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Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose

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UNSETTLEDNESS IN DELAWARE CORPORATE LAW: BUSINESS
JUDGMENT RULE, CORPORATE PURPOSE*

BY LYMAN JOHNSON**

ABSTRACT

This Article revisits two fundamental issues in corporate law. One—the central role of the business judgment rule in fiduciary litigation—involves a great deal of seemingly settled law, while the other—is there a mandated corporate purpose—has very little law. Using the emergent question of whether the business judgment rule should be used in analyzing officer and controlling shareholder fiduciary duties, the latter issue having recently been addressed by Chancellor Strine in the widely-heralded MFW decision, this Article proposes a fundamental rethinking of the rule’s analytical preeminence. For a variety of reasons, it is suggested that fiduciary duties should be made more prominent and the business judgment rule should be dramatically deemphasized. The policy rationales for the rule are sound, but they have no relevance for shareholders and introduce needless complexity. For directors, those rationales do not apply in the loyalty setting, and in the care setting, can be achieved by recalling simply that there is no substance to judicial review in that context.

As to corporate purpose, the Article advocates that Delaware law permit a pluralistic approach in the for-profit corporate sector. Long agnostic about ultimate corporate objective, Delaware law may have turned unnecessarily toward a strict shareholder primacy focus in the 2010 eBay decision. To bring clarification and to foster flexibility, Professor Johnson recommends a legislative default provision, with an opt-out feature. This feature should be in the business corporation statute itself. Delaware’s new benefit corporation law laudably advances the goal of institutional pluralism, but does so at the ironic risk

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of reinforcing a belief that business corporations themselves are legally permitted only to maximize profits. Judges in a democratic society should not dictate institutional goals.

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I. INTRODUCTION

Apart from the Justices on the United States Supreme Court, it is hard to imagine that any judges in our country receive closer scrutiny than those serving on Delaware's courts. This is due to their central role,¹ historically, in expounding corporate law and, more recently, in fleshing

¹Michael J. Maimone, *Causes of Action*, in DELAWARE SUPREME COURT GOLDEN ANNIVERSARY 1951-2001, at 53, 57 (The Honorable Justice Randy J. Holland & Helen L. Winslow eds., 2001) ("It is beyond dispute that the Supreme Court of Delaware is regarded as the nation's leading arbiter of issues of corporate law.").

out the law of noncorporate business entities.² Numerous dimensions of their business law jurisprudence have been scrupulously analyzed.³ These include, to note just a few, the longstanding "race" debate over state and federal rivalry with Delaware⁴—both as to competitors' possible influence on Delaware law and also as to the preferred forum for chartering and for adjudicating disputes;⁵ the supposed substantive superiority (or inferiority) of Delaware law as compared to other states' laws;⁶ and the different philosophies underlying its noncorporate and

²The limited liability company is rapidly emerging as the most popular business form for new companies. Peter Walsh Jr. & Dominick T. Gattuso, *Delaware LLCs - The Wave of the Future and Advising Your Clients About What to Expect*, 19 BUS. L. TODAY, Sept.-Oct. 2009, at 11; Rodney D. Chrisman, *LLCs Are The New King of the Hill: An Empirical Study of the Number of New LLCs, Corporations, and LPs Formed in the United States Between 2004-2007 and How LLCs Were Taxed for Tax Years 2002-2006*, 15 FORDHAM J. CORP. & FIN. L. 459, 459-60 (2010) ("The limited liability company (LLC) is now undeniably the most popular form of new business entity in the United States."). Both the Delaware Supreme Court and the Delaware Chancery Court are issuing more and more important opinions in the noncorporate area. See, e.g., *Gatz Props., LLC v. Auriga Capital Corp.*, 2012 WL 5425227 (Del. Nov. 7, 2012).

³See *infra* notes 4-7 and accompanying text.

⁴For a fairly brief description of the origins of the "race to the bottom"/"race to the top" debate, see Frank H. Easterbrook, *The Race to the Bottom in Corporate Governance*, 95 VA. L. REV. 685, 686-87 (2009) (describing briefly the origins of the race to the bottom/race to the top debate). Cf. Bruce H. Kobayashi & Larry E. Ribstein, *Delaware for Small Fry: Jurisdictional Competition for Limited Liability Companies*, 2011 U. ILL. L. REV. 91, 93-95 (2011) (explaining the "competition" debate now extends to limited liability companies).

⁵See generally Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 59-60 (2009) (discussing the preeminence in corporate law and the horizontal and vertical challenges it faces). As to federal "competition" for Delaware, see Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 592 (2003). Recently, many commentators have observed that, with respect to Delaware corporations, plaintiffs frequently are filing litigation outside Delaware. E.g., Joseph A. Grundfest, *The History and Evolution of Intra-Corporate Forum Selection Clauses: An Empirical Analysis*, 37 DEL. J. CORP. L. 333, 344-45 n.57 (2012) ("[A]cademic research suggest that Delaware has been losing cases to other venues because plaintiff counsel perceives the Court of Chancery as an unfriendly jurisdiction.") (citing John Armour, Bernard Black & Brian Cheffins, *Is Delaware Losing Its Cases?* 42 (Eur. Corp. Governance Inst. Law Working Paper No. 151/2010, Nw. Univ. Law Sch. Law & Econ. Research Paper No. 10-03, Feb. 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1578404). Thus, Delaware provides the governing substantive law, but Delaware courts may not be adjudicating these disputes. *Id.* This has led to proposals for ex ante resolution of this place of filing issue via forum selection clauses in a corporation's organic documents. See Thomas T. McClendon, Note, *The Power of a Suggestion: The Use of Forum Selection Clauses by Delaware Corporations*, 69 WASH. & LEE L. REV. 2067, 2070 (2012).

⁶See, e.g., William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L.J. 1, 9-11 (2009) (introducing empirical evidence as to why Delaware is the leader for corporate charters); William B. Chandler III & Anthony A. Rickey, *Manufacturing Mystery: A Response to Professors Carney & Shepherd's "The Mystery of Delaware Law's Continuing Success,"* 2009 U. ILL. L.J. 95, 97 (2009) (criticizing

corporate decisions.⁷ And of course, there is the age-old question of whether, in a particular case or line of cases, Delaware "got it right." Or, as to an issue yet to be resolved, speculation as to whether they will "get it right."

This Article takes up certain issues in Delaware corporate law that are, as yet, unsettled. But the Article also examines some issues in Delaware's law that, although ostensibly settled, nonetheless, to this Author at least, remain unsettling and worth revisiting. The Article addresses issues *in* Delaware's substantive corporate law itself. It does not tackle issues *about* that law (or Delaware's courts) in relation to procedural matters or to developments or institutions outside Delaware.⁸

The aim—in this ideal venue for exchanging ideas among the bench, bar, and academic communities that, along with the General Assembly, comprise the commonwealth of Delaware corporate law—is to raise some first-order questions. Ultimately, judges must express the resolution of fundamental issues in doctrinal terms, their *lingua franca*.⁹ Consequently, this Article will also attend to matters of legal doctrine in Delaware law. The larger point, however, is about Delaware corporate law as a highly adaptive and dynamic social institution, notwithstanding the apparently settled nature of core precepts.

Delaware's leadership in corporate law is not just the result of its well-established body of precedent, its highly regarded judiciary, or its supposed tilt (or lack thereof, depending on one's viewpoint) toward management or investors.¹⁰ Delaware's bench also has the advantages of having so many opportunities to address critical corporate law issues,¹¹ the certainty of immediate and sustained scrutiny and feedback from lawyers and scholars, and the deft lever of equity that permits judges, as a lawmaking mechanism, to stand between the categorical edicts of a

Carney and Shepherd's analysis about the indeterminacy of Delaware law).

⁷See Lyman Johnson, *Delaware's Non-waivable Duties*, 91 B.U. L. REV. 701, 705-08 (2011) (describing the more contractarian approach of Delaware noncorporate law as compared to its corporate law).

⁸See *supra* notes 4-7 and accompanying text. A recent example is the 2012 federal court ruling holding unconstitutional a Delaware provision by which judges on the Chancery Court serve as arbitrators. *Del. Coal. for Open Gov't v. Strine*, 2012 WL 3744718 (D. Del. Aug. 30, 2012).

⁹See Brian Broughman, Jesse M. Fried & Darian Ibrahim, *Delaware Law as Lingua Franca: Evidence from VC-Backed Startups* 2 (Harv. Pub. Law Working Paper No. 12-38, 2012), available at <http://ssrn.com/abstract=2117967> ("Delaware law can be expected to serve as a 'lingua franca': firms seeking out-of-state investors will be more likely to use Delaware law so they can provide a common language to all their investors.").

¹⁰See *supra* notes 4-5 and accompanying text.

¹¹More than 50% of all U. S. publicly-traded companies, and 63% of the Fortune 500 are incorporated in Delaware. *Division of Corporations, ST. OF DEL.*, <http://corp.delaware.gov/> (last visited April 10, 2013).

legislative/regulatory state and pure, unconstrained private ordering.¹² To do the latter effectively, and in a way congruent with shifting expectations of corporate behavior in a democratic society, requires an enormous capacity for professional introspection, engagement with the larger corporate community, and a willingness to rethink and possibly remold prior rulings, in the light of experience.

This Article is organized into four parts and takes up, broadly, two issues. The first involves a subject on which, in general, there is a great deal of law in Delaware, but not on two related and emerging sub-issues. The second pertains to a topic on which there is virtually no law. In particular, Part II explores whether the cornerstone doctrine of Delaware law—the business judgment rule—should play a central role in adjudicating the still nascent (and unsettled) areas of officer's and controlling shareholder's duties and liability. Those two topics also, however, are a useful lens to raise a more general issue: Should the business judgment rule, rather than fiduciary duties themselves, really remain the central analytical construct in Delaware corporate law? This Article provides several reasons why the business judgment rule should recede in prominence in favor of emphasizing fiduciary duties. Only Delaware's courts can settle this issue.

Part III addresses the always nettlesome issue of corporate purpose. Specifically, does Delaware law currently—and, relatedly, should Delaware law—mandate a particular corporate purpose? Or, is law—and should it remain—rightly agnostic on that baseline issue? After briefly considering certain theoretical and doctrinal failings on corporate purpose, the Article extensively reviews the 2010 Delaware Court of Chancery decision in *eBay Domestic Holdings, Inc. v. Newmark* appearing to mandate profit maximization.¹³ It will be suggested that *eBay* wrongly espouses a narrow, singular objective for corporate endeavor that lacks authoritative support. At best, and somewhat remarkably, existing positive law is still sufficiently unclear in 2013 that a statutory solution, via a default purpose and optional opt-outs, is advisable. Without a statutory "fix," or timely clarification by the Delaware Supreme Court, Delaware law might be interpreted as imposing an undesirable monism of corporate purpose at a time when, in

¹²For a description of equity's unique constitutional status in Delaware, see Johnson, *supra* note 7, at 703. For a recent example of the dynamic character of Delaware lawmaking in the fiduciary duty area, see Lyman Johnson, *Dynamic, Virtuous Fiduciary Regulation* (U. of St. Thomas [Minnesota] Legal Studies Research Paper No. 13-23, 2013), available at <http://ssrn.com/abstract=2273869>.

¹³16 A.3d 1, 35 (Del. Ch. 2010).

corporate law as elsewhere, institutional pluralism should be encouraged. If Delaware's courts will not rectify this issue—as they can—the General Assembly should, and it should do so within the business corporation statute itself, not merely by enacting a new "public benefit" corporation statute as it has recently done. Part IV is a brief conclusion.

II. RETRENCHING THE BUSINESS JUDGMENT RULE

The business judgment rule has long been the cornerstone concept in Delaware corporate law.¹⁴ To suggest its retrenchment in a lecture attended by many of Delaware's eminent judges and leading members of its elite corporate bar—and in an article published in Delaware's premier law journal—might seem an act of legal sacrilege. Some might liken it to visiting the Vatican with the intention of giving the Pope a copy of Luther's small catechism,¹⁵ or Calvin's *Institutes of the Christian Religion*.¹⁶ It is not intended in that way, but rather in the spirit of Holmes's famous observation that "[i]t is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV."¹⁷ Any rule of law, however old and established, must continue to serve its intended purposes or it should be discarded, *stare decisis* notwithstanding. At a minimum, it is useful from time to time to take up settled matters, if only to reaffirm them as not having outlived their usefulness. Moreover, the business judgment rule is well established as a mainstay doctrine in Delaware only with respect to corporate directors, not with respect to officers or controlling shareholders.¹⁸ This Part, after very briefly describing what is settled about the business judgment rule, turns to the far less settled areas of its application to officers and

¹⁴See Rodman Ward & Paul J. Lockwood, *Corporate Law, in* DELAWARE SUPREME COURT GOLDEN ANNIVERSARY 1951-2001, at 82 (The Honorable Justice Randy J. Holland & Helen L. Winslow eds., 2001) (tracing the business judgment rule concept in Delaware back to decisions from 1912, 1924, and 1935); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (citing precedent); *Krasnick v. Pac. E. Corp.*, 180 A. 604, 607 (Del. Ch. 1935); *Robinson v. Pitt. Oil Ref. Corp.*, 126 A. 46, 48 (Del. Ch. 1924); *Bryan v. Aikin*, 82 A. 817, 820 (Del. Ch. 1912), *rev'd*, 86 A. 674, 687 (Del. 1913).

¹⁵Martin Luther, *The Small Catechism of Dr. Martin Luther* (Rev. H. Wetzell ed., trans., 1872) (1529).

¹⁶JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* (Henry Beveridge trans., Hendrickson Publishers, Inc. 2008) (1536).

¹⁷Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). This passage was quoted by the Delaware Supreme Court in *Keeler v. Hartford Mut. Ins. Co.*, 672 A.2d 1012, 1017 n.6 (Del. 1996).

¹⁸All of the old decisions cited by Mr. Ward, *supra* note 14, involve corporate directors.

controlling shareholders before reflecting more generally on how the rule and fiduciary duties might be sensibly realigned in all three areas—directors, officers, and controlling shareholders.

A. The Settled Business Judgment Rule for Corporate Directors

Doctrinally, the business judgment rule "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."¹⁹ That 1984 formulation, however, is only one of three constitutive strands of the rule, specifically, the procedural guide.²⁰ Another aspect stems from the 1993 effort to link analytically the business judgment rule and fiduciary duties.²¹ There, the Delaware Supreme Court stated that to rebut the rule's *Aronson* presumption, the plaintiff must sufficiently plead a breach of fiduciary duty, whereupon the burden shifts to defendant directors to prove the entire fairness of a transaction.²² This is the rule-duty linkage strand.²³ If a plaintiff fails to carry that burden, the substantive dimension of the rule "attaches" to protect director decisions because courts will not "second-guess" business judgments.²⁴ This last "substantive" law strand of the rule stems, in its current formulation, from the 1971 decision in *Sinclair Oil Corp. v. Levien*.²⁵ Thus, although well established, the contours of the business judgment rule have been altered over the years and now encompass refinements from the 1970s, 1980s, and 1990s.

Clearly, moreover, the decisional law focus is on directors.²⁶ This is seen not only in existing doctrine, but also in well-known policy

¹⁹*Parnes v. Bally Entm't Corp.*, 722 A.2d 1243, 1246 (Del. 1999); *Aronson*, 473 A.2d at 812.

²⁰*See Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993), *modified*, 636 A.2d 956 (Del. 1994).

²¹*Id.* at 361-62.

²²*Id.* *See Gantler v. Stephens*, 965 A.2d 695, 706 (Del. 2009) (affirming the procedural and the rule-duty linkage strands of the business judgment rule announced in *Cede & Co.*).

²³*See Gantler*, 965 A.2d at 706.

²⁴*Cede & Co.*, 634 A.2d at 361.

²⁵280 A.2d 717, 720 (Del. 1971) (director business judgment will not be overturned if it "can be attributed to any rational purpose"). *See also* *Unitrin, Inc. v. Am. Corp.*, 651 A.2d 1361, 1373 (Del. 1995) (quoting *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985)). Prior to *Sinclair*, as enhanced by *Aronson*, Delaware courts would not interfere with business judgments unless there was "gross and palpable overreaching," or equivalent conduct. *E.g.*, *Getty Oil Co. v. Skelly Oil Co.*, 267 A.2d 883 (Del. 1970) (quoting *Meyerson v. El Paso Natural Gas Co.*, 246 A.2d 789, 794 (Del. Ch. 1967)).

²⁶*See infra* Part II.D (discussing the business judgment rule and director conduct).

rationales for the rule.²⁷ Delaware courts frequently ground the rule in that section of the corporate statute providing that the business and affairs of a corporation are to be managed by or under the direction of its board.²⁸ This is a director-centered rationale.²⁹ Another rationale is to induce qualified persons to serve as directors and to more closely align director attitudes toward risk—they will capture little of the eventual payoff from success but face litigation exposure from failure—with stockholder risk preferences as influenced by holding a diversified portfolio of stock.³⁰ A third rationale emphasizes that judges, as public officials, unlike directors, are not business experts; and directors, not judges, are elected by stockholders.³¹ These rationales coalesce to form the rule's "powerful presumption in favor of actions taken by the directors."³²

Moving beyond doctrine and policy to history, one finds that the business judgment rule became a key feature of Delaware's jurisprudence long before the duty of care.³³ This history is well traced by Justice Henry Ridgely Horsey in a lecture delivered at Widener University School of Law and later published as an article in this journal.³⁴ Justice Horsey confessed to being surprised at finding that it was only in 1963 that the Delaware Supreme Court came to "first recognize the existence of a director's fiduciary duty to act in an informed and prudent manner,

²⁷See Elizabeth S. Miller & Thomas E. Rutledge, *The Duty Of Finest Loyalty And Reasonable Decisions: The Business Judgment Rule In Unincorporated Business Organizations?*, 30 DEL. J. CORP. L. 343, 350-51 (2005) (discussing justifications for the business judgment rule).

²⁸See DEL. CODE ANN. tit. 8, § 141(a) (2012); see, e.g., *Cede & Co.*, 634 A.2d at 360; *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 64 (Del. 1989). See also *In re Cox Commc'ns S'holder Litig.*, 879 A.2d 604, 614 (Del. Ch. 2005) (explaining the business judgment rule "exemplifies and animates" centralized management in the form of a corporation's board of directors and the subordinate officers chosen by directors).

²⁹See, e.g., *In re Cox Commc'ns*, 879 A.2d at 614 ("It would not be much of a stretch to say that the central idea of Delaware's approach to corporation law is the empowerment of centralized management, in the form of boards of directors and the subordinate officers they choose, to make disinterested business decisions.").

³⁰See *Gagliardi v. Trifoods Int'l, Inc.*, 683 A.2d 1049, 1052 (Del. Ch. 1996). Former Chancellor William Allen describes the rule as seeking to overcome a director inclination toward "sub-optimal risk acceptance." *Id.* at 1052-53.

³¹See Lyman Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439, 456-57 (2005) (collecting authority).

³²*Cede & Co.*, 634 A.2d at 361.

³³See Justice Henry Ridgely Horsey, *The Duty of Care Component of the Delaware Business Judgment Rule*, 19 DEL. J. CORP. L. 971, 985, 995 (1994) (explaining that the business judgment rule has been part of corporate law for at least 150 years) (citing S. Samuel Arsht, *The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93, 93 (1979-1980)).

³⁴*Id.*

i.e., with due care."³⁵ The essence of the business judgment rule, of course, had been around for decades before that.³⁶

Taking the doctrines in the historic order in which they had emerged, Justice Horsey in both his 1994 scholarly article and his contemporaneously written 1993 judicial opinion in *Cede*,³⁷ linked the duty of care with the business judgment rule by making the former a "component"³⁸ or an "element"³⁹ of the latter. In this way, reflecting Holmes's insight that the life of the common law's development is not always logic, but experience,⁴⁰ the duty of care, for corporate directors at least, became doctrinally embedded in the still regnant business judgment rule only about 20 years ago.⁴¹ The business judgment rule, first to arrive on the Delaware legal scene, remained predominant, with the director duty of care (and the duty of loyalty) being subsumed within it.⁴²

B. *The Unsettled Issue of the Business Judgment Rule and Corporate Officers*

Surprisingly, given Delaware's extensive corporate law jurisprudence, it is not settled today whether in cases involving corporate officers, judges will doctrinally deploy the business judgment rule in the same all-encompassing manner that it has been used for corporate directors.⁴³ Delaware courts have stated in dicta that the rule covers officers,⁴⁴ but they have not held it to be so applicable, nor have they

³⁵*Id.* at 985 (citing *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963)). Two years before *Graham*, however, Chancellor Seitz had held corporate directors liable for failing in their duty to exercise, in a case involving no business judgment, "a reasonable discharge of their duties." *Lutz v. Boas*, 171 A.2d 381, 395 (Del. Ch. 1961). The duty of care was even more forthrightly expressed in *Smith v. Van Gorkom*, 488 A.2d 858, 872-73 (Del. 1985) (distinguishing care from loyalty).

³⁶See *supra* note 14.

³⁷See *Cede & Co.*, 634 A.2d at 361.

³⁸Horsey, *supra* note 33, at 989, 991, 997.

³⁹*Cede & Co.*, 634 A.2d at 361, 366.

⁴⁰Oliver Wendell Holmes, Jr., *The Common Law* (Am. Bar Ass'n 2009) (1881).

⁴¹*Cede & Co.*, 634 A.2d at 360-61.

⁴²See *id.* at 360 (referring to the duty of loyalty and the duty of care strands of the business judgment rule).

⁴³Johnson, *supra* note 31, at 440-41.

⁴⁴*Id.* at 443-47 (discussing cases). See also Lawrence A. Hamermesh & A. Gilchrist Sparks III, *Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson*, 60 BUS. LAW. 865, 865 (2005) (stating that the "policy rationales underlying the development and application of the business judgment rule" warrant its application to officers as well as directors).

analytically linked it to fiduciary duties as they did with respect to directors in the *Cede* framework. Consequently, they also have had no occasion to fully consider the policy case for and against application of the rule to officers.⁴⁵

In fact, in the 2009 decision of *Gantler v. Stephens*,⁴⁶ a case of first impression on officer duties, the Court rather obviously did *not* subsume the duty of care under, or even mention, the business judgment rule in its treatment of officers. Importantly, the Court stated that while it had earlier "implied that officers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and that the fiduciary duties of officers are the same as those of directors . . . [w]e now explicitly so hold."⁴⁷ Conspicuously absent in its analysis of officer duties, however, was the business judgment rule.⁴⁸ Thus, in *Gantler*, after applying the usual analytical framework of requiring plaintiffs to overcome the presumptions of the business judgment rule for directors,⁴⁹ by way of contrast, the Court straightforwardly found, with respect to officers, that the plaintiff's allegations "state a claim that they breached their fiduciary duties as officers."⁵⁰

Although neither the doctrinal nor policy aspects of the business judgment rule have been settled with respect to officers, on the historical front officers strikingly differ from directors.⁵¹ Recall that for directors in Delaware the business judgment rule emerged well before full articulation of the duty of care.⁵² Consequently, perhaps out of a belief that the newer concept should be engrafted onto the older (rather than vice versa) director fiduciary duties became "elements" or "components"

⁴⁵For contrasting views on this issue, compare Johnson, *supra* note 31, at 452, 462-69 (advocating against an application of the business judgment rule to officers), with Hamermesh & Sparks, *supra* note 44, at 865 (advocating for an application of the business judgment rule to officers).

⁴⁶965 A.2d 695 (Del. 2009).

⁴⁷*Id.* at 708-09.

⁴⁸*See id.* at 708-09 (holding plaintiffs had stated claim that defendants breached their fiduciary duties as officers without discussing the business judgment rule in reference to the officers).

⁴⁹*Id.* at 708.

⁵⁰*Gantler*, 965 A.2d at 709. *See* Michael Follett, *Gantler v. Stephens: Big Epiphany or Big Failure? A Look at the Current State of Officers' Fiduciary Duties and Advice for Potential Protection*, 35 DEL. J. CORP. L. 563, 565-66, 582 (2010) (business judgment rule for officers unresolved).

⁵¹Follett, *supra* note 50, at 566-69 (discussing the different duties between officers and directors and whether the courts should grant officers protection under the business judgment rule).

⁵²*See supra* notes 35-36 and accompanying text.

of the business judgment rule in 1993.⁵³ But in *Gantler*, the fiduciary duties of officers emerged *prior* to the business judgment rule, which has not yet been adopted for officers in Delaware.⁵⁴ Therefore, with respect to officers, in Delaware there is currently no pre-existing historical, policy, or doctrinal connection between fiduciary duties and the business judgment rule, as is the case with directors.⁵⁵ Put another way, at least for now, *Gantler* momentarily has properly placed the fiduciary duty horse in front of the business judgment rule cart, not behind it, as in *Cede*.⁵⁶ The unsettled issue is whether Delaware law eventually will, for officers, follow the approach adopted for directors and subsume duties within the rule or, conversely, not do so and, in fact, use officers as a timely occasion to reconsider the linkage earlier made for directors. Before addressing that, the unsettled (and unsettling) relationship of the business judgment rule to controlling shareholders will be treated, because it helpfully illuminates precisely the same issue.

C. *The Unsettling Issue of the Business Judgment Rule and Controlling Shareholders*

If the future application of the business judgment rule to officers remains unsettled, the possible application of it to controlling shareholders is unsettling. The deployment of the business judgment rule in the shareholder setting seemed to first appear in the late 1960s.⁵⁷ It was then more or less suppressed for controlling shareholders in the 1990s in favor of uniformly using an entire fairness standard where self-dealing is involved;⁵⁸ now it may be on the verge of more generally re-appearing, particularly in light of Chancellor Strine's recent and important opinion in *In re MFW Shareholders Litigation*.⁵⁹ This Article does not dispute the various policy considerations favoring a more deferential approach to controlling shareholder conduct under certain

⁵³See *supra* notes 37-39 and accompanying text.

⁵⁴See *supra* notes 49-50 and accompanying text. This issue is taking on renewed importance given recent federal rulings in California that the business judgment rule does not apply to officers. See *FDIC v. Perry*, 2012 WL 589569, at *4 (C.D. Cal. Feb. 21, 2012); *FDIC v. Hawker*, 2012 WL 2068773, at *7 (E.D. Cal. June 7, 2012). *But see* *FDIC v. Briscoe*, No. 1:11-cv-02303-SCJ (N.D. Ga. Aug. 14, 2012). See generally John Jenkins, *But I Just Work Here!: The Rise of Corporate Officer Fiduciary Liability*, 6 DEAL LAWYERS 1 (Nov.-Dec. 2012) (discussing scholarship and case law).

⁵⁵See *supra* note 43 and accompanying text.

⁵⁶This is elaborated on in *infra* Part II.D.

⁵⁷See *infra* Part II.C.1.

⁵⁸See *infra* Part II.C.2.

⁵⁹See *infra* Part II.C.3.

conditions, but the business judgment rule is not the appropriate doctrinal vehicle for implementing that approach. Thus, as is the case with officers, the possible re-emergence of the rule in the controlling shareholder context offers a timely occasion to re-consider the larger utility of the rule in framing Delaware's fiduciary duty analysis. This will be taken up after first tracing the rule's fleeting but possibly re-emergent role in the shareholder setting.

1. The Appearance of the Business Judgment Rule

Delaware courts traditionally examined business dealings between a controlling shareholder—frequently a parent corporation—and the controlled company using a strict entire (or intrinsic) fairness test.⁶⁰ *Sterling v. Mayflower Hotel Corp.* and *Gottlieb v. Heyden Chemical Corp.* are widely cited 1952 decisions that did so, and neither mentioned the business judgment rule.⁶¹ In 1970, however, the Delaware Supreme Court introduced the business judgment rule into its analysis of transactions involving controlling shareholders.⁶²

In *Getty Oil Company v. Skelly Oil Company*,⁶³ the Court recited that the proper test for parent-subsidiary dealings was fairness,⁶⁴ but stated that there were two tests "to determine the limits of 'fairness'" ⁶⁵ Citing *Sterling*,⁶⁶ the Court first referred to the "'intrinsic fairness'" test,⁶⁷ but then also referred to the "'business judgment' test,"⁶⁸ the latter being applicable where the terms of a transaction are set by a third party, not the parent.⁶⁹ As support for the latter proposition, the Court cited a 1967 Delaware Court of Chancery decision, *Meyerson v. El Paso Natural Gas Co.*⁷⁰ The court in *Meyerson* acknowledged that the

⁶⁰See, e.g., *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 109-110 (Del. 1952); *Gottlieb v. Heyden Chem. Corp.*, 90 A.2d 660, 663 (Del. Ch. 1952); accord *David J. Greene & Co. v. Dunhill Int'l., Inc.*, 249 A.2d 427, 430 (Del. Ch. 1968).

⁶¹*David J. Greene & Co.*, 249 A.2d at 430.

⁶²See *Getty Oil Co. v. Skelly Oil Co.*, 267 A.2d 883, 887 (Del. 1970).

⁶³*Id.*

⁶⁴*Id.* at 886.

⁶⁵*Id.* at 887.

⁶⁶93 A.2d at 107.

⁶⁷267 A.2d at 887 (finding that fairness standard would be met through a transaction reached as though each party exerted bargaining power at arm's length).

⁶⁸*Id.*

⁶⁹*Id.* (observing in the special context of that case that the third party is "usually the State or Federal Government").

⁷⁰246 A.2d 789 (Del. Ch. 1967). See also *Wolfensohn v. Madison Fund, Inc.*, 253 A.2d 72, 76 (Del. 1969) (holding that a finding of overreaching is necessary to prevail against a parent of a subsidiary).

proper test for parent-subsidary dealings was fairness, but considered the arm's length measure to be meaningless in parent-subsidary dealings, and thus the court observed that the question "is reduced to one of business judgment with which the court should not interfere" ⁷¹ Relying on this approach, the *Getty* Court also noted, however, that one basis for interfering with business judgment is an advantage obtained by the controlling shareholder to the disadvantage of the subsidiary or its minority shareholders.⁷² The court in *Getty* found no advantage accruing to the parent in relation to the subsidiary or its minority stockholders and, therefore, held that there was no warrant for the court to interfere.⁷³

The following year, the Delaware Supreme Court sought to clarify the relationship between the entire fairness and business judgment standards in the shareholder context.⁷⁴ In *Sinclair Oil Corp. v. Levien*,⁷⁵ the Court stated that the intrinsic fairness standard did not apply to all parent-subsidary dealings, but only those where there was "self-dealing"—i.e., where the "parent causes the subsidiary to act in such a way that the parent receives something from the subsidiary to the exclusion of, and detriment to, the minority stockholders" ⁷⁶ Critically, however, the Court observed that, where self-dealing is absent, then the business judgment standard is to be applied to transactions involving controlling shareholders;⁷⁷ the Court also reiterated the pertinence of that standard for corporate directors.⁷⁸ Thus it is that the business judgment rule standard came to be applied to controlling shareholders. But the reason is not so much that a compelling case for the rule was ever made, or even considered. Rather, the rule was then seen as the only available doctrinal alternative to the much stricter fairness standard.⁷⁹

After *Sinclair*, absent self-dealing by a controlling shareholder, the business judgment rule became the generally applicable or "default" standard.⁸⁰ Consequently, a rule originally designed for corporate

⁷¹246 A.2d at 794.

⁷²267 A.2d at 887.

⁷³*Id.* at 888.

⁷⁴*Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720-22 (Del. 1971).

⁷⁵*Id.*

⁷⁶*Id.* at 720.

⁷⁷*Id.*

⁷⁸*Sinclair*, 280 A.2d at 720.

⁷⁹*See id.*

⁸⁰*See generally* Lewis H. Lazarus & Brett M. McCartney, *Standards of Review In Conflict Transactions On Motions To Dismiss: Lessons Learned In The Past Decade*, 36 DEL. J. CORP. L. 967, 998-1003 (2011) (illustrating through case studies that the presumption of the business judgment rule is standard under Delaware law unless rebutted). *But see* Frank v.

directors and rooted in policy rationales specifically tailored to the statutory role of corporate directors in company governance took hold in the 1970s in the controlling shareholder context.

2. The Suppression of the Business Judgment Rule

Although the business judgment rule after *Sinclair* became the default standard for reviewing a transaction where a controlling shareholder did not self-deal,⁸¹ the question arose as to whether there was some other way to invoke that relaxed standard instead of entire fairness, even where there was self-dealing.⁸² This was particularly true after two mid-1980s Delaware Supreme Court decisions reaffirming application of the demanding entire fairness test with a corresponding burden of proof shift.⁸³ After some uncertainty at the Delaware Court of Chancery level,⁸⁴ the Delaware Supreme Court held in 1994 that entire fairness—not business judgment rule review—was the only applicable standard.⁸⁵ And this was true even if the self-dealing transaction was approved by a properly functioning committee of independent directors with real bargaining power or was approved by a vote of a majority of the minority shareholders.⁸⁶ Either of those approval mechanisms could effectuate a shift in the burden of proof from defendants to plaintiff, but would not lead to business judgment rule review.⁸⁷ Thus, having been unleashed into the controlling shareholder area, application of the business judgment rule to controlling shareholder transactions had, by 1994, become severely restricted in key settings.

Elgamal, 2012 WL 1096090, at *8 (Del. Ch. Mar. 30, 2012) (entire fairness standard where no self-dealing by controlling shareholder but where latter derived benefit from and could veto transaction with nonaffiliated party).

⁸¹*Frank*, 2012 WL 1096090, at *7-8. The rule also is typically applied where a non-controlling stockholder's conduct is challenged. *Id.*

⁸²*See* *Weinberger v. UOP, Inc.*, 457 A.2d 701, 703-04 (Del. 1983). *See also* *Rosenblatt v. Getty Oil*, 493 A.2d 929, 937 (Del. 1985) (discussing the entire fairness standard).

⁸³*Id.*

⁸⁴*Compare In re Trans World Airlines, Inc. S'holders Litig.*, 1988 WL 111271, at *884-885 (Del. Ch. Oct. 21, 1988) (providing a possible application of business judgment review), *with* *Citron v. E. I. DuPont De Nemours & Co.*, 584 A.2d 490, 499-500 (Del. Ch. 1990) (addressing the entire fairness standard).

⁸⁵*Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1117 (Del. 1994). For a recent reaffirmation of this approach by the Supreme Court, see *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1243 (Del. 2012).

⁸⁶*Kahn*, 638 A.2d at 1117.

⁸⁷*Id.* at 1116. The Court in *Kahn* did not consider the effect of deploying both approval mechanisms on the standard of review. *See infra* note 93 and accompanying text.

3. The Possible Re-Emergence of the Business Judgment Rule

The possible application of the business judgment rule standard even to self-dealing transactions by controlling shareholders has emerged in certain Delaware Court of Chancery decisions.⁸⁸ In *In re Cox Communications, Inc. Shareholders Litigation*, then-Vice Chancellor Strine addressed two policy concerns arising under the *Lynch* entire fairness review standard.⁸⁹ First, he noted the value of creating an incentive for transactional planners to use the deal structure that is most advantageous to minority shareholders.⁹⁰ Second, he explained the importance of providing defendants with a meaningful option to get rid of nonmeritorious cases short of trial.⁹¹

The chief hindrance to both of these was the entire fairness test which, even with a burden of proof shift resulting from independent committee or minority shareholder approvals, made it virtually impossible for defendants to gain a pre-trial dismissal.⁹² Emphasizing that *Lynch* had not foreclosed use of the business judgment rule standard where both an independent negotiating committee *and* approval by a majority of minority shareholders were used,⁹³ Strine noted that such "double approvals" would benefit minority shareholders.⁹⁴ To incentivize their salutary use in structuring transactions *ex ante*, Strine suggested that self-dealing "going private" mergers be accorded business judgment rule review where the controlling shareholder proposed a deal subject, from inception, to both approval mechanisms.⁹⁵ Moreover, in any ensuing litigation, defendants could then obtain a pre-trial dismissal unless "plaintiffs pled particularized facts that the committee was not independent, or was ineffective because of its own fiduciary duty breach or wrongdoing by the controller (e.g., fraud on the committee)[,]" or

⁸⁸*In re MFW S'holders Litig.*, 2013 WL 2436341, at *4 (Del. Ch. May 29, 2013); *In re CNX Gas Corp. S'holders Litig.*, 4 A.3d 397, 400 (Del. Ch. 2010); *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 606 (Del. Ch. 2005).

⁸⁹879 A.2d at 606-07.

⁹⁰*Id.* This point was repeated several times by Chancellor Strine in the 2013 *MFW* decision. *MFW S'holders Litig.*, 2013 WL 2436341, at *4, *20, *21.

⁹¹*Cox Commc'ns*, 879 A.2d at 607. The Supreme Court in *Theriault* held that, prospectively, "if the record does not permit a pretrial determination that defendants are entitled to a burden shift," the defendants will retain the burden throughout the trial. *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1243 (Del. 2012).

⁹²*Cox Commc'ns*, 879 A.2d at 607, 617.

⁹³*Id.* at 617.

⁹⁴*Id.* at 642.

⁹⁵*Id.* at 643-44.

because the approval by minority shareholders was somehow tainted.⁹⁶

Seeking to reconcile his doctrinal suggestion with the rules governing so-called *Siliconix* tender offer freeze-outs,⁹⁷ Strine proposed extending it into that setting as well.⁹⁸ This proposal was subsequently considered at length by Vice Chancellor Laster in his 2010 decision in *In re CNX Gas Corp. Shareholders Litigation*.⁹⁹ As Strine had five years earlier,¹⁰⁰ Laster cited extensive academic commentary addressing this issue,¹⁰¹ and he agreed that Strine's suggestion was the "coherent and correct approach."¹⁰² He also made the doctrinal point that using both approval mechanisms (i.e., an effective independent committee and minority stockholder approval) meant that, essentially, the controller only stood on "one side of the transaction,"¹⁰³ thus removing the predicate of standing on "both sides of a transaction" that, stemming from *Sterling* and *Sinclair*,¹⁰⁴ underlies the demanding entire fairness standard.¹⁰⁵

However astute the analyses of Chancellor Strine and Vice-Chancellor Laster, the *Cox* and *CNX* cases did not squarely present the issue of whether using both an independent committee and a majority-of-the-minority provision would result in business judgment rule review.¹⁰⁶ That changed in *MFW*, where the issue was squarely posed for the first time to Chancellor Strine.¹⁰⁷ In a very careful and scholarly opinion, Chancellor Strine drew heavily on, and further elaborated on, his earlier analysis in *Cox*.¹⁰⁸ He held that when a controlling shareholder merger has, from the outset, "been subject to (i) negotiation and approval by a special committee of independent directors fully empowered to say no, and (ii) approval by an uncoerced, fully informed vote of a majority of the minority investors, the business judgment rule standard of review

⁹⁶*Cox Commc'ns*, 879 A.2d at 644.

⁹⁷See *In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421, 437 (Del. Ch. 2002); *In re Siliconix Inc. S'holders Litig.*, 2001 WL 716787, at *6 (Del. Ch. June 21, 2001), reprinted in 27 DEL. J. CORP. L. 1011, 1020 (2002).

⁹⁸*Cox Commc'ns*, 879 A.2d at 607, 646.

⁹⁹4 A.3d 397, 414 (Del. Ch. 2010).

¹⁰⁰*Cox Commc'ns*, 879 A.2d at 618 n.34, 624 n.50, 625 n.52, 644 n.85.

¹⁰¹*CNX Gas Corp.*, 4 A.3d at 407 n.4, 409 n.5.

¹⁰²*Id.* at 414.

¹⁰³*Id.* at 412. This also somewhat harkens back to the Getty reference to a "third party" presence as permitting business judgment review. See *supra* notes 62-73 and accompanying text.

¹⁰⁴*Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 110 (Del. 1952); *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971).

¹⁰⁵*CNX Gas Corp.*, 4 A.3d at 410-11 n.7 (citing authority).

¹⁰⁶*In re MFW S'holders Litig.*, 2013 WL 2436341, at *3 (Del. Ch. May 29, 2013).

¹⁰⁷*Id.* at *1.

¹⁰⁸*Id.* at *20 n.140.

applies."¹⁰⁹ Finding those conditions to have been met, Chancellor Strine reviewed the transaction under the business judgment rule standard, found that standard to have been met by *the controlling shareholder*, and granted summary judgment to all defendants.¹¹⁰

Chancellor Strine's analysis did not differ for the controlling shareholder and the directors.¹¹¹ Strikingly, for purposes of this Article, Chancellor Strine did not consider whether, given that the dual approval mechanisms had spared all defendants a strict entire fairness review, an alternative review standard other than "business judgment" review would better suit a controlling shareholder whose conduct is attacked.¹¹² Specifically, as in *Gantler* for officers,¹¹³ Chancellor Strine might have straightforwardly asked, with respect to the controlling shareholder, whether plaintiffs could proffer any evidence that the shareholder had breached a fiduciary owed to them. Failing that, as plaintiffs did, warranted entry of summary judgment.¹¹⁴ The cumbersome business judgment rule edifice did not need to be introduced into the *MFW* analysis because it not only added nothing, it is not designed for, nor are its policy underpinnings aimed at, shareholders.

The reasoning and conclusions reached in all of these Delaware Court of Chancery decisions are impressive and persuasive. But moving away from entire fairness review in the going private setting (or any self-dealing context) in favor of a more deferential approach to achieve laudable policy objectives simply does not necessarily mean a business judgment rule framework should be adopted. Instead, in a manner similar to the approach taken by *Gantler* with respect to corporate officers,¹¹⁵ the Delaware Supreme Court should, notwithstanding Chancellor Strine's use of the rule in *MFW*, consider this controlling

¹⁰⁹*Id.* at *4. The pertinent language derived from this case states:

The business judgment rule is only invoked if: (i) the controller conditions the procession of the transaction on the approval of both a special committee and a majority of the minority stockholders; (ii) the special committee is independent; (iii) the special committee is empowered to freely select its own advisors and to say no definitively; (iv) the special committee meets its duty of care; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.

Id. at *25.

¹¹⁰*MFW S'holders Litig.*, 2013 WL 2436341, at *25. The defendants were a controlling shareholder and the directors of the to-be-merged corporation. *Id.* at *1.

¹¹¹*Id.* at *1-*2.

¹¹²*Id.* at *20.

¹¹³*See supra* text accompanying notes 46-50.

¹¹⁴*See MFW S'holders Litig.*, 2013 WL 2436341, at *25.

¹¹⁵*See supra* notes 46-50 and accompanying text.

shareholder issue as a straightforward matter of fiduciary duty. In other words: Has the plaintiff sufficiently pled a duty of care breach (extremely unlikely with respect to a shareholder) or a duty of loyalty breach? The business judgment rule—designed for directors, rooted in their plenary governance role, and central there only because of history—should be bypassed here. To speak of "business judgment" in the shareholder context is incoherent because such a shareholder makes no "business" judgment on behalf of the corporation in the same statutory way directors do. To be sure, in a third party merger, shareholder approval is necessary to effectuate the merger, but shareholders in that setting—controlling or otherwise—owe no fiduciary duties to the corporation and other shareholders.¹¹⁶ Instead, they can and do vote based on whether, to them as investors, the merger is financially beneficial.¹¹⁷ When minority shareholders similarly are empowered under a majority-of-the-minority provision in a controlling shareholder self-dealing merger, they too lack fiduciary duties, can vote based on self-interest, and are not required to advance the company's best interests or those of any other person.¹¹⁸ And when the ostensibly controlling shareholder in that setting votes on the merger, it does not "control" the outcome given the dual approval mechanisms and it properly and likely votes its own financial investor interests.

The issue of the best interests of the corporation is a matter of concern only for directors. Moreover, there simply is no reason to require a "rational business purpose" in reviewing the conduct of a shareholder who does not act for the company or breach a fiduciary duty. Chancellor Strine did so, however, because he saw the business judgment rule construct as the only alternative to entire fairness.¹¹⁹ That inquiry, however, is simply inapt for examining shareholder conduct.

In the *Lynch*, *MFW*, and *Siliconix* settings, the underlying concern is whether the controlling shareholder discharges its duty of loyalty as it seeks to gain for itself complete ownership of the stock (or other advantage) to the exclusion of the minority shareholders.¹²⁰

¹¹⁶See *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1040-41 (Del. Ch. 2012).

¹¹⁷See *id.* ("[T]he duty to put the best interest of the corporation and its shareholders above any interest . . . not shared by the stockholders generally does not mean that the controller has to subrogate his own interests so that the minority stockholders can get the deal that they want." (internal quotations omitted)).

¹¹⁸See *id.*

¹¹⁹See *MFW S'holder Litig.*, 2013 WL 2436341, at *16.

¹²⁰*Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1114-15 (Del. 1994); *MFW S'holders Litig.*, 2013 WL 2436341, at *25; *In re Siliconix Inc. S'holders Litig.*, 2001 WL 716787, at *6 (Del. Ch. June 21, 2001), reprinted in 27 DEL. J. CORP. L. 1011, 1020-21

Although taking different transactional paths, only one of which involves classic self-dealing, both forms implicate the hallmark of loyalty—"the need to protect minority stockholders" ¹²¹ Triggered by the desire of the controller to gain something from, or to the detriment of, the minority, the duty of loyalty would, as a default standard, require the controller to prove the entire fairness of the transaction. ¹²² However, if as Chancellor Strine proposed in *Cox Communications*, and squarely held in *MFW*, ¹²³ the controller conditions the proposal from the outset on the dual approval mechanisms, then ex ante the controller presumptively fulfills its duty of loyalty subject only to ex post allegations of fiduciary wrongdoing by the independent committee or tainted approval by the minority shareholders, as to which the plaintiff has the burden. ¹²⁴ The conduct of the committee members themselves, moreover, provided they truly were independent and properly-functioning, would, because they are directors, receive traditional business judgment rule review. Maybe...

D. The Business Judgment Rule and Review of Director Conduct

Having suggested that application of the business judgment rule standard to corporate officers and controlling shareholders is unnecessary and unsound on doctrinal and policy grounds, ¹²⁵ could the same be said with respect to application of the rule to directors themselves? The emergent areas of officers and controlling shareholders at least offer a lens to reconsider this issue. Such a suggestion, initially, seems heretical, particularly given the rule's long pedigree as the presumptive standard of judicial review. ¹²⁶ And the policy rationales for the rule are sound, ¹²⁷ particularly the court's deference to the substance of director decisions. ¹²⁸ Nonetheless, the role of the business judgment rule in

(2002).

¹²¹*In re Cox Commc'ns S'holder Litig.*, 879 A.2d 604, 624 (Del. Ch. 2005).

¹²²*Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971).

¹²³879 A.2d at 643-44; 2013 WL 2436341 at *5.

¹²⁴*Id.* at 644 (if only one approval mechanism were used, the entire fairness standard would remain applicable).

¹²⁵For officers, the doctrinal and policy rationales for applying the business judgment rule are stronger than for controlling shareholders given officers' managerial role in corporate governance, but use of the rule is unnecessary. For controlling shareholders, use of the rule is unsound on doctrinal/policy grounds and the rule unnecessarily complicates what should be a more straightforward fiduciary duty analysis.

¹²⁶*Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 42 (Del. 1993); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

¹²⁷*See supra* notes 27-32 and accompanying text.

¹²⁸*QVC Network, Inc.*, 637 A.2d at 45 n.17.

Delaware corporate law warrants revisiting for several reasons.

First, the business judgment rule, not fiduciary duties, currently enjoys pride of place in Delaware.¹²⁹ Essentially, the business judgment rule is a doctrinal vessel of judicial review into which the fiduciary duties of care and loyalty are fitted and subsumed.¹³⁰ As noted by the Delaware Supreme Court, the duty of care is but an "element of the rule."¹³¹ But fiduciary duties are broader in scope than the reach of the business judgment rule, which applies only if an identifiable business judgment is made.¹³² An example is a faulty oversight context where no business decision was exercised.¹³³ And fiduciary duties apply to directors whether or not their conduct is reviewed later in court.¹³⁴ Thus, the more narrowly applicable doctrine should not sensibly serve as the umbrella concept for the broader-reaching duties. Moreover, given the importance of judicial formulations to lawyerly counsel and director understandings,¹³⁵ it is no answer to insist that the rule is a standard of review only and not a standard of conduct. Presumably, many non-law factors influence legal advice and director conduct, but when it comes to law itself, the sole concern is likely whether, if attacked, a decision stands up in court and liability is averted. The deployment of the business judgment rule as the organizing framework, therefore, is jurisprudentially flawed because it is under-inclusive. Its retention as the keystone concept reflects a misguided effort to use it as a unifying doctrinal artifact for both conceiving and reviewing director compliance with fiduciary duties.

Second, the primacy of the business judgment rule over fiduciary duties in Delaware's analysis of director performance is an accident of history.¹³⁶ The duty of care, being a doctrinal latecomer,¹³⁷ was, along

¹²⁹*See, e.g.,* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 36 (Del. Ch. 2010) (noting that under the business judgment rule, the court presumes "directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company").

¹³⁰*See supra* notes 37-41 and accompanying text.

¹³¹*Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 366 (Del. 1994). *See supra* notes 38-39 and accompanying text.

¹³²*Aronson v. Lewis*, 473 A.2d 805, 813 (Del. 1984). The Delaware Supreme Court, moreover, has described director duties as "unremitting." *Malone v. Brincat*, 722 A.2d 5, 10-11 (Del. 1998).

¹³³*Rales v. Blasband*, 634 A.2d 927, 933-34 & n.9 (Del. 1993).

¹³⁴*See Malone*, 722 A.2d at 10 (noting that fiduciary duties are a "constant compass by which all director actions . . . must be guided").

¹³⁵*See id.* (noting the court has tried to mark clear guidelines regarding fiduciary duties to help directors act within them); *Cede & Co.*, 634 A.2d at 360 (stating the business judgment rule is "both a procedural guide for litigants and a substantive rule of law").

¹³⁶*See supra* Part II.A.

with the duty of loyalty, embedded into the pre-existing business judgment rule framework in *Cede*, in an effort to harmonize those duties with the rule.¹³⁸ But the rule has retained analytical preeminence, leading to a diminished emphasis on what is really most critical to corporate governance, both in and out of court: Did directors fulfill or breach either of their fiduciary duties?¹³⁹ That issue should be doctrinally showcased, not obscured.

Third, all of the laudable policy rationales said to undergird the rule can be preserved while placing primary emphasis on a director's fiduciary duties. The plaintiff still must establish a breach of any fiduciary duty.¹⁴⁰ And in the duty of care context, the court still would not weigh in on the substantive soundness of director decisions.¹⁴¹ But that already is true in the duty of care context because care itself is entirely process-oriented.¹⁴² There is no substance to duty of care review.¹⁴³ Consequently, there is no need to add, via the rule, either *Aronson's* "presumption" strand of the rule or the *Sinclair/Cede* "substantive" strand.¹⁴⁴ Thus, it is as an aspect of duty of care review that the true "substantive" function of the business judgment rule can be seen. It cogently houses the sensible policy decision of courts not to second-guess business judgments as part of reviewing fiduciary duty of care claims.¹⁴⁵ Ironically, then, business judgment deference is better understood as an "element" of care, not the reverse, as currently is the case.¹⁴⁶ In effect, the judicial policy of not substantively reviewing care claims mirrors the opposite entire fairness approach in loyalty claims where substance is reviewed.¹⁴⁷ In classic director self-dealing (loyalty)

¹³⁷See *supra* notes 34-41 and accompanying text.

¹³⁸See *supra* notes 37-42 and accompanying text.

¹³⁹*Cede & Co.*, 634 A.2d at 360 (describing the duties of loyalty and care as standards within the business judgment rule).

¹⁴⁰*Id.* at 361.

¹⁴¹*Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000) ("As for the plaintiffs' contention that the directors failed to exercise 'substantive due care,' we should note that such a concept is foreign to the business judgment rule. Courts do not measure, weigh or quantify directors' judgments.").

¹⁴²*Id.* ("Due care in the decisionmaking context is *process* due care only.").

¹⁴³*Id.*

¹⁴⁴See *supra* notes 22-25 and accompanying text. To the extent a substantive "floor" for fiduciary behavior is thought desirable, substantively irrational behavior permits an inference that good faith is lacking. *Parnes v. Bally Entm't Corp.*, 722 A.2d 1243, 1246 (Del. 1999).

¹⁴⁵See *Cede & Co.*, 634 A.2d at 361 (highlighting the policy of the courts not to second-guess business judgments).

¹⁴⁶See *id.* at 360 (describing the duties of loyalty and care as standards within the business judgment rule).

¹⁴⁷See *Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000) (noting that in the context of business judgments due care is not reviewed substantively); *Cede & Co.*, 634 A.2d at 361

cases, of course, the judicial policy of no substantive review falls away and the rule does not and should not play any role.¹⁴⁸

Moreover, the only theoretical basis for imposing liability on a director or for overturning a board decision is violation of some legal precept, such as a fiduciary duty.¹⁴⁹ It is not unlawful to make a business judgment; it is unlawful to do so in a way that breaches a duty.¹⁵⁰ Thus, the focus should be on fiduciary duties, which courts are legally competent to address, not the "business judgment" rule. The mere phrasing of it suggests that there is some jurisprudential basis for judicially interfering (or not) in a business decision when there is no such basis apart from a duty breach.¹⁵¹ Even then, courts do not "review" or "second-guess" the substance of business decisions; they simply proceed with the analysis under fiduciary duty principles.¹⁵²

Directors are afforded ample latitude in making business decisions and taking appropriate risks by calibrating the duty of care at the gross negligence level,¹⁵³ essentially a permissive recklessness standard.¹⁵⁴ Thus, even as to process, great deference is given to directors. Moreover, statutory exculpation remains fully available for duty of care breaches if stockholders approve an even greater measure of protection for directors than just a loose liability standard.¹⁵⁵ Neither of these benefits requires the business judgment rule. In addition, the current pleading or review standards on a motion to dismiss need not change. A pleading that is inadequate to make it past a dismissal motion today under the rule's rubric will still be inadequate when the straightforward focus is on duties.¹⁵⁶ If a plaintiff today cannot sufficiently plead enough to overcome the "presumption" of *Aronson* and *Cede*, he has not adequately pled a breach of duty.¹⁵⁷ And, as Professor

(describing the entire fairness standard of review).

¹⁴⁸See *supra* Part II.C.1, C.3.

¹⁴⁹See *Cede & Co.*, 634 A.2d at 360-61 (explaining that plaintiffs have the burden of showing a breach of a fiduciary duty).

¹⁵⁰*Id.*

¹⁵¹See *id.* at 361 (noting that the court will not second guess a business judgment absent a showing by the plaintiff of a breach of director's fiduciary duties).

¹⁵²See *id.* (describing the entire fairness standard used for analysis of the disputed transaction).

¹⁵³*Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985).

¹⁵⁴*McPadden v. Sidhu*, 964 A.2d 1262, 1273-74 (Del. Ch. 2008).

¹⁵⁵DEL. CODE ANN. tit. 8, § 102(b)(7) (2012) (permitting exculpation of directors for damages resulting from duty of care breaches).

¹⁵⁶See, e.g., *McPadden*, 964 A.2d at 1274-75 (granting a motion to dismiss where plaintiff failed to plead directors acted with "a conscious disregard for their duties").

¹⁵⁷See, e.g., *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) (to overcome the presumption of validity of the business judgment rule, plaintiff must show a breach of fiduciary duty).

Larry Hamermesh has usefully pointed out, even with care claims, many are derivative in nature, and thereby are subject to existing Rule 23.1 pleading requirements.¹⁵⁸

Fourth, elevating fiduciary duties to be the primary focal point in judicially analyzing director conduct—and officer and shareholder conduct—streamlines that analysis and rationally aligns it with other fiduciary approaches in law, such as those used in agency law.¹⁵⁹ For example, in a 2010 decision involving agency principles, Vice Chancellor Parsons noted how a claim for fiduciary duty wrongdoing requires proof of two elements: "that a fiduciary duty existed" and "that a defendant breached that duty."¹⁶⁰ That simple framework likewise could be used for directors. Of course, directors owe unremitting duties,¹⁶¹ so the focus in any particular case is, quite simply, whether they did or did not breach a duty. In the care setting, the plaintiff must bear that burden,¹⁶² while in the classic self-dealing loyalty context, one or more directors will shoulder the burden.¹⁶³

Fifth, prioritizing the business judgment rule rather than fiduciary duties in judicial analysis serves to unsoundly deem directors to be performing at a higher level than they might actually be performing, while simultaneously insufficiently emphasizing the affirmative nature of their duties.¹⁶⁴ The business judgment rule, after all, *presumes* that directors have acted on an informed basis, in good faith, and in the honest belief that their actions are in the best interests of the company.¹⁶⁵ In other words, it presupposes that directors *are* behaving carefully and loyally, without expressly stating it just that way.¹⁶⁶ Yet, by agreeing to serve as directors, such persons take on an *affirmative* obligation they did not have before assuming their position—i.e., to act with care and loyalty in discharging their offices.¹⁶⁷ Care and loyalty are not exercised, and the

¹⁵⁸See Del. Ch. Ct. R. 23.1.

¹⁵⁹See, e.g., *Beard Research, Inc. v. Kates, ASDI, Inc.*, 8 A.3d 573, 601 (Del. Ch. 2010) ("Under fundamental principles of agency law, an agent owes his principal a duty of loyalty, good faith, and fair dealing.").

¹⁶⁰*Id.* (citing *Zrii, LLC v. Wellness Acq. Gp., Inc.*, 2009 WL 2998169, at *11 (Del. Ch. Sept. 21, 2009)).

¹⁶¹*Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998).

¹⁶²*Cede & Co.*, 634 A.2d at 361.

¹⁶³See, e.g., *Gantler v. Stephens*, 965 A.2d 695, 707 (Del. 2009) (noting that where a majority of the remaining directors are self-interested, they must prove entire fairness).

¹⁶⁴See, e.g., Lyman Johnson, *Rethinking Judicial Review of Director Care*, 24 DEL. J. CORP. L. 787, 805 (1999) (expressing concern that duty of care analysis is substantially shrinking partially due to the business judgment rule).

¹⁶⁵*Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984); *Cede & Co.*, 634 A.2d at 360-61.

¹⁶⁶*Cede & Co.*, 634 A.2d at 360.

¹⁶⁷*Cf.* RESTATEMENT (THIRD) TORTS, § 7 cmt. k (2010) (stating that one who

best interests of the company are not served, merely by the fact of occupying the office of director or by inaction.¹⁶⁸ In both judicial doctrine and legal counsel given to directors, therefore, it should be emphasized that directors, as the key governing body in a corporation, must affirmatively fulfill their duties, not essentially get a linguistic benefit of the doubt that they are doing all they should unless proven otherwise.¹⁶⁹

This obligation is masked by an approach that presumes directors have behaved properly, rather than one underscoring that directors must energetically endeavor to do so.¹⁷⁰ This has nothing to do with altering the customary burden of proof in litigation.¹⁷¹ It goes instead to not unwittingly crafting a review standard that, in operation, misleadingly suggests that directors have fulfilled their duties unless a plaintiff can prove otherwise.¹⁷² The tree does fall in the forest whether or not someone is there to observe it. So too, inadequate director conduct is inadequate, even if undetected or unproven.

And in featuring fiduciary duties more prominently in their opinions, judges should not couch those duties only in negative, liability-avoiding ways.¹⁷³ Thus, with respect to care, courts can and certainly should state that the culpability standard is gross negligence.¹⁷⁴ But the duty of care is not merely a duty to avoid gross negligence,¹⁷⁵ because such phrasing lacks a reference point: Don't be grossly negligent with respect to what? Rather, as Chancellor Chandler noted in the *Disney* litigation,¹⁷⁶ the "duty of due care requires that directors of a Delaware corporation 'use that amount of care which ordinarily careful and prudent men would use in similar circumstances.'"¹⁷⁷ And in loyalty cases, courts

affirmatively acts in a manner creating risk of harm to others must exercise reasonable care in performing those acts).

¹⁶⁸See, e.g., *Francis v. United Jersey Bank*, 432 A.2d 814, 823 (N.J. 1981) ("A director is not an ornament, but an essential component of corporate governance.").

¹⁶⁹*Id.*

¹⁷⁰See *Parnes v. Bally Entm't Corp.*, 722 A.2d 1243, 1246 (Del. 1999).

¹⁷¹But see *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) ("[T]he burden is on the party challenging the decision to establish facts rebutting the presumption.").

¹⁷²*Id.*

¹⁷³See, e.g., *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) ("[F]ulfillment of the fiduciary function requires more than the mere absence of bad faith or fraud.").

¹⁷⁴*Id.* at 873 ("We think the concept of gross negligence is also the proper standard for determining whether a business judgment reached by a board of directors was an informed one.").

¹⁷⁵*Id.* at 872-73. The Revised Uniform Partnership Act also provides that the duty of care for a general partner is that of gross negligence. REV. UNIF. PART. ACT § 404 (1997).

¹⁷⁶*In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006).

¹⁷⁷*Id.* at 749 (quoting *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963)).

likewise should not only emphasize the importance of not being disloyal—as, for example, by not wrongly self-dealing or appropriating corporate opportunities.¹⁷⁸ Here again, the affirmative aspect of loyally advancing the best interests of the company should be routinely recited.¹⁷⁹ Doing so would both draw on the traditional moral discourse aspect of fiduciary duties recently emphasized by Chief Justice Steele,¹⁸⁰ and promote emerging evidence from behavioral psychology that ex ante moral admonition can lead to more honest conduct.¹⁸¹

When a plaintiff asserts a claim, moreover, the focus should be forthrightly on whether a cognizable breach of duty claim has been pled,¹⁸² unfiltered by unnecessary reference to (or through) the threshold "presumption" of the business judgment rule, which is not even a particularly useful heuristic.¹⁸³ A legal Occam's Razor should excise the rule at this stage of fiduciary analysis,¹⁸⁴ and functionally draw on it only to preclude substantive second-guessing as part of the due care review.¹⁸⁵

Finally, elevating fiduciary duties in prominence, and reducing a

¹⁷⁸See, e.g., *Telxon Corp. v. Meyerson*, 802 A.2d 257, 263 (Del. 2002) (providing an example of self-dealing by directors of a corporation); *Guth v. Loft*, 5 A.2d 503, 510 (Del. 1939) (providing an example of directors usurping a corporate opportunity).

¹⁷⁹See generally Lyman Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. L. 27 (2003) (emphasizing affirmative aspect of loyalty); Leo E. Strine, Jr., Lawrence A. Hamermesh, R. Franklin Balotti, & Jeffrey M. Gorriss, *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629 (2010) (concluding that the basic definition of the duty of loyalty is the obligation to act in good faith to advance the best interests of the corporation).

¹⁸⁰Myron T. Steele, *The Moral Underpinnings of Delaware's Modern Corporate Fiduciary Duties*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 3, 3 (2012) (explaining that one of the two purposes of fiduciary duties is to serve as a "moral pulse of our society as we define and set expectations for business relationships"). See also Lyman Johnson, *Counter-Narrative In Corporate Law: Saints and Sinners, Apostles and Epistles*, 2009 MICH. ST. L. REV. 847, 850-51 (2009) (elaborating on the strong moral reproof role of Delaware's opinions).

¹⁸¹Dan Ariely, *Why We Lie*, THE WALL STREET J., May 26, 2012, available at <http://online.wsj.com/article/SB10001424052702304840904577422090013997320.html>.

¹⁸²*Cf.* *Beard Research, Inc. v. Kates*, 8 A.3d 573, 601 (Del. Ch. 2010) ("A claim for breach of fiduciary duty requires proof of two elements: (1) that a fiduciary duty existed and (2) that the defendant breached that duty.").

¹⁸³See Carol Seidler, *Assessing the Wisdom of the Business Judgment Rule in Corporate Control Contests: Is It Time to Make Shareholders' Interests Paramount*, 23 LOY. L.A. L. REV. 919, 923 (1990) ("Regardless of what standard applies, courts struggle in imposing [liability] consistently due to the broad and often anomalous protection afforded by the business judgment rule.").

¹⁸⁴Occam's Razor (or, the law of parsimony) is a principle whereby a simpler theory with equivalent explanatory power is preferred over a more complex approach, in effect "shaving away" what is unneeded. Ockham's razor, Britannica.com, <http://www.britannica.com/EBchecked/topic/424706/Ockhams-razor> (last visited May 21, 2004).

¹⁸⁵See *Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000).

threshold emphasis on the business judgment rule as a standard of review, would facilitate teaching law students and others the rudiments of fiduciary duties. In a wry bit of understatement, the American Law Institute's *Principles of Corporate Governance* state as follows: "Confusion with respect to the business judgment rule has been created by the numerous varying formulations of the rule and the fact that courts have often stated the rule incompletely or with elliptical shorthand references."¹⁸⁶ In an effort to alleviate confusion, the ALI, unlike Delaware which embeds the duty of care within the business judgment rule edifice,¹⁸⁷ regards the rule as simply "a judicial gloss on duty of care standards" ¹⁸⁸ Yet, confusion persists, and not just in the ranks of the elite corporate bar.¹⁸⁹

After all, the patrons of Delaware law are not only the sophisticated members of the Delaware judiciary and Delaware bar. They include numerous business lawyers across the country (and maybe in other countries, such as Canada and England) who devote less than an exclusive professional focus on Delaware developments.¹⁹⁰ Importantly, they also include thousands of law students every year who must learn law and who someday may counsel the governing officials of Delaware companies. Is Delaware fiduciary duty law and judicial analysis as clear and user-friendly as it might be to these less knowledgeable patrons? And to the extent Delaware law influences corporate law in other jurisdictions, such as other states and countries, perhaps Delaware exports needless complexity to lawyers and students in those places.¹⁹¹

As just one law professor who has grappled with teaching this material to law students for almost thirty years, this author can say that presenting students with a comprehensible, coherent, and cogent understanding of fiduciary duties is made more difficult by Delaware's current business judgment rule construct. Students—having studied the concept of legal duty in diverse curricular offerings such as torts, trusts and estates, agency and partnership law, and professional

¹⁸⁶A.L.I. PRINCIPLES OF CORP. GOV: ANALYSIS AND RECOMMENDATIONS § 4.01 cmt. a, at 173 (1994).

¹⁸⁷*Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 367 (Del. 1993), *modified* 636 A.2d 956 (Del. 1994).

¹⁸⁸A.L.I. PRINCIPLES, *supra* note 186, at cmt d., at 141.

¹⁸⁹*See, e.g.*, S. Samuel Arsh, *supra* note 33, at 94 ("Subsuming the presumptions and limitations under the term 'business judgment rule' leads to confusion because the single term is then employed with reference to wholly different aspects of the rule's application, which are governed by disparate legal principles.").

¹⁹⁰Del. St. Bar Ass'n, *Membership*, DSBA.ORG, <http://www.dsba.org/index.php/about-the-dsba/membership.html> (last visited on Jan. 27, 2013).

¹⁹¹*See* Arsh, *supra* note 33, at 93-94.

responsibility—understand the importance of legal duties, including the scope of duty and situations of no-duty.¹⁹² The concepts of care and loyalty, in all their manifestations, are therefore relatively easy to grasp, if of somewhat surprising contours. And the longstanding policy of judicial non-review that forms the key substantive essence of the business judgment rule¹⁹³—really, as noted, an aspect of duty of care review—even if initially startling for many students who see legal liability expanding elsewhere as judges scrutinize so many aspects of modern life, can at least be appreciated and grasped, if not also immediately agreed with.¹⁹⁴

Analytically and doctrinally, the teaching could stop there—with fiduciary duties and their breach—and students would have a solid and workable understanding.¹⁹⁵ Little but unnecessary complexity in the law and pedagogy is added by then filtering all of the above through the threshold of the business judgment rule construct as a standard of review, particularly with the *Cede* breach of duty/burden shift feature.¹⁹⁶ Introducing this form of the business judgment rule after addressing fiduciary duties can lead students to think they may not truly grasp duties after all, whereas starting with the Delaware business judgment rule construct—before taking up duties—can hinder students from ever clearly seeing just how vital duties really are.¹⁹⁷ The overall result today may be student familiarity with core concepts, but likely not a true understanding. This, unfortunately, likely is the case with many practicing lawyers as well.

¹⁹²See, e.g., Widener Univ. Sch. of Law, *Delaware Student Curriculum*, LAW.WIDENER.EDU, <http://law.widener.edu/Gateway/CurrentStudents/DelawareStudents/AcademicResources/Curriculum.aspx> (last visited on Jan. 27, 2013).

¹⁹³Lyman Johnson, *The Modest Business Judgment Rule*, 55 BUS. LAW. 625, 631 (2000) (stating that the business judgment rule reflects a policy of judicial non-review of the substance of business decisions); Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 90 (2004).

¹⁹⁴See Arsh, *supra* note 33, at 94 (stating that the confusion surrounding the business judgment rule has been compounded by "[j]udicial penchant for colorful phrases" like "gross negligence," "gross abuse of discretion," and "palpable overreaching").

¹⁹⁵See Clark W. Furlow, *Good Faith, Fiduciary Duties, and the Business Judgment Rule in Delaware*, 2009 UTAH L. REV. 1061, 1063 (2009) ("The duty of loyalty defines *what* the directors are to seek to accomplish The duty of care defines *how* they are to pursue that goal Good faith . . . describes the state of mind of a director who is acting in accordance with her duty of loyalty.").

¹⁹⁶*Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993), *modified*, 636 A.2d 956 (Del. 1994).

¹⁹⁷See, e.g., Melvin A. Eisenberg, *The Duty of Care of Corporate Directors and Officers*, 51 U. PITT. L. REV. 945, 972 (1989) (concluding that "[t]he duty of care is not without its problems. Nevertheless, it has served as a critical component of the corporate system in this country.").

III. DOES (OR SHOULD) CORPORATE LAW MANDATE CORPORATE PURPOSE?

A. *Background*

If there is a surfeit of law on the business judgment rule,¹⁹⁸ there is a paucity on corporate purpose.¹⁹⁹ No corporate statute in the United States, for example, requires a corporation to advance a particular purpose, such as profit or share price maximization.²⁰⁰ Rather, consistent with an expansive, enabling philosophy on company powers and purposes, corporate statutes—including Delaware's—are wholly agnostic on corporate purpose.²⁰¹ Delaware's corporate purpose statute broadly states that a corporation may conduct "any lawful business or purpose[]." ²⁰²

As to case law, there are only a handful of decisions in the entire country that address purpose, and some of those do so quite obliquely in dicta.²⁰³ The Delaware Supreme Court has held only that corporate

¹⁹⁸See *supra* Part II.

¹⁹⁹See William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 825 n.33 (2012) (collecting the few cases).

²⁰⁰See Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 738 (2005) ("Corporate managers have never had an enforceable legal duty to maximize corporate profits."). See generally LYNN STOUT, *THE SHAREHOLDER VALUE MYTH* 24-32 (2012) ("The notion that corporate law requires directors, executives, and employees to maximize shareholder wealth simply isn't true.").

²⁰¹See EDWARD P. WELCH ET AL., *FOLK ON THE DELAWARE GENERAL CORPORATION LAW* § 102.4 (5th ed. 2012) ("In lieu of the formerly required recitals of the corporation's business or purposes, the statute now requires only the statement that the corporation may engage in any lawful act or activity."). See also DAVID A. DREXLER ET AL., *DELAWARE CORPORATION LAW AND PRACTICE* § 6.01[3] (2012) (explaining that the Delaware corporate purpose statute has become widely used as the "exclusive statement of purpose").

²⁰²Compare DEL. CODE ANN. tit. 8, § 101(b) (2011) ("A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes . . ."), and § 102(a)(3) ("It shall be sufficient to state . . . that the purpose of the corporation is to engage in any lawful act or activity."), with JAMES D. COX & THOMAS LEE HAZEN, *TREATISE ON THE LAW OF CORPORATIONS* 240-48 (3d ed. 2010) (comparing Delaware's broad corporate purpose statutes with other state statutes that allow or require a corporate purpose that takes into account parties involved other than shareholders).

²⁰³The iconic case is *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (stating in dictum and without recitation of authority that a business's primary purpose is to maximize shareholder wealth). *Dodge* is a peculiar case for many reasons, not the least of which is that minority shareholders earned over 20 times their initial investment from special dividends alone. See Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps*, 25 REGENT L. REV. 269, 274 n.22 (2012). See generally, David Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. (forthcoming 2013). This Author and

directors do not typically have an obligation to maximize the share price in the short term,²⁰⁴ even as they act to "benefit" stockholders²⁰⁵—or to accede to shareholder desires on that score²⁰⁶—and they only have such an obligation only in one narrow setting:²⁰⁷ a corporation's "end stage," i.e., in a corporate break-up, when they initiate an active bidding process, or when they enter into a transaction that shifts a dispersed shareholding base into a controller's hands, essentially a privatization.²⁰⁸ In each of these settings, the aim is for most of the shareholders to exit because the venture, for them, will be over.²⁰⁹ Beyond that, the Delaware Supreme Court has mandated nothing, or even spoken.²¹⁰

The Delaware Court of Chancery likewise said little until 2010,²¹¹ in a decision to which this Article will return.²¹² In dictum, in a 1986 case brought by creditors,²¹³ the Delaware Court of Chancery said that corporations should advance the long-term interests of stockholders.²¹⁴ And, correspondingly and in line with the Delaware Supreme Court decision in *Time*,²¹⁵ in 2011, that Court observed that directors have no obligation to maximize the short-term share price.²¹⁶

Professor Yosifon disagree on what Delaware law requires as to corporate purpose but Professor Yosifon's article provides a full treatment. See also Leo E. Strine, Jr., *Our Continuing Struggle With The Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 147 n.34, 147-48 n.35 (2012) (collecting commentary). For other judicial decisions discussing corporate purpose see *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986) ("It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders."). But see *Long v. Northwood Hills Corp.*, 380 S.W.2d 451, 476-77 (Mo. Ct. App. 1964) (examining a corporation's purpose that is not to maximize shareholder wealth).

²⁰⁴See *Paramount Commc'n, Inc. v. Time Inc.*, 571 A.2d 1140, 1150 (Del. 1989).

²⁰⁵In *Gheewalla*, the Delaware Supreme Court stated that directors act to "benefit" stockholders but the Court did not mandate maximization. *N. Am. Cath. Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 103 (Del. 2007) (citing *Prod. Res. Grp., L.L.C. v. NCT Grp., Inc.*, 863 A.2d 772, 797 (Del. Ch. 2004)).

²⁰⁶See *Paramount Commc'n, Inc.*, 571 A.2d at 1150.

²⁰⁷See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (discussing best price). See also *Paramount Commc'n, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 50 (Del. 1994) (discussing the best value).

²⁰⁸See *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1289-90 (Del. 1994) (stating when this obligation is triggered). See also *Revlon*, 506 A.2d at 182 (discussing maximization).

²⁰⁹See *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1289-90 (Del. 1994).

²¹⁰See *COX & HAZEN*, *supra* note 202, at 240-48 (comparing Delaware's vague use of the corporate purpose statute with other states that suggest or require a more narrow corporate purpose).

²¹¹See *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 33-34 (Del. Ch. 2010).

²¹²See *infra* Part III.B (discussing the decision in *eBay*).

²¹³*Katz v. Oak Indus. Inc.*, 508 A.2d 873, 875 (Del. Ch. 1986).

²¹⁴*Id.* at 879.

²¹⁵See *Paramount Commc'n, Inc. v. Time Inc.*, 571 A.2d 1140, 1150 (Del. 1989).

²¹⁶See *Air Prods. & Chems., Inc. v. Airgas Inc.*, 16 A.3d 48, 112 (Del. Ch. 2011)

If there is so little law, one might ask where beliefs on this foundational issue originate.²¹⁷ Pretty clearly, thinking stems from perceptions (even if faulty) about legal mandates,²¹⁸ business norms and conventions, management lore, faulty executive compensation incentives, and through the professional training provided in business and law schools.²¹⁹ These are powerful influencers of thought and conduct.

Underlying these formative molders of belief and action lie theories about both individuals and institutions.²²⁰ As to individuals, a strong political-legal emphasis on liberty, coupled with neo-classical economic analysis,²²¹ leads to a depiction of people as essentially self-interested.²²² Consequently, in commercial settings, whether in or outside a firm, individuals, behaviorally, are presumed to consistently navigate and bargain for self-advantage.²²³ Recently, this impoverished anthropological view of human behavior has been challenged by behavioralists based on empirical work,²²⁴ largely because instances of altruistic behavior and self-denial are simply too common to ignore.²²⁵

At the organizational level of theory—whether as to a corporation or other association—this cramped anthropology of the individual carries over.²²⁶ The organization is frequently theorized as a "nexus of contracts,"²²⁷ that is, as simply a web of various contracting relationships.²²⁸ It is essentially disaggregated and disregarded as a meaningful institution in its own right.²²⁹ Little heed is given to whether the organization itself—be it a business firm, university, sports team,

(quoting *Paramount Commc'n, Inc.*, 571 A.2d at 1150).

²¹⁷See Lyman Johnson, *Pluralism In Corporate Form: Corporate Law And Benefit Corporations*, 25 REGENT U. L. REV. 269, 273-76 (2013).

²¹⁸This certainly lies behind the post *eBay* enactment of legislation in several states permitting the formation of so-called "benefit corporations," that need not maximize profits or returns to shareholders. See *id.*

²¹⁹*Id.* at 275-76.

²²⁰See Henry Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON L. REV. 99, 103-06 (1989). See also William W. Bratton Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1480-82 (1989).

²²¹Bratton, *supra* note 220, at 1480.

²²²See Butler, *supra* note 220, at 103-06. See also Lyman Johnson, *Re-Enchanting the Corporation*, 1 WM. & MARY BUS. L. REV. 75, 84-89 (describing self-interest premise in corporate law and contrary evidence).

²²³The seminal work is FRANK EASTERBROOK & DANIEL FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 23-29 (1991).

²²⁴See STOUT, *supra* note 200, at 96-102. See also Johnson, *supra* note 217, at 273-76.

²²⁵See STOUT, *supra* note 200, at 96-102.

²²⁶See *id.* at 97-102

²²⁷See EASTERBROOK & FISCHER, *supra* note 223, at 12.

²²⁸See *id.*

²²⁹See Bratton, *supra* note 220, at 1475.

labor union, religious organization, school, social club or other group—might have an overarching institutional purpose or "mission" distinct from that of its various constituencies.²³⁰ Many such contractarian theorists, moreover, are strictly shareholder focused,²³¹ especially those emphasizing an agency theory approach,²³² and thus "corporate" purpose for them means maximizing shareholder wealth.²³³ Multi-stakeholder conceptions of a corporation, including the Team Production theory,²³⁴ broaden corporate purpose to encompass non-shareholder constituencies.²³⁵ But neither shareholder primacy nor stakeholder theorists fully account for various noncontractual interests.²³⁶ And neither model articulates a truly "corporate" institutional objective or purpose.²³⁷ Moreover, these alternative theoretical ways of thinking about corporate purpose are largely unaffected by the fact that such collectivities are legal persons utterly distinct from their diverse constituencies.²³⁸

Beyond positive law and theory addressing corporate purpose, the normative debate has gone on for decades and shows no signs of abating.²³⁹ The shareholder primacy camp advocates that profit

²³⁰This is a critical failing of both shareholder primacy and stakeholder theory approaches to corporate purpose. See Lyman Johnson et al., *Teaching The Purpose of Business in Catholic Business Education*, J. CATH. HIGHER ED. 18-24 (2012) (criticizing these two approaches and advocating that a better individual and institutional understanding of a corporation is gained through a "Community of Persons" Model). Professor Andrew Keay recently has fully articulated the Entity Maximization and Sustainability Model he has been developing in various articles. See ANDREW KEAY, *THE CORPORATE OBJECTIVE* ch. 4 (2011) (explaining that a corporation, as an entity, has its own distinctive objective).

²³¹See EASTERBROOK & FISCHER, *supra* note 223.

²³²See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305, 312-13 (1976). Professor Jensen, nonetheless, recognizes that there continues to be a considerable difference of opinion as to corporate purpose. See Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 14 J. APP. CORP. FIN. 8, 8 (2001).

²³³See Jensen & Meckling, *supra* note 232, at 8.

²³⁴See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 249-50 (1999).

²³⁵See *id.*

²³⁶See KEAY, *supra* note 230, at 191-97 (explaining the problems with the contractarian theory).

²³⁷This critique is made quite penetratingly by Professor Keay. See *id.* at 189-97.

²³⁸However corporations are conceived as a matter of theory, and however contentious (and unresolved) the shareholder-stakeholder debate about corporate purpose may be, it is not controversial that, as a positive law matter, corporations are distinct legal persons, separate from their various constituencies. See Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1140 (2012).

²³⁹This is well captured in a number of places but KEAY, *supra* note 230, at 173

maximization and shareholder wealth should be the proper and sole corporate purpose.²⁴⁰ This largely builds on Adolph Berle's original "trust" conception of managers as "trustees" for shareholder interests, in an effort to avoid according managers uncontrollable discretion.²⁴¹ Today, this is frequently couched in principal-agent terminology,²⁴² in which, contrary to law,²⁴³ financial theorists simplistically regard directors and managers as "agents" of their "principals," the shareholders.²⁴⁴ This descriptive error in modeling corporate relationships haunts "corporate" theory today. It represents, moreover, a profound failure by corporate law scholars, in the 1980s and now, who draw on finance theory, to insist on accurately portraying the legal dimension of institutional relationships. Even theorists who emphasize the reality of board governance make the normative turn toward investor interests. Thus, shareholder well-being is the normative goal in Professor Bainbridge's well-known "director primacy" model.²⁴⁵

Those advancing multiple purposes or a broader corporate focus than simply maximizing financial returns for investors, frequently stand on a "multi-stakeholder" or "communitarian" conception of corporate purpose.²⁴⁶ More neutrally, they may advance a pluralistic, institutionalist approach in which different firms and their managers pursue different purposes, in varying degrees combining financial pursuits with "socially responsible" objectives.²⁴⁷ The antecedents for stakeholder views are Merrick Dodd's multi-constituency conception of director duties,²⁴⁸ and Berle's more societal model of the corporation²⁴⁹—each extending consideration to noncontracting parties such as the "public interest"—as well as mid-20th century managerialism.²⁵⁰ These

provides a full, recent summary.

²⁴⁰*Id.* at 43-44.

²⁴¹A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932).

²⁴²See STOUT, *supra* note 200, at 18; Jensen & Meckling, *supra* note 232, at 309.

²⁴³See STOUT, *supra* note 200, at 27-32 (explaining that shareholder maximization is not required by law). Directors are not, legally, agents of shareholders or of the company itself. *Arnold v. Soc'y for Sav. Bancorp., Inc.*, 678 A.2d 533, 539-40 (Del. 1996).

²⁴⁴See Jensen & Meckling, *supra* note 232, at 309-10.

²⁴⁵Stephen Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1 (2002).

²⁴⁶KEAY, *supra* note 230, at 117-18.

²⁴⁷See Johnson, *supra* note 217, at 290-91 (advocating a more pluralistic, less monistic approach to corporate purpose but not a stakeholder approach).

²⁴⁸E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1147-48 (1932).

²⁴⁹ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 312-13 (1932).

²⁵⁰See, e.g., PETER F. DRUCKER, *THE PRACTICE OF MANAGEMENT* 37 (1954)

normative stakeholder/communitarian positions, while certainly expanding the number of interests that should be considered and/or served by a corporation's governing officials, continually fail to articulate a truly overarching "corporate" purpose or mission.²⁵¹

As to which normative position has held sway, historically, they tend to ebb and flow in influence.²⁵² Growing out of the famous Berle-Dodd debate of the early 1930s,²⁵³ the managerialist view predominated in mid-century as shareholder primacy receded.²⁵⁴ Notwithstanding iconic assertions by economist Milton Friedman in the early 1960s and again in 1970,²⁵⁵ many prominent mid-century thinkers did not concur with his profit maximization position.²⁵⁶ The Friedman view received an intellectual shot in the arm from financial theorists in the 1970s, however, with the emergence of theoretical work on the firm by financial theorists.²⁵⁷ And that "nexus of contracts" theory was very quickly imported into legal scholarship via the "law and economics" movement in the 1980s.²⁵⁸ Its normative shareholder primacy position, moreover, rapidly became predominant as well in corporate law theory.²⁵⁹ Today, it permeates the teaching of corporation law at elite law schools (and business schools).²⁶⁰ Yet, through all this, even during the tumultuous 1980s takeover era,²⁶¹ Delaware law remained largely agnostic and

(explaining that the purpose of business must lie outside itself in society because business is an "organ of society").

²⁵¹KEAY, *supra* note 230, at 171; Johnson, *supra* note 217, at 290-91.

²⁵²KEAY, *supra* note 230, at 21.

²⁵³Berle, *supra* note 241, at 1367 (arguing that the justification for Dodd's argument is "theory, not practice"); Dodd, *supra* note 248, at 1147-48.

²⁵⁴DRUCKER, *supra* note 250, at 36. Berle conceded mid-century that Dodd's view, at that time, seemed to have prevailed. Berle, *supra* note 241, at 1371-72. His concession proved to be premature.

²⁵⁵MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962); Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970, at 32, 33.

²⁵⁶Besides management guru Peter Drucker's mid-century views, see *supra* note 250, at 37, even the mainstream Harvard Business Review featured a 1960 article criticizing profit maximization. Robert Anthony, *The Trouble with Profit Maximization*, 38 HARV. BUS. REV. 126 (1960).

²⁵⁷See Jensen & Meckling, *supra* note 232, at 329-30.

²⁵⁸EASTERBROOK & FISCHER, *supra* note 223, at 12, 90-91.

²⁵⁹D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 278 (1998).

²⁶⁰In a 2011 report, the Brookings Institute documented that the top 20 law schools and the top 20 business schools in the United States overwhelmingly teach a shareholder primacy approach to corporate purpose. Darrell West, *The Purpose of the Corporation in Business and Law School Curricula*, BROOKINGS INST. (July 2011), available at http://www.brookings.edu/~media/research/files/papers/2011/7/19%20corporation%20west/0719_corporation_west.

²⁶¹Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 TEX. L. REV. 865, 933 (1990) (noting that Delaware courts remained

ambivalent about corporate purpose.²⁶²

As we currently stand in the midst of a seemingly strict shareholder primacy theoretical era, it should be recalled that normative positions on corporate purpose have dramatically changed, historically. Besides changes in 20th century thinking noted above, in the late 18th and early 19th centuries, for example, corporations generally were chartered to fulfill some public purpose, not solely to pursue private gain.²⁶³ Although law moved away from requiring a public purpose to permitting private gain, it never—outside very narrow settings²⁶⁴—has required the pursuit of a particular purpose. Thus, law today, by being agnostic, rightly refrains in a free society from prematurely (if ever) foreclosing ongoing, and sometimes shifting, social and normative debates about the proper goal(s) of corporate activity.²⁶⁵ This stance seems particularly sensible at those moments when significant segments of American society once again appear to be somewhat disenchanted with the corporate sector. Likely, we are now in a period in which societal expectations of the private business sector are shifting. As such, law rightly adopts an enabling and pluralistic approach to corporate purpose, even as the fiduciary obligations of directors and managers can clash with that permissiveness because of the need to hold such persons accountable for their conduct. Often the deference of the business judgment rule becomes a key mechanism for creating the necessary slack between law's agnosticism about corporate purpose and actual governance conduct.

It is against this doctrinal, theoretical, and historical backdrop that the 2010 Delaware Court of Chancery case of *eBay Domestic Holdings, Inc. v. Newmark* arises.²⁶⁶ For the first time, albeit in an unusual procedural setting, a Delaware court, outside the so-called *Revlon* setting,²⁶⁷ articulated shareholder wealth maximization as the required objective of corporate endeavor.²⁶⁸ Such a novel and bold position invites close study.

"ambivalent" about corporate purpose to reflect larger societal ambivalence).

²⁶²Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1415, 1425 (2008). The judiciary's ambivalence about corporate purpose remains in the twenty-first century. *Id.* at 1426.

²⁶³Johnson, *supra* note 238, at 1144-47.

²⁶⁴See *supra* notes 207-08 and accompanying text.

²⁶⁵See *supra* notes 261-62 (noting societal ambivalence about corporate purpose).

²⁶⁶16 A.3d 1 (Del. Ch. 2010).

²⁶⁷See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 185 (Del. 1986).

²⁶⁸*eBay*, 16 A.3d at 34.

B. The eBay Decision

1. Craigslist and Its Investors

Craigslist, Inc. was formed in the 1990s as a California corporation that,²⁶⁹ in 2004, was reincorporated in Delaware.²⁷⁰ It had three early shareholders—Messrs. Craig, Buckmaster, and Knowlton—and thirty-four employees.²⁷¹ Chancellor Chandler acknowledged that Craigslist had an unusual business strategy, culture, and perspective on what it means to run a successful business.²⁷² This is because it mainly operates its business as a community service.²⁷³ Nearly all classified ads are placed without charge, and Craigslist does not sell advertising space.²⁷⁴ Its only revenue is derived from fees for job postings in selected cities and from apartment listings in New York City.²⁷⁵ Mr. Craig described this as the corporate "mission," and Chandler observed that the management team was "committed to this community service approach to doing business."²⁷⁶ Thus, management's good faith is evident, as is Craig's recognition that money is needed to advance the corporate mission. This philosophical approach to business, it should be noted, is similar to Mark Zuckerberg's 2012 description of Facebook's strategy, as described by that iconic company's founder in a letter to shareholders accompanying the filing of a registration statement with the Securities and Exchange Commission.²⁷⁷ There, Mr. Zuckerberg stated that Facebook did not "build services to make money; we make money to build better services."²⁷⁸

The Craigslist strategy has been very successful. Craigslist long has been the dominant company in the online classified ads industry.²⁷⁹ In 2002, however, one shareholder—Knowlton—wanted a greater emphasis on profits and thus he started shopping his shares in an effort to goad his two co-investors to effectuate change.²⁸⁰ eBay sought

²⁶⁹*Id.* at 7.

²⁷⁰*Id.* at 11.

²⁷¹*Id.* at 8-9.

²⁷²*eBay*, 16 A.3d at 8.

²⁷³*Id.*

²⁷⁴*Id.*

²⁷⁵*Id.*

²⁷⁶*eBay*, 16 A.3d at 8.

²⁷⁷John Letzing & Shayndi Raice, *U.S. News: Zuckerberg Faces Wall Street in First Earnings Call*, WALL ST. J., July 27, 2012, at A.2.

²⁷⁸*Id.*

²⁷⁹*eBay*, 16 A.3d at 8.

²⁸⁰*Id.* at 9.

Knowlton's shares, tentatively agreeing to pay \$15 million.²⁸¹ eBay's initial hope was to acquire all of the Craigslist stock, not remain a minority investor.²⁸² Craig and Buckmaster made it quite clear, however, that they would not sell to eBay.²⁸³ As part of the negotiations to purchase Knowlton's stock, eBay negotiated with Craig and Buckmaster as well over a variety of corporate governance issues.²⁸⁴ The result was that Knowlton received \$16 million from eBay for his stock and, in essence, eBay invested another \$16 million in Craigslist followed by Craigslist paying Craig and Buckmaster \$8 million each as a dividend.²⁸⁵ In this way, importantly, all three investors gained significant financial benefit from their positions as shareholders and as a result of the Knowlton transaction, eBay owned 28.4% of Craigslist stock, and Craig and Buckmaster continued to own 42.6% and 29%, respectively.²⁸⁶

These three shareholders entered a Shareholders' Agreement that, among other provisions, gave eBay the right to consent to certain transactions and restricted the transfer of shares by all three investors.²⁸⁷ eBay expressly preserved a right to compete with Craigslist in the classified ads business.²⁸⁸ Upon doing so, however, it would lose its consent rights but, correspondingly, its shares became freely transferable.²⁸⁹ Although eBay's long-term plan was to acquire Craigslist outright, it went into its position as a minority shareholder in a business having a unique strategy with its corporate eyes open.²⁹⁰ eBay was under no illusion as to what Craigslist's avowed "mission" and business strategy was.²⁹¹ Moreover, it negotiated certain provisions but not others.²⁹² Notably, recalling here the teachings of *Nixon v. Blackwell* on the ability of investors in close corporations to bargain ex ante for certain financial benefits such as mandatory dividends, "put" or "call" options, and so on,²⁹³ eBay did not so bargain on the core subjects of corporate

²⁸¹*Id.* at 10.

²⁸²*Id.*

²⁸³*eBay*, 16 A.3d at 10.

²⁸⁴*Id.* at 10-11.

²⁸⁵*Id.* at 11.

²⁸⁶*Id.*

²⁸⁷*eBay*, 16 A.3d at 11-12.

²⁸⁸*Id.* at 13.

²⁸⁹*Id.*

²⁹⁰*Id.* at 10.

²⁹¹*eBay*, 16 A.3d at 32.

²⁹²*See, e.g., id.* at 12-13 (showing that eBay wanted an "entirely unfettered ability to compete" with Craigslist, but agreed to certain consequences if they do, indeed, compete).

²⁹³*Nixon v. Blackwell*, 626 A.2d 1366, 1378-80 (Del. 1993).

purpose, profit-making, and purchase rights.²⁹⁴

Far from Craig and Buckmaster altering the Craigslist business philosophy, they sought from eBay even greater appreciation for Craigslist's "unique mission."²⁹⁵ The parties—now in a co-investor relationship—had sharply divergent views about whether and how to more vigorously "monetize" Craigslist.²⁹⁶ Relations became further strained when eBay launched its own competitive business in 2007.²⁹⁷ This meant that eBay lost consent rights, but also that its stock became freely transferrable.²⁹⁸ Craig and Buckmaster sought legal counsel as to how to keep eBay from placing a director on the three-person board, given that Craigslist had cumulative voting, and also on how to limit eBay's ability to purchase additional Craigslist shares.²⁹⁹

Critical for this Article's purposes was the eventual adoption of a Rights Plan ("poison pill"), an oddity for a close corporation. The aim of the Craigslist Plan was to prevent eBay from selling its shares as a block and from buying additional shares, particularly after Craig and Buckmaster died.³⁰⁰ In 2008, eBay sued Craigslist, Craig and Buckmaster, alleging that, by adopting the Rights Plan (and other measures not pertinent here), the latter gentlemen breached their fiduciary duties as both directors and controlling shareholders of Craigslist.³⁰¹

2. The Court's Analysis

Characterizing the Rights Plan as a defensive measure, the Chancellor applied the *Unocal* enhanced scrutiny standard.³⁰² This played a decisive role in the Chancellor's decision to nullify the Rights Plan because unlike Delaware law generally—which is agnostic on corporate purpose—*Unocal*, according to Chandler and a 2007 Delaware Court of Chancery decision he cited, requires that directors "identify the proper corporate objectives served by their actions"³⁰³ In fact,

²⁹⁴See *eBay*, 16 A.3d at 11-13.

²⁹⁵*Id.* at 15.

²⁹⁶*Id.* at 16.

²⁹⁷*Id.* at 17-19.

²⁹⁸*eBay*, 16 A.3d at 39.

²⁹⁹*Id.* at 20.

³⁰⁰*Id.* at 32.

³⁰¹*Id.* at 7.

³⁰²*eBay*, 16 A.3d at 28. See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 949 (Del. 1985).

³⁰³*eBay*, 16 A.3d at 28 (quoting *Mercier v. Inter-Tel (Del.) Inc.*, 929 A.2d 786, 807

Unocal requires directors to identify a threat to "corporate policy and effectiveness" ³⁰⁴ This linguistic modification, and invocation of the phrase "proper corporate objective" (or "proper corporate purpose"), was central to Chandler's analysis because it seemingly presented for resolution the issue of what is a "proper" corporate purpose or objective. ³⁰⁵ After invoking *Unocal*, Chandler immediately focused on "stockholder value" to define what he believed "corporate objective" meant. ³⁰⁶ This is because *Unocal* arose in, and was designed for, hostile takeovers, where stockholders typically are, or conceivably might be, presented with an offer to purchase their stock. That setting, however, was not pertinent in *Craigslist* because the company's Plan did not preclude any existent or imminent purchase offer to investors. ³⁰⁷ But it influenced the analysis, as did the opinion's under-appreciation of *Unocal's* distinction between "corporate enterprise" and "stockholders." ³⁰⁸ It was a threat to the former that *Unocal* focused on, even if the threat came from an existing stockholder. ³⁰⁹ By Chandler's own admission, eBay wanted to alter Craigslist's (very effective) *corporate* policy. ³¹⁰

The defendant directors understandably presented as the identified threat under *Unocal*, the possible alteration of Craigslist's core values, culture, business model, and public-service mission. ³¹¹ Chandler pooh-poohed this as a trial tactic: a "fiction," designed to invoke the memorable reference to "corporate culture" in *Paramount Communication, Inc. v. Time*. ³¹² But that characterization is passing strange given his own statement of facts where he clearly credits

(Del. Ch. 2007)).

³⁰⁴*Unocal*, 493 A.2d at 955.

³⁰⁵Occasionally, Chandler would use the *Unocal* "corporate policy and effectiveness" language. *eBay*, 16 A.3d at 31-32.

³⁰⁶*Id.* at 33-34.

³⁰⁷In this way, *Craigslist* was somewhat more like *Moran v. Household International, Inc.*, 500 A.2d 1346 (Del. 1985) (approving adoption of Rights Plan and leaving until later its deployment).

³⁰⁸For the analysis of Craigslist's Rights Plan under the *Unocal* standard, see *eBay*, 16 A.3d at 31-33.

³⁰⁹*Unocal*, 493 A.2d at 954.

³¹⁰*eBay*, 16 A.3d at 32. Chandler also seemed overly quick to dismiss the 1960 Chancery Court decision in *Kors v. Carey*, 158 A.2d 136 (Del. Ch. 1960). *eBay*, 16 A.3d at 32 n.102. That *Unocal* altered the analytical framework for defensive measures does not mean it overturned the gist of those decisions acknowledging pre-existing corporate policies as worthy of protection. Moreover, Chancellor Chandler did not reference *Cheff v. Mathes*, 199 A.2d 548 (Del. Ch. 1964), which identified a proposed change in corporate sales policies as a valid corporate interest, an obviously pertinent authority for the craigslist policy.

³¹¹*eBay*, 16 A.3d at 32.

³¹²*Id.* at 32-33 (quoting *Paramount Comm'n, Inc. v. Time, Inc.*, 1989 WL 79880, at *4 (Del. Ch. July 14, 1989), *aff'd*, 571 A.2d 1140 (Del. 1990)).

Craigslist's "different" strategy, culture, and perspective on business.³¹³ as well as his acknowledgment that the strategy "continues to be successful."³¹⁴ Moreover, eBay obviously recognized the uniqueness of the Craigslist policy because it was precisely that business strategy that presented such a large potential monetization opportunity.³¹⁵

Again switching from a focus on "corporate culture" to stockholders, Chandler stated that defendants had not shown that Craigslist "sufficiently promotes stockholder value"³¹⁶ But Knowlton, an early shareholder, had recently departed with a cool \$16 million in an arm's length stock sale, and Craig and Buckmaster collectively received \$16 million in dividends as part of that same transaction.³¹⁷ Craigslist, thus, was not failing to provide significant financial returns to its investors. The Chancellor then disparaged the public service mission as a "sales tactic" designed to build a vast community of users so that Craigslist could charge fees to select employers and real estate brokers seeking a "large market of consumers"³¹⁸ Business strategy, however, is for corporate directors to craft, not judges. Moreover, the complete reverse of what Chandler conjectured could equally be true. Craigslist, like Facebook, might seek profits—clearly redounding to investor benefit—so that it can advance its larger, public-service corporate mission.

Having equated "corporate purpose" with "stockholder value," Chandler sought to add one further twist given that, factually, investors already had made significant sums from their holdings in Craigslist and thus its activities were not "purely philanthropic."³¹⁹ He stated several times that a corporate policy is improper if it does not seek to "maximize" economic value for stockholders.³²⁰ Chandler acknowledged that Craig and Buckmaster had proven that they sincerely believed Craigslist's mission should not be about stockholder wealth maximization.³²¹ Yet this determination of corporate objective by the

³¹³*Id.* at 7.

³¹⁴*Id.* at 8.

³¹⁵*eBay*, 16 A.3d at 9.

³¹⁶*Id.* at 33.

³¹⁷*Id.* at 11.

³¹⁸*Id.* at 33.

³¹⁹*eBay*, 16 A.3d at 34. This verbal jab is reminiscent of *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919), where the Court chided Henry Ford about "incidental" benefits to investors when, in fact, he had provided his early stage investors with staggering financial returns of about 20 times their initial investment, in the form of special dividends. Modern day hedge fund managers, no doubt, would be delighted to replicate such returns.

³²⁰*eBay*, 16 A.3d at 34.

³²¹*Id.*

properly-constituted board of directors—who held, as stockholders, 72% of the stock—was considered by the Chancellor to be of no legal moment for Delaware law.³²² It was not for them to decide, he effectively ruled, what purpose a corporation they founded and controlled should advance or even whether, as holders of 72% of the stock, they knew what was in their best interests.³²³ Rather, he said, it was up to him, and he could not accept such a strategy as valid.³²⁴ Seeking some legal foundation for his view, he could only come up with the fact that Craigslist was a "for-profit" corporation.³²⁵ But he did not go on to explain how being a "for-profit" corporation meant a company had to "maximize" profits, as opposed to making (or seeking or enhancing) profits³²⁶—as Craigslist undoubtedly did—while also serving other chosen corporate objectives. More importantly, whatever one's normative beliefs, or even prevailing non-law business norms, the question remains whether positive law does or should mandate a monistic rather than pluralistic approach to corporate purpose.

3. The Aftermath of *eBay*

The *eBay* opinion carries important implications for corporate theory and legislative reform as well as future doctrinal analysis by courts. At the theory level, the opinion strongly manifests Berle's "trust" conception of the director-stockholder relationship as well as the current "principal-agent" conception of agency theory.³²⁷ In each of these views, the corporate enterprise is effectively disregarded in favor of focusing on the director-stockholder nexus. Thus, notwithstanding that corporations are distinct legal persons,³²⁸ nor that *eBay* was not an end-of-the-enterprise case like *Revlon*,³²⁹ ultimately, the Craigslist "corporate" mission did not matter to the Court, only stockholders did. Lost then was any respect for the corporation as an institution serving interests that included—but more importantly, transcended—providing returns to investors. In this way, although Delaware doctrine pays homage to an

³²²*Id.*

³²³*Id.*

³²⁴*eBay*, 16 A.3d at 34.

³²⁵*Id.*

³²⁶Economist Henry Simon, for example, argued that companies might seek to make satisfactory profits, what he called "profit-satisficing." HENRY SIMON, MODELS OF MAN 204 (1957).

³²⁷See *supra* notes 232, 241 and accompanying text.

³²⁸See Johnson, *supra* note 238, at 1158.

³²⁹See *supra* note 208 and accompanying text.

entity conception of the corporation in some settings,³³⁰ when corporate purpose was on the line as in *eBay*, the entity conception gave way. Doctrinally, this reflects a recurrent flaw of both the shareholder primacy and stakeholder theories of the "corporation"—neither, in fact, pays real heed to the corporation itself as a meaningful social-legal institution.³³¹

Both shareholder primacy and stakeholder theories, moreover, like the *eBay* opinion, are grounded in an anthropology of humans that remains individualistic and self-interested. Stakeholder theory may broaden the range of persons to be considered by corporate decision makers as claimants, but it does not advance a fundamentally different vision of human role and motivation within an institutional setting—i.e., that the participants' purpose, once in the firm, is to advance the larger, common good of the company's mission. Nor, at the organizational level, does stakeholder theory articulate an overarching "corporate" purpose or mission. Rather, in both shareholder primacy and stakeholder theories, the "corporation" is simply an analytical and semantic trope representing either shareholder interests, on the one hand, or those of multi-stakeholders, on the other. Firm relationships in both theories remain bargained-for economic exchanges, not what Lynne Dallas calls "covenantal relationships" based on mutual commitment to the welfare of others and allegiance to a set of shared values and goals, as expressed in a truly "corporate" mission and purpose.³³² Put another way, pursuit of an all-embracing corporate "common good" is ignored at both the organizational and individual level of theory. This is odd, and a loss, given the very etymology of "company" as meaning "breaking bread" together,³³³ and of "corporation" meaning "body,"³³⁴ of which many parts are integral. Apparently, under *eBay's* cramped view of corporate purpose—as in corporate theory generally—it is legally and conceptually incoherent to speak of Penn State, the New York Yankees, Craigslist, or any other of countless groups, as having interests that transcend those of particular constituencies. Profound failures of modern corporate theory

³³⁰William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 276 (1992).

³³¹See *supra* notes 229-233 and accompanying text.

³³²Lynne L. Dallas, *Short-Terminism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 356 (2012).

³³³EDWIN S. HUNT & JAMES M. MURRAY, A HISTORY OF BUSINESS IN MEDIEVAL EUROPE, 1200-1550, at 13 (1990) ("[T]he daily dietary question was what to have with bread, *cum panis*, the etymological root of the word 'company' and its derivatives . . .").

³³⁴See KLEIN'S COMPREHENSIVE ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE (Unabridged, One-Volume ed. 1971) (Corporation is a derivate of the Latin infinitive, *corporare*, "to take into body").

thus meant the Chancellor had little scholarly support in striking a blow for the validity of a genuinely *corporate* purpose.

As to Craigslist's pursuit of its avowed corporate purpose, the court's remedy of nullifying the Rights Plan under *Unocal* did nothing to change Craigslist's corporate mission. *eBay* follows the iconic *Dodge v. Ford Motor Co.*³³⁵ in this regard, where, after a judicial scolding, dividends were ordered to be paid but Henry Ford still went his merry way hiring workers and pricing vehicles just as he pleased.³³⁶ The corporate purpose chosen by the properly-constituted governing officials was judicially rebuked in both cases, but not judicially altered.³³⁷ This is because judges do not and cannot make directors and officers maximize anything in the operation of a business venture. They can only prohibit them from taking particular actions.³³⁸ Notwithstanding this constraint on judicial reach, the quite troubling question still arises as to whether it is at all appropriate for a judge, who is a government official, to command management of a private enterprise to advance (or refrain from) otherwise lawful activities. This is particularly true where a savvy shareholder went in with its financial eyes wide open.³³⁹ In effect, eBay the crafty investor was fortuitously saved by a modern rendition of the slumbering *ultra vires* doctrine.³⁴⁰

The issue of corporate purpose, moreover, can potentially raise a troubling religious liberty concern, if not a First Amendment free exercise issue.³⁴¹ This can be seen by looking at the privately held (like Craigslist) Chick-fil-A company, a business recently in the news for the views of its controlling shareholder-manager on gay marriage.³⁴² That company famously is not open for business on Sundays.³⁴³ The reason is the founding family's religious belief that one should rest and not unnecessarily labor on Sundays.³⁴⁴ Moreover, Chick-fil-A headquarters

³³⁵ *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

³³⁶ *See id.* at 683.

³³⁷ *See id.* at 684; *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 48 (Del. Ch. 2010).

³³⁸ *E.g.*, *Dodge*, 170 N.W. at 684 (explaining the court's decision to avoid judicial interference in Ford's business policy because "judges are not business experts," and there exists a lack of sufficient threat to the interests of the shareholders to condone such judicial interference).

³³⁹ *See* discussion *supra* Part III.B.1.

³⁴⁰ *See* DEL. CODE ANN. tit. 8, § 124 (2011); *see, e.g.*, *Jacksonville M., P. Ry. & Nav. Co. v. Hooper*, 160 U.S. 514, 526 (1896) (a defense of *ultra vires* was not sustained).

³⁴¹ *See, e.g.*, *Speak Low if You Speak God*, THE ECONOMIST, Aug. 4, 2012.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

displays a plaque that clearly states the religious dimension of its corporate purpose: to "glorify God by being a faithful steward . . . [and] have a positive influence on all" ³⁴⁵ In addition, the company and its founder have given magnanimously to financially assist numerous disadvantaged groups and individuals. ³⁴⁶ Thus, the company over the decades has pretty clearly failed to "maximize" profits or shareholder wealth, potentially having left hundreds of millions of dollars unearned by its decision to close all 1,600 stores on Sunday and to generously donate company funds.

At the urging of a hypothetical eBay-like future investor in Chick-fil-A, would—could—the Delaware Court of Chancery rule that that company wrongly refused to maximize profits and, therefore, should be ordered to sell chicken on Sundays? Alternatively, what if the founders of Craigslist had founded that company and operated it as they do out of deeply-held religious convictions; could a Court then mandate a change in operations so as to achieve profit maximization? To the extent that numerous companies are operated in a profit-seeking, but not profit-maximizing, manner out of religious belief, it would seem disturbing on religious liberty grounds for a state official to mandate that the governing constituents of a business must strive to make more money. ³⁴⁷ This raises in a particularly troubling way the more general issue of why corporate officials of any philosophical bent should be heavy-handedly required by law to endeavor to earn as much money as

³⁴⁵See Chick-fil-A at Independence Center Timeline Photos, FACEBOOK, <https://www.facebook.com/photo.php?fbid=10151480736938318&set=pb.55766183317.-2207520000.1373591949.&type=3&theater> (search "Chick-fil-A at Independence Center"; then click on "Photos" hyperlink; and scroll to find "Corporate Purpose" plaque).

³⁴⁶See Clare O'Connor, *Meet the Cathys: Your Guide to the Billionaires Behind Chick-fil-A*, FORBES (Aug. 3, 2012), www.forbes.com/sites/clareoconnor/2012/08/03/meet-the-cathys-your-guide-to-the-billionaires-behind-chick-fil-a/ ("WinShape [Foundation] is the vehicle through which Chick-fil-A, and by extension the Cathys, have made about \$5 million of donations . . . with \$1.9 million of that donated in 2010 to outfits including the Family Research Council and Marriage & Family Foundation."). See also *Partnerships and Programs*, CHICK-FIL-A FOUNDATION, <http://www.chick-fil-afoundation.org/how-we-help/partnerships-programs> (last visited June 20, 2013) (donating to various disadvantaged groups and individuals through the American Red Cross and The Salvation Army, among others).

³⁴⁷The Author is not suggesting that such a mandate would violate the First Amendment, given the neutrality of application to all corporations, but only that religious liberty would thereby be substantially curbed in the corporate setting. Compare *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 711-12 (2012) (First Amendment protects group communication of religious beliefs) (Alito, J., concurring), with *Emp't Div., Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872, 890 (1990) (upholding a law affecting religious activity when that law was equally applicable to all citizens).

possible, provided prospective investors are fully informed in advance of any investment, as eBay clearly was. Lawmakers should not impose their own beliefs about the proper goals of business activity on the private sector but should themselves remain, ironically enough, "agnostic."

The modern corporate form after *eBay* may seem to offer less flexibility than the modern LLC form when it comes to business purpose. Delaware's LLC statute explicitly permits that type of entity to be used by both for-profit and not-for-profit purposes,³⁴⁸ as noted by certain commentators.³⁴⁹ By way of contrast, corporations, although they can conduct "any lawful business or purposes,"³⁵⁰ are, formally, one of only two types of corporations—i.e., for-profit or nonprofit³⁵¹—unlike LLCs, where either for-profit or nonprofit ventures can be conducted in the same type of vehicle.³⁵² The error and teaching of *eBay*, however, is to hold that to operate at all in the for-profit mode means that profits must be maximized rather than pursued (or enhanced, satisfied, and so on) in some manner and to some degree. The for-profit corporation statute itself, however, includes no such requirement.³⁵³ Thus, in the LLC setting, there likewise can be no assurance after *eBay* that for-profit LLCs may refrain from *maximizing* profits, if they elect to pursue profits at all.

One legislative response to *eBay* in numerous states already is the adoption of legislation authorizing the formation of benefit corporations.³⁵⁴ These so-called "B Corps" are for-profit companies that seek to make profits while also serving environmental/social objectives.³⁵⁵ They do not need to maximize profits.³⁵⁶ Proponents of this legislation routinely read the *eBay* decision as requiring profit

³⁴⁸See DEL. CODE ANN. tit. 6, § 18-101 (2012).

³⁴⁹See, e.g., Ann E. Conaway, *The Global Use of the Delaware Limited Liability Company for Socially-Driven Purposes*, 38 WM. MITCHELL L. REV. 722, 780-81 (2012) [hereinafter *Global Use of the Delaware LLC*]. See also Ann E. Conaway & Peter I. Tsoflias, *The Delaware Series LLC: Sophisticated and Flexible Business Planning*, 2 MICH J. PRIVATE EQUITY & VENTURE CAP. L. 97, 122-23 (2012).

³⁵⁰See *supra* note 202 and accompanying text.

³⁵¹See Conaway, *Global Use of the Delaware LLC*, *supra* note 349, at 780-71.

³⁵²See *supra* notes 348-349 and accompanying text.

³⁵³See DEL. CODE ANN. tit. 8, § 101(b) (2012).

³⁵⁴See Johnson, *supra* note 217, at 270 n.6 (listing states as of 2012). In 2013, additional states have adopted benefit corporation statutes, including Delaware. S.B. 47, 147th Gen. Assemb. (Del. 2013).

³⁵⁵See Johnson, *supra* note 217, at 287-88.

³⁵⁶See *id.*

maximization³⁵⁷ and, thus, that decision comprises a key reason for promulgating a new "dual mission" form of business vehicle.

Another legislative approach to accommodate mixed purpose business vehicles can be seen in Oregon's corporate statute.³⁵⁸ Oregon permits a corporation's articles of incorporation to include a provision authorizing or directing the conduct of the business in an environmentally and socially responsible manner.³⁵⁹ Prospective investors thus know from the outset that such a corporation may not be maximizing profits in all circumstances and they can invest or refrain accordingly. In this way, as with benefit corporation legislation, states are permitting, but not mandating, a pluralistic approach to corporate purpose rather than decreeing a singular objective. Market and social forces, not law, can then work to determine which models succeed.³⁶⁰

Another statutory approach for Delaware in the aftermath of *eBay*, besides its new benefit corporation statute, would be to more clearly adopt a statutory default rule on the profit-seeking/profit-maximizing issue within its business corporation statute.³⁶¹ The most likely rule, given widespread corporate norms and conventions,³⁶² would be profit maximization (or, perhaps profit "enhancement"). This should be coupled with a permitted opt-out of profit maximization (or enhancement) in favor of an alternative and clearly specified purpose or combination of purposes.³⁶³ In this way, the notion of the corporation as a meaningful social-economic institution serving its own overarching

³⁵⁷See *id* at 273 n.16 and accompanying text.

³⁵⁸OR. REV. STAT. § 60.047 (2011).

³⁵⁹*Id.*

³⁶⁰Of course, if shareholders eventually fund only zealous profit maximizers, then capital providers—not boards of directors or senior executives—will effectively decide corporate purpose in our society. Proponents of greater legal pluralism to permit corporations to pursue more varied business purposes thus need to be careful of what they hope for. They may get it but with a different outcome than anticipated.

³⁶¹Delaware law both provides that a corporation may pursue "any lawful business or purposes," see DEL. CODE ANN. tit. 8, § 101(b) (2012), and that a company's certificate of incorporation may include any "provision for the management of the business and for the conduct of the affairs of the corporation . . . not contrary to the laws of this State." *Id.* § 102(b)(1).

³⁶²See *supra* notes 215-19 and accompanying text.

³⁶³The British East India Company, Professor Keay notes, stated in its charter that the company's purpose was to serve "public interests." KEAY, *supra* note 230, at 6-7 & n.38. The articles of incorporation of Control Data Corporation, a major computer manufacturer in the 20th century, contained since at least the 1970s a provision that the company served the interests of numerous constituencies. M. AOKI, *THE CO-OPERATIVE GAME THEORY OF THE FIRM* 179 (1984). And originally, many early American corporations were granted charters because they sought to advance a public purpose, not simply facilitate private financial gain. See Johnson, *supra* note 217, at 276-78.

mission distinct from that of any of its constituencies—investors or otherwise—could be restored and brought into legal reality. And as currently is the case in Canada, the director duty of loyalty to advance the corporate purpose would be owed to the corporation itself, not to the stockholders.³⁶⁴ Furthermore, this reform would advance the laudable goal of facilitating greater institutional pluralism in the corporate realm,³⁶⁵ thereby avoiding the overly sharp current dichotomy (and typology) between for-profit and nonprofit corporations. As recently observed by the Delaware Supreme Court: "[I]t is hardly absurd for the General Assembly to design a system promoting maximum business entity diversity."³⁶⁶

IV. CONCLUSION

Delaware corporate law is unsettled on two rather basic issues addressed in this Article, i.e., the precise reach but also the continuing utility of the business judgment rule as now formulated, and whether a narrow corporate purpose is and should be mandated. Unsettledness, to varying degrees, is an inherent feature of dynamic lawmaking in the common law system. Delaware law, after all, does not design rules for a business system that itself is static; consequently, law itself cannot be static, and lawmaking mechanisms must themselves be highly adaptive. We saw this very clearly in a highly compressed time period in 2012 when doubt was raised as to the existence of default fiduciary duties in LLCs, a doubt quickly dispelled by the General Assembly.³⁶⁷

But doctrinal flux can also operate in a narrow band and over a longer, Kondratiev-like cycle.³⁶⁸ We see this where baseline issues remain contested and where thoughtful judges, lawyers, and professors retain a lingering discomfort as to rule optimality and social congruence. This Article suggests that while the policy underpinnings of the business

³⁶⁴This is not to say that in other respects the directors would not also owe a duty of loyalty to shareholders.

³⁶⁵Contractarian scholars who generally favor shareholder primacy also believe business people should be free to opt for the pursuit of another purpose. *See, e.g.*, EASTERBROOK & FISCHER, *supra* note 223, at 35; Stephen Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 577-80 (2003).

³⁶⁶CML V, LLC v. Bax, 28 A.3d 1037, 1043 (Del. 2011).

³⁶⁷This is fully described in Johnson, *supra* note 12.

³⁶⁸According to some economists, a Kondratiev wave is a business cycle spanning a long period, ranging from 45 to 60 years. *See e.g.*, Toivo Tanning, Maksim Saat, & Lembo Tanning, *Kondratiev Wave: Overview of World Economic Cycles*, 2 GLOBAL BUS. & ECON. RES. J. 1, 3 (2013).

judgment rule remain sound, Delaware's deployment of the rule is not. Delaware's rule has outworn its usefulness for analyzing director conduct for the simple if startling reason that it is doctrinal surplusage; and for controlling shareholders, the rule is simply inapt and does nothing but complicate the analysis. The key question for all corporate fiduciaries, like all other fiduciaries, is whether they did or did not breach their duties in a way that caused harm. Delaware's rule is a prolix, doctrinal vestige wrongly pressed into service as a unifying vehicle for analyzing this straightforward issue. Such over-refined complexity in intellectual thought typically precedes a much-needed, simplifying paradigm shift.³⁶⁹ Delaware judges should fundamentally alter the "map" of fiduciary analysis by showcasing fiduciary duties and downplaying the business judgment rule. They can begin doing so by not adopting the rule in analyzing officer and shareholder conduct. And for directors, the policy of no-substantive review central to duty of care analysis can easily accomplish the goal of deferential review in a more streamlined doctrinal manner.

As to corporate purpose, in a complex modern economy committed to free choice, ingenuity, experimentation, and diverse social patterns, Delaware law should not mandate a narrow money-maximizing purpose. As in the tumultuous 1980s, when Delaware judges wisely refused to endorse a view that corporations existed solely to enrich shareholders,³⁷⁰ common law judges should not dictate that objective today. Such a view, although dominant in corporate law theory, is at odds with broader social expectations of business conduct in the modern world and it undermines much-needed judicial legitimacy in the business law area. Delaware law should retain its enabling quality and remain agnostic on this issue.

³⁶⁹This, of course, is the insightful thesis of Thomas Kuhn's classic book, THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

³⁷⁰See Johnson, *supra* note 261.