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Theories of the Firm and Judicial Uncertainty

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I. INTRODUCTION

There is no necessary connection between academics' theories of the firm and judicial theories of the firm. Economists and legal scholars may adopt one theory of the firm, and courts may adopt another. We might even predict this result. Judges are not economists, and as increasingly sophisticated theories of the firm emerge in the academic literature, judges are not well-positioned to keep pace with the evolving accounts. Indeed, judges may reasonably choose to adopt no theory at all.

Given these premises, this Essay explores the relationship between academically developed theories of the firm and corporate legal doctrine. Legal scholars who focus on theories of the firm often develop an interpretation of corporate law that endorses a particular legal theory of the firm. On these accounts, courts are thought to have adopted a commentator's preferred theory (consciously or otherwise), with legal doctrine seen as a means of facilitating the formation and governance of firms with the desired features. There is another interpretation of corporate law worth considering, however.

This Essay hypothesizes that much of corporate legal doctrine can be explained differently—not as the legal adoption of a particular theory of the firm, but rather as a response to judicial uncertainty regarding the correct theory of the firm. Theories of the firm still matter on this account—they motivate judicial reasoning—but they are not specifically adopted by corporate law.

There is also evidence in support of this hypothesis. Courts, in fact, seem to go out of their way to avoid adopting a particular theory of the firm. At the same time, actual case outcomes are subject to multiple interpretations from a theory of the firm perspective. Moreover, leading explanatory theories often must identify at least some cases as exceptions

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to the rule, a necessity that indicates these theories do not perfectly fit the case law. These circumstances suggest the courts' expressions of indecision on theories of the firm may reflect an underlying reality.[1]

Notably, there are now a variety of theories of the firm relevant to corporate law. It is increasingly hard for legal institutions to adjudicate between these theories. This concern is compounded by the possibility that particular theories of the firm will fit best at different stages of a firm's life span. Given that Delaware courts generally adopt one corporate law for various different types of corporations (from closely held to public),[2] it is a challenge to determine how best to set the legal default. Even if courts could ascertain the best legal conception of the firm for purposes of public firms, this would not necessarily be the best legal conception of the firm for a corporate law that will regulate both public and private firms.

Corporate law, however, may take into account the variety of theories of the firm by choosing not to adopt any particular theory. In other words, judicial uncertainty may be a factor driving much of corporate law.[3] Courts may, quite understandably, wish to avoid standing in the way of whichever theory is best, while not knowing which theory that will be. We may then explain important features of corporate law in terms of their indeterminacy on theories of the firm.

Given these possibilities, the discussion below will suggest a reading of corporate law that does not take sides on theory of the firm debates. In order to keep the analysis concise, this discussion will focus on fiduciary duties and doctrines related to their enforcement. Part II of this Essay will suggest an indeterminacy of corporate law with respect to theories of the firm, in light of express judicial statements on the topic. Part III will assess the significance of the business judgment rule. Part IV will assess the legal ambiguity concerning the identity of directors' fiduciary beneficiaries. Part V will assess corporate purpose clauses. Part VI then concludes.

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1. As will become clear, it is not just ultimate legal outcomes but also the legal reasoning courts use that support the interpretation suggested in this Essay. *Cf.* Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457, 476–77 (2000) (explaining the importance of understanding legal practices in terms of the concepts embedded in legal reasoning).

2. *See* Nixon v. Blackwell, 626 A.2d 1366, 1379–81 (Del. 1993) (rejecting special rules for closely held corporations when not qualified as a statutory close corporation).

3. Obviously, this hypothesis would not provide a complete account of corporate law. Courts resolve various questions when they decide corporate cases, and there are substantive theories which drive these decisions. The point for purposes of this Essay is that with respect to particular theories of the firm, courts may intentionally leave legal doctrine agnostic.

II. EXPRESS STATEMENTS SUGGESTING LEGAL INDETERMINACY

This Essay introduces a hypothesis that much of corporate law can be explained in terms of a choice not to adopt a particular theory of the firm, rather than an application of a particular theory of the firm. Because this proposed explanation requires us to interpret corporate law, a brief note on methodology may be helpful at the outset.

A. Explanatory Methodology

Interpretive legal theories do not always state their criteria for a successful interpretation. When they do so, such theories often emphasize the fit between a legal theory and legal doctrine, and they often emphasize the normative justification for having a legal doctrine that matches the preferred interpretation.[4] Other criteria, however, may also matter. For example, some theorists are concerned with predictive success,[5] and some are concerned with the transparency of judicial reasoning (that is, they are concerned with adopting explanations that assume courts mean what they say).[6] Coherence is also an important aim.[7]

That said, fit and justification are especially salient, particularly among scholars concerned with theories of the firm. Commonly, legal scholars' accounts of corporate law combine a normative analysis that explains why a particular theory of the firm is desirable for corporate law to adopt with a positive account that explains how this theory of the firm is largely consistent with existing corporate law precedents.[8] While the criteria for a successful interpretation are often left unsaid, descriptive fit and normative justification appear to dominate these explanatory accounts.

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4. For a helpful account of several leading criteria for a successful legal interpretation, see STEPHEN A. SMITH, CONTRACT THEORY 7–32 (2004).

5. *See* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 600 (2003) ("Because an economic model's ability to predict real world outcomes is more important than the extent to which the model's assumptions accurately depict the real world, the key question is whether the mediating hierarchy model facilitates accurate predictions about the content of the law.").

6. *See* SMITH, *supra* note 4, at 24–32 (discussing a transparency criterion). This is not an exhaustive list, however. One might also look to such criteria as simplicity and consilience, or as noted below, coherence. *See, e.g.*, Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L. REV. 1873, 1884 (2011) (discussing the consilience criterion as it relates to interpretations of private law); *see also* JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE 38–41(2001) (discussing the role of consilience for legal explanatory accounts).

7. *See* SMITH, *supra* note 4, at 11–13 (discussing a coherence criterion).

8. Good examples include Bainbridge, *supra* note 5, at 559–92, and Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 280–81 (1999). In both cases, proponents of the respective theories of the firm present a case for the efficiency of their conception of the firm, as well as a case for the descriptive fit with existing corporate law.

The difficulty for present purposes is that each of the leading theories has a plausible claim to meet a reasonable fit criterion, and the outcome under the justification criterion is a matter of dispute. Proponents of each leading theory can point to cases that seem to recognize their chosen theory of the firm. In addition, proponents of each leading theory can argue that the true basis for the desirability of the firm is the benefit that they discern.

With respect to the fit criterion, it is hard to find clear winners among the contending factions. Once we include the law as it relates to both public and private corporations, the law as it relates to takeovers, and the law as it relates to corporate philanthropy, we find that most theories have their strong and weak spots. We might conclude that certain explanatory failures should be fatal to an interpretation. But as a general matter, it is a difficult problem for an interpretive legal theory to explain precisely how stringent the fit criterion should be.[9] Absent a compelling account for treating some cases as peripheral and other cases as core, it is difficult to differentiate among the leading theories purely on the basis of doctrinal fit.

With respect to normative criteria, efficiency goals are largely shared by the leading explanatory accounts. Determining which account best squares with an efficiency aim is substantially more challenging. The empirical question whether a particular theory of the firm best comports with efficiency goals is hard to assess. More to the point, it presents an empirical problem that courts are poorly suited to resolve. Courts are often considered to have weaknesses when it comes to determining the best means to an end for individual firms. But these weaknesses are not limited to ordinary business decisions. If we think courts cannot readily determine the best business choices for individual firms, why should we think they can readily determine the best theory of the firm?

These concerns can help motivate a different type of explanatory theory. Suppose we try to interpret corporate law as a legal domain designed with theories of the firm in mind but without any particular theory of the firm. Would this interpretation fit the legal doctrine? Would it also be justifiable to have a legal doctrine with such features? The sections below will suggest, at least in part, what such an interpretation might look like.[10]

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9. *See* William Lucy, *Method and Fit: Two Problems for Contemporary Philosophies of Tort Law*, 52 MCGILL L.J. 605, 637–43 (2007) (discussing concerns related to the fit criterion for theories of tort law).

10. While judicial uncertainty will play a significant role in developing the argument in this Essay, it should be noted that uncertainty can also have other explanatory roles in the corporate law setting. *See, e.g.*, Charles R. T. O'Kelley, *The Entrepreneur and the Theory of the Modern Corpora-*

B. Evidence of Indeterminacy in Legal Reasoning

As a starting point, one place we might look to see whether courts have affirmatively adopted a theory of the firm is the express language of judicial opinions.[11] There is no question that theories of the firm have influenced judicial decision-making. Particularly in Delaware, the bench is staffed with judges who read and respond to developments in economic and legal scholarship. But as we will see, the evidence that they have adopted a particular theory is equivocal.

It is uncommon for Delaware courts to affirmatively mention the "theory of the firm." (A Westlaw search for this phrase in Delaware cases turns up few examples.) Courts clearly respond to the theory of the firm literature, however. Indeed, Chancellor Allen specifically discusses theories of the firm in the reasoning of a judicial opinion. What is striking, to the extent express discussions exist, is the judicial ambivalence that these cases suggest.

For example, in *Stahl v. Apple Bancorp, Inc.*, Chancellor Allen notes that "the prospect of losing a validly conducted shareholder vote cannot, in my opinion, constitute a legitimate threat to a corporate interest, at least if one accepts the traditional model of the nature of the corporation that sees shareholders as 'owners.'"[12] The sources Chancellor Allen cites in support of this traditional model are articles concerning the theory of the firm.[13] On the other hand, in a footnote, the court then adds: "If the law accepts some other model of the corporation, shareholder action through the vote might well be seen as constituting a threat to other corporate constituencies or to a distinctive corporate 'entity.'"[14]

Cases like *Stahl* are interesting examples because they suggest either an uncertainty on the court's part as to whether the law accepts a particular theory of the firm, or else a reluctance to make a definitive

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tion, 31 J. CORP. L. 753, 767 (2006) (noting the importance of uncertainty for Frank Knight's approach to the firm).

11. Although the transparency of judicial opinions is not always assumed in efficiency-based explanatory theories, this Essay will assume that, all else equal, a theory that treats judicial opinions as transparent has an advantage over one that does not. This Essay will thus assume as a starting point that judicial opinions accurately state the basis for courts' decisions. For further discussion of a transparency criterion, see SMITH, *supra* note 4, at 24–32 (discussing a transparency criterion for explanatory theories of law). *Cf.* Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L .REV. 287 (2007) (discussing and critiquing a transparency criterion for explanatory theories of law).

12. Stahl v. Apple Bancorp, Inc., 579 A.2d 1115, 1124 (Del. Ch. 1990).

13. *See id.* at 1124 n.9 (citing William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471 (1989); John C. Coates IV, Note, *State Takeover Statutes and Corporate Theory: The Revival of An Old Debate*, 64 N.Y.U. L. REV. 806 (1989)).

14. *Id.*

statement as to what that particular theory of the firm might be. While Chancellor Allen may well have had a theory of the firm in mind when deciding *Stahl*, he was careful not to ascribe any particular theory of the firm to "the law." This type of judicial analysis supports the view that courts are intentionally leaving theory of the firm questions undecided.[15]

There are also cases that implicitly do adopt a theory of the firm, even if they do not explicitly use the phrase. For example, in *Unisuper Ltd. v. News Corp.*, Chancellor Chandler addressed a case involving an alleged corporate promise to put an extension of a poison pill to a shareholder vote.[16] The court's analysis in resolving a motion to dismiss was premised in part on the view that shareholders are owners of the firm. As the court reasoned:

> Delaware's corporation law vests managerial power in the board of directors because it is not feasible for shareholders, *the owners of the corporation*, to exercise day-to-day power over the company's business and affairs. Nonetheless, when shareholders exercise their right to vote in order to assert control over the business and affairs of the corporation the board must give way. This is because the board's power—*which is that of an agent's with regard to its principal*—derives from the shareholders, who are the ultimate holders of power under Delaware law.[17]

This statement seems to endorse a particular theory of the firm (or a particular category of theory). Shareholders are owners on this account, and directors are their agents.

But in a subsequent *Unisuper* opinion concerning leave to appeal, Chancellor Chandler took a step back from this unequivocal statement about shareholder owners and director agents.[18] Now, the court characterized its earlier opinion as one that "employed agency law principles to illustrate *by analogy* the gap filling nature of fiduciary duties."[19] This more recent language is much more open to interpretation. What was a relation of owners to agents turns into something more abstract and indeterminate in nature.

15. It is also telling that Chancellor Allen apparently felt that the theory of the firm question was an open one—if the Delaware courts had clearly adopted a theory of the firm when *Stahl* was written, the court's choice in *Stahl* not to endorse a theory would make substantially less sense.

16. Unisuper Ltd. v. News Corp., No. 1699-N, 2005 WL 3529317, at *1 (Del. Ch. Dec. 20, 2005).

17. *Id.* at *6 (emphasis added). For recent discussion of the significance of the *Unisuper* case, see D. Gordon Smith et al., *Private Ordering with Shareholder Bylaws*, 80 FORDHAM L. REV. 125, 181–82 (2011).

18. *See* Unisuper Ltd. v. News Corp., No. Civ. A. 1699-N, 2006 WL 207505, at *3 (Del. Ch. Jan. 19, 2006).

19. *Id.* (emphasis added).

Plainly, isolated opinions will not adequately prove the thesis of this Essay. There are some opinions that best fit with a particular theory of the firm, and clear judicial language on legal conceptions of the firm is not unheard of.[20] Yet, there is also a broad range of cases that can be successfully embraced by more than one theory. In addition, if we focus on explicit judicial language, the courts seem careful to avoid endorsing one particular theory of the firm. It is at least possible, from what we have seen so far, to think that corporate law lacks a particular theory of the firm.[21]

Express language is not the only basis on which to interpret corporate law, however. As we will see, other aspects of corporate law are also consistent with the view that courts are reluctant to adopt a particular theory of the firm. For example, the business judgment rule can be understood in this way. To the extent courts are unsure what conception of corporations is most efficient—or what conception should ground their analysis—they can often abstain from deciding the question. In fact, this may be one of the key benefits provided by the business judgment rule, at least from a perspective of judicial uncertainty. The business judgment rule allows for a corporate law that does not adopt a theory of the firm. If the risk of judicial error is high enough, this is a significant gain. The business judgment rule has many reasons for its existence, but one of its basic justifications may be that it allows courts to remain detached from deciding between high-level theories.

III. THE BUSINESS JUDGMENT RULE AS A MEANS TO INDETERMINACY

One basic way courts can avoid reaching a complete resolution of theory of the firm debates is by rigorously enforcing the business judgment rule. A standard description of the rule is that it is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[22] In practice, the rule means that a large number of fiduciary duty-based claims are subject to dismissal.

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20. For a recent example that appears to take a more shareholder-centric position, see eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010).

21. One might also look to the statements of Delaware and former Delaware judges in their non-judicial capacity, which indicate at least some indeterminacy in the legal point of view. *See, e.g.*, 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 the ambivalence of Delaware corporate law as to whether its sole aim is to facilitate shareholder economic welfare). Such commentary will presumably tell us less than published judicial opinions, but it may still provide indirect evidence in support of the reading proposed in this Essay.

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

Justifications for the rule are abundant, and it is safe to say that its existence is overdetermined.[23] Among other reasons, it has been explained based on concerns with hindsight bias,[24] lack of judicial expertise on business-related questions,[25] the availability of shareholder diversification,[26] the potential consequences of director risk aversion,[27] and the statutory allocation of authority within the corporation.[28] In prior work, I have suggested that the business judgment rule is also a reasonable response to severe problems of judicial uncertainty.[29]

This latter concern is relevant here, for conditions of uncertainty will often produce divergent opinions on the subject that engenders such uncertainty. Here, the difficult question is which theory of the firm to adopt. And this uncertainty creates a potential problem. For while courts and commentators may differ on theories of the firm, courts must still reach decisions in concrete cases. The business judgment rule offers a pragmatic solution to this problem.

Notice that courts do not need a fully developed theory of the firm in order to adopt the business judgment rule. The business judgment rule has all the earmarks of an "incompletely theorized agreement."[30] It is a legal doctrine that courts can adopt based on their consensus about desirable outcomes, without developing a shared viewpoint on the high-level theory that supports the low-level principles at stake.[31] Such agreements are common in various areas of the law, and corporate law provides a likely example in this instance.

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23. The literature on this topic is immense. For examples of recent scholarship explaining the rule, see 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, 402 n.21 (2007) (listing articles).

24. *See* Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 621 (1998).

25. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) (refusing to intervene in a decision to expand a business, and noting that "judges are not business experts").

26. *See* Joy v. North, 692 F.2d 880, 886 (2d Cir. 1982) (discussing availability and significance of shareholder diversification).

27. *See* William T. Allen et al., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of* Van Gorkom *and Its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449, 455 (2002).

28. *See* Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) ("Under Delaware law, the business judgment rule is the offspring of the fundamental principle . . . that the business and affairs of a Delaware corporation are managed by or under its board of directors.").

29. *See* Gold, *supra* note 23, at 447–72.

30. On incompletely theorized agreements generally, see Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–36 (1995) ("Participants in legal controversies try to produce incompletely theorized agreements on particular outcomes. They agree on the result and on relatively narrow or low-level explanations for it. They need not agree on fundamental principle." (emphasis and footnote omitted)).

31. *See id.*

Suppose, hypothetically, that one member of the Delaware Supreme Court sees corporations in terms of a director primacy theory of the firm. Suppose another justice sees corporations in terms of a team production theory. Suppose that a third is undecided on a theory of the firm but feels strongly that business judgment rule protections should prevail for stare decisis reasons. All three of these justices can agree in their opinions that the appropriate legal doctrine is a protective business judgment rule, without ever having to work out their disagreements concerning a theory of the firm.

For example, director primacy theories of the firm support the business judgment rule because of its effect on the board's internal functions, among other reasons.[32] Team production theories of the firm support the business judgment rule in light of the need for a neutral mediating hierarch.[33] The two sides may never agree on the ultimate foundations for the business judgment rule, but in practical terms, they rarely (if ever) need to. As an incompletely theorized agreement, the business judgment rule can function as a means to reach outcomes that are viewed as desirable by the relevant decision-makers, even if the bases for their views diverge significantly.

But note also that an incompletely theorized agreement is a mechanism to address uncertainty, even if judicial opinions do not diverge. The business judgment rule is often viewed as a response to judicial uncertainty regarding the appropriate means to corporate ends. Courts have limited expertise at making business judgments, as is often emphasized. The business judgment rule, however, can also be viewed as a response to judicial uncertainty as to the appropriate *ends* of director decisions.[34] Most judges may resemble the third justice in our example above: they may simply not know what the best theory of the firm is, and accordingly, precisely what ends directors should serve.[35]

As non-economists, this judicial sense of uncertainty may also be prudent. The issues at stake are likely to raise "trans-scientific" prob-

32. *See* Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 125 (2004) ("[J]udicial review could interfere with—or even destroy—the internal team governance structures that regulate board behavior.").

33. *See* Blair & Stout, *supra* note 8, at 300 ("In particular, the rule may help prevent coalition members (and especially shareholders) from using lawsuits as strategic devices to extract rents from the coalition.").

34. *See* Gold, *supra* note 23, at 436 (discussing directors' interpretive discretion concerning the ends of fiduciary conduct).

35. *Cf.* Sunstein, *supra* note 30, at 1735 ("Judges are certainly not ordinary citizens. But neither are they philosophers. Indeed, participants in law may be unwilling to commit themselves to large-scale theories of any kind, and they will likely disagree with one another if they seek to agree on such theories.").

lems[36]—problems that cannot be cost-effectively resolved within a reasonable time frame. The empirical complexities involved in determining outcomes based on different legal conceptions of the firm include: variations among different types of corporation, different moments in our economic history, stages of a firm's existence, vagueness in corporate law, unobserved social norms, and an absence of jurisdictions comparable to Delaware, among other things.[37]

Not only are the empirical problems potentially irresolvable, but if they can be resolved, their resolution could also take a substantial number of years. Courts, which must decide cases in the short-term, are not capable of waiting ten or twenty years for a (perhaps) reliable set of empirical data to emerge. Whether or not answers in the empirical literature will be forthcoming, courts are not in a position to wait.[38] In short, there are good reasons to interpret the business judgment rule as a means to avoid adopting a theory of the firm. The business judgment rule ably fills this role, and we can see why courts would want it to.

Courts nevertheless discuss fiduciary duties in terms that could potentially implicate theories of the firm. Courts often analyze fiduciary duties as standards of conduct, and this feature of corporate jurisprudence raises distinct issues.[39] The next Part will discuss the significance of legal doctrine on fiduciary standards of conduct. As will become apparent, the legal doctrine here also points toward indeterminacy.

IV. THE INDETERMINACY OF FIDUCIARY BENEFICIARIES

Notwithstanding the above analysis, we might question the view that the business judgment rule is serving as a means for courts to avoid adopting a theory of the firm. Courts might still have such a theory, even if the business judgment rule permits otherwise. Legal doctrine could embody a particular theory of the firm, even if in the ordinary case, courts are able to remain detached. Yet, when we turn to what the courts

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36. On trans-scientific problems as they relate to law, see ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 158 (2006). For discussion of their relevance to corporate law and legal standards of review, see Gold, *supra* note 23, at 452–67.

37. *Cf.* Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1201 (2002) ("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.").

38. As Sunstein notes, the time constraints that affect judges are one of the bases for adopting incompletely theorized agreements. *See* Sunstein, *supra* note 30, at 1749 ("[I]ncompletely theorized agreements may be the best approach available for people with limited time and capacities.").

39. On the relevant distinction between standards of conduct and standards of review, see generally Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437 (1993).

say about fiduciary duties and the parties to whom they are owed, we see a continuation of the above theme of non-decision. We see a clear reluctance to determine precisely whom directors should seek to benefit.

This non-decision is significant. For although the business judgment rule may be an area where various theories of the firm converge, the object of fiduciary duties is not. Different theories of the firm diverge sharply as to which parties directors should seek to benefit. Following specific theories of the firm, courts might say that fiduciary duties are owed to the shareholders. Or they might say that they are owed to the corporation. Effectively, courts choose neither of these paths. Instead, courts announce that fiduciary duties are owed to both the shareholders and the corporation. And because the interests of shareholders and the interests of the corporation will sometimes conflict, this amounts to an indeterminate standard.

Moreover, courts are leaving things undecided in an area that matters. Arguably, the fiduciary beneficiary question is one of the most fundamental questions in corporate law. It is true that director liability will only rarely turn on this question. But the presence of the business judgment rule does not make judicial statements regarding fiduciary standards of conduct irrelevant as a practical matter. Judicial statements regarding fiduciary duties are often thought to affect director behavior, even if those statements will rarely lead to liability given business judgment rule protections. This is particularly so if, as Douglas Baird and Todd Henderson suggest, directors "want to do what they are supposed to do."[40] The indeterminacy here thus calls for an explanation.

A. The Ambiguity of the Case Law

In the recent *Gheewalla* decision, the Delaware Supreme Court concluded that "[i]t is well-established that the directors owe their fiduciary obligations to the corporation *and* its shareholders."[41] Similar statements are found in prior decisions.[42] In addition, although the Delaware courts will sometimes just refer to duties owed to shareholders or to du-

40. *See* Douglas G. Baird & M. Todd Henderson, *Other People's Money*, 60 STAN. L. REV. 1309, 1323 (2008); *see also* Stephen A. Smith, *The Normativity of Private Law*, 31 OXFORD J. LEGAL STUD. 215, 216 (2011) (contending that "citizens sometimes do what legal rules stipulate simply because they are legal rules and not because of the incentives that the law offers for compliance").

41. N. Am. Catholic Educ. Programming Found. v. Gheewalla, 930 A.2d 92, 99 (Del. 2007) (emphasis added).

42. *See, e.g.*, Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939) (indicating that directors "stand in a fiduciary relation to the corporation and its stockholders").

ties owed to the corporation, the phrasing alternates with frequency.[43] The result is substantial ambiguity.

Can we nonetheless understand this legal doctrine from the perspective of a particular theory of the firm? The answer may depend on how deeply the ambiguity runs. As will be developed, these open-ended qualities of fiduciary duties are a characteristic feature of Delaware corporate law.

Christopher Bruner has provided one of the more sustained recent treatments of this ambiguity, and his argument is worth considering in detail.[44] In Bruner's view, the courts' announcement of multiple beneficiaries reflects a broader theme in corporate law—judicial ambivalence over core features of corporate law. Ultimately, Bruner sees corporate law as ambivalent over the power structures within the corporation, ambivalent over the beneficiaries of corporate production, and most fundamentally, ambivalent over the relation between corporate law and achievement of the social good.[45]

Bruner considers these issues against the backdrop of several leading theories of the firm in the legal literature: the director primacy approach (which he groups under the "nexus-of-contracts" approach); the team production approach; and the shareholder primacy approach. For present purposes, Bruner's claim about corporate law's beneficiaries is the key concern. A brief review of Bruner's argument follows.

The director primacy approach suggests that shareholders do not actually own the corporation.[46] They are residual claimants but not corporate owners. Consistent with this view, shareholders are quite limited in their authority with respect to corporate decision-making. They are permitted to vote only in certain limited settings, and in those settings where they may vote their ability to effect changes is circumscribed. This is not to say that shareholders are powerless. One of the main ways in which shareholders influence the direction of corporate conduct is through their ability to sell their shares. But it is a key feature of corporate law that the board is granted the primary role in managing corporate affairs.

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43. 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 that describe duties owed to the corporation or to the corporation and its shareholders). For discussion of the beneficiaries question in the takeover context, see Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 TEX. L. REV. 865, 923–25 (1990).

44. *See* Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385 (2008).

45. *See id.* at 1386, 1421.

46. *See* Bainbridge, *supra* note 5, at 563–65 (critiquing the view that shareholders own the firm).

From this perspective, the board is (and should be) the primary decision-making authority. Indeed, in one articulation, the board is a sui generis body, like a set of Platonic guardians.[47] In light of the limitations on shareholder authority, however, shareholders require something in return. Shareholder wealth maximization becomes a central component of the director primacy theory.[48] Fiduciary duties reflect this emphasis. Given the shareholders' residual claimant status, and the general absence of contractual protections for shareholders, they are the beneficiaries of the board's fiduciary duties.

Bruner contends that this theory runs into difficulty on shareholder wealth maximization. He notes that no state statute explicitly creates a shareholder wealth maximization norm.[49] And legal doctrine often cuts the other way. In the takeover setting, boards are empowered as a de facto matter to reach decisions on bases that suggest shareholder wealth maximization is only one of several aims that boards may consider.[50] The business judgment rule, combined with recognition that boards may consider long-term shareholder interests, makes it quite easy for the board to ignore shareholder wealth maximization.[51] And in various settings, boards may support charitable donations.[52] Bruner suggests that each of these facts runs contrary to a shareholder wealth maximization norm.

In contrast, a team-production theory suggests that boards should take into account a variety of corporate constituencies.[53] Here, various constituents of the firm function as a team, making team-specific investments in the corporate enterprise. Like the director primacy view, a team production theory of corporate law suggests that the board should have a great deal of power. This is because the board should serve as a neutral mediating hierarch, deciding among the various claims of these diverse constituencies.[54] The beneficiary of directors' fiduciary duties is different, however. Under the team-production view, directors' fiduciary duties are owed to the firm as a whole.[55]

47. *See id.* at 560.

48. *See id.* at 577–84 (discussing shareholder wealth maximization).

49. *See* Bruner, *supra* note 44, at 1400 ("The claim that shareholder wealth maximization is the corporate end upon which the (hypothetically) negotiating parties would rationally agree is undercut by the fact that no state statute explicitly mandates the maximization of shareholder wealth.").

50. *See id.* at 1415–18 (analyzing from this perspective the decisions in *Paramount Commc'ns v. Time Inc.*, 571 A.2d 1140 (Del. 1990); *Revlon, Inc. v. MacAndrews & Forbes Holding, Inc.*, 506 A.2d 173 (Del. 1986); *Unocal Corp. v. Mesa Petrol. Co.*, 493 A.2d 946 (Del. 1985)).

51. *See id.* at 1401.

52. *See id.*

53. *See* Blair & Stout, *supra* note 8, at 280–81.

54. *See id.* at 276–87.

55. *See id.* at 298.

Team production theories have little difficulty with the various takeover precedents that allow the board to consider the interests of shareholders, creditors, employees, and even the local community.[56] Nor are they troubled by the degree to which boards can favor other constituencies thanks to a strong business judgment rule. Critics have found a different problem for the team-production approach. The very freedom that allows boards to choose not to engage in shareholder wealth maximization also gives the board the ability to actively engage in shareholder wealth maximization.[57] And in many cases, boards are dominated by a controlling shareholder, undermining the neutral, mediating hierarch model.[58] In these cases, the image of the board as a mediating hierarch breaks down.

The shareholder primacy approach, as the name suggests, views shareholders as the owners of the firm.[59] From this perspective, shareholders should have at least some authority over the firm.[60] Proponents of this view also tend to support a variety of legal reforms to bring corporate law more in line with this conception of the shareholder role. Many of these proposed reforms focus on increasing the effectiveness of shareholder voting rights beyond their current level.[61]

Whatever its normative merits may be, Bruner indicates that the shareholder primacy account is descriptively weak in certain areas. Like the director primacy account, it founders on the shareholder wealth maximization norm.[62] While a shareholder primacy account suggests shareholder wealth maximization should be a core requirement of corporate law, there are various contexts in which boards have de jure or de facto discretion to act differently.

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56. The *Revlon* case may present more of a challenge for team-production theorists, although there are answers available. *See id.* at 309 (providing an account of the *Revlon* case).

57. *See* Bruner, *supra* note 44, at 1403; *see also* David Millon, *New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law*, 86 VA. L. REV. 1001, 1022 (2000).

58. *See* Bruner, *supra* note 44, at 1403; *see also* John C. Coates IV, *Measuring the Domain of Mediating Hierarchy: How Contestable are U.S. Public Corporations?*, 24 J. CORP. L. 837 (1999).

59. For a description of a shareholder-oriented model as the "standard model" in corporate law, see Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001). For recent analysis and defense of the view that shareholders own the corporation, see Julian Velasco, *Shareholder Ownership and Primacy*, 2010 U. ILL. L. REV. 897.

60. *See* Bruner, *supra* note 44, at 1405–07 (discussing this type of perspective).

61. *See id.* at 1406 (discussing Lucian Bebchuk's efforts in this regard).

62. *See id.* at 1407 ("Perhaps more importantly, the shareholder primacist's claim that the purpose of the corporation is to maximize shareholder wealth encounters the same descriptive problems that the nexus-of-contracts theory does: the absence of any such general duty, the explicit endorsement of deviations from it, and the relative insulation of tacit deviations from it under the business judgment rule.").

In short, the question to whom fiduciary duties are owed is not a question we can readily sidestep by looking to the practical effects of corporate law doctrine. It is not merely that courts explicitly say director fiduciary duties are owed to both shareholders and the corporation. It is that, as a practical matter, the law in this area is indeterminate or subject to conflicting interpretations. As Bruner's analysis suggests, the question of fiduciary beneficiaries implicates a deep ambiguity in corporate law. The law concerning fiduciary beneficiaries is unclear and has been unclear for some time.

B. Director Social Norms and the Significance of Ambiguity

The above discussion suggests the descriptive challenges faced by theories of the firm that also aim to interpret corporate law. It does not necessarily mean courts are questioning the relationship between shareholders' interests and the interests of society.[63] Delaware courts typically indicate a strong sense of optimism about the benefits of Delaware corporate law, with respect to both shareholders and society.[64] But these descriptive challenges are important. In an area where theories of the firm often lead to strong opinions about which parties directors should seek to benefit, the courts have left the law's perspective uncertain.

What are we to make of these circumstances? We might conclude that the above descriptive concerns are largely irrelevant, given the business judgment rule. Directors will rarely be held to account for their subjective interpretation concerning fiduciary beneficiaries. Accordingly, courts would have less need to focus their attention on a precise definition of fiduciary beneficiaries.

Doctrinal choices concerning fiduciary beneficiaries are not necessarily irrelevant, however. For one thing, there are exceptions to the business judgment rule's protections. In certain extreme circumstances, the business judgment rule may not protect directors who knowingly act contrary to the interests of their beneficiaries.[65] This means that, at least

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63. *Cf. id.* at 1449 (suggesting the ambivalence of corporate law regarding beneficiaries reflects "larger misgivings about the consistency of shareholders' interests and incentives with those of society at large").

64. A good example is Chancellor Chandler's recent defense of the business judgment rule in the *Disney* litigation:

> Should the Court apportion liability based on the ultimate outcome of decisions taken in good faith by faithful directors or officers, those decision-makers would necessarily take decisions that minimize risk, not maximize value. The entire advantage of the risk-taking, innovative, wealth-creating engine that is the Delaware corporation would cease to exist, with disastrous results for shareholders and society alike.

In re Walt Disney Co. Deriv. Litig., 907 A.2d 693, 698 (Del. Ch. 2005).

65. This follows from the reasoning in the *Disney* cases and also from the holding in *Stone ex rel AmSouth Bancorp. v. Ritter*, 911 A.2d 362 (Del. 2006). Deliberate failures to comply with fiduci-

occasionally, directors may face liability risk or reputational sanctions that hinge on the courts' definition of a fiduciary beneficiary. For another, even if we discount the possibility of external sanctions, directors may conclude they should act in certain ways simply because they wish to comply with whatever duty the courts describe.[66] In other words, they may feel obligated to follow the legal rules because they are the legal rules. This need not occur with respect to a majority of directors in order for it to have a significant impact. If a sizable subset of directors would alter their behavior—and perhaps their individual theory of the firm—based on judicial statements concerning fiduciary duty, this becomes a question of legal significance.

It is also possible that judicial statements regarding the content of fiduciary duties (or in this case, the beneficiaries of that content) can have an impact on director social norms. Director social norms, in turn, may have an impact on how fiduciary duties are internalized by individual directors.[67] Furthermore, even where social norms do not cause directors to internalize a particular understanding of their fiduciary responsibilities, directors may nonetheless feel substantial pressure to act in ways that comply, or appear to comply, with the relevant norms.

For example, judicial statements regarding fiduciary duties may affect director conduct by signaling a social consensus concerning appropriate behavior.[68] Delaware judges are likely to have views of corporate law that correspond roughly to commonly held perspectives in the business world. And to the extent some directors publicly express the views stated by these judges, the perception of an established norm may be reinforced. In addition, judicial opinions in this area may create a salient

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ary duties can trigger bad-faith claims under the duty of loyalty. *See id.* at 370. For discussion of the rare circumstances that do fall outside the business judgment rule in this way, see Andrew S. Gold, *The New Concept of Loyalty in Corporate Law*, 43 U.C. DAVIS L. REV. 457, 500 n.198 (2009) (noting that the Delaware Supreme Court has "adopted a challenging standard for claims of bad-faith-based disloyalty in transactional contexts" and that claims for lack of oversight are similarly difficult to demonstrate).

66. *See* Smith, *supra* note 40 (describing how parties may feel an obligation to follow law because it is law).

67. *See* Gold, *supra* note 65, at 515–16; *cf.* Kenworthey Bilz & Janice Nadler, *Law, Psychology & Morality*, *in* MORAL COGNITION AND DECISION MAKING 101–31 (Douglas Medin et al. eds., 2009) ("Rather than (just) working directly to change behaviors and attitudes, the law is able to work via more subtle psychological processes, to shape perceptions of morality—even for those citizens who would not take the state of the law alone as authoritative guidance for their moral beliefs.").

68. On the signaling effects of law, see Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 340 (2000); Richard H. McAdams, *The Origin, Regulation, and Development of Norms*, 96 MICH. L. REV. 338, 388 (1997). For discussion of the relation between this signaling and the law of fiduciary duties, see Gold, *supra* note 65, at 520–21.

focal point around which directors can coordinate.[69] This too could affect director social norms. Indirectly, these effects on social norms may then encourage directors to internalize particular conceptions of fiduciary duty.

Given these possibilities, we may reasonably predict that the courts' selection of fiduciary beneficiaries—whether it is the shareholders as a whole, a subgroup of shareholders, or the corporation—will make a difference for the way directors act. The courts' choice to leave this core area of fiduciary doctrine ambiguous is thus a potentially important phenomenon even with the business judgment rule as a backdrop. For if courts were to adopt a particular view on fiduciary beneficiaries, they could have real world effects on the governance of corporations. This suggests the ambiguity of fiduciary beneficiaries may mean something, and we should seek a basis for it in our interpretation of corporate law.

C. Explanations for the Indeterminacy

In light of these premises, there are still a variety of ways to interpret (and perhaps also justify) the undecided legal doctrine. Some of them could even include particular theories of the firm. The very ambiguity that pervades this area makes a conclusive interpretation difficult. Several plausible explanations, however, suggest that this ambiguity is a product of judicial choices not to adopt a theory of the firm.

One potential explanation is that corporate law is simply displaying a form of prudence. Courts could be following a principle that they should do no harm when faced with uncertainty.[70] They might avoid defining the beneficiaries of fiduciary obligation unless they are confident they know which definition will be desirable. On the other hand, a lack of guidance from the courts may itself do harm, and presumably courts are aware of this. Directors, shareholders, and corporations might benefit from having a more precise answer—even an imperfect one—rather than the current level of vagueness in the legal doctrine.[71]

It is also possible that the indeterminate legal doctrine serves as a means to bring about desired ends. On this view, courts may be adopting

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69. On focal points and the expressive functions of law, see Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1659–60 (2000). For discussion of the focal point theory as it relates to the law of fiduciary duties, see Gold, *supra* note 65, at 518–19.

70. We might also imagine a form of prudence motivated by political concerns. Certain features of fiduciary doctrine may allow Delaware courts a flexible means to address political pressures. *See* Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1 (2005) (analyzing the fiduciary duty of good faith in these terms). Arguably, the vagueness here could play a similar role.

71. *Cf.* Gold, *supra* note 65, at 503–09 (discussing information costs as they relate to a fiduciary standard of conduct).

a response to uncertainty that is intended to encourage preferred outcomes, rather than merely avoid undesirable ones. Faced with intractable uncertainty, courts may hope to make the best of the circumstances. Indeterminate doctrine may play an instrumental role, comprising an affirmative benefit rather than a prudential measure to limit judicial errors.

For example, consider Seana Shiffrin's recent account of legal vagueness.[72] Shiffrin argues that in certain circumstances, opaque laws may induce individuals to beneficially engage in moral deliberation.[73] Her classic illustration involves traffic law. In some contexts, drivers may drive with a greater degree of care when faced with a regulation that includes a degree of uncertainty than they do when confronted with a series of precise rules. In the former case, they may be more inclined to give thought to appropriate conduct (thus increasing safety), while in the latter case, they are more apt to comply with the law through routine behavior.[74]

Something analogous could occur when laws direct compliance with vague moral concepts. Shiffrin's suggestion is that in certain settings, vagueness in the law may induce citizens to engage in moral deliberation as to the best behavior.[75] And for a variety of reasons—grounded in both moral and political philosophy—she concludes this deliberation can be a desirable outcome. Perhaps her insights also apply here.

Admittedly, traffic law is very different from corporate law, as any commentator or court can attest. And we may feel that moral reasoning and questions of loyalty do not perfectly converge.[76] Moreover, there is empirical uncertainty involved here as well. The benefits that Shiffrin proposes are conjectural, and they are potentially swamped by the costs. The point, however, is that uncertainty in the law of fiduciary beneficiaries could have salutary effects precisely because of the way uncertainty affects legal actors. On this hypothesis, uncertainty may be adopted for its positive properties.[77]

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72. *See* Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1219–21 (2010).

73. *See id.* at 1220 ("The evident uncertainty prompts drivers to pay greater attention to their driving, to think about how to negotiate a road, and to think about how to treat the specific pedestrians and cars around them.").

74. *See id.* (discussing nuances).

75. *See id.* at 1223 ("Where standards incorporating moral terms regulate conduct, citizens may themselves have to deliberate about what is morally proper and should be expected of them."). The potential costs and benefits of this outcome, where it occurs, are discussed at much greater length (and with greater sophistication) in Shiffrin's paper. Here, her argument is used solely for illustrative purposes.

76. *See* Gold, *supra* note 65, at 525 (suggesting loyalty and morality can have distinct content).

77. Indeterminacy of fiduciary content may also have benefits, but the concern here is with the indeterminacy concerning beneficiaries. For a more general discussion of potential benefits from

Moreover, indeterminate law on corporate fiduciary duties may also be linked to economic efficiency. For example, in a draft article I suggest that the ambiguous law on fiduciary beneficiaries permits directors to shift their interpretation of fiduciary law over time, and that it permits new boards to interpret the beneficiary question differently from old boards.[78] The effect is a dynamism in fiduciary duties that allows for variation in corporate governance. This variation potentially allows for desirable innovations.

The core idea here stems from Armen Alchian's work on uncertainty and economic theory. As Alchian suggests, we can turn to principles of biological evolution to understand the success of firms.[79] From this perspective, "those who realize positive profits are the survivors; those who suffer losses disappear."[80] By an evolutionary process, business plans that work—for whatever reason—will tend to win out over time. In light of this insight, directors' selection of fiduciary beneficiaries can be seen as a business judgment. Or in some cases, the selection can be seen as a matter of luck.[81] On the evolutionary account, the important thing is that successful innovations may result from the various ways in which directors interpret the vague fiduciary standard that courts have provided.[82]

Of course, the reader might not find Shiffrin's argument applicable here, and the reader might not find the evolutionary account convincing with respect to this feature of corporate law. In short, the reader might not see affirmative benefits to the ambiguity of fiduciary beneficiaries. Perhaps courts would feel similarly. But the present concern is not that we determine precisely why courts have adopted an indeterminate answer on the fiduciary beneficiaries question. Instead, the concern is interpretive. Does it make sense to think of corporate law as lacking a particular theory of the firm?

The above discussion suggests that the ambiguity of fiduciary beneficiaries is not a peripheral feature of corporate law, but rather a central question to be explained. The motivations for the legal doctrine may be

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indeterminacy in corporate law, see 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).

78. *See* Andrew S. Gold, *Dynamic Fiduciary Duties*, CARDOZO L. REV. (forthcoming) (on file with author).

79. *See* Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, *in* 1 THE COLLECTED WORKS OF ARMEN ALCHIAN 3 (Daniel K. Benjamin ed., 2005).

80. *Id.* at 6.

81. *Cf. id.* at 8–10 (discussing the potential role for luck in successful business choices).

82. Note that this idea may also be tied in with justifications for the business judgment rule, particularly if it is conceived of as an incompletely theorized agreement. *Cf.* Sunstein, *supra* note 30, at 1749 ("[I]ncompletely theorized agreements may be valuable when what is sought is moral evolution over time.").

several. This indeterminacy may well be a prudential response to judicial uncertainty; it may also be something more. But in either event, the ambiguity here is important—and it is also a salient feature of the law. Under many leading theories of the firm, we would have difficulty predicting this feature. It is an ambiguity we *can* predict if courts are seeking to avoid adopting a particular theory of the firm.

What we see then is a pattern. We can reasonably interpret the ambiguity regarding fiduciary beneficiaries as part of a larger indeterminacy in corporate law.[83] And we can interpret the ambiguity as deliberate. From this perspective, it is yet another feature of a corporate jurisprudence that has not definitively arrived at a particular theory of the firm. In order to non-arbitrarily determine which beneficiaries are owed fiduciary duties, courts would need to announce a more complete theory of the firm—and they are not doing so. Instead, courts are avoiding those legal determinations that would require them to select a particular theory of the firm.

V. THE SIGNIFICANCE OF CORPORATE PURPOSE CLAUSES

Thus far, we have focused on judicial responses to judicial uncertainty, but there are other institutions involved in corporate law. It is worth considering legislative responses to judicial uncertainty as well. From this perspective, the provisions in the Delaware code that provide for freedom in crafting corporate purpose clauses are also significant.[84]

Corporate purpose clauses are sometimes used as evidence in favor of a particular theory of the firm. For example, Margaret Blair and Lynn Stout suggest that, given their interpretation of corporate law as a whole, fiduciary duties are effectively owed to the firm, rather than to shareholders. They suggest that if shareholder wealth maximization were what parties wanted when they found a corporation, it would always be possible to adopt a corporate purpose clause that calls for shareholder wealth maximization.[85] Yet, firms rarely choose this option.

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83. This possibility is, at this point, still a hypothesis. This Essay does not address each and every important feature of corporate law in arriving at an interpretation of fiduciary beneficiary doctrine, but rather offers an argument that we should take seriously the idea that corporate law lacks a particular theory of the firm.

84. We might also consider the discretion to amend corporate charters and bylaws, but in this context, the corporate purpose clause seems most directly relevant. Likewise, we might consider the freedom to select different business entities as an alternative means for business people to respond to an erroneous legal endorsement of a particular theory of the firm. In this respect, the ability to eliminate fiduciary duties altogether for Delaware LLCs may take on added significance.

85. *See* Margaret M. Blair & Lynn A. Stout, *Specific Investment: Explaining Anomalies in Corporate Law*, 31 J. CORP. L. 719, 740–42 (2006).

Of course, much depends on how one reads the status quo. Corporate purpose clauses are typically set to give the broadest allowable scope for corporate action. For a theorist who sees corporate law as generally inclining toward a duty of shareholder wealth maximization, the absence of corporate purpose clauses that call for directors to act in the best interests of the firm could be read as supporting evidence that shareholder wealth maximization is what corporate founders have in mind. Likewise, if one takes seriously the view that directors owe their fiduciary duties to the corporation *and* its shareholders—which is what courts expressly state—then the absence of contrary corporate purpose clauses could be read as supporting a satisfaction with the current doctrinal vagueness (and, perhaps, the flexibility it permits). Without significantly more empirical work, these perspectives are hard to assess.

But there is also another possibility. We can think of the corporate purpose clause as a further response to judicial uncertainty. For what the corporate purpose clause provision in the Delaware code most prominently does is permit variation in corporate purposes—given *whatever* background interpretation courts are providing. The point then is not how the provision is currently exercised against a backdrop of existing judicial precedents concerning the theory of the firm, but how it could be exercised. The availability of changes to corporate purpose clauses amounts to a legislatively provided safety valve.

In addition, it is worth keeping in mind that even in not giving an express answer on the theory of the firm, courts may still be producing an undesirable legal doctrine for some firms. Perhaps there are some firms that will be better off if directors cannot readily exercise discretion in their interpretation of the appropriate beneficiary of their fiduciary duties. Or perhaps the absence of guidance from the courts concerning their theory of the firm is not as complete as it might be. Courts, in other words, may implicitly adopt a particular theory of the firm in some settings, and they may err in doing so. For these circumstances, there is still a convenient means to customize one's firm—the corporate purpose clause.

For the most part, corporate law is comprised of default terms. Corporate purpose clauses receive less attention than the contractual freedom to amend corporate charters and bylaws. This may be due to the fact that corporate founders generally select the broadest corporate purpose clause available, thus rendering alternatives largely academic.[86] Yet, the exist-

86. Non-exercise does not equate to unimportance, of course. For example, the Third Amendment to the United States Constitution has been remarkably dormant in practice but may nonetheless provide an important bulwark against misused government power. As such examples suggest, the importance of having a right can be assessed independently from the frequency of its exercise.

ence of the corporate purpose clause as an option can be seen as yet another measure of caution—a prudential device made available to avoid the costs associated with potentially undesirable legal conceptions of the firm.

VI. CONCLUSION

This Essay does not claim that all of corporate law is premised on judicial uncertainty about ideal theories of the firm, nor that all relevant features of corporate law are indeterminate. Certain features of corporate law may indeed reflect a particular theory of the firm. Other features may reflect a different set of values altogether, unrelated to theories of the firm. Moreover, the very doctrinal murkiness that makes this Essay's hypothesis plausible also makes it hard to definitely prove the hypothesis. Perhaps in subtle ways, courts are really fans of the team production theory, or perhaps deep down they agree with shareholder primacy accounts. When it comes to the theory of the firm, courts are hard to pin down.

We should also keep in mind the possibility of pluralism. Corporate law may be explained by a multitude of theories of the firm, with each occupying a specific domain. Particular theories of the firm may explain particular niches of corporate law. Likewise, several theories of the firm may be balanced against each other with compromise results in areas of conflict. This Essay examines a core area of corporate law; it by no means covers all aspects of the subject matter.

That said, several of the core features of corporate law can be understood in terms of an intentionally noncommittal stance. The business judgment rule permits courts to avoid deciding on their preferred theory of the firm. The vague standard on fiduciary beneficiaries permits courts to delegate these questions to boards of directors. And corporate purpose clauses enable parties to avoid—to some degree—mistaken judicial theories of the firm (including theories that have yet to arise).

No theory of the firm is a perfect fit for corporate law. Instead, legal academics typically suggest that their theory is the best fit. If the indeterminacy argument is correct, however, then we should consider that a particular theory of the firm may not carry the day even if that theory of the firm is better than its rivals. For judicial indecision on theories of the firm can explain significant features of corporate legal doctrine, and given the severe empirical uncertainty surrounding theories of the firm, that indecision may be a quite reasonable judicial approach.