

COMMENT

Corporate Purposes in a Free Enterprise System: A Comment on *eBay v. Newmark*

In 1995, while working for Charles Schwab's San Francisco IT department, Craig Newmark started an email list to publicize local events for his friends.¹ Sixteen years later, craigslist dominates the online classifieds market, owing in part to the price of most of its services: free.² As Craig tells it, craigslist emerged "both technologically and in spirit" from within the virtual community at the WELL—the Whole Earth 'Lectronic Link.³ As an early online meeting place, the WELL connected a diverse group of Internet pioneers—hippies, yuppies, libertarians, and futurists—all contributing to a new culture on the cyberfrontier.⁴ The design of craigslist, both as a website and as a company, embodies the Whole Earth ethos. But for a purple peace sign adorning each page, the site is sparse. Proper nouns go uncapitalized. Craig, because he is not interested in being a CEO, spends most of his working life completing routine tasks of customer service.⁵ To this day, craigslist—though incorporated as a for-profit Delaware corporation—defines itself by its "relatively non-commercial nature, public service mission, and non-corporate culture."⁶

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1. See *craig newmark*, CRAIGSLIST, http://www.craigslist.org/about/craig_newmark (last visited Oct. 21, 2011).
 2. See *factsheet*, CRAIGSLIST, <http://www.craigslist.org/about/factsheet> (last visited Oct. 21, 2011).
 3. Craig Newmark, *craigslist is (around) fifteen years old*, SFGATE (Mar. 8, 2010, 4:56 PM), http://www.sfgate.com/cgi-bin/blogs/newmark/detail?entry_id=58719.
 4. For a fascinating study of the WELL, see HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER* (1993), available at <http://www.rheingold.com/vc/book>.
 5. See Gary Wolf, *Why Craigslist Is Such a Mess*, WIRED, Aug. 24, 2009, http://www.wired.com/entertainment/theweb/magazine/17-09/ff_craigslist.
 6. *factsheet*, *supra* note 2.

In 1999, Craig put this idiosyncratic culture at risk when he transferred a minority share of his company to an employee, Philip Knowlton. Craig recalls:

I figured that maybe someday I'd go middle-aged crazy So, with the idea of establishing checks and balances, mostly on myself, I entrusted some equity in craigslist to a guy who was working with me at the time. . . . I figured it didn't matter, since everyone agreed that the equity had only symbolic value, not dollar value. Well, the guy later left the company, and decided to sell his equity, which i [sic] learned he had every legal right to do.⁷

In 2004, Knowlton sold his shares to eBay, the online auction operator.⁸

Knowlton, eBay, and the remaining equityholders—Craig and CEO Jim Buckmaster—brokered a \$32 million deal. eBay acquired 28.4% of craigslist, thus securing itself a seat on the craigslist board of directors.⁹ eBay bought out Knowlton for \$16,000,000, and Craig and Jim each received \$8,000,000 dividends in the transaction.¹⁰ Because Craig and Jim were bound together by a voting agreement, they retained 71.6% of the company, and thus effective control over the company's ordinary business decisions.¹¹ Both eBay and the Jim-Craig unit entered the deal without respect for the other side's professed intentions: eBay had "incessantly" repeated its wish to either acquire or compete with craigslist, and Jim and Craig had made it clear that a controlling stake in craigslist was not for sale.¹² While eBay executives waxed poetic about craigslist's "tremendous untapped monetization potential,"¹³ Jim and Craig were content to do business as they always had.

7. Craig Newmark, *eBay and craigslist*, CRAIGCONNECTS (Aug. 13, 2004, 5:00 AM), http://craigconnects.org/2004/08/ebay_and_craigs.html.

8. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 11 (Del. Ch. 2010).

9. *Id.*

10. *Id.* at 11 n.15.

11. *Id.* at 11.

12. *Id.* at 10, 15-16. For discussion of how the lawyers could have done a better job of negotiating the transaction, see Steven M. Davidoff, *What's Next for eBay, Craigslist and Poison Pills*, DEALBOOK (Sept. 13, 2010, 2:21 PM), <http://dealbook.nytimes.com/2010/09/13/whats-next-for-ebay-craigslist-and-poison-pills>; and Scott J. Davis, *Recent Delaware Cases Regarding Poison Pills*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (Oct. 10, 2010, 11:25 AM), <http://blogs.law.harvard.edu/corpgov/2010/10/10/recent-delaware-cases-regarding-poison-pills>.

13. *Newmark*, 16 A.3d at 16 (quoting a strategy presentation delivered to the eBay board).

Between 2004 and 2008, eBay used its board seat to obtain proprietary craigslist data, which it employed in developing a direct craigslist competitor.¹⁴ (eBay styled its site “Kijiji” – Swahili for “village.”¹⁵) In response, Craig and Jim used their control over the board to adopt three defensive measures, including a poison pill rights plan,¹⁶ designed to “keep eBay out of the craigslist boardroom and to limit eBay’s ability to purchase additional craigslist shares.”¹⁷ According to the terms of the poison pill rights plan, each shareholder received one right per share of craigslist stock, which, if triggered, would enable the shareholder to purchase two additional craigslist shares at a mere \$0.00005.¹⁸ The rights would be triggered (i) if eBay, Jim, or Craig were to acquire 0.01% or more of additional stock, or (ii) if any party other than Jim, Craig, or eBay were to acquire greater than 15% of craigslist stock, except if that party were an heir, charitable organization, or trust receiving a transfer of shares from Jim or Craig.¹⁹ Thus, the first trigger effectively prevented eBay from mounting a takeover campaign, and the second trigger effectively prevented eBay from selling more than 15% of its stock to a buyer other than Jim or Craig.

In *eBay Domestic Holdings, Inc. v. Newmark*, the Delaware Court of Chancery rescinded craigslist’s poison pill.²⁰ Under the two-pronged *Unocal* test for defensive measures, a poison pill must be adopted in response to a reasonably perceived threat and must be proportional in response to that

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14. *Id.* at 17-18. A suit in which craigslist accuses eBay of, among other things, unfair business practices, is approaching trial in the Superior Court of California, County of San Francisco. *Craigslist, Inc. v. eBay Inc.*, No. CGC-08-475276 (Cal. Super. Ct. filed May 13, 2008); see also Karen Gullo, *eBay Loses Bid To Avoid Craigslist Fraud Suit in California*, BLOOMBERG BUSINESSWEEK (July 14, 2011, 12:24 AM), <http://www.businessweek.com/news/2011-07-14/eBay-loses-bid-to-avoid-craigslist-fraud-suit-in-california.html>. The Justice Department has also been investigating the events in question. See Howard Mintz, *Probe of eBay May Turn on Quest for Craigslist’s “Secret Sauce,”* L.A. TIMES, Sept. 27, 2011, <http://articles.latimes.com/2011/sep/27/business/la-fi-ebay-20110927>.
15. Bonnie Goldstein, *eBay v. Craigslist*, SLATE (May 15, 2008, 9:33 AM), <http://img2.slate.com/id/2191425>.
16. Poison pills protect the power of controlling shareholders or incumbent boards of directors by preventing hostile parties from acquiring large blocks of voting stock. See 4 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 23:7 (3d ed. 2011).
17. *Newmark*, 16 A.3d at 20. The other two defensive measures were an amendment to establish staggered boards, which the court upheld, and an optional stock issuance, which the court rescinded. *Id.* at 41, 46. Neither is important to this Comment.
18. *Id.* at 23.
19. *Id.*
20. *Id.* at 35.

threat.²¹ The *Newmark* court convincingly holds that craigslist's poison pill met neither of these criteria.²² This Comment does not argue that *Newmark* came out the wrong way regarding the poison pill; the court's holding rested on multiple grounds, and the decision was reasonable. Instead, this Comment criticizes *Newmark's* most incendiary ground for rescinding the poison pill: that because craigslist rejects shareholder value maximization, its action was motivated by an impermissible corporate purpose as a matter of law.

I. REASONABLE DISAGREEMENT ABOUT CORPORATE PURPOSES

Newmark exposes a tension between two approaches to the question of permissible corporate purposes. One approach would *mandate* that all for-profit corporations adopt the purpose of shareholder value maximization. The other would enable firms that seek profit to make use of the corporate form even if they elect not to maximize shareholder value at every turn.²³ As Frank Easterbrook and Daniel Fischel tell us, this tension has "plagued" scholars for some time²⁴:

[W]hat is the goal of the corporation? Is it profit, and for whom? Social welfare more broadly defined? . . . Our response to such questions is: who cares? If the *New York Times* is formed to publish a newspaper first and make a profit second, no one should be allowed to object. Those who came in at the beginning consented, and those who came later bought stock the price of which reflected the corporation's tempered commitment to a profit objective. If a corporation is started with a promise to pay half of the profits to the employees rather than the equity investors, that too is simply a term of the contract.²⁵

21. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955-57 (Del. 1985).

22. *Newmark*, 16 A.3d. at 34-35 (holding that eBay posed no real threat, and the true purpose of the poison pill was to "punish" eBay for competing); *see also* *Air Prods. & Chems. v. Airgas, Inc.*, 16 A.3d 48, 55, 103-13 (Del. Ch. 2011) (emphasizing the "reasonably perceived threat" analysis). For further discussion, *see infra* Part IV.

23. There are important differences between "shareholder value maximization," "profit maximization," "firm value maximization" and other related ideas. I do not discuss these here. Suffice it to define "shareholder value maximization" as a strategy that maximizes the net present value of expected payouts to a rational shareholder who has no "tastes" regarding financial assets, other than their ability to generate wealth.

24. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991).

25. *Id.* at 35-36.

At root, Easterbrook and Fischel's approach to the question of corporate purposes displays a deep respect for freedom of contract.²⁶ By enabling parties to create tailored, enforceable corporate contracts, the law can enhance the parties' welfare²⁷ and honor their capabilities to plan and commit to complex, cooperative projects.²⁸

In contrast to the approach espoused by Easterbrook and Fischel, *Newmark* is far from neutral regarding the proper "goal of the corporation." In places, *Newmark* seems to describe shareholder value maximization as the mandatory objective for Delaware corporations; throughout, the opinion signals that a lack of commitment to shareholder value maximization will provoke hostility from Delaware courts. Thus, *Newmark* is in tension with the well-supported scholarly view that, if anything, "shareholder value maximization" should be a default purpose that the common law uses to fill gaps in corporate contracts.²⁹

In what follows, I argue against the mandatory approach to corporate purposes and counsel against a strong reading of *Newmark* on this point. Part II reads *Newmark* as mandating the purpose of shareholder value maximization: the opinion's strongest language seems to do so, and multiple commentators have read the case this way.³⁰ Part III counsels against this troublesome reading for several reasons. Part IV provides a roadmap for how future courts might adopt the default approach to corporate purposes in the

26. Katherine Litvak refers to respect for contractual freedom as Easterbrook and Fischel's "starting place." Katherine V. Litvak, *Easterbrook and Fischel*, in PIONEERS OF LAW AND ECONOMICS 246, 249 (Lloyd R. Cohen & Joshua D. Wright eds., 2009).

27. See EASTERBROOK & FISCHEL, *supra* note 24, at viii (arguing that the contractualist approach serves to "promote social welfare").

28. See, e.g., Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1752 (2006) (arguing that "enhancing flexibility to engage in private ordering" is a dominant goal in Delaware); see also *id.* at 1749, 1782-86.

29. See, e.g., Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 577-83 (2003) (arguing that a shareholder value maximization duty should be a "majoritarian default" because idealized parties would choose such a default in a hypothetical bargain); Jonathan R. Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, 3 VA. L. & BUS. REV. 177, 179 (2008) ("[M]aximizing shareholder gain is only a default rule. Shareholders could opt out of this goal if they so desired."). Many scholars reject even default rules regarding shareholder value maximization. See, e.g., KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW* 127 (2006); Douglas G. Baird & M. Todd Henderson, *Other People's Money*, 60 STAN. L. REV. 1309 (2008); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999). My only goal is to argue against the mandatory approach to shareholder value maximization, not to vindicate the default approach against all competitors.

30. See *infra* notes 37-42.

wake of *Newmark*. It proposes ways to distinguish *Newmark*'s discussion of corporate purposes, and it offers thoughts on how Delaware courts might best implement a default rule of corporate purposes in the future.

II. FOR PROFIT, OR ONLY FOR PROFIT?

In its poison pill analysis, *Newmark* examined whether Jim and Craig adopted the pill for a "proper corporate purpose."³¹ As the court understood it, one of craigslist's purposes in adopting the pill was to prevent eBay (or a similar monetizer) from purchasing control of craigslist.³² *Newmark*'s strongest statements suggest that a purpose that sacrifices economic value for shareholders simply cannot be proper, as a matter of law. In its culminating analysis on this issue, the court wrote:

Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that. Thus, I cannot accept as valid for the purposes of implementing the [poison pill] Rights Plan a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders³³

This language suggests that craigslist's poison pill would have been impermissible *even if* craigslist had written its values into its corporate charter *ex ante*—which, in the actual case, it did not. But let's imagine the case of *zBay v. megslit Inc.*—identical to *Newmark*, except for two changes. First, assume Meg drafted a provision in the megslit Inc. charter announcing a goal of "maximizing shareholder value, with the caveat that megslit employees will

31. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 32 (Del. Ch. 2010). This "proper corporate purpose" analysis is part of *Newmark*'s elaboration on the first prong of the *Unocal* test. See *id.* at 28 (quoting *Mercier v. Inter-Tel (Del.) Inc.*, 929 A.2d 786, 807 (Del. Ch. 2007)). See *infra* Part IV for further discussion.

32. *Newmark*, 16 A.3d at 32.

33. *Id.* at 34.

work only three days a week.”³⁴ Second, assume zBay was aware of, and explicitly consented to, this provision at the time of its investment.

Would zBay and megslis’s rejection of shareholder value maximization hold up before the *Newmark* court? If the language quoted above is given full weight, the megslis charter provision and zBay-megslis agreement would be void. As Chancellor Chandler writes, the “Inc.” at the end of Delaware corporations’ names “has to mean” that the corporation’s board is precluded from protecting policies that “admittedly seek[] not to maximize the economic value of a for-profit Delaware corporation.”³⁵ This would require all boards—including the megslis board—to adhere to that duty, even if they explicitly attempted to reject such a duty in their corporate charter. Thus, *Newmark* suggests that if the hypothetical megslis were to appear in court, its corporate purpose would be held to fall outside the range of reasonableness.

According to this reading of *Newmark*, “proper corporate purpose” in a *Unocal* analysis must be defined as “maximization of shareholder value.”³⁶ Commentators have either read *Newmark* this way, or have glossed over the question altogether. For instance, some scholars cite *Newmark* as evidence that Delaware law “grants wide discretion to decision-makers about how to achieve the ends of shareholder value, though not over the end itself.”³⁷ Others read *Newmark* for the proposition that Delaware corporations are “required” by law to maximize profits,³⁸ or that they must adhere to “a fiduciary duty to maximize profits under Delaware law.”³⁹ Others have focused on the similarity

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34. Megslis’s commitment might be thought of as similar to Chick-fil-A’s commitment not to do business on Sundays. See *Why We’re Closed on Sundays*, CHICK-FIL-A, <http://www.chick-fil-a.com/Company/Highlights-Sunday> (last accessed Feb. 12, 2012).
35. Presumably, the same reasoning would apply to other corporate identifiers, such as “Co.” or “Corp.” See DEL. CODE ANN. tit. 8 § 102(a)(1) (West Supp. 2011).
36. See discussion *supra* note 23.
37. Lissa L. Broome, John M. Conley & Kimberly D. Krawiec, *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759, 800 (2011).
38. Maxwell S. Kennerly, *eBay v. Newmark: Al Franken Was Right, Corporations Are Legally Required To Maximize Profits*, LITIGATION & TRIAL (Sept. 13, 2010), <http://www.litigationandtrial.com/2010/09/articles/the-law/for-lawyers/ebay-v-newmark-al-franken-was-right-corporations-are-legally-required-to-maximize-profits> (last accessed Feb. 12, 2012).
39. Lyman Johnson, *Beyond the Inevitable and Inadequate Regulation of Bankers: A Comment on Painter*, 8 U. ST. THOMAS L.J. 29, 37 n.29 (2011); see also John Tyler, *Negating the Problem of Having “Two Masters”: A Framework for L3C Fiduciary Duties and Accountability*, 35 VT. L. REV. 117, 127 n.42 (2010) (stating that *Newmark* “reject[s the] argument that for-profit corporate directors may seek not to maximize stockholder value when there are shareholders who want that value”).

between *Newmark* and *Dodge v. Ford Motor Co.*,⁴⁰ the controversial 1919 Michigan case often cited to stand for the duty to maximize shareholder value.⁴¹ As one commentator in *Forbes* opines, *Newmark* indicates that “stockholder wealth maximization is the only game in town.”⁴²

III. AGAINST THE MANDATORY APPROACH TO CORPORATE PURPOSES

Delaware courts should refuse to credit *Newmark*'s “mandatory” language. If anything, shareholder value maximization should be a default corporate purpose. First, a mandatory rule would improperly override the plans of sophisticated corporate contractors who mutually consent to shareholder-value-eschewing purposes. Second, there is dissensus within the law and business communities regarding what corporate purposes are justifiable. Amid reasonable disagreement, a default rule would allow for experimentation. Third, any information cost savings generated by a mandatory rule would be minimal, and they could be replicated by less intrusive solutions. Finally, Delaware would be unwise to forgo potential incorporation revenues from the growing sector of for-profit businesses that choose not to maximize shareholder value.

One of the deep principles animating Delaware corporate law is respect for private ordering.⁴³ This principle counsels in favor of supporting the avowed

40. 170 N.W. 668 (Mich. 1919); see, e.g., Davidoff, *supra* note 12; Joshua Fershee, *Philanthropy as a Business Model: Comparing Ford to Craigslist*, BUS. LAW PROF BLOG (Sept. 10, 2010), http://lawprofessors.typepad.com/business_law/2010/09/philanthropy-as-a-business-model-comparing-ford-to-craigslist.html; Gordon Smith, *eBay v. Newmark: A Modern Version of Dodge v. Ford Motor Company*, CONGLOMERATE (Sept. 9, 2010), <http://www.theconglomerate.org/2010/09/eBay-v-newmark-a-modern-version-of-dodge-v-ford-motor-company.html>.

41. See, e.g., STEPHEN M. BAINBRIDGE, CORPORATE LAW 141 (2d ed. 2009) (“It is well-settled that directors have a duty to maximize shareholder wealth.” (citing *Dodge*)); ROBERT C. CLARK, CORPORATE LAW 678-79 (1986) (citing *Dodge* for the assertion that corporations should have a “profit-maximizing purpose”).

42. Jay Coen Gilbert, *What eBay's Court Fight with Craigslist Reveals*, FORBES: CORP. SOC. RESP. (Sept. 21, 2010, 10:56 AM), <http://www.forbes.com/sites/csr/2010/09/21/what-ebays-court-fight-with-craigslist-reveals>.

43. See *supra* note 28 & accompanying text. This is exemplified by the presumption of openness to tailoring of the corporate contract in the absence of contrary laws. See DEL. CODE ANN. tit. 8, § 102(b) (West Supp. 2011) (“[T]he certificate of incorporation may also contain any . . . provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders, or the

organizational goals of two sophisticated parties like zBay and megslis. As Easterbrook and Fischel explain, if “those who came in at the beginning consented, and those who came later bought stock [at a price that] reflected the corporation’s tempered commitment to a profit objective,” then “no one should be allowed to object.”⁴⁴ A mandatory rule would unduly limit the minority of capital investors who *value* corporate purposes that do not maximize economic value, but rather that take into account a range of ethical considerations imperfectly correlated with economic value. These include preferences for companies that commit to environmental sustainability, refuse to deal with atrocious sovereign regimes, or don’t do business on Sundays.⁴⁵ If Delaware were to adhere to a mandatory approach to corporate purposes, it would limit entrepreneurs’ abilities to satisfy the ethical preferences of this minority of investors.

While Delaware would be right not to enforce unreasonable bargains such as contracts waiving good faith, commitment to nonmaximizing purposes is not a substantively unreasonable bargain of this kind. The idea of shareholder value maximization is one of the most contested in all of business law. Courts and scholars have diverse and conflicting views regarding the legitimate purposes that a board of directors may seek to pursue.⁴⁶ For instance, though some cases suggest that directors have a duty to maximize shareholder value,⁴⁷ others—including *Unocal* itself—suggest that directors might take the considerations of constituencies other than shareholders into account when

governing body, members, or any class or group of members of a nonstock corporation; if such provisions are not contrary to the laws of this State.”).

44. EASTERBROOK & FISCHEL, *supra* note 24, at 36.

45. According to the Social Investment Forum Foundation, 12.2% of investments under professional management in 2010 were invested according to strategies they categorize as “socially responsible”—up 34% from 2005. SOC. INV. FORUM FOUND., REPORT ON SOCIALLY RESPONSIBLE INVESTING TRENDS IN THE UNITED STATES 8 (2010), available at <http://ussif.org/resources/research/documents/2010TrendsES.pdf>. Those numbers are based on a broad definition of “socially responsible investing.” In comparison, Morningstar Inc. classifies approximately 3% of mutual funds it tracks as socially responsible—though of course, mutual funds do not comprise the entire universe of public equity investors. See Jennifer Hoyt Cummings, *Your Practice: Socially Responsible Advising Gaining Ground*, REUTERS, Feb. 27, 2012, <http://www.reuters.com/article/2012/02/27/us-impact-advising-idUSTRE81Q1OJ20120227>.

46. For comprehensive discussions of these different views, see Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 764-65, 850 (2005); and Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163 (2008).

47. See, e.g., *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986).

making decisions.⁴⁸ These mixed signals in the doctrine are reflected in dissensus among normative legal theorists, as well. A substantial minority rejects the shareholder value maximization purpose in favor of corporate responsibility to serve society directly,⁴⁹ and another minority rejects it in favor of board discretion to act in the interests of the entire corporate production team.⁵⁰ A nuanced doctrine regarding corporate purposes might help facilitate experimentation regarding which approaches are able to satisfy which investors. Furthermore, businesspeople are at least as divided as scholars on the issue of proper corporate purposes. To take one prominent example, Whole Foods CEO John Mackey writes: “Making high profits is the means to the end of fulfilling Whole Foods’ core business mission. We want to improve the health and well-being of everyone on the planet through higher-quality foods and better nutrition.”⁵¹ The idea of dedication to some mission other than wealth-accumulation is hardly foreign to American business culture, and it should not be foreign to our business courts. Courts should not foreclose experimentation within a range of reasonable disagreement among prominent judges, scholars, and businesspeople regarding the purposes of business activity. Rather, parties to corporate contracts should have the freedom to settle these complex and controversial issues for themselves. When it comes to corporate purposes, the old bedrock teaching seems apt: “[J]udges are not business experts.”⁵² It would be epistemically immodest to foreclose the incorporation of businesses like Whole Foods and meglist, and it would hinder us in gathering more data about what works and doesn’t work in the marketplace.

48. *Paramount Commc’ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1152 (Del. 1989) (holding that the Time Inc. board could implement defensive measures to protect its corporate culture); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985) (allowing consideration of a defensive measure’s “impact on . . . creditors, customers, employees, and perhaps even the community generally”). For readings comporting with those descriptions, see Blair & Stout, *supra* note 29 (discussing *Unocal*); Elhauge, *supra* note 46, at 764–65, 850 (discussing *Paramount* and *Unocal*). It should be noted that *Newmark* goes out of its way to reject these readings of *Paramount*, instead suggesting that decisions protecting culture are reasonable only if they can plausibly relate to the maximization of shareholder value. See *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 32–33 (Del. Ch. 2010).

49. See, e.g., GREENFIELD, *supra* note 29, at 127 (“Principle 1: The Ultimate Purpose of Corporations Should Be to Serve the Interests of Society as a Whole.”).

50. See, e.g., Blair & Stout, *supra* note 29.

51. John Mackey, *Profit Is the Means, Not End*, REASON (Oct. 2005), <http://reason.com/archives/2005/10/01/rethinking-the-social-responsibi/3>.

52. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

It may be argued that even a mandatory shareholder value maximization purpose is not *truly* mandatory, since the hypothetical meglist could opt to incorporate in a different organizational form, such as the nonprofit or the limited liability corporation.⁵³ On this view, one would argue that it is efficient to mandate shareholder value maximization within the C-corporation, but allow tailored purposes within the nonprofit and LLC forms, for instance.⁵⁴ One might argue that this approach could reduce information costs to contracting parties and produce positive network externalities by maintaining simple legal doctrines applicable to the individual statutory forms. Indeed, when Chancellor Chandler writes about what the “Inc.” at the end of a firm’s name “has to mean,” perhaps he is suggesting that the mandatory approach will reduce information costs.⁵⁵ After all, it would cost potential investors time and effort to distinguish between firms adhering to the default and those opting out. Perhaps investors’ savings from reliance on the “Inc.” outweigh the benefits that a default rule would produce for the meglists of the world. Given that most shareholders want to maximize monetary return on their investments, perhaps a mandatory rule is preferable.

This information costs rationale should carry little weight because the savings generated by a mandatory rule would be small. Investors conduct exceedingly careful due diligence in private equity transactions; it would take negligible extra effort for a reasonable investor to learn about a target company’s commitment to nonmaximization. And though public equity investors are often less informed than their private market analogues, it would be relatively easy to alleviate the information costs associated with companies’ nonmaximization commitments through a few channels. First, if there is a significant paternalist concern regarding unsophisticated investors, it seems plausible that market operators like NYSE would either require nonmaximizers to identify themselves in some way, or prohibit them from listing. Second, if nonmaximizers become prominent in the public marketplace, then those who sell information to retail investors are likely to add details about corporate

53. For a discussion of the range of entity forms available to venturers, see LARRY E. RIBSTEIN, *THE RISE OF THE UNINCORPORATION* (2010). An economic rationale for the diversity of ownership arrangements across forms is explained in HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* (1996).

54. Notably, the Delaware Code explicitly permits venturers to incorporate LLCs for unprofitable purposes. DEL. CODE ANN. tit. 6, § 18-106(a) (2005) (“A limited liability company may carry on any lawful business, purpose or activity, whether or not for profit . . .”).

55. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010).

purposes to the suite of information they sell.⁵⁶ Finally, Delaware itself could easily mitigate any information cost problems by requiring nonmaximizers to append a distinguishing signal after the “Inc.” in their names. (Perhaps “megslist, Inc., nm.” would do the trick.⁵⁷) This would alert potential investors to the existence of a nonmaximization covenant “running with” the corporate charter.⁵⁸ It’s worth noting that this would actually make it easier to identify nonmaximizing firms than it is to identify the state in which a firm is incorporated.

Some may additionally argue that shareholders in nonmaximizing companies could encounter difficulty in monitoring the firms’ commitments to goals that are less easily measured than share price.⁵⁹ Indeed, courts and lawmakers should be concerned with this agency cost problem.⁶⁰ However, rather than seeing it as a reason to foreclose a form of business that has the potential to serve venturer’s goals, courts and lawmakers should see the monitoring problem in the same light that they see all problems of ownership-control separation: as something that law and contract can effectively mitigate.

To do anything else would simply be bad business for Delaware. An alternative network of for-profit, but nonmaximizing, firms is rapidly growing; firms in this network are increasingly wary of doing business through the

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56. The same applies to purveyors like Yahoo! Finance, who give away information as a means to generate advertising revenue. See YAHOO! FIN., <http://finance.yahoo.com> (last visited Mar. 27, 2012).
 57. Cf. Steven J. Haymore, Note, *Public(ly Oriented) Companies: B Corporations and the Delaware Stakeholder Provision Dilemma*, 64 VAND. L. REV. 1311, 1344-45 (2011) (suggesting that Delaware corporations run for the benefit of society in addition to shareholders add “B” and “A Beneficial Corporation” to their names and logos). It’s worth noting that nonprofit firms such as Special Olympics of Delaware, Inc. are not shareholder value-maximizing firms, and nobody seems to be confused by this. However, investors have no opportunity to buy shares of nonprofits, so perhaps investors know intuitively that they run no risk of making mistaken purchases.
 58. See Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. S373, S390-93 (2002) (discussing “rights whose presence or absence is verified by a sign that is attached to, or travels with” an asset).
 59. See, e.g., CLARK, *supra* note 41, at 20 (“A single objective goal like profit maximization is more easily monitored than a multiple, vaguely defined goal like the fair and reasonable accommodation of all affected interests. It is easier, for example, to tell if a corporate manager is doing what she is supposed to do than to tell if a university president is doing what she is supposed to do.”).
 60. For a general statement of the problem of commitment-monitoring in social enterprises, see Ofer Eldar, *The Distinctive Role of Social Enterprise* 17-19 (Feb. 2012) (unpublished manuscript) (on file with author) (identifying control mechanisms, contractual mechanisms, and certification mechanisms for surmounting the problem).

Delaware corporate form.⁶¹ Instead, they are opting to incorporate as B corporations, flexible purpose corporations, and low-profit limited liability companies (L3Cs) in other jurisdictions.⁶² Delaware will hinder its chances of earning potentially significant incorporation revenues if it refuses to accommodate this growing network of firms. To the extent that there are unanswered questions about how to structure these firms, the mandatory approach tacitly asserts that they are questions not worth answering. Instead, Delaware should stick to its tradition of business law leadership.⁶³ Over decades, Delaware has honed careful jurisprudence regarding the market for corporate control; using similar judicial ingenuity, it could help facilitate the emerging business practices of these new firms.

IV. DISTINGUISHING *NEWMARK* AND REFINING THE DEFAULT APPROACH

For the reasons offered in Part III, future courts should refuse to credit *Newmark's* “mandatory” language. Instead, they should distinguish the opinion’s discussion of corporate purposes and do their best to elucidate a principled default rule structure.

Future interpreters should read *Newmark's* “mandatory” language as dicta because the opinion offers two grounds for rescission of the poison pill that do not require inquiry into the definition of “proper corporate purposes.” First, under *Unocal*, *Newmark's* holding rests on the fact that the craigslist board did not face a reasonably perceived threat to their corporate strategy. Throughout the opinion, Chancellor Chandler repeatedly notes that the material threat posed to Jim and Craig’s control was insignificant. Indeed, the only real threat that Jim and Craig perceived was the possibility of one of their heirs selling control to eBay or some other barbarian at the gate.⁶⁴ According to *Newmark*,

61. See Gilbert, *supra* note 42.

62. See, e.g., Dana Brakman Reiser, *Governing and Financing Blended Enterprise*, 85 CHI.-KENT L. REV. 619 (2010) (discussing the low-profit liability company, community interest company, and B corporation); John Tozzi, *Patagonia Road Tests New Sustainability Legal Status*, BLOOMBERG (Jan. 4, 2012, 7:57 AM), <http://www.bloomberg.com/news/2012-01-04/patagonia-road-tests-new-sustainability-legal-status.html> (discussing Patagonia’s experience with the benefit corporation form and California’s new flexible purpose corporation form). For an economic theory of why business forms that are neither nonprofits nor shareholder value-maximizers can be efficient, see Eldar, *supra* note 58.

63. For discussion of Delaware’s potential responses to the rise of the alternative forms, see Haymore, *supra* note 57.

64. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 32 (Del. Ch. 2010).

such a distant threat is not one that a board can reasonably defend against with measures like a poison pill.⁶⁵ While there are Delaware cases that uphold the authority of boards to adopt anticipatory defensive measures, these cases all deal with defensive measures adopted in public companies where an active takeover market posed an *actual*, if nonspecific, hostile threat.⁶⁶ Quite the opposite is true regarding craigslist: as long as Jim and Craig maintain their voting agreement, nobody can actually threaten their control.⁶⁷ This provided Chancellor Chandler a basis upon which to find that the craigslist board did not reasonably perceive a threat when adopting the poison pill, thus rendering the pill impermissible according to the first prong of the *Unocal* test. Because there were “adequate and independent grounds” for the decision, nothing about the controversial subject of corporate purposes needed to be said.

Newmark also focused on the fact that the primary goal of the poison pill was evidently to “punish” eBay.⁶⁸ This fact drove the holding on the proportionality prong of *Unocal*. The proportionality analysis requires that a defensive response to a threat fall within a “range of reasonableness.”⁶⁹ To fall within that range, “directors must at minimum convince the court that they have not acted for an inequitable purpose,” and an inequitable purpose will always render a defensive measure disproportionate in response to the perceived threat in question.⁷⁰ Given that “Jim and Craig . . . were the only known beneficiaries” of the poison pill and that they adopted it to “punish” eBay, the decision to adopt it was paradigmatically inequitable—a self-serving decision made by entrenched controlling shareholders.⁷¹ The poison pill’s vengeful origins are the central source of inequity, not the corporate purposes under color of which Jim and Craig acted. For this additional reason, *Newmark*’s discussion of corporate purposes can be sidelined as unnecessary to the holding.

65. *Id.* (making light of the fact that “Jim and Craig ask th[e] Court to validate their attempt to . . . shape the future of the space-time continuum”).

66. *Moran v. Household Int’l., Inc.*, 500 A.2d 1346, 1357 (Del. 1985); *In re Gaylord Container Corp. Shareholders Litig.*, 753 A.2d 462, 481 (Del. Ch. 2000) (“[T]he mere adoption of a garden-variety pill is not in itself preclusive under Delaware law.”).

67. *Newmark*, 16 A.3d at 35 (noting that Jim and Craig “are perfectly able to ensure the continuation of craigslist’s ‘culture’ so long as they remain majority stockholders”).

68. *Id.*

69. *Paramount Commc’ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 45 (Del. 1993).

70. *Newmark*, 16 A.3d at 30 (quoting *Mercier v. Inter-Tel (Del.), Inc.*, 929 A.2d 786, 807 (Del. Ch. 2007) (citing *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985))).

71. *Id.* at 34.

Finally, if faced with a case dealing with corporate purposes, a Delaware court should elucidate how parties might best commit to a nondefault purpose. How should they memorialize their agreed-upon intentions so that a court would enforce those intentions in the event of a dispute? By answering that question, a court could show respect to entrepreneurs, capitalists, laborers, suppliers, and customers with minority preferences regarding corporate purposes. As Ian Ayres details elsewhere in this Issue, lawyers and their sophisticated clients benefit from knowing the necessary and sufficient methods by which they can contract around default rules.⁷² Would an explicit provision in the corporate charter, bylaws, or shareholders' agreement be enough? Would a megslist need to deliver some form of notice to potential future stock purchasers, perhaps by calling itself "megslist, Inc., nm."?⁷³ These questions remain unanswered, and Delaware courts should do what they can to provide guidance.

CONCLUSION

In *Newmark*, the Delaware Chancery Court was less than hospitable to the idea that a for-profit corporation might strive to do something other than maximize shareholder value. In this regard, I have argued, *Newmark* was mistaken. One need not be a true believer in the Whole Earth ethos to think that future Craigs and Megs should have the support of the Delaware courts in structuring and operating their businesses. Of course, Craig erred by failing to seek contractual consent to his idiosyncratic corporate purposes prior to *Newmark*. However, we should remember that craigslist became successful because of its idiosyncrasies. In the future, instead of repelling entrepreneurs and investors with atypical preferences and ethics, Delaware should enable contractors to build corporations that satisfy those preferences and adhere to those ethics. At the very least, judges should not mandate the purposes of corporate enterprise.

DAVID A. WISHNICK

72. Ian Ayres, *Regulating Opt Out: A Theory of Altering Rules*, 121 YALE L.J. 2032 (2012) (showing how courts should enable parties through clear altering rules). As Ayres proposes, the court could have simply dropped a footnote explaining how craigslist could have altered the default. *Id.* at 2055-60.

73. See *supra* notes 56-58 and accompanying text.