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DYNAMIC FIDUCIARY DUTIES

Andrew S. Gold†

This Article assesses a fundamental puzzle concerning directors' fiduciary duties. While courts have gradually refined the content of fiduciary duties, they have yet to determine which parties are the beneficiaries of these duties. In the standard Delaware pronouncement, directors owe their duties to "the corporation and its shareholders." Since the interests of the corporation and its shareholders will diverge in various settings, this is at best an indeterminate legal doctrine. The puzzle is that this indeterminacy remains an ongoing feature of the law, rather than a temporary area of uncertainty. Why don't the courts pick just the shareholders, or just the corporation?

In order to better understand why the courts might select ambiguity, this Article will focus on the practical effects of the existing doctrine. An underappreciated feature of the current ambiguity is that it facilitates dynamic fiduciary duties. The broad range of judicially endorsed beneficiaries gives directors a variety of legitimate interpretations among which to choose. Directors are likely to develop their own interpretations of the correct fiduciary beneficiary from within that range, and these interpretations will inevitably shift over time. In short, a key feature of fiduciary duties is that they are read differently across time and between firms.

This dynamism of fiduciary duties might be accounted for in terms of political convenience, or judicial compromise. But there is another possibility. This Article will explore whether the uncertainty of fiduciary beneficiaries could be understood as a desirable legal outcome. Two hypotheses will be considered. First, it may be that dynamic fiduciary duties follow predictable patterns, reflecting the allocations of bargaining power among corporate constituents. This would suggest that directors' fiduciary duties are a "bargain-mimicking" default rule. Under limited circumstances, this

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hypothesis may be accurate. In the ordinary case, however, a bargain-mimicking account would likely fail.

Second, dynamic fiduciary duties may provide for variation in outcomes. This hypothesis is more promising. On this account, dynamic fiduciary duties may be a way to experiment with legal options—i.e., individual firms may be "laboratories of corporate governance." This idea fits well with an evolutionary account of business strategy. In effect, those firms which adopt the most efficient fiduciary duties for their circumstances (whether in terms of a firm's stage of existence, industry, or other features) are more likely to survive, or succeed in comparison to others. Dynamic fiduciary duties may then be a means to develop desirable forms of fiduciary duty in a context where courts, and even boards, are unlikely to come up with these answers on their own.

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"Unlike ideals of corporate governance, a fiduciary's duties do not change over time."

- In re Walt Disney Co. Derivative Litigation[1]

INTRODUCTION

Contrary to the above account, directors' fiduciary duties do change over time. Granted, the basic content of fiduciary duties does not change very often—the broad meaning of loyalty and care is largely static. But fiduciary duties still undergo constant revision in a very important sense: the beneficiaries of fiduciary duties do change, and they change based on the decisions of the directors themselves.

When we recognize this dynamism, we can better understand an important but puzzling feature of corporate law: legally speaking, there is a deep uncertainty as to precisely which parties are the beneficiaries of directors' fiduciary duties. Courts regularly state that directors' fiduciary duties are owed to both shareholders and the corporation.[2] Yet it has long been recognized that shareholders and corporations can have divergent interests.[3] And, to the extent that fiduciary duties are owed to shareholders in particular, courts tend not to differentiate among subgroups within the shareholder set. Here, too, interests within the group will diverge.[4] As a consequence, the beneficiaries of director fiduciary duties are left indeterminate.[5]

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1 907 A.2d 693, 697 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006).

2 *See, e.g.*, N. Am. Catholic Educ. Programming Found. v. Gheewalla, 930 A.2d 92, 99 (Del. 2007) ("It is well established that the directors owe their fiduciary obligations to the corporation and its shareholders."). For an indication of the ambiguity in Delaware courts' statements on this topic, see E. Norman Veasey & Christine T. Di Guglielmo, *How Many Masters Can a Director Serve? A Look at the Tensions Facing Constituency Directors*, 63 BUS. LAW. 761, 764 n.8 (2008) (listing cases which describe duties owed to the corporation or to the corporation and its shareholders). This is not to deny that, in certain limited fact patterns, courts describe a fiduciary duty in terms of a specific beneficiary. *See, e.g.*, Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (describing a duty to maximize shareholder value when the sale and break-up of the corporation was inevitable).

3 One instance where this may occur is when corporations near insolvency. *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 297 (1999) (noting that when a corporation approaches insolvency "shareholders' interests can become a poor proxy for the corporate coalition's interests"). But the two interests differ from each other, or at least can differ, in other respects as well. *See* David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 255 (arguing for divergent shareholder and corporate interests in the takeover setting); *cf.* Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 645–46 (2006) (indicating that shareholder wealth is not always a proxy for firm value).

4 *See* Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 579–92 (2006) (describing divergent shareholder interests).

5 This indeterminacy is important, at least, if we accept the Delaware courts' current view that the fiduciary duty of loyalty includes an affirmative duty to act in the best interests of the

This Article focuses on the outcome of this indeterminacy. By announcing a duty to multiple beneficiaries (and enforcing the business judgment rule), courts are allowing directors to select from within a range of fiduciary beneficiaries.[6] That discretion means that fiduciary duties can have changing beneficiaries, as directors' interpretations of the appropriate beneficiary shift over time. This dynamic feature suggests that fiduciary duties will often track changes in the bargaining power of corporate constituents. More generally, it suggests that fiduciary duties will have differing beneficiaries across time, and across firms.

At first glance, a duty to multiple, conflicting beneficiaries may seem incoherent.[7] For this reason, we may think the uncertainty here is a byproduct of other policy concerns. Courts may have left the beneficiary question open because they are unsure about the extent to which shareholder interests coincide with the public good.[8] Alternatively, courts may have compromised between competing views on policy.[9] Perhaps the vagueness of legal doctrine is intended to serve political ends.[10] This Article suggests an additional way to understand the beneficiaries puzzle. Vague legal doctrine results in dynamic

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shareholders and the corporation. If one instead defined directors' fiduciary duties such that they only incorporate an anti-self-dealing rule, then the puzzle would be substantially less significant. *Cf.* Larry E. Ribstein, *Fencing Fiduciary Duties*, 91 B.U. L. REV. 899, 909 (2011) ("The fiduciary duty to avoid self-dealing is not defined with reference to the specific parties on whose behalf the fiduciary must act."). That definition, however, is not consistent with existing law.

6 *Cf.* Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule: Reflections on* Disney, *Good Faith, and Judicial Uncertainty*, 66 MD. L. REV. 398, 436 (2007) ("[Corporate] ends themselves are open to different interpretations."). On the effect of the business judgment rule in this setting, see Kelli A. Alces, *Debunking the Corporate Fiduciary Myth*, 35 J. CORP. L. 239, 247 (2009).

7 Conflicting duties are not, however, unheard of in fiduciary law. *See generally* Steven L. Schwarcz, *Fiduciaries with Conflicting Obligations*, 94 MINN. L. REV. 1867 (2010).

8 *See* Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1449 (2008) ("Corporate law's ambivalence . . . regarding beneficiaries . . . reflect[s] larger misgivings about the consistency of shareholders' interests and incentives with those of society at large."). Courts may also be expressing ambivalence as a result of concerns over prevailing social norms. *See* Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 TEX. L. REV. 865, 934 (1990) ("The actions of Delaware's judges on the takeover front reveal how common-law doctrine ultimately must square with underlying social norms. Their opinions chronicle a clumsy but fascinating doctrinal expression of ambivalent social expectations of corporate behavior.").

9 *See* Bruner, *supra* note 8, at 1426 (describing this account); *see also* William T. Allen et al., *The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide*, 69 U. CHI. L. REV. 1067, 1067 (2002) (describing ambivalence of Delaware corporate law as to whether its sole aim is to facilitate shareholder economic welfare).

10 *Cf.* Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 7–8 (2005) (analyzing the fiduciary duty of good faith as a response by the Delaware courts to an environment of corporate crises).

fiduciary duties, and this dynamism can be understood as a desirable feature of corporate law.[11]

In order to make sense of the courts' announcement of vague and conflicting beneficiaries, we need to understand what this doctrine accomplishes. By instructing directors to act as fiduciaries to both shareholders *and* the corporation, the courts have effectively given directors leeway to exercise discretion; within limits, they may act as fiduciaries to the shareholders *or* the corporation.[12] Likewise, by describing fiduciary duties to shareholders without determining which categories of shareholders, directors may make the choice themselves.[13] Directors have discretion (within a bounded range) to decide which parties their decisions will serve.[14]

This discretion also means that directors can alter their choices regarding the ends they serve. Nothing stops a director from serving the shareholders on day one, and then serving the corporation a year later. Both choices of beneficiary can be understood to fall within the required range of acceptable fiduciary conduct—the relevant duties being owed to shareholders and the corporation—but the nature of these duties will vary with the director's choices. Moreover, as the composition of the board changes with new director elections, we can anticipate variation even if individual directors were to remain static in their interpretation of their responsibilities. In short, directors' fiduciary duties are inevitably dynamic.[15]

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11 We may conclude that judicial compromise is also a desirable feature of corporate law, but compromise would be desirable in a different sense. Compromise may be justified in terms of prudence or in terms of political ends. It is desirable as a way to limit the effects of potential errors, for example. This Article suggests that the ambiguity of fiduciary beneficiaries can be a means to help achieve goals such as efficiency or respect for the corporate contract. These objectives involve a different type of aim from the objectives commonly served by compromise.

12 Note that directors may decide which beneficiaries to favor even if the directors understand themselves to be acting as fiduciaries to both shareholders *and* the corporation. Although this interpretation of fiduciary duties would be distinct from a disjunctive reading of the judicial language, a substantial dynamism of fiduciary duties would still result.

13 A particularly striking exercise of director discretion may arise where the board falls under the control of preferred shareholders. *See* Jesse M. Fried & Mira Ganor, *Agency Costs of Venture Capitalist Control in Startups*, 81 N.Y.U. L. REV. 967, 992 (2006) ("In any event, Orban establishes that a preferred-controlled board does not owe a fiduciary duty specifically to the common shareholders and that it has wide discretion to benefit the preferred shareholders instead.").

14 A similar point holds if we see the beneficiary as just the corporation. In that case, there is substantial room to interpret what "the corporation" refers to, and which ends are "corporate" ends. *See* Gold, *supra* note 6, at 436 (noting that directors have some discretion not only as to the means they choose in obtaining a corporate end, but also as to the ends served); *cf.* Paul B. Miller, *A Theory of Fiduciary Liability*, 56 MCGILL L.J. 235, 278 (2011) ("[P]articularly where the [fiduciary] authority relates to matters of personality, the fiduciary may be authorized to determine the ends of the beneficiary.").

15 The vagueness of fiduciary doctrine is not the only basis for this view. We may also tie it to the broad corporate purpose clauses that corporations generally adopt. *Cf.* Ernest L. Folk, III, *De Facto Mergers in Delaware:* Hariton v. Arco Electronics, Inc., 49 VA. L. REV. 1261, 1280 n.80

This Article will explore two potential justifications for this dynamism.[16] One possibility is that dynamic fiduciary duties will produce a desirable pattern of director conduct. The dynamism of fiduciary duties may broadly follow shifts in power among corporate constituents, updating directors' responsibilities as the corporation changes. In other words, fiduciary duties may amount to a bargain-mimicking default.[17]

The standard economic account of fiduciary duties is that they are a majoritarian default, designed to fill gaps in the corporate contract. On this view, courts attempt to construct a hypothetical bargain based on the terms which the majority of contracting parties would select ex ante, in a world of zero transaction costs.[18] Bargain-mimicking defaults follow a different template. They instead reflect the allocation of bargaining power among particular contracting parties.

Notably, the dynamism of fiduciary duties need not be random in its effects—changes in directors' interpretations may follow a pattern. Over time, different corporate constituents will have different relationships with the corporation and its board. On the bargain-mimicking account, the pattern of dynamic fiduciary duties will take into account these shifts in power among corporate constituents. Given the incentives directors face, directors' discretion regarding corporate ends may result in corporate decisions that broadly (if imperfectly) reflect the current division of bargaining power among the various constituents of the firm.[19]

(1963) ("[T]he articles of incorporation may be drafted with an indefinite number and variety of business 'purposes,' and the directors may decide when they want to change course."). For recent accounts of broad corporate purpose clauses and their relevance to corporate law, see Margaret M. Blair & Lynn A. Stout, *Specific Investment: Explaining Anomalies in Corporate Law*, 31 J. CORP. L. 719, 740–42 (2006); and Andrew S. Gold, *Theories of the Firm and Judicial Uncertainty*, 35 SEATTLE U. L. REV. 1087, 1106–08 (2012).

16 It should be noted that these justifications are not the only available explanations for the uncertain doctrine concerning fiduciary beneficiaries. For example, that uncertainty can be accounted for as the product of judicial ambivalence, pragmatic compromise, or political strategy. *See infra* text accompanying notes 48–50. This Article explores the possibility that dynamic fiduciary duties are desirable legal policy in their own right, rather than a mere byproduct of other phenomena.

17 *See* Omri Ben-Shahar, *A Bargaining Power Theory of Default Rules*, 109 COLUM. L. REV. 396 (2009).

18 For a helpful account of the hypothetical bargain methodology in the corporate law setting, see Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 577–79 (2003).

19 For prior suggestions that director decision-making will respond to allocations of bargaining power among corporate constituencies, see Blair & Stout, *supra* note 3, at 283 (suggesting that the benefits received by different corporate constituencies "may be driven more by political power than by economic factors"); and David Millon, *New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law*, 86 VA. L. REV. 1001, 1027–30 (2000) (suggesting that boards are responsive to the bargaining power of shareholders). It should be noted that commentators differ on the extent to which this responsiveness is desirable.

As we will see, there are reasons to doubt whether this first account can succeed, at least as a general matter. Bargain-mimicking defaults are not obviously efficient, and it is at best debatable whether fiduciary duties are dynamic in a way that will accurately reflect allocations of bargaining power among corporate constituents. Under limited circumstances, a bargain-mimicking default may make sense in describing fiduciary duties, particularly where bargaining power is lopsided in favor of one party. It is not clear, however, that directors' fiduciary duties will ordinarily fall into this category.

Yet there is another argument for dynamic fiduciary duties. When we are faced with long time horizons and substantial uncertainty, variable outcomes can provide a significant regulatory benefit: they allow for the discovery of desirable innovations. Dynamic fiduciary duties produce variance among firms (and within firms across time). Given a spectrum of fiduciary approaches, markets may select for one type of fiduciary behavior over another. On this account, more efficient decisions regarding fiduciary beneficiaries are more likely to survive. Dynamic fiduciary duties could thus be a useful strategy even if we remain uncertain about the ideal fiduciary beneficiary.

Part I of this Article describes the dynamism of fiduciary duties. Part II indicates how dynamic fiduciary duties may function as a bargain-mimicking default. Part III assesses the potential costs and benefits of a bargain-mimicking approach to fiduciary duties. This Part indicates that the merits of such an approach are debatable for ordinary fact patterns. Part IV provides an evolutionary account of dynamic fiduciary duties. This Part suggests that the uncertainty surrounding optimal fiduciary duties may justify the indeterminate doctrine adopted by the Delaware courts.

I. THE DYNAMIC NATURE OF FIDUCIARY DUTIES

There are several senses in which corporate fiduciary duties could be considered dynamic. It is therefore important to distinguish exactly what kind of dynamism is under discussion in this Article. Courts have claimed that fiduciary duties are static.[20] A contrary claim—that fiduciary duties actually change—is therefore likely to meet some resistance, and we will want to be clear about what type of dynamism is at stake.

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20 *See In re* Walt Disney Co. Derivative Litig., 907 A.2d 693 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006) ("Unlike ideals of corporate governance, a fiduciary's duties do not change over time. How we understand those duties may evolve and become refined, but the duties themselves have not changed, except to the extent that fulfilling a fiduciary duty requires obedience to other positive law.").

Henry Hansmann's work suggests one important sense in which fiduciary duties are dynamic, even if they appear static at first glance. From this perspective, fiduciary duties are dynamic as a result of legal changes imposed by the state.[21] As Hansmann notes, corporate law is dominated by default rules, rather than mandatory rules.[22] Yet, perhaps ironically, many of these default rules are left in place by corporate charters. Why should this be so? Hansmann's answer is that default terms are left in place because the state adjusts the law to take into account changing circumstances.[23]

If we consider amendments to the law to be a part of the corporate contract, then fiduciary duties are clearly dynamic. Indeed, fiduciary duties may be dynamic on a regular basis if legal institutions frequently alter them. From this perspective, fiduciary duties are malleable even if they remain unchanged in between legislative or judicial amendments. And, although there is debate about the frequency of such revisions, many believe that directors' fiduciary duties change as a result of judicial decisions.[24] It is also easy to provide salient examples. The duty of care was effectively changed pursuant to *Smith v. Van Gorkom*,[25] and a significant subset of commentators believe that the duty of loyalty was changed by the recent decision in *Stone v. Ritter*.[26]

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21 Henry Hansmann, *Corporation and Contract*, 8 AM. L. & ECON. REV. 1, 2 (2006) ("The provisions of corporate law are essentially contract terms that can be repeatedly reformed by a third party—the state—to adapt them to changing circumstances.").

22 *See id.* at 3 ("[I]n substance, all mandatory terms in state corporate law have now been eliminated."). Note that, even if we conclude that there are some important mandatory rules in corporate law, Hansmann's larger thesis about state-authored changes to the corporate contract would still be plausible.

23 *See id.* at 9 ("[S]hareholders and managers delegate to government the task of revising their contractual relations over time.").

24 For a critique of Delaware law on the basis that it changes regularly, see William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1, 16–17 ("The important observation here is not that the rules are difficult to discern once announced, but that new rules have been announced with remarkable regularity.").

25 488 A.2d 858 (Del. 1985). On the *Smith v. Van Gorkom* case as a change in the law, see Jonathan R. Macey & Geoffrey P. Miller, *Trans Union Reconsidered*, 98 YALE L.J. 127, 131 (1988) ("The outcome of the case was exactly opposite to what virtually every observer of Delaware law would have predicted.").

26 911 A.2d 362 (Del. 2006). On *Stone v. Ritter* as a change in the duty of loyalty, see, for example, Stephen M. Bainbridge et al., *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 595–98 (2008) (contending that *Stone* reinterpreted the duty of care in the *Caremark* case so that it involved the duty of good faith); Andrew S. Gold, *The New Concept of Loyalty in Corporate Law*, 43 U.C. DAVIS L. REV. 457, 470 (2009) (indicating that the *Stone* decision "reordered the roles of good faith and loyalty"); Claire A. Hill & Brett H. McDonnell, Stone v. Ritter *and the Expanding Duty of Loyalty*, 76 FORDHAM L. REV. 1769, 1778 (2007) ("[W]hat had been generally understood to be an instance of the duty of care . . . [the *Caremark* doctrine] became officially an instance of the duty of loyalty."). It should be noted that others believe *Stone v. Ritter* confirmed the pre-existing content of fiduciary duties in Delaware law. *See* Leo E. Strine, Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 633 (2010) (suggesting that *Stone* was "an important but, ultimately, mundane and unsurprising decision").

In another sense, fiduciary duties may be dynamic based on their context-dependent nature. Particular duties of loyalty, for example, may apply to corporations when they are closely held, and these duties may then shift when the corporation becomes publicly held.[27] Of course, we might not think this is really a form of dynamism. Instead, this context-dependency could be seen as the result of a static but fact-specific legal standard. The legal doctrine is arguably the same, while the applications of that doctrine vary.[28] Even so, commentators sometimes view this adaptability as a form of dynamism, and sensitivity to context is an important feature of fiduciary duties.[29]

This Article suggests a third sense in which fiduciary duties are dynamic. It will not focus on legislated or judicially-imposed changes to legal doctrine; nor will it address those cases where the legal doctrine of fiduciary duties is sensitive to changing corporate conditions. Instead, this Article is concerned with the ways in which fiduciary duties change when boards of directors revise their interpretation of fiduciary beneficiaries. This type of dynamism differs from the above categories, for it is a product of directors' own interpretive choices.

In order to see how directors are able to make such changes to fiduciary duties, it will help to start with the business judgment rule. This is the standard legal 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."[30] As a result of the business judgment rule, directors have a tremendous amount of discretion with respect to the management of a corporation's business affairs. The business judgment

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27 *See* EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 139 (2008) (describing a scenario where "the appropriate default rule on corporate opportunities changes as the corporation grows from closely held to publicly held"). I have some doubts concerning Elhauge's particular account of changing fiduciary duties, but it provides a good example of the type of theory under discussion. Another context in which fiduciary duties have sometimes been thought to shift with changes in the corporation's condition is when it nears or enters insolvency. *See* Laura Lin, *Shift of Fiduciary Duty Upon Corporate Insolvency: Proper Scope of Directors' Duty to Creditors*, 46 VAND. L. REV. 1485, 1512 (1993) (describing this perspective). Delaware courts, however, have now indicated that directors do not owe fiduciary duties directly to creditors, even when the corporation is in insolvency. *See* N. Am. Catholic Educ. Programming Found. v. Gheewalla, 930 A.2d 92, 103 (Del. 2007).

28 For an example of this perspective, see Veasey & Di Guglielmo, *supra* note 2, at 763 ("What may change over time is the circumstantial and contextual backdrop against which the duties of the board of directors and those of individual directors are viewed.").

29 *See, e.g.*, ELHAUGE, *supra* note 27, at 138–39. There is also another possibility. Events that occur after a contractual relationship is created may change the legal interpretation of that relationship. *Cf.* Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 2 THEORETICAL INQUIRIES L. 1 (2001). Some jurisdictions' law of close corporations applies this type of approach by taking into account changes in the parties' reasonable expectations (and thus arguably rendering fiduciary duties dynamic).

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

rule contains important exceptions in self-dealing situations and in contexts where self-dealing is considered likely.[31] But once we depart from those limited exceptions, the rule provides expansive protections.

In prior work, I have argued that the business judgment rule allows courts and other legal actors to reach an incompletely theorized agreement.[32] Incompletely theorized agreements involve a consensus on desirable outcomes in the absence of agreement on the high-level theory that supports those outcomes.[33] In the legal setting, this type of agreement can be a very useful means to resolve cases when judges differ in their judicial philosophy, or otherwise fail to share the same foundation for their legal reasoning.

Courts and commentators may differ on the purpose of fiduciary duties at a high level of generality, while reaching agreement on the business judgment rule as an appropriate doctrine. Whether one is a supporter of the shareholder primacy, director primacy, or team production models, a strong business judgment rule will make sense.[34] Even if one thinks that boards should consider non-corporate constituencies—such as the public interest—there may still be reason to support a protective business judgment rule.[35] The business judgment rule thus allows courts to resolve fiduciary litigation without reaching a definitive resolution of core corporate law debates.

The difficulty is that, on an individual basis, directors still must reach an answer as to which party or parties they owe fiduciary duties. Many loyalty cases implicate a non-self-dealing rule—but many other cases require a choice among beneficiaries.[36] If directors are attempting to wealth maximize, they must figure out whose wealth they will maximize. These questions, moreover, will present themselves even if directors conclude that they owe their fiduciary duties to the

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31 *See* Gold, *supra* note 6, at 433 ("Traditionally, the way for plaintiffs to get around this presumption was to allege fraud, illegality, or a conflict of interest. Otherwise, a plaintiff would have to demonstrate that the board's decisions did not have a rational basis—i.e., that there is no possibility of a legitimate business purpose.").

32 *Id.* at 435. On the general concept of incompletely theorized agreements, see Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–36 (1995).

33 Sunstein, *supra* note 32.

34 For an analysis from the director primacy perspective, see Bainbridge, *supra* note 18, at 602–03. For an analysis from the team production perspective, see Blair & Stout, *supra* note 3, at 299-303.

35 *See* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 770 (2005) ("[T]he business judgment rule makes plain that the duty of care cannot be enforced in a way that would bar managers from exercising discretion to sacrifice corporate profits in the public interest.").

36 For those cases which solely implicate a rule against self-dealing, the questions at issue in this article will fade into the background. *Cf.* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 284 (1998) ("Some applications of the fiduciary principle in corporate law do not require the identification of any particular corporate constituency as beneficiary, but only that the interests of 'the corporation' in general must be served.").

shareholders alone. Shareholders also have a very wide range of potentially diverging interests.[37] On this type of question, however, the judiciary and legislature have provided little in the way of guidance.[38]

The scope of appropriate director conduct will vary depending on one's chosen theory of corporate law. For example, under the classic shareholder primacy theory, directors are viewed as agents of the shareholders.[39] From this perspective, directors understandably are thought to owe a duty to maximize shareholder wealth. In contrast, the director primacy view rejects the idea that directors are agents of the shareholders. They are instead in a sui generis category, managing the corporation according to their best judgment.[40] But as developed by its proponents, director primacy is also thought to support a shareholder wealth maximization norm.[41] For team production theorists, however, directors are supposed to be neutral mediating hierarchs.[42] They make sure that each corporate constituent receives adequate returns in light of their participation in the corporate endeavor.[43] Shareholder wealth maximization is no longer a mandate.

Interpretive choices will exist under each of these theories. If one adopts a team production approach, directors are given room to decide whether to favor non-shareholder constituents or shareholders.[44] Even under a shareholder primacy approach, directors have substantial

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37 *See* Anabtawi, *supra* note 4, at 578–92.

38 For these purposes, the lack of judicial guidance is notable, since there is no external consensus on the matter. This lack of guidance may in part be a product of the business judgment rule, which permits courts to resolve cases without always delineating clear standards of conduct. *Cf.* Douglas G. Baird & M. Todd Henderson, *Other People's Money*, 60 STAN. L. REV. 1309, 1323 (2008) ("The business judgment rule, however, is an awkward tool for giving directors the legal guidance they need to make good decisions."). That said, the presence of the business judgment rule does not render irrelevant judicial guidance (or lack of guidance) on fiduciary standards of conduct. Or at least not if, as Baird and Henderson note, many directors "want to do what they are supposed to do." *Id.* In addition, judicial pronouncements can matter for directors with distinct motivations. Judicially described standards of conduct can have a significant impact on social norms, and these norms may be internalized by individual directors. *See* Gold, *supra* note 26, at 518–21; Gold, *supra* note 15, at 1101–03. Directors who do not follow standards of conduct simply because they are legally obligatory may still follow those standards for other reasons.

39 *See* Robert B. Thompson & D. Gordon Smith, *Toward a New Theory of the Shareholder Role: "Sacred Space" in Corporate Takeovers*, 80 TEX. L. REV. 261, 268–69 (2001) (describing the agency view).

40 For examples of the director primacy view, see Stephen M. Bainbridge, *The Board of Directors as Nexus of Contracts*, 88 IOWA L. REV. 1 (2002); Bainbridge, *supra* note 18. On the sui generis status of directors, see *id.* at 550–51.

41 *See* Bainbridge, *supra* note 18, at 550 (supporting shareholder wealth maximization under a director primacy approach).

42 *See* Blair & Stout, *supra* note 3, at 276–87.

43 *Id.* at 286 (suggesting that directors "should be viewed as disinterested trustees charged with faithfully representing the interests not just of shareholders, but of all team members").

44 *Id.* at 296 (suggesting a judicial perception that directors' fiduciary duties "go beyond a simple duty to maximize shareholder wealth, and encompass the interests of a variety of other corporate constituencies").

interpretive freedom. The Delaware courts have made it clear that it is up to directors to figure out which time horizons to adopt for purposes of their business decisions.[45] They have also left it open to directors to decide whether to favor shareholders who are diversified or undiversified; shareholders who are hedged or unhedged; shareholders who are risk-averse or risk-neutral; shareholders who are affiliated or unaffiliated with the corporation.[46]

The practical implications of this very broad grant of director discretion—to act on behalf of the shareholders *and* the corporation—are thus significant. Different directors are likely to reach substantially different conclusions as to precisely whom they owe fiduciary duties. Variations will certainly emerge. The striking feature, however, is the resulting tendency toward dynamism. It is not merely that multiple interpretations of fiduciary beneficiaries are possible, but that these interpretations will change over time.

As old directors are replaced by new directors—whether through retirements or removal—the directors' internal judgments of the proper fiduciary beneficiary are likely to shift. And as directors themselves change their views—whether through increased experience or other psychological processes—their internal judgments will also shift. Furthermore, if directors believe they are accountable to the views of the current corporate polity, then changes in shareholders, creditors, and employees will also bring about changes in director views.[47] The end result is that there is an inevitable revision of fiduciary duties over time, as directors alter their interpretations regarding the target of their fiduciary conduct.

These outcomes could be explained as a matter of chance. Dynamic fiduciary duties may be the accidental result of the business judgment rule, combined with certain pragmatic judicial choices. Some suggest that judicial ambivalence plays a role in the uncertainty of fiduciary beneficiaries.[48] Perhaps courts are compromising between conflicting and irreconcilable visions of good corporate governance.[49] In addition,

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45 *See* Paramount Commc'ns v. Time, Inc., 571 A.2d 1140, 1150 (Del. 1989) ("[D]irectors, generally, are obliged to charter a course for a corporation which is in its best interests without regard to a fixed investment horizon."); *see also* Gold, *supra* note 6, at 437 ("Directors effectively get to pick which shareholder time horizons to favor in their corporate strategy."); Henry T.C. Hu, *Risk, Time, and Fiduciary Principles in Corporate Investment*, 38 UCLA L. REV. 277, 308–13 (1990) (discussing the *Paramount* decision in the context of judicial efforts to provide directors with discretion regarding appropriate time horizons).

46 *See* Gold, *supra* note 6, at 437–38 (noting ambiguity as to which shareholders boards should seek to benefit).

47 This is because the composition of the current polity is frequently changing. In contrast, if directors feel that they should focus on the original polity when the corporation was founded, this would likely produce a more static outcome.

48 *See* Bruner, *supra* note 8, at 1449.

49 *Cf. id.* at 1443 (describing the view that an appropriate balance has been struck).

courts may be using the vagueness of fiduciary doctrine instrumentally, as a means to change legal doctrine when political pressures come into play.[50]

While each of these explanations is potentially accurate, this Article will seek a different type of theory. It will assess whether the resulting legal doctrine is a justifiable outcome in terms of efficiency values and, potentially, in terms of adherence to the corporate contract. From this perspective, courts may have reason to leave a degree of uncertainty in fiduciary law in order to permit directors some discretion in determining the primary beneficiaries of their fiduciary duties.[51]

A helpful starting point is to focus on the most probable director interpretations of their fiduciary responsibilities. In theory, there is an indefinite number of ways in which director interpretations could change over time. If dynamic fiduciary duties follow a particular pattern of revision, however, this may help to justify them. Perhaps fiduciary duties will be adjusted over time in a predictable way. If so, this pattern of adjustment may allow us to assess whether the dynamism of fiduciary duties is a productive part of corporate doctrine.

One possibility is that directors' judgments about appropriate corporate beneficiaries will track changes in bargaining power among corporate constituencies. Directors' fiduciary duties may amount to a bargain-mimicking default—i.e., a default that reflects allocations of bargaining power among the contracting parties. This possibility will be discussed in Part II below.

II. BARGAIN-MIMICKING DEFAULTS IN CORPORATE LAW

From the leading economic perspective, the corporation is a nexus of contracts, and the corporate charter and bylaws are contractual in nature.[52] These contractual relations are thought to have a variety of gaps, and courts provide default content to fill those gaps when the parties are silent. Fiduciary duties are a prominent example of such a

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50 *Cf.* Griffith, *supra* note 10, at 7–8 (analyzing the fiduciary duty of good faith in similar terms). More generally, commentators have suggested that indeterminacy in corporate law can play a role in Delaware's competition with other jurisdictions. *See, e.g.*, Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908 (1998).

51 It should be noted that efficiency values and contractual norms are not the only values which might provide such a justification. For example, Seana Shiffrin has recently developed an account of legal vagueness which suggests that, under certain circumstances, vagueness can induce a desirable form of moral deliberation. *See* Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214 (2010). Quite possibly directors would be encouraged to engage in this moral deliberation in determining the proper objectives of their fiduciary conduct. *See* Gold, *supra* note 15, at 1104–06 (discussing the relevance of Shiffrin's account to the vagueness of fiduciary beneficiaries in corporate law).

52 *See* Bainbridge, *supra* note 18, at 552–53 (describing the "nexus of contracts" model).

gap-filler. In addition, the now prevailing view of directors' fiduciary duties—and of many other corporate law doctrines—is that they are majoritarian default terms.[53] That is, they are default terms that the majority of corporate actors would select ex ante in a world of zero transaction costs.[54]

Within this rubric, there are substantial differences of opinion about the purpose of the firm and the various legal rules which regulate the firm. As noted, some scholars take a shareholder primacy view, while others take a director primacy view.[55] Team production theories have also gained currency in recent years.[56] Yet there are common features to each approach. Generally speaking, a majoritarian approach is dominant as a starting point, and these theories then offer distinctive understandings of what this majoritarian outlook requires.

On the other hand, while corporate law is replete with majoritarian default rules, it plausibly contains default rules of varying types. In particular contexts, corporate law may make use of tailored defaults,[57] penalty defaults,[58] sticky defaults,[59] or muddy defaults.[60] Defaults may also be designed to take into account the evolution of corporate law.[61] Each of these variants has its proponents, and when courts fill gaps in the corporate contract, they may draw on each of these defaults.

This Part suggests that an additional approach could be operating in corporate law—a bargain-mimicking approach. In a recent paper, Omri Ben-Shahar has argued that this type of default approach helps us

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53 For a leading economic account of fiduciary duties in this vein, see Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425 (1993).

54 *Id.* at 426.

55 The meaning of the shareholder primacy category is somewhat ambiguous. However, it often incorporates the view that shareholders are the owners of the corporation, that they have ultimate control over the corporation, and that directors owe fiduciary duties to maximize wealth for the shareholder class. For an argument that this is a consensus position in corporate law, see Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439–40 (2001). For a discussion of the director primacy view, see generally Bainbridge, *supra* note 18.

56 *See generally* Blair & Stout, *supra* note 3.

57 On tailored defaults and their relation to corporate fiduciary duties, see Mariana Pargendler, *Modes of Gap Filling: Good Faith and Fiduciary Duties Reconsidered*, 82 TUL. L. REV. 1315 (2008).

58 On penalty defaults, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); *see also* Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591 (1999).

59 On sticky defaults in corporate law, see Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. REV. 383 (2007).

60 On muddy defaults in the law of business organizations, see Stephen M. Bainbridge, *Contractarianism in the Business Associations Classroom:* Kovacik v. Reed *and the Allocation of Capital Losses in Service Partnerships*, 34 GA. L. REV. 631, 651–52 (2000); *see also* Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1081–85 (2000) (describing use of muddy rules in corporate law).

61 *See* Lucian Arye Bebchuk & Assaf Hamdani, *Optimal Defaults for Corporate Law Evolution*, 96 NW. U. L. REV. 489 (2002).

to understand certain features of contract law. The idea of a bargain-mimicking default may also help us to understand the fiduciary beneficiaries puzzle. The Section below will begin by explaining what a bargain-mimicking default is, and how it may be justified in some settings.

A. *The Contractual Theory of Bargain-Mimicking Defaults*

Bargain-mimicking defaults differ from the ordinary contractual default in that, when adopting them, courts are not necessarily seeking to maximize the joint surplus stemming from a contract. Courts are instead seeking a gap-filler that will reflect the relative bargaining power of the contracting parties. This means, in some cases, favoring the stronger party. But while that outcome might sound counter-intuitive, under the right circumstances the approach may be a reasonable one.

As Ben-Shahar notes, "[t]he most broadly accepted principle of gap-filling is that courts should 'mimic the parties' will.'"[62] In the typical gap-filling case, there is no will as such to be followed. In addition, we do not generally know the precise terms to which the individual parties would have consented. In light of these realities, courts infer a hypothetical will.[63] From this perspective, courts often assume that the parties would have opted for the most efficient terms. Or, as Ben-Shahar puts it: "Assuming parties are rational, they would have agreed upon terms that maximize their joint surplus, irrespective of the distributive impact of such terms."[64]

In order for a surplus-maximizing approach to work, Ben-Shahar suggests that there must be a surplus-neutral term (typically, the price term).[65] Yet it is possible for a contract to have a gap with respect to this surplus-neutral term. With respect to these surplus-neutral contract terms, Ben-Shahar accordingly suggests that we depart from the surplus-maximizing principles usually applied to fill gaps.[66] Where these surplus-neutral terms are at stake, the parties' interests will often diverge—there may be no jointly shared preferences that we can

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62 *See* Ben-Shahar, *supra* note 17, at 396 (quoting Richard Craswell, *Contract Law: General Theories*, *in* 3 ENCYCLOPEDIA OF LAW AND ECONOMICS 1, 3-4 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000)).

63 *See id.* ("Of course, the notion of the parties' will is hypothetical. Because the contract contains a gap, we do not know what they would have consented to.").

64 *Id.* at 397.

65 *See id.*

66 *See id.* ("[T]he surplus-maximizing conception of gap filling is, by definition, insufficient to resolve all gaps because it does not resolve gaps in the price term or in any other contract term that is purely distributive.").

hypothesize.[67] Ben-Shahar thus argues that we need a different kind of default rule to address these gaps.

In such cases, it is arguable that we can still respect the parties' agreement.[68] A common justification for the standard hypothetical bargain methodology is that it reflects the terms that most similarly situated parties would have agreed upon, and this can be helpful information as to what the specific parties before the court would have done. A bargain-mimicking default can be justified on similar grounds. As Ben-Shahar explains:

> In the case of distributive terms, the parties do not have a joint interest, ex ante.... The argument, therefore, is that the central conception of what the joint will is must be supplemented by a criterion that would apply to settings that are purely distributive. Fortunately, courts often have information that can help them tease out what the parties would have agreed upon: information about the parties' relative bargaining power.[69]

In other words, the principle that we should seek terms that the parties would have selected underpins both the standard majoritarian hypothetical bargain analysis, as well as the bargain-mimicking analysis. The aim is to provide terms that the parties would have arrived at, if they had addressed the issue.[70]

The next Section of this Article will consider whether corporate fiduciary law presently includes bargain-mimicking defaults. We might question a bargain-mimicking justification for dynamic fiduciary duties if bargain-mimicking were unheard of in corporate law. In fact, there are fiduciary cases which suggest that courts have already adopted a bargain-mimicking default. The clearest example occurs in circumstances where weaker investors attempt to disempower an investor with greater bargaining power. Thus, at least in the abstract, it is plausible to apply the approach to dynamic fiduciary duties.

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67 *See id.* ("[T]he existence of a gap in a contract is often an indication that a consensus could not be reached because a single jointly preferable term does not exist.").

68 This is not to say that a court-provided gap-filler is the same as a term that the parties actually consented to. It may, however, be the next best thing to a term that the parties actually consented to.

69 *See* Ben-Shahar, *supra* note 17, at 404.

70 If Ben-Shahar is correct on the hypothetical bargain justification for a bargain-mimicking approach, it is possible that this justification would supersede the interest in adopting majoritarian default rules. For a suggestion along these lines, see Shawn J. Bayern, *The Limits of Bargaining Power as an Interpretive Aid* 2 n.11 (Fla. St. Univ. Coll. of Law, Public Law Research Paper No. 381, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1430704. Although that concern is a significant one, it is beyond the scope of this Article.

B. *Application to the Corporate Setting*

As indicated above, corporate law, for the most part, follows a majoritarian gap-filling strategy. Yet it is not hard to find default rules in corporate law that follow a bargain-mimicking approach. The bargain-mimicking terminology is admittedly novel, but the reader need not conclude that this approach is inconsistent with settled principles of corporate law. To the contrary, corporate law plausibly includes a variety of default rule categories, and the bargain-mimicking approach is a recognizable example.[71]

Consider the case of *Adlerstein v. Wertheimer*.[72] In that case, Mr. Adlerstein had founded a corporation, Spectrumedix. Adlerstein encouraged two other individuals, Wertheimer and Mencher, to join the enterprise, and Wertheimer and Mencher were both elected to the board.[73] The firm, however, suffered a liquidity crisis. Adlerstein helped address this crisis by providing financial support. This support also came at a price. After loaning Spectrumedix $500,000, Adlerstein was provided a convertible note which could be converted into stock with 80,000 votes per share. Based on a partial conversion of this note, Adlerstein then controlled 73.27% of the voting power of the corporation.[74]

Over time, the corporation ran into further difficulty, and Wertheimer and Mencher became convinced that Adlerstein was harming the business substantially. Adlerstein had been accused of sexual harassment of an employee, and Wertheimer and Mencher also believed that he had been giving inaccurate information to the board.[75] It was apparent to Wertheimer and Mencher that the firm was in serious trouble.[76] In response to these concerns, Wertheimer and Mencher contacted Ilan Reich, an investor with experience in turning around distressed corporations.[77] Reich was interested in investing if he could take charge of the company.[78] Given Adlerstein's dominant voting rights, Wertheimer and Mencher needed to find a way to give control to Reich. Wertheimer and Mencher discussed with Reich whether Adlerstein could be fired as CEO.[79]

71 That said, one might conclude that the bargain-mimicking approach, when it is used in these cases, is used for majoritarian reasons.

72 No. CIV.A. 19101, 2002 WL 205684 (Del. Ch. Jan. 25, 2002).

73 *See id.* at *1.

74 *See id.* at *2.

75 *See id.* at *2–3.

76 *See id.* at *3.

77 *See id.* at *4–5.

78 *See id.* at *4.

79 *See id.* at *5.

In order to bring about a shift in control of the firm, a board meeting was necessary. Adlerstein allegedly called a board meeting at the urging of Wertheimer and Mencher, but was not told of their plan to shift control to Reich.[80] At this meeting, Wertheimer and Mencher voted to remove Adlerstein for cause from his office as CEO, and to have the corporation issue sufficient numbers of super-voting shares to Reich such that he gained voting control.[81] Following the meeting, Reich then voted his shares by written consent to remove Adlerstein from the board of directors.[82]

Adlerstein sued, claiming that the board meeting was invalid, and that the events which occurred at that board meeting were in violation of Wertheimer and Mencher's fiduciary duties. The Delaware Chancery Court concluded that the board meeting was validly called,[83] but it held that Wertheimer and Mencher had violated their fiduciary duties by implementing their scheme in secret.[84]

As the court noted, Adlerstein possessed the contractual power to block the issuance of the super-voting shares to Reich.[85] Given his voting power as a shareholder, he could remove Wertheimer or Mencher from the board, effectively barring their plan from success. He was prevented from exercising this power by the fact that the agenda for the board meeting had not been shared with him beforehand. The court indicated that a shareholder or director is ordinarily not entitled to such an agenda, but found that as a director and controlling shareholder, Adlerstein's situation was different.[86] Indeed, the court emphasized that the hidden conduct at issue was improper even if it was designed to "save the company."[87]

Under a number of theories, the *Adlerstein* case is hard to explain. It has been suggested that the court's decision conflicts with both director primacy and team production theories of corporate law.[88] Arguably, Wertheimer and Mencher were choosing a path that would

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80 *See id.* at *5–6.

81 *See id.* at *6–7.

82 *See id.* at *7.

83 *See id.* at *8.

84 *See id.* at *11–12.

85 *See id.* at *9.

86 *See id.* at *9 n.28 ("The outcome in this case flows from the fact [that] Adlerstein was both a director and a controlling stockholder, not from either status individually.").

87 *See id.* at *11.

88 *See* Charles R.T. O'Kelley, *The Entrepreneur and the Theory of the Modern Corporation*, 31 J. CORP. L. 753, 774–76 (2006). Other (non-bargain-mimicking) explanations are available. Charles O'Kelley offers an entrepreneur-based theory, for example. *See id.* at 776–77. The *Adlerstein* case may also be explained under a particular conception of loyalty. *See* Gold, *supra* note 26, at 483 n.130. In addition, it is conceivable that *Adlerstein* can be squared with the leading standard accounts of fiduciary duties and corporate law. For example, *Adlerstein* is possibly consistent with a shareholder-primacy view. Its reasoning is nonetheless not an obvious outcome of that approach.

serve the best interests of the shareholders, and also the corporation. But despite an absence of conflicting interests, their choice did not receive judicial deference. The driving force of the court's opinion was focused elsewhere. The court was concerned with the position of power which Adlerstein held—he had the ability to stop the plot if he had known about it, and this power to halt Wertheimer and Mencher's scheme made all the difference.[89]

Although the *Adlerstein* case may be difficult to square with standard accounts, it is understandable as an application of a bargain-mimicking default. Fiduciary duties, on this account, are filling a gap with terms that reflected Adlerstein's relative bargaining power in comparison to the other corporate constituencies. And, while the *Adlerstein*-type fact pattern is not common, the case is not sui generis. In similar contexts, the Delaware courts have applied the same basic doctrine.[90]

We can thus see that courts, at least sometimes, apply bargain-mimicking defaults to corporate problems, in effect favoring stronger parties within the corporate polity.[91] A bargain-mimicking approach is not foreign to corporate law. Well-established precedents adopt the basic framework. It is a separate question whether the dynamism of fiduciary duties can also be explained as a bargain-mimicking default.

1. The Problem in Calculating Bargaining Power

Cases like *Adlerstein* present relatively clear allocations of bargaining power, but in other cases these allocations will be hard to determine. Should courts attempt to provide a bargain-mimicking default, a crucial challenge is to figure out how such an approach could function accurately. Bargain-mimicking defaults require courts to assess highly difficult questions of bargaining power. Inquiries into bargaining power require courts to address often obscure relations among the parties, with substantial limits to both information and judicial expertise.

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89 *See Adlerstein*, 2002 WL 205684, at *9 n.28 (discussing the significance of Adlerstein's role as both a director and controlling shareholder).

90 *See, e.g.*, Koch v. Stearn, Civ. A. No. 12515, 1992 WL 181717 (Del. Ch. July 28, 1992); *see also* VGS, Inc. v. Castiel, No. C.A. 17995, 2000 WL 1277372 (Del. Ch. Aug. 31, 2000) (applying similar doctrine in an LLC setting).

91 In considering this possibility, we might query whether a bargain-mimicking term should reflect ex ante or ex post allocations of bargaining power. These are different types of bargain-mimicking. As Ben-Shahar indicates, moreover, some contracts may be designed ex ante so that ex post shifts in bargaining power will affect the terms of the contractual relationship. *See* Ben-Shahar, *supra* note 17, at 413–15 (suggesting that parties may use a "technique of one-sided, ex post control over a term to create what is effectively a bargain-mimicking, gap-filling regime").

The difficulty in assessment is great for ordinary contracts, and it may seem insurmountable in the corporate context. If courts are inquiring after the fact, how can they reconstruct the relative bargaining power of multiple corporate constituencies? If they can somehow make that determination, how expensive and time consuming an adjudicative process would be required? Given that bargaining power is not publicly advertised, the task could be extremely difficult. In fact, it sounds like the type of inquiry that courts would routinely get wrong.

In the contract setting, Ben-Shahar provides several responses to this challenge. For one, he suggests that "implementing a regime with error, or only in those cases where the parameter is verifiable, is better than nothing."[92] This point presumably depends on the court's error rate, as well as the degree of error when mistakes occur.[93] But even so, there are surely cases in which determining relative bargaining power should not be hard. As Ben-Shahar indicates, "someone who sells a good for which demand is inelastic undeniably possesses greater bargaining power than those with whom she is negotiating."[94]

In addition, courts are likely familiar with bargaining power inquiries. While we may not traditionally think of courts in the bargain-mimicking role, they are often called upon to consider relative bargaining power. Ben-Shahar notes that the unconscionability doctrine, for example, often takes into account whether there was one-sided bargaining power.[95] Bargaining power can be a significant issue in duress cases, and it is relevant to the contra proferentum principle.[96] Ben-Shahar concludes: "a substantial doctrinal tradition is . . . founded on the belief that courts can identify bargaining power and determine legal consequences based on this identification."[97]

Granting these arguments, it is not clear that they carry over to the standard corporate context.[98] How is a court to determine relative bargaining power among a spectrum of institutional shareholders, creditors, and other potential constituencies? Unconscionability cases are often extreme cases. And, to the extent there is corporate precedent for bargain-mimicking in cases like *Adlerstein*, these are also extreme cases. No one could doubt Mr. Adlerstein's bargaining power. How can

92 *Id.* at 408.

93 It should also be noted that a default that merely gives an approximation of what the parties would have bargained toward is not necessarily a default that the parties would consider acceptable if they had bargained over the issue.

94 Ben-Shahar, *supra* note 17, at 408.

95 *See id.* at 409.

96 *Id.*

97 *Id.*

98 Note that we might still question these arguments in contractual settings as a general matter, even if they resolve our concerns in particular cases. *See* Bayern, *supra* note 70, at 4-6 (questioning the reliability of a bargain-mimicking approach to contractual gap-filling).

a court make the more subtle determinations when there are many parties involved, and where the power relations are not so clear cut?

The problem's complexity is substantial. In practice, a bargain-mimicking default does not mean that courts should give the more powerful party or parties whatever they happen to want.[99] In many cases, compromises will be required, in light of the weaker parties' strong preferences on particular subject matters. The analysis of likely bargains thus includes highly fact-specific concerns about individual preferences and bargaining strategy. This could make the bargain-mimicking inquiry quite difficult, even if courts are relatively well informed.

In addition, the powerful party may have already used its bargaining power on a different issue from the one before the court.[100] There are also limits to what weaker parties may be willing to tolerate. Accordingly, the mere fact that one party is stronger in bargaining power overall does not mean it should receive its vision of the ideal contract term. Indeed, as Ben-Shahar notes: "If the stronger party suppressed a specific issue and deliberately left a gap, it could actually be an indication of the limits of her bargaining power."[101]

When assessing relative bargaining power, courts should also recognize that parties may have bargaining power in different areas.[102] This can create substantial complexity in the corporate arena. Creditors, for example, may have significant bargaining power when issues arise that relate to specific terms in their debt agreement. They may have increased influence when the corporation is in financial difficulty. Creditors may have much less bargaining power when a business decision is not plausibly covered by the debt agreement. In light of the quantity of constituencies involved in corporate fact patterns, these are not minor challenges for a court to resolve.

2. The Board as an Estimator of Bargaining Power

A potential answer to these accuracy concerns emerges when we consider an analogous setting. In the statutory interpretation setting, courts sometimes apply what amounts to a bargain-mimicking default for unclear statutes.[103] In Einer Elhauge's phrase, courts apply a "current

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[99] *See* Ben-Shahar, *supra* note 17, at 409–10 (noting that some gaps may reflect limits of a stronger party's bargaining power).

[100] *See id.* at 410.

[101] *Id.* at 410.

[102] *Id.* at 419 (describing this possibility in the insurance contract setting).

[103] For a discussion of these default rules, see generally ELHAUGE, *supra* note 27.

preferences default."[104] This default seeks to fill statutory gaps by looking to the currently enactable preferences of the legislature. A current preferences default rule is effectively a bargain-mimicking default rule based on the present-day bargaining power of legislative and executive actors.[105]

As with corporations, legislatures present serious challenges for a court that would seek to assess allocations of bargaining power. How can courts know which members of Congress would get their way? Given the complexities of legislative decision-making, coalition-based votes, and also presidential vetoes, current-preferences defaults for statutes seem just as challenging to implement as bargain-mimicking defaults for contracts. A potential answer to this challenge is to use another legal institution to address hard cases.

In the statutory setting, courts do not always need to fill statutory gaps, as agencies do much of the gap-filling. Indeed, under *Chevron U.S.A. Inc. v. Natural Resources Defense Council*,[106] courts must often defer to agency interpretations of unclear statutes. Where the statutory meaning is clear, courts apply that statutory meaning. Where that meaning is ambiguous or vague, courts generally defer to the relevant agency's interpretation of the statute's meaning. As a consequence, a very large number of federal statutes are effectively interpreted by agencies rather than the judiciary.

The *Chevron* doctrine can be explained in several ways. For example, it may be understood as a separation of powers-based doctrine, or it may reflect a judgment that agencies have greater policy expertise than courts.[107] Elhauge suggests that we can explain this allocation of authority on a different basis. From his perspective, the *Chevron* doctrine is a straightforward mechanism to estimate enactable legislative preferences. In Elhauge's view: "[*Chevron*] proves easy to explain if courts are . . . applying default rules that track reliable indications of current enactable preferences, because decisions by current agencies normally provide such an indication, given the agencies' political accountability."[108]

On this view, agencies are likely to be responsive to currently enactable preferences.[109] As Elhauge notes, agency heads are selected by

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104 *See id.* at 9–10 (using this phrase to describe defaults that track the preferences of the current legislative polity).

105 Indeed, Ben-Shahar notes this fact. *See* Ben-Shahar, *supra* note 17, at 430.

106 467 U.S. 837 (1984).

107 For a helpful discussion of different theories regarding the *Chevron* doctrine, see Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 863–73 (2001).

108 ELHAUGE, *supra* note 27, at 79.

109 The key question, however, is a comparative one. The question is not whether agencies are ideally responsive to currently enactable preferences, but whether their decisions are more likely to reflect those preferences than the decisions of courts.

the President and confirmed by the Senate, in significant part based on the acceptability of their policy views.[110] Once confirmed, agency heads are supervised by the executive, and legislative committees provide further oversight.[111] Agency heads also serve for limited terms, and agencies benefit from ex parte contacts with affected parties.[112] Elhauge concludes: "The policy views that govern the actions of agency heads thus generally come about as close to being a barometer of current political preferences as we can get."[113]

We may or may not agree that Elhauge has captured the rationale of the *Chevron* doctrine. But notice that the structure of Elhauge's *Chevron* argument can be applied to other settings in which courts may wish to address allocations of bargaining power. Indeed, the argument is particularly suggestive for the corporate setting. Non-judicial institutions may be available for bargain-mimicking purposes even if we have significant doubts that courts are well-suited for the task, and boards of directors could plausibly serve this function.[114]

For present purposes, the relation of courts to boards is similar to the relation of courts to agencies under the *Chevron* doctrine.[115] In the corporate context, courts are in a poor position to figure out the shifting allocations of bargaining power among corporate constituencies. Even so, many gaps in the corporate contract are filled by a party that should know current preferences among corporate constituencies quite well: the board of directors.[116] Director decisions may reflect these preferences. In turn, the dynamism of fiduciary duties may reflect changes in power among corporate constituencies.

Given the various ways in which corporate constituencies can benefit (or suffer) from board discretion, it makes sense to expect that these constituencies will seek influence over board decisions. These

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110 *See* ELHAUGE, *supra* note 27, at 80.

111 *See id.*

112 *See id.* at 82.

113 *Id.* at 80. There are also practical features of judging which make it likely that agencies will be superior at assessing current preferences in a large run of cases. Judges are often appointed years prior to the relevant dispute, and may not be well-positioned to know the current bargaining power of legislative actors. *See id.* at 81.

114 Note that this idea may be helpful for present purposes even if we reject Elhauge's account in the statutory setting. Elhauge's theory has come under substantial criticism as an approach to statutory default rules. *See generally* Elizabeth Garrett, *Preferences, Laws, and Default Rules*, 122 HARV. L. REV. 2104 (2009) (reviewing ELHAUGE, *supra* note 27).

115 This is not to deny that statutory contexts are very different from corporate contexts in other respects. As Elhauge notes, we may not expect legislators to have the same preferences for efficient default rules that we would expect in corporate contexts. *See* ELHAUGE, *supra* note 27, at 5–6.

116 For a suggestion that corporate charters provide a default rule under which boards fill in what would otherwise be contractual gaps, see John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1682–83 (1989).

efforts to obtain influence will have an effect, at least some of the time. In fact, constituent pressure is often thought to play a role in director judgments. As Margaret Blair and Lynn Stout suggest, "the returns to any particular corporate stakeholder from participating in the corporation will be determined not only by market forces, but by political forces."[117]

There are also many opportunities for investors and other corporate constituencies to influence directors. Unlike the judicial context, where ex parte contacts are a problem, significant investor contacts with directors are often acceptable (assuming no insider trading or related concerns).[118] Furthermore, as institutional shareholders have grown in strength, the similarities to lobbying in the legislative arena have also grown. Institutional investors may engage in private negotiations with management.[119] In addition, shareholders may threaten proxy contests, and precatory votes may signal the viewpoints associated with large numbers of shares.[120]

Indeed, various constituencies have bargaining power, and regularly exercise that power. Hedge funds are often quite active with respect to the corporations in which they invest.[121] Likewise, creditors also exert influence. Boards have changed course on business strategy when confronted with unhappy bondholders.[122] Labor unions are often vocal participants regarding corporate policy, and may effectively be represented by directors on the board.[123] Naturally, different constituencies will have greater bargaining power with respect to different issues. In some cases, contractual rights will be directly on point. In some cases, an issue will be of particular concern to one constituency, and less relevant to other constituencies. But corporate boards do not lack for signals regarding these interests.

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117 Blair & Stout, *supra* note 3, at 325.

118 For example, Regulation FD could have an impact with respect to some of these contacts. For a discussion of that regulation and its effects, see Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 48–52 (2002).

119 *See* John Pound, *The Rise of the Political Model of Corporate Governance and Corporate Control*, 68 N.Y.U. L. REV. 1003, 1056–57 (1993).

120 *See* Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 622 (2003) (suggesting that precatory votes are "a means to power").

121 *See* Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1278–79 (2008) (describing the role of hedge funds as activist investors).

122 *See, e.g.*, HB Korenvaes Invs. v. Marriott Corp., Civ. A. No. 12922, 1993 WL 257422, at *5 (Del. Ch. July 1, 1993) (describing change to a major business transaction following bondholder litigation).

123 Note that, in addition to the traditional sources of bargaining power held by labor unions, they may also hold bargaining power as activist shareholders. *See* Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018 (1998).

Boards are also uncannily good at winning close shareholder votes. As Yair Listokin's work suggests, management-sponsored proposals are much more likely to win votes by a small margin than to lose votes by a small margin.[124] This skill in winning close votes suggests that directors often have a reasonably accurate knowledge of where the corporate polity stands. If nothing else, it suggests that boards have the ability to acquire that knowledge when it matters to their own interests.[125] We not only have indications that parties lobby boards, we also have evidence that boards (at least some of the time) find ways to acquire accurate information about the corporate polity.

Now, it is a separate question whether board decisions in the relevant area will accurately reflect the parties' bargaining power. Boards might be quite skillful at knowing how bargaining power is disseminated among the various parties, without actually choosing to respect that bargaining power. It is also entirely possible that bargaining power will only be recognized in those cases where it benefits directors, or that it will be recognized in ways that overindulge the interests of more powerful constituencies.[126] That said, given the way in which directors are elected, their incentives will often push them in a bargain-mimicking direction, and directors' understanding of bargaining power among the various parties is likely to be more accurate than the understanding of the courts.[127]

Boards will not always get things right. Yet they have a comparative advantage in accessing information, and incentives that will commonly push them toward interpretations of their duties that favor parties with stronger bargaining power. It is reasonable to think that their decisions are more likely to reflect present allocations of bargaining power than those of the judiciary. From this perspective, we can understand director decision-making as a mechanism for providing a bargain-mimicking default.

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124 *See* Yair Listokin, *Management Always Wins the Close Ones*, 10 AM. L. & ECON. REV. 159, 161 (2008).

125 *See id.* at 161–62 ("The results indicate that, at some point in the voting process, management obtains highly accurate information about the likely voting outcome and, based on that information, acts to influence the vote.").

126 Listokin's findings could be consistent with this view. One of his conclusions is that boards find ways to influence shareholder voting outcomes once they have acquired knowledge about likely voting results. *Id.* The end result of a board's review of allocations of bargaining power could still be self-serving, however, without being bargain-mimicking.

127 One might think that a focus on allocations of bargaining power would result in a team production-type fiduciary outcome. But given director incentives, it is entirely possible that the board's interpretation of its fiduciary duties will ultimately focus on shareholder interests. *Cf.* Millon, *supra* note 19, at 1030 ("To the extent that rent allocation decisions depend on politics rather than law, shareholders possess substantial leverage that privileges them in relation to workers and other stakeholders.").

C. *Summary*

In both the contractual and statutory settings, the law sometimes adopts a bargain-mimicking default. Like these other spheres, corporate law can be at least partially understood in bargain-mimicking terms. Cases like the *Adlerstein* case provide good examples. Dynamic fiduciary duties may also fall into this category. If boards shift their interpretation of fiduciary beneficiaries in light of shifts in allocations of bargaining power, then the dynamism of fiduciary duties may follow a bargain-mimicking pattern.

So far, however, this tells us little about the merits of the existing law. Fiduciary duties are, sometimes, responsive to whichever parties possess bargaining power respecting a potential board decision. In this light, the dynamism of fiduciary duties can be seen as a bargain-mimicking device. Justifying dynamic fiduciary duties on this basis is more difficult. Part III will discuss the challenges in justifying a bargain-mimicking approach.

III. THE MERITS OF A BARGAIN-MIMICKING APPROACH

A. *Costs and Benefits*

The dynamism of fiduciary duties could, in theory, reflect shifting allocations of bargaining power. At the level of corporate policy, however, it is hard to determine whether a bargain-mimicking approach is desirable. To a large degree, the problem is one of empirical uncertainty.[128] The proper role (if any) for a bargain-mimicking approach is difficult to resolve under existing data, and this is unlikely to change in the near future.

Some of the effects of bargain-mimicking fiduciary duties can be predicted. In certain contexts, a bargain-mimicking default should decrease transaction costs. Ben-Shahar emphasizes this point for ordinary contracts.[129] Where there is lopsided bargaining power, anything other than the bargain-mimicking default will often result in an effort by the more powerful party to circumvent the judicially chosen

128 *Cf.* Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1201 (2002) ("Where can we search for empirical evidence on the question of whether shareholder primacy (the property model) or director primacy (the entity model) is the best approach to corporate governance? For now, at least, I doubt that academics can provide a definitive answer. Whether the social losses from shareholder primacy outweigh the social losses from allowing greater director discretion is an extraordinarily complex question. Moreover, the answer is likely to vary from firm to firm and from one historical period to another.").

129 *See* Ben-Shahar, *supra* note 17, at 411-13 (discussing transaction cost benefits).

gap-filler in future cases.[130] The same point seems plausible for corporate relationships. In such cases, parties with substantially greater bargaining power will find ways—albeit potentially costly ways—to bring about the types of business decisions they would receive from a board that reflected their bargaining power at the time of its decision making.[131]

Other benefits may also exist. Perhaps giving boards the flexibility to serve a dynamic range of constituencies (whether within the shareholder class or outside of it) would encourage investors with valuable ideas to contribute more financing to the business. Overinvestment in influence is a concern, but there can be cases where investment has been limited by hold-up concerns.[132] Where an individual who would make a surplus-enhancing investment is also in a position to develop a strong bargaining position, the ability to invest in influence may then be desirable.[133]

On the other hand, there are a variety of risks associated with bargain-mimicking fiduciary duties. For one, the vagueness of fiduciary beneficiaries may facilitate self-dealing. The "two masters" problem is a substantial risk.[134] The greater the variety of time horizons, constituencies, and shareholder interests which are available to choose from, the more likely it is that directors can disguise a business decision which benefits their own personal interests by arguing that it is really a business decision made for "the corporation and its shareholders."[135]

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130 *See id.* at 412 ("If the law accords a party the same terms that she could secure by explicit (and harsh) bargaining, the party with the bargaining power need not expend the costs of explicitly specifying these same terms."). As Ben-Shahar indicates, explicit specification will be likely in future cases. *Id.* ("Perhaps even more than in other contexts, when the distribution is at stake it is likely that the stronger party will insist on contracting around a nonmimicking gap filler."). Another possible benefit of bargain-mimicking defaults is that the weaker party need not be humiliated by explicitly dictated terms. *Id.* at 412–13.

131 The ability to avoid constant updating of terms could be a related benefit. *Cf.* ELHAUGE, *supra* note 27, at 45 ("A current preferences default rule also has a nice side benefit. It reduces the legislative time that would otherwise have to be spent updating statutes.").

132 *See* Ben-Shahar, *supra* note 17, at 417.

133 *See id.* ("If the party who makes the surplus-enhancing investment is also the one who is in a position to make the bargaining-leverage investment, it is no longer clear that the latter investment is a social waste.").

134 *Cf.* STEPHEN M. BAINBRIDGE, THE NEW CORPORATE GOVERNANCE: IN THEORY AND PRACTICE 67 (2008) ("[A]bsent clear standards, directors will be tempted to pursue their own self-interest.").

135 In this regard, we do need to keep in mind that the business judgment rule is, for present purposes, a given. Even if courts were to precisely describe the intended beneficiaries of fiduciary duties, it would be possible for covert self-dealing conduct to survive scrutiny. That said, it remains possible that the two masters problem will be greater the more potential constituencies benefit from directors' fiduciary duties—even where liability is not at issue. This could be the case if it is easier for directors to spin their conduct to other directors based on the vagueness of the law. It could also be the case if directors have less reliable judgments on fiduciary beneficiaries when they have a self-interested motive. Directors might subconsciously choose whichever interpretation of fiduciary beneficiaries is most likely to benefit the directors.

In addition, there is a potential problem of rent-seeking. As Iman Anabtawi has emphasized, individual shareholders sometimes seek private benefits from the firm, at the expense of the common interests of all shareholders.[136] The same point holds true if we consider other corporate constituents.[137] They expend funds seeking to influence the board. Presumably, a legal policy on fiduciary duties that encourages bargain-mimicking results could also encourage various parties to seek to influence the board for their own private benefit.

In other words, a vaguely defined range of potential fiduciary beneficiaries may raise influence costs.[138] One example of such costs occurs when individual shareholders or other corporate constituents successfully divert director decision-making for their private benefit. But, as Anabtawi notes, influence costs may also arise when a would-be rent seeker fails at obtaining a private benefit. For the battle over influence is itself costly. These "squabbling costs" which result from inter-shareholder disputes would be an undesirable outcome,[139] and in many cases these costs would be substantial.

Moreover, depending on the business decision at issue, there is some risk that boards will lose their reputation for neutrality. As David Millon has noted:

> For the board to play a facilitating role in cultivating trust between workers and shareholders, both parties must be willing to trust the board itself. They must believe in its neutrality; the board must not be perceived as acting solely or primarily on behalf of one party or the other.[140]

If the board is sufficiently overt, or sufficiently biased, in its favoring of particular constituents, this could have undesirable side effects on the relation between various corporate constituents.[141]

And finally, there are error costs. It is quite reasonable to expect boards to more closely reflect allocations of bargaining power than courts do. It does not follow that boards are particularly accurate or reliable in this role. Deviations are especially likely given that boards are not instructed by courts to reflect allocations of bargaining power. Board decisions may effectively reflect allocations of bargaining power,

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136 *See* Anabtawi, *supra* note 4, at 575–76.

137 *See* Millon, *supra* note 19, at 1031 ("[I]f the board owes no legal duty to any corporate constituency, everything is potentially up for grabs and everyone therefore stands to gain from efforts to influence the board's allocation decisions—no one can afford to stand on the sidelines.").

138 *See* Anabtawi, *supra* note 4, at 575 (defining influence costs in terms of distortions in director decision making, and in terms of resources spent in reallocating wealth).

139 Anabtawi deserves credit for the "squabbling costs" coinage. *See id.* at 577.

140 *See* Millon, *supra* note 19, at 1035–36.

141 There are also other potential costs. For example, well-meaning directors might expend significant time and effort attempting to render determinate an indeterminate set of duties.

but they may still fail to do so with sufficient regularity or precision to overcome the mistakes and inconsistencies which will inevitably result.

While the scope and likelihood of these various costs is unclear, these costs are not trivial concerns. The benefits of a vague rule respecting fiduciary beneficiaries could outweigh the costs, but this is non-obvious. Furthermore, the overall costs and benefits are non-obvious in an area where we are unlikely to obtain reliable empirical data, especially in the near term. We cannot readily determine how helpful, or harmful, the bargain-mimicking features of fiduciary duties ultimately are. Given these concerns, the next Section of this Article will assess a distinct, non-efficiency reason for adopting a bargain-mimicking default.

B. *Autonomy Values*

Autonomy values suggest a different perspective on dynamic fiduciary duties.[142] Ideally, the bargain-mimicking approach approximates the hypothetical bargain of the parties in the absence of a majoritarian outcome. In some cases, this may be the best we can do if we wish to respect the parties' contractual choices. The majoritarian approach might give us more than one plausible answer, or no answer at all. Under a bargain-mimicking approach, we can still try to give the parties the outcome they would have reached if they had bargained over the question under dispute.

Suppose there are two business strategies which will result in the same total benefits for a firm and its shareholders, but one strategy is better for medium-term shareholders, and another is better for long-term shareholders. Which one should the board choose based on its fiduciary duties? Both outcomes may maximize wealth for the shareholder class, but the distribution of benefits across constituencies will vary. If the criterion is maximization of joint surplus, there is no obvious way to decide this case.[143]

For these situations, it may make sense to turn to the will of the parties, as it would exist were they to contract over the relevant question. As Ben-Shahar suggests in the contract setting, this idea provides an underpinning for the standard, majoritarian analysis.[144] A

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142 On the potential role of autonomy values in the determination of hypothetical bargains, see David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1825–35 (1991). Since no actual choice was made in the case of a gap, however, "autonomy" is used loosely here.

143 Note that even if the reader has a strong opinion about the appropriate time horizon for board decision-making, this problem can be replicated using a variety of other distinctions among shareholders and other constituencies.

144 *See* Ben-Shahar, *supra* note 17, at 396–97.

bargain-mimicking approach is another means to show respect for the parties' agreement—by seeking what their effective choice would have been—in cases where no actual will exists or where no such will can readily be calculated.[145]

In addition, the bargain-mimicking approach accomplishes a degree of tailoring. Corporate law primarily uses majoritarian defaults, rather than defaults tailored to the preferences of the specific parties. A bargain-mimicking default, in contrast, will take into account allocations of bargaining power among the actual constituents of the specific corporation at issue. It is particularized, rather than generic. From this perspective, a bargain-mimicking default is a way to respect the choices of the individual parties to the precise corporate contract at issue.[146]

Yet there are difficulties here as well. The same concerns with director errors and scope of discretion which undercut a cost/benefit argument will also undercut an autonomy argument. Moreover, there is a temporal concern. It is not clear that autonomy arguments will support a bargain-mimicking default that is tied to allocations of bargaining power as they exist at the time of a board's decision. One could plausibly conclude that the correct bargain-mimicking default must take into account whatever terms the parties would have chosen at the time the corporation was founded. Those terms may be impossible to determine after the fact—both for courts and boards—and they could deviate substantially from the terms which boards are likely to produce ex post.

C. *Summary*

If the bargain-mimicking approach is justifiable, this is most likely to be so in those cases where bargaining power is lopsided. Here, boards (or courts) are in the best position to accurately determine what a bargain-mimicking outcome would be. Likewise, this is a context in which stronger parties are more likely to contract around any contrary, non-mimicking default rule. This is also a context where a bargain-mimicking default will often reflect the design of the parties ex ante.

145 Indeed, we might even conclude that the founders of a corporation intended a bargain-mimicking approach, based on their choice to have decisions made ex post by a board strongly susceptible to allocations of bargaining power. *Cf. id.* at 413–15 (discussing flexible contract drafting designed to provide for outcomes that reflect allocations of bargaining power at a subsequent stage). This argument is somewhat uncertain, in part because it begs the question whether bargain-mimicking approaches are really anticipated.

146 *Cf.* ELHAUGE, *supra* note 27, at 3–5 (suggesting in the statutory interpretation setting that a preference-estimating default rule is a means for courts to be honest agents of the legislature).

Outside this limited domain, the challenges for a bargain-mimicking approach are daunting. True, many board decisions will loosely correspond to allocations of bargaining power among corporate constituents. But deviations could be common, whether they stem from conflicting fiduciary interpretations, director error, or self-dealing. In addition, influence costs are a significant risk. Given each of these concerns, there is far too much uncertainty to conclude that a bargain-mimicking default is a desirable one as an across-the-board approach. In many cases, it is debatable whether bargain-mimicking is even a descriptive fit for the ways in which fiduciary duties are dynamic.

IV. AN EVOLUTIONARY CASE FOR DYNAMIC FIDUCIARY DUTIES

While corporate law may provide an effective bargain-mimicking default in certain cases, this possibility does not adequately justify the current legal doctrine. Bargain-mimicking defaults are not necessarily desirable, especially if we doubt whether our legal and corporate institutions will accurately reflect allocations of bargaining power. In addition, even within such a rubric, we must always ask which time period is at issue. The founders of a corporation might plausibly prefer a default which statically mimics founding era allocations of bargaining power.[147] Whether our focus is efficiency or autonomy, bargain-mimicking is at best a debatable basis for dynamic fiduciary duties.

There is, however, another possibility. By permitting boards to fill gaps in fiduciary duties dynamically, courts are allowing a form of legal experimentation. They are, to use Gordon Smith's recent phrase, providing for "laboratories of corporate governance."[148] This legal experimentation admittedly occurs against a backdrop of judicial uncertainty. Courts will often be unaware if a particular reading of fiduciary beneficiaries is efficient when it occurs.[149] They may

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147 *Cf.* Garrett, *supra* note 114, at 2118–19 (critiquing Elhauge's account of statutory default rules on a similar basis).

148 *See* D. Gordon Smith et al., *Private Ordering with Shareholder Bylaws*, 80 FORDHAM L. REV. 125, 181 (2011) (suggesting amendments to corporate law that would "facilitate private ordering, creating laboratories of corporate governance in U.S. public corporations"). As Smith and his co-authors suggest, one basis for having such laboratories is the reality that different corporate governance structures will work best for different firms. *See id.* at 188 (grounding this insight in transaction-cost economics). Another example of this idea can be found in Kelli Alces's work. *See* Alces, *supra* note 6, at 278–79 (suggesting that a role for an equity trustee would "provide[] a way to replace the state laboratories for corporate contracts with corporate laboratories—each firm has the chance to compose the contract with the best terms for shareholders as balanced against other corporate interests" (footnote omitted)).

149 *See* Baird & Henderson, *supra* note 38, at 1314–15. Baird and Henderson state:

> Our understanding of capital structures is simply too primitive for us to do much more than enforce the contracts that are written as best we can. The default rules we devise—and fiduciary obligations are simply one of these—should be in service of

nonetheless help create legal structures that enable more efficient fiduciary duties to emerge over time.

A. The Evolutionary Account

Whichever institution fills gaps in the corporate contract—be it a court, legislature, or board of directors—it is conceivable that it will do so poorly.[150] It may simply select the wrong default rule. Recent work on corporate default rules has accordingly focused on the problem of uncertainty in determining the desired default content. From this perspective, the concern is to select a default rule that takes into account the possibility that legal institutions will err.[151]

In the corporate setting, the risk that legal institutions will err is relatively high. As others have noted, it is very hard to assess the merits of a shareholder wealth maximization norm as an empirical matter.[152] It is similarly hard to assess the leading alternatives. And courts are especially ill-suited to making these assessments. This Article will thus assume judicial uncertainty as between shareholder primacy, director primacy, and team production models of corporate law.[153] It will likewise assume that courts do not know precisely which understanding of fiduciary beneficiaries is ideal. Dynamic fiduciary duties offer a response to these concerns.

When we are uncertain what regulatory approach will lead to optimal results, a policy that supports variable regulatory approaches can be desirable.[154] Different variations may work in different settings,

> these contracts. Imposing duties on directors that are too rigid or too mechanical may limit the ability of investors to create capital structures that are beyond the ken of those writing the rules.

Id. (footnotes omitted).

150 Indeed, staunch defenders of the majoritarian hypothetical bargain approach recognize the difficulty in determining hypothetical bargains. *Cf.* Easterbrook & Fischel, *supra* note 53, at 445 ("Creating hypothetical contracts is difficult. Judges have less information than the parties.").

151 For one approach to this type of problem, see Bebchuk & Hamdani, *supra* note 61, at 492 ("[W]hen public officials face significant uncertainty about which choice [of default] would be value maximizing, a better strategy often would be to make the choice in a way designed to facilitate change in the event that the chosen default arrangement turns out to be disfavored by shareholders.").

152 *See* Stout, *supra* note 128, at 1201.

153 For arguments suggesting that current legal doctrine is ambiguous with respect to these models, see generally Bruner, *supra* note 8, at 1421-32; and Gold, *supra* note 15.

154 On the merits of variation for regulatory policy, see generally Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480 (2008). Experimentalist approaches to federalism also suggest the merits of variation. *See, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998). There are differences in the details, however. Listokin suggests his approach would differ from experimentalist approaches

and successes and failures can provide information for future reform. Yet, while regulatory variation can provide opportunities for innovation, it is not always beneficial, and can actually be harmful in some settings.[155] Given this risk, Yair Listokin has suggested two conditions for a variation-based response to uncertainty about legal rules: the legal rules at issue must be reversible, and we must be able to learn about their effects.[156] Both conditions are worth considering in the present context.

Dynamic fiduciary duties are likely to give us variation across a spectrum of fiduciary interpretations. The reversibility concern is limited with respect to these outcomes. It is readily possible for courts, legislatures, or corporations themselves to revise directors' fiduciary duties if their content proves undesirable.[157] The question of learning is more difficult. The nuances of fiduciary conduct are often difficult for external parties to observe. But, to a degree, dynamic fiduciary duties should produce variance that we (or at least corporations) can learn from.

Of course, many director interpretations of their own fiduciary duties are opaque to outsiders. Perhaps courts or legislatures will never learn which fiduciary interpretation is optimal; the necessary data may be too difficult to acquire. Yet there is an additional way in which fiduciary variations can provide benefits in the corporate setting. Even if it is difficult to accurately assess which fiduciary interpretations are ideal for which corporations, we may benefit from fiduciary variation as a result of evolutionary processes.[158]

Armen Alchian's insights help to illustrate the basic argument. Alchian notes that "[i]n the presence of uncertainty—a necessary condition for the existence of profits—there is no meaningful criterion for selecting the decision that will 'maximize profits.'"[159] Yet, we can turn to principles of biological evolution to understand the success of

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to federalism in that his argument can support trying risky policies with negative expected values. *See* Listokin, *supra*, at 514.

155 This could be the case for a number of reasons. For example, it might be that particular regulatory variations are quite costly because the regulations at issue are poorly conceived. Or, it could be the case that a uniform regulatory policy will cut down on information costs or administrative costs in a manner that outweighs the benefits of variance.

156 *See* Listokin, *supra* note 154, at 514.

157 The ability to reverse is enhanced by the flexible practice of stare decisis in Delaware. *Cf.* Fisch, *supra* note 60, at 1078 (suggesting that the Delaware Supreme Court "appears ready to distinguish or overrule a precedent without regard to considerations of stare decisis").

158 For a prior application of evolutionary arguments to corporate law, see Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PENN. L. REV. 1735, 1757–58 (2001) ("[F]irms that successfully encourage trust among their participants on relevant tasks can enjoy an evolutionary advantage over firms that do not.").

159 *See* 1 ARMEN A. ALCHIAN, *Uncertainty, Evolution, and Economic Theory*, *in* THE COLLECTED WORKS OF ARMEN ALCHIAN 5 (Daniel K. Benjamin ed., 2005).

firms.[160] From an evolutionary perspective, "those who realize positive profits are the survivors; those who suffer losses disappear."[161] An equivalent of natural selection applies. This insight, in turn, suggests two conclusions: "First, success (survival) accompanies relative superiority; and, second, it does not require proper motivation but may rather be the result of fortuitous circumstances."[162]

An evolutionary understanding suggests a potential justification for a legal system with dynamic fiduciary duties. Courts cannot determine what will maximize profits any more than boards of directors. Nor can courts determine which understanding of fiduciary beneficiaries will lead firms to success. Dynamic fiduciary duties may nevertheless allow for a healthy evolution of approaches. With sufficient room for variation, and a long enough time horizon, more productive approaches to fiduciary duties may gradually win out.

Variation among fiduciary interpretations arises from many sources. Some fiduciary innovations will be the product of business acumen; other innovations will result from pure luck.[163] As with evolution, some of the most successful innovations will occur by accident. There are many, many corporations out there. Given a large enough number of corporations, and a sufficiently long period of time, it is reasonable to think that some corporations will stumble on a lucky business strategy. This same possibility exists with respect to director interpretations of fiduciary duties.

Imitation also plays an important role in innovation. Successful fiduciary innovations may be adopted by other firms, especially where a successful approach is clearly visible. And information about successful fiduciary approaches may travel across firms even if that information is not available to most outsiders. It is common for directors of public corporations to serve on multiple boards. These directors may pass along information that is otherwise difficult for firms to verify.[164] Board

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160 *See id.* at 16 (indicating that economists "can predict the more adoptable or viable types of economic interrelationships that will be induced by environmental change even if individuals themselves are unable to ascertain them").

161 *See id.* at 6. It should be noted that an evolutionary process need not require firms to actually fail. Directors who perceive that their business strategies could lead to failure will often change those strategies.

162 *See id.* at 6–7.

163 *See id.* at 8–10 (discussing the possibility of luck in successful choices).

164 *Cf.* Stephen M. Bainbridge, *Why a Board? Group Decision-Making in Corporate Governance*, 55 VAND. L. REV. 1, 43 (2002). Bainbridge states:

> Firms considering a joint venture need access to credible information about the competencies and reliability of prospective partners. Almost by definition, however, this information is asymmetrically held and subject to strategic behavior. Interlocks between prospective partners provide both access to such information and, by analogy to hostage taking, a credible bond of the information's accuracy.

Id. A similar point could hold true for directors who currently serve or have previously served

minutes may not be the most transparent medium, but governance approaches may still move from one firm to another.

In other cases, accurate information about successful approaches will be inaccessible to outside observers.[165] Yet this too can provide a benefit. Not every imitation needs to be successful in order for useful innovations to emerge. Some innovations occur because of failed imitations.[166] To the extent that firms do not—or cannot—precisely learn about a desirable conception of fiduciary duties by imitation, new conceptions will arise. These new conceptions will, in turn, offer potential improvements.

The benefits of variation may also exist in those cases where boards err, whether or not they are imitating other firms. Suppose, for example, that a board is trying to provide a bargain-mimicking default. That is, suppose the board conceives of its duties to the shareholders and corporation in light of the allocations of bargaining power among corporate constituents. Acting in good faith, this board could still get its bargain-mimicking analysis wrong. A failure to accurately mimic a hypothetical bargain could nevertheless produce a successful variation on fiduciary duty.

Moreover, this variation-based argument holds whether or not boards are attempting to mimic successful allocations of bargaining power. The key component here is the dynamism of fiduciary duties. Directors will plausibly have differing views of what it means to be loyal to the corporation and its shareholders. Perhaps those views are centered on shareholder wealth maximization, or perhaps they involve a team production theory. Director views regarding the correct beneficiary will likely change over time, and even if individual director views are static, the composition of the board will change over time. We could accordingly reject the bargain-mimicking theory altogether, while still seeing benefits from dynamic fiduciary duties as a source of variance.

Desirable innovations can even be a product of otherwise dubious behavior.[167] At times, corporate constituents try to gain private benefits

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as directors or officers of a different corporation.

165 To the extent such information is available, this may provide another argument in favor of enabling variation. In addition to directors, courts and legislatures may learn more about the costs and benefits of distinct fiduciary approaches if director interpretations are sufficiently varied. On the other hand, that possibility would likely face significant measurement difficulties.

166 *See* ALCHIAN, *supra* note 159, at 13 ("Even innovation is accounted for by imitation. While there certainly are those who consciously innovate, there are those who, in their imperfect attempts to imitate others, unconsciously innovate by unwittingly acquiring some unexpected or unsought unique attributes which under the prevailing circumstances prove partly responsible for the success.").

167 Commentators have noted this type of outcome in other contexts. Larry Ribstein notes that successful LLC statutes may emerge from an evolutionary process, even if the original

from the firm, and in some cases constituent lobbying for private benefits will successfully influence the board. The conduct is not generally desirable. But despite the drawbacks, this conduct may produce distinct interpretations of fiduciary beneficiaries. In certain cases, these interpretations may amount to a successful variant on corporate governance.

Quite reasonably, there are still substantial limits to acceptable fiduciary conduct.[168] While there may be radical uncertainty as to the ideal understanding of fiduciary beneficiaries, there is broad consensus that certain conduct should be prohibited, at least by default. The odds that self-dealing and corporate waste will harm shareholders and corporations are high enough to justify these limits, even if the alternative would create greater variation in fiduciary approaches.[169] The range of acceptable fiduciary interpretations is thus bounded. But within the broad range of acceptable fiduciary understandings, variations could be productive as part of an evolutionary process.

B. *Potential Evolutionary Outcomes*

Given the above analysis, one might conclude that boards would converge on a particular understanding of fiduciary beneficiaries—for example, they might converge on a single understanding which is the most efficient.[170] This is questionable. In theory, the ability to learn from other corporations could lead to this result. The broad range of acceptable fiduciary interpretations could, as a matter of practice, narrow down to a particular understanding of fiduciary duties, or at least narrow down to a narrow subset within that broad range. An objective of shareholder wealth maximization might predominate, or directors might understand their beneficiary to be the corporation as a

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lobbying for those statutes was sought by interest groups. *See* Larry E. Ribstein, *The Evolving Partnership*, 26 J. CORP. L. 819, 832 (2001) ("For example, although particular firms or interest groups caused enactment of the first LLC and LLP statutes, these statutes are best viewed merely as mutations that spurred evolution." (footnote omitted)). The same possibility should apply to boards when they determine which variation of fiduciary beneficiary to adopt.

168 Similarly, final period transactions can present serious risks of director malfeasance. Here, too, courts play a more expansive role in monitoring director interpretive choices.

169 There may nonetheless be cases where investors feel otherwise. To the extent this is so, it is worth noting that the Delaware law of LLC's now permits parties to entirely eliminate fiduciary duties. For further discussion of this option, see Andrew S. Gold, *On the Elimination of Fiduciary Duties: A Theory of Good Faith for Unincorporated Firms*, 41 WAKE FOREST L. REV. 123 (2006).

170 There are certainly indications that such a convergence has yet to occur, although tendencies may exist. *Cf.* Elhauge, *supra* note 35, at 804 ("Surveys indicate that most managers believe that they must weigh shareholder interests against those of other stakeholders."). As Elhauge notes, "[t]o be sure, there is other evidence that managers believe their 'primary' goal should be shareholder profits." *Id.*

whole. Yet it is not clear that this type of convergence should be the predicted result, even if corporations can readily learn from each other.

For one thing, an evolutionary process will select for comparatively successful approaches; these may not be identical with the optimal approach. In addition, an evolutionary process can lead to specialization rather than convergence across all corporations. Even if there is a great deal of successful imitation, this imitation may occur within specific niches. Start-up firms may typically prefer one interpretation of fiduciary beneficiaries, while established firms may prefer another. Closely held firms may lean toward a certain type of fiduciary relationship, in contrast to the inclinations of publicly held firms. And in each case, there may be highly successful exceptions to the rule.

The leading theories of corporate law often focus on particular types of corporations, or particular fact patterns. For example, team production theorists focus on the applicability of their theory to public corporations.[171] On the other hand, the team production model may not work as well for closely held corporations,[172] and it is debatable for firms with controlling shareholders.[173] These cases are suggestive. Each understanding of fiduciary beneficiaries may have categories of firms or industries for which it is well-suited, and others for which it is doubtful. If so, we need not anticipate that boards will converge on a particular fixed reading of fiduciary beneficiaries.

Furthermore, a less than complete convergence may be desirable from an evolutionary perspective. The current system of vague fiduciary duties—in keeping with the evolutionary idea—will allow for variations that can be successful under conditions that do not presently exist. New industries, business models, economic conditions, and types of investors may all result in situations where a different reading within the range of acceptable fiduciary conceptions will be preferred. The question is not solely whether a dynamic approach will allow for evolution that addresses today's conditions, but whether a dynamic approach will allow for evolution that addresses tomorrow's conditions.[174]

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171 *See* Blair & Stout, *supra* note 3, at 258 (critiquing alternative theories "when applied to public corporations"). The venture capital setting may also provide examples. Stephen Bainbridge argues that high-tech start-ups do not generally fit the team production model, because "the entrepreneurial founders hire the first factors of production." BAINBRIDGE, *supra* note 134, at 63. But he notes that "[e]quity capital may be the principal exception. . . . [since] it is more accurate to say that venture capitalists hire entrepreneurs than vice versa." *Id.* at n.80.

172 *See* John C. Coates IV, *Measuring the Domain of Mediating Hierarchy: How Contestable Are U.S. Public Corporations?*, 24 J. CORP. L. 837, 840–41 (1999) (indicating that the team production model does not work well here because in these cases board members are also likely to be shareholders).

173 *See id.* at 841–42 (noting that in such cases, the board will likely be dominated by shareholders, to the exclusion of non-shareholder constituencies). Coates adds that a similar problem will arise where the board is dominated by managers. *See id.* at 844–46.

174 *Cf.* ALCHIAN, *supra* note 159, at 8 (describing a scenario in which, as circumstances change, differing parties would be successful).

Dynamic fiduciary duties may well lead to more efficiency in comparison to other options, yet they need not lead to one convergent answer. To the extent there is convergence, this convergence may occur within particular niches. In addition, if convergence does result, it may be temporary. The evolutionary argument for dynamic fiduciary duties is not aimed at a particular moment in time. It is instead a response to a problem of uncertainty spread across a very long time horizon. In some cases, an evolutionary process could lead to convergence among corporations. Where conditions change, that same evolutionary process may cause divergence. Under the right conditions, both outcomes can be worthwhile.

C. *Summary*

The above account is premised on substantial levels of uncertainty, the presence of large numbers of firms, and a long time horizon. It stands independently from the prior, bargain-mimicking account. This evolutionary argument may have merit even if we do not think that a bargain-mimicking approach to fiduciary duty is likely to produce efficient outcomes. In fact, the very uncertainty which undermines the bargain-mimicking approach for most circumstances provides a reason to look to an evolutionary approach.

An evolutionary process may not give us perfectly efficient fiduciary duties at any one point in time.[175] What it does provide is the potential for increasingly efficient outcomes. And, although it is still an empirical question, this potential suggests that the dynamism of fiduciary duties can serve a beneficial purpose. Under conditions of great judicial uncertainty, this may be the most we can hope for. Whatever the judicial motivations may be for leaving fiduciary beneficiaries uncertain, the indeterminacy could be justified.[176]

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175 In some cases, we may even anticipate that an evolutionary process will leave a large gap between the efficiency of directors' interpretations and an optimal understanding of fiduciary beneficiaries. *Cf.* Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1, 12 (2009) ("If the rate of change in social, economic, and technological environments is high, however, then social evolution faces a shifting target: even if social structures constantly evolve towards efficiency, they may at any particular point remain very far from it."). If the economic environment is relatively static, a large gap might also arise if fiduciary duties shift too often, or too dramatically. Directors might change desirable interpretations before the benefits from those interpretations become apparent.

176 The above arguments should not be understood as a demonstration that the current uncertainty regarding fiduciary beneficiaries actually *is* a justified practice. This is partly because, even if an evolutionary account is technically accurate, the evolution which results may be insignificant in its effects. And even if the benefits are significant, the costs generated by uncertainty may swamp those benefits. Note also, that the potential benefits of an evolutionary process may be controversial. It might be that a system of dynamic fiduciary duties benefits shareholders, employees, and various corporate constituencies as a general matter. In the

CONCLUSION

At present, we confront substantial uncertainty as to the ideal fiduciary beneficiaries in corporate law. This is not necessarily troubling, but it is reason to be cautious before narrowing down our range of proper fiduciary beneficiaries. If only out of prudence, it is not surprising that courts eschew clear answers concerning the beneficiaries of director fiduciary duties. But the existing law may also serve a further purpose. The courts may be onto something when they obscurely state that directors owe their fiduciary duties to "the corporation and its shareholders."

Delaware judges may be ambivalent about the relation between corporate law and the public good. Likewise, judges may be compromising between rival corporate theories. Even if these claims are correct, there may be additional reasons to have a vague legal doctrine regarding the correct target of directors' fiduciary duties. The vagueness of the legal doctrine will inevitably result in dynamic fiduciary duties. Directors will interpret their duties in different ways across time and across firms, with different understandings of fiduciary beneficiaries. This dynamism, in turn, may be valuable.

This Article proposes two possible justifications for these dynamic fiduciary duties. The first possibility is that dynamic fiduciary duties effectively provide a bargain-mimicking default. On this account, dynamic fiduciary duties are a means to fill gaps in the corporate contract with terms that will reflect current allocations of bargaining power among the various corporate constituencies. In theory, this may be the best means available to respect the will of the parties given a very complex contract and divergent corporate interests.

This understanding is most plausible in cases where there are lopsided allocations of bargaining power. Yet a bargain-mimicking approach is beset with problems if it is applied more broadly. For one thing, the potential costs of this approach could readily overwhelm the potential benefits. In appropriate cases, transaction costs might well be lowered by a default that reflects allocations of bargaining power. But influence costs—both in terms of successful acquisition of private benefits, and in terms of squabbling costs—could be substantial. In addition, while boards will quite likely have better information about bargaining power than courts, boards are also in a position to self-deal. Moreover, the likelihood of director error may be high enough that

alternative, it might be that shareholders as a group would benefit from such a system, but other corporate constituencies would do less well. Depending on one's perspective, this latter possibility could be problematic.

outcomes will inadequately approximate the bargain which corporate constituents would have reached.

The second possibility is more promising. Dynamic fiduciary duties may provide variations in approach. This, in turn, could fit a model of corporate evolution. Under an evolutionary account, firms with desirable innovations—including interpretations of fiduciary duties—are more likely to survive in the long term. Whether these innovations occur by means of wise business decisions, imitation of others, mistakes, trial and error, or luck, dynamic fiduciary duties will allow for a variety of options. Over time, the better interpretations may last. And should conditions change, new fiduciary interpretations can replace them.

Given uncertainty over which interpretation of fiduciary beneficiaries is ideal, the current legal ambiguity may be a justifiable doctrine. Fiduciary duties will indeed change over time as a result. Directors will make varying choices as they gain experience, interact with other directors, and witness shifts in the corporate polity. But different fiduciary interpretations may also work best for particular types of firms, for particular industries, and for particular stages in a corporation's existence—and each of these features may change with new economic conditions. From this perspective, even our understanding of fiduciary beneficiaries can be seen as a matter for business judgment.