turn to faith and tradition, for direction in formulating strategic policy and in making operating decisions. The result is likely to be more vital, vigorous, and “zesty” discussion, as a broader range of stories and viewpoints are presented. Those engaging in such dialogue, however,

290. This raises the critical question of whether and how lawyers advise directors and officers as to the duty of faithfulness.

291. NASH, *supra* note 16, at 246-47.

292. Fort, *supra* note 99 at 456-69; *see also* John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUDIES 1, 1 (1987) (arguing for secular conversation).

293. Fort, *supra* note 99, at 469-71.

294. *See supra* Part VI.B.

295. Fort, *supra* note 99, at 470.

296. *Id.* Professor Feldman calls such secular arguments “stand-ins.” FELDMAN, *supra* note 23, at 224.

297. *See* Fort, *supra* note 99, at 470.

must appreciate that others in the room may not share their frame of reference or even understand the meaning or significance of certain terms. That will require patience, respect, and clarity of expression. Even when clearly and fully explained, a position grounded in faith may encounter bewilderment or outright rejection, both by those of a similar faith tradition who, nonetheless, reason differently and by those who simply do not share core beliefs.²⁹⁸

This possibility should not be regretted. It should, instead, be welcomed. Social harmony does not depend on ignorance enforced by a norm of self-restraint on religious speech. In a pluralist society with representative corporate leadership, persons holding fully revealed, diverse viewpoints must reason together to reach a group decision. Bound by the pragmatic need to reach a collective position, a corporate board must patiently work through individual differences to reach consensus. It is a formidable struggle to endeavor to resolve, rather than evade, honest differences.

Being free to promote business positions on religious grounds, of course, does not mean there is not risk in doing so. Beyond substantive disagreement, some colleagues may believe it is simply improper to invoke faith-based language in business. That point of view is permitted as well, and it must be thoughtfully engaged. If properly engaged, a real possibility for honest dialogue opens up. Noah Feldman illustrates how this willingness to encounter a faith-based moral position might proceed. Feldman suggests that one could ask a believer

how his faith directs him to make moral judgments about the world and how we ought to act in it? Almost no believer will simply repeat that he just knows morality as an automatic matter, or that God has directly told him the right way to live. Prophets hear directly from God; most religious believers will point to religious texts and traditions that they consider authoritative guides for living. They will mention the Bible or the Qur'an, the teachings of a church or of rabbis or other sages. Even denominations that believe in direct inspiration, such as Quakers or some evangelicals, rarely think there is no room for interpretation. If one asks the believer *how* he knows what his Scripture or his tradition teaches about the good life, he will likely answer that he, alone or with others, must interpret the teachings of his faith to make sense of how they apply to the real world.

Once the believer acknowledges, as he almost surely will, that religion calls for human interpretation, the possibilities for holding a conversation about important moral topics open up dra-

298. See Calhoun, *supra* note 283, at 89-94 (discussing challenge of applying religious belief in particular settings).

matically. For one thing, anybody can engage a believer on the question of how his or her religious tradition should be translated into the political sphere

So religious belief can jump-start conversations as well as stop them. No religious tradition is without internal discussion, debate, and disagreement about hard questions, and even an outsider can take on these subjects if he bothers to learn the basic beliefs from which the believers are arguing. If believers do not want to engage outsiders' interpretations of their tradition, the outsiders can still argue about how the religious beliefs should be applied in the [particular] context If the religious believer asserts that the answers to these second-order questions, too, are dictated by religious belief, the outsider can still ask why it should be so and find a subject for discussion in the answer to that question.²⁹⁹

A June 2005 meeting of the Nortel board of directors provides a corporate illustration. The chief operating officer, Gary Daichendt, a deeply religious Christian, told Nortel directors at the board meeting to which he was invited that he and his wife had prayed that morning for guidance.³⁰⁰ Mr. Daichendt reported that he understood God's response to be that he, Daichendt, should be named chief executive officer of Nortel, and that the current CEO and the chief financial officer should be replaced.³⁰¹ The directors' response, reportedly, was "astonishment."³⁰² One director directly asked what Daichendt's difficulty was with the current CEO and CFO, thereby doing what Feldman urges; he posed a question that sought a fruitful basis for further discussion. Reportedly, Daichendt's response was not impressive. Also, apparently, directors decided Daichendt was not ready for the top post, possibly because of the ambition he revealed, rather than because of the terms in which he expressed what came through as a power play.³⁰³ The point here is that Daichendt's simplistic religious speech neither stopped the conversation nor carried the day.

Any business leader who chooses to draw on religious faith in this way must recall, as Martin Marty puts it, that each speaker "simply does not have the field to itself."³⁰⁴ Marty, like Michael Perry in the political realm,³⁰⁵ cautions that those who resort to particular religious claims "too

299. FELDMAN, *supra* note 23, at 226-27.

300. James Bagnall, *The Day God Walked into Nortel's Boardroom*, CALGARY HERALD, July 10, 2005, at D3.

301. *Id.*

302. *Id.*

303. *Id.*

304. Marty, *supra* note 289, at 321.

305. MICHAEL J. PERRY, UNDER GOD?: RELIGIOUS FAITH AND LIBERAL DEMOCRACY 116-17, 122-23 (2003).

blithely or too frontally” may not fully appreciate the risks, including what Marty sees as the risk that the speaker’s own absolutes will be relativized when encountered by persons who see things differently.³⁰⁶ The point here is simply that much good can be gained from honest religious speech, but at the probable price of some discomfort and risk. The decision as to whether, where, and how to draw on faith in the business setting must itself be carefully made.

Success in using and encountering religious discourse in the corporation may raise our social comfort level with religious speech in other settings, most likely in other social but nongovernmental contexts, but perhaps eventually including the public square itself. Increasingly, people may more widely appreciate that, as Stephen Prothero put it, “it is not un-American to bring religious reasoning into our public debates.”³⁰⁷ A freer flow of religious speech will not put an end to nonreligious reasoning by any means. Nonreligious reasoning will remain predominant in many settings, but it may be more freely and comfortably supplemented with non-secular discourse, so that “bi-lingual” conversation is more frequent. As Bellah reminds us about social institutions, not only do we form them, but they form us as well;³⁰⁸ and they “are not only constraining but also enabling.”³⁰⁹ Business leaders—and the leaders of other civil institutions—who become more at ease with, and learn the benefits of (and how best to avoid the drawbacks of) religious discourse, may inspire others to do so in other settings, possibly thereby allaying some of the skittishness over the place of religious talk in a free society. In this way, corporations can be “social laboratories” for experimentation,³¹⁰ with corporations possibly varying greatly in how they handle this issue. Those emerging as attractive (or unattractive) can serve as models for others to emulate (or eschew). The spillover benefits thus may flow not only to other business organizations, but eventually, perhaps, to other voluntary associations and to some venues of public discourse more generally. A voluntary, eclectic, “federalism-like” approach is most conducive to such healthy, adaptive experimentation.

The argument advanced here as to corporate law and practice is consonant with that broadly made by Noah Feldman in the constitutional arena, to the effect that we should “loosen up on religious talk.”³¹¹ Proponents of an exclusively secular discourse, while seeking to embrace inclusiveness, may ironically exclude believers from a sense of full par-

306. Marty, *supra* note 289, at 321.

307. Prothero, *supra* note 207.

308. Bellah, *supra* note 242, at 12.

309. *Id.*

310. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

311. FELDMAN, *supra* note 23, at 238.

ticipation in conversations where religious talk is derided.³¹² Rather than abruptly stopping moral conversation,³¹³ if the unwritten ground rule of civil discourse is that only secular terms are permitted, conversation may never even get going in a way that acknowledges the existence of a true moral debate.³¹⁴ More robust religious discourse throughout civil society—where a norm of restraint of uncertain strength now exists—might actually lead to a reduction in insistence on religious displays in public settings. Such insistence may reflect regret over the quieting of religious voice in social settings generally, rather than a strong belief that government should provide a forum for such displays.

For many believers, it remains the case that religious values underlie moral positions and it is best to allow people to draw on primary beliefs when making moral argument. Attempting this strategy, modestly, within the corporation and other civil institutions can help us gauge its effectiveness in moving us beyond endless debate over the terms of debate and into discussion of genuine substantive concern. Reflecting on the meaning of faithfulness in the corporate setting, by drawing on its significance in faith, can be a step in that direction.

VII. CONCLUSION

Corporate law theory has been vastly enriched over the last thirty years by the insights of numerous disciplinary perspectives. One vantage point conspicuously missing, however, is that of religious faith. This reflects a social norm of uncertain strength, not a legal requirement. Moreover, the absence of religious voice in corporate law is somewhat odd because many business people—like many others in the United States—are people of faith, and faith can, at least in the fiduciary duty area, serve as a rich resource for better understanding the post-*Disney* legal obligation to be faithful. There are many benefits for permitting and encouraging business people (and their lawyers and corporate theorists) to be more open about the connection between religious faith and business. Business people themselves benefit from gaining another source for understanding their legal duties and from the ability to engage in honest conversation. Corporate conduct itself may also benefit by altering the social norm of suppressing religious speech. Finally, greater comfort in the corporate milieu may serve to usefully reduce current skittishness about reli-

312. *Id.* at 243-44.

313. Feldman challenges Richard Rorty's position that religion is a "conversation stopper." *Id.* at 225 (citation omitted).

314. *Id.* at 227. Feldman also challenges Stanley Fish's assertion that, with religious speech, "the conversation 'will never get started.'" *Id.* at 225 & n.6 (quoting STANLEY FISH, *THE TROUBLE WITH PRINCIPLE* 256 (1999)). Feldman believes such speech can, in fact, "jump-start conversations as well as stop them." *Id.* at 227.

gious thinking and speech in the larger social arena, a plus in a pluralist society.

