

SCRUTINIZING SUCCESSION

CARRIE STANTON*

Businesses are at their most vulnerable during leadership transitions. Lack of succession planning has been recognized as a key risk factor, especially for closely held, family-owned businesses, but the problem is more extensive. Even public corporations with supposedly independent boards of directors too often fail to separate the corporation's interests from those of charismatic leaders who enjoy the perquisites of control and may be loath to surrender it. Shareholders trust directors to manage business affairs, and ensuring leadership continuity is critical to this charge. Yet succession often remains overlooked in practice. It also remains understudied in the literature, and state legislatures have failed to create a specific statutory requirement to engage in succession planning. This Article draws on growing but still nascent succession scholarship, as well as robust literature on corporate fiduciary duties and mergers and acquisitions (M&A), to propose new solutions to the many problems that companies face at the time of succession.

In doing so, this Article makes several contributions to the literature. First, it provides a rich and layered account of the governance challenges that arise at the time of succession. This is an increasingly important moment in the life of the modern corporation, especially as companies use dual-class shares, enterprise foundations, and other methods to retain founder control even after going public. Second, this Article contends that a board cannot satisfy its fiduciary duties of care and loyalty unless it ensures that the corporation has in place a reasonable, current, well-documented, and clearly communicated succession plan for senior management. The absence of succession planning should be considered a per se violation of fiduciary duty.

Moreover, this Article argues that the succession plans boards promulgate should not receive the deference accorded to most director decisions pursuant to the business judgment rule. Instead, courts should borrow from Delaware M&A law and apply enhanced scrutiny. In both M&A and succession planning, when corporate managers contemplate institutional transition, problems of agency and entrenchment abound. These inflection points amplify the risk that corporate agents' business judgment will be clouded by self-interest. In M&A, boards might reject prospective deals due to concerns that directors will lose their seats upon consummation of a change of control. And implementing succession plans lowers the cost of leadership

* Carrie Stanton, Visiting Assistant Professor of Law, Washington and Lee University School of Law. Sincere thanks to Charles Barzun, Christopher Bruner, Quinn Curtis, Jessica Erickson, George Geis, Elissa Gentry, Sarah Haan, Cathy Hwang, Alan Kluegel, Ben Means, Doug Michael, Jennifer O'Hare, Kish Parella, Usha Rodrigues, Andrew Schwartz, Doug Spencer, Megan Stevenson, and Karen Woody for helpful comments and conversation. I would also like to thank participants at the November 2024 faculty workshop hosted by the Center of Law, Ethics & Commerce at the Gonzaga University School of Law. Special thanks to Andrew Christensen for indispensable research support; the editorial team of the *Wisconsin Law Review*; and Rachel Hall, Sydney Layne, and Marc Sendra, who provided excellent research assistance.

transition, which can facilitate management changeover and provoke ambivalence and avoidance in director decision-making. Corporate agents in both contexts thus confront profound economic and psychological conflicts that might cause a board to act in its own interest instead of in the interests of the corporation and its shareholders. In the M&A context, Delaware courts address this concern by applying heightened judicial scrutiny, more rigorous than the business judgment rule, but more forgiving than exacting entire fairness review. This Article proposes application of a similar enhanced scrutiny standard in the succession planning context and reviews several high-profile cases to show how that standard could reshape corporate governance to better serve the interests of all shareholders.

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INTRODUCTION

*As everything,
forgetting its own enchantment, whispers:
I too love oblivion why not it is full
of second chances. Now,
hiss the bright curls of the leaves. Now!
booms the muscle of the wind.*

—Mary Oliver¹

Corporations may exist perpetually, but the people running them do not.² From history to headlines and stage to screen, the problem of succession crosses genres and spans generations. This proves especially true when family dynamics are at play. Shakespeare made the transition of power within families one of his great themes.³ The British monarchy, for reasons Shakespeare illuminated, has wrestled with questions of succession and primogeniture for centuries.⁴ More recently, the embattled Redstone family fought for decades to maintain control over its vast entertainment empire,⁵ and, from 2018 to 2023, HBO's *Succession* defined prestige television.⁶ In each case, we are reminded of

1. MARY OLIVER, *TWELVE MOONS* 52 (1st ed. 1979).

2. Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764, 766 (2012) (“Natural persons can get sick and die, and similarly, other forms of business organization, such as the partnership or sole proprietorship, have only limited lifespans. But one of the defining legal characteristics of the corporation is its capacity to live forever.”).

3. See, e.g., WILLIAM SHAKESPEARE, *KING LEAR*; see also Benjamin Means, *Solving the “King Lear Problem,”* 12 U.C. IRVINE L. REV. 1241 (2022) [hereinafter Means, *King Lear*] (exploring succession challenges in family-owned businesses through the lens of *King Lear*).

4. See, e.g., Peter W. Hogg, *Succession to the Throne*, 33 NAT’L J. CONST. L. 83, 84–86 (2014) (providing a brief history of succession to the British throne, tracing the basis of succession from common law male preference primogeniture to codification in the Act of Settlement (1701) and its modification in the Succession to the Crown Act (2013)); *Succession*, ROYAL FAM., <https://www.royal.uk/encyclopedia/succession> (last visited Mar. 27, 2025) (official website of the British royal family, summarizing the basis for succession to the throne).

5. See Benjamin Mullin & Lauren Hirsch, *Paramount Agrees To Merge with Skydance*, N.Y. TIMES (July 7, 2024), <https://www.nytimes.com/2024/07/07/business/media/paramount-skydance-merger-deal.html> (announcing a merger agreement between Paramount and Skydance, which would signal the end of the Redstone era at Paramount); JAMES B. STEWART & RACHEL ABRAMS, *UNSCRIPTED: THE EPIC BATTLE FOR A MEDIA EMPIRE AND THE REDSTONE FAMILY LEGACY* (2023).

6. Phillip Maciak, *The End of Succession Is the End of an Era in TV*, NEW REPUBLIC (May 26, 2023), <https://newrepublic.com/article/172944/end-succession-end-era-tv-season-four-finale> [<https://perma.cc/5T5C-8L3U>].

the devastating effects of failed succession—be it succession to the C-suite or succession to the crown.⁷

The numbers support the narrative. One study of large public companies indicates that “companies that scramble to find replacements for departing CEOs forgo an average of \$1.8 billion in shareholder value,”⁸ and another study shows that “the longer it takes a company to name a new CEO during a succession crisis, the worse it subsequently performs relative to its peers.”⁹ Recent scholarship puts a finer point on the data, suggesting that succession planning mitigates the shareholder losses that accompany CEO turnover and identifying board readiness and disruption minimization as two key ways in which succession plans effect this cost-saving.¹⁰

However, despite the familiar risks posed by inadequate succession planning, businesses have fallen woefully short in this area.¹¹ Indeed, across all businesses, it may be the most serious and pervasive governance failure. In one recent survey of CEOs and board directors,

7. See, e.g., Means, *King Lear*, *supra* note 3, at 1252–57 (first discussing *Gadeco, LLC v. Grynberg*, 415 P.3d 323 (Colo. 2018), a case concerning a hostile takeover attempt by the family of aging Colorado oil tycoon Jack Grynberg, and then discussing *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Ringling*, 53 A.2d 441 (Del. 1947), a case concerning a struggle for control among family stockholders).

Royal variations of succession crises—real and fictional—include abdication, see, e.g., *Abdication of Edward VIII 1936*, NAT’L ARCHIVES, <https://www.nationalarchives.gov.uk/education/resources/significant-events/abdication-of-edward-viii-1936/> [<https://perma.cc/5YGP-4EW7>], and much worse, see, e.g., Means, *King Lear*, *supra* note 3, at 1249–50 (noting that all three of Lear’s daughters are killed in a power struggle for control of their father’s kingdom, but stressing that, mercifully, “most family business conflicts end short of murder”).

8. Eben Harrell, *Succession Planning: What the Research Says*, HARV. BUS. REV. (Dec. 2016), <https://hbr.org/2016/12/succession-planning-what-the-research-says> [<https://perma.cc/V9EB-DY5A>] (citing Ken Favaro, Per-Ola Karlsson & Gary L. Neilson, *The \$112 Billion CEO Succession Problem*, STRATEGY+BUS. (May 4, 2015), <https://www.strategy-business.com/article/00327> [<https://perma.cc/9BHP-THTG>]).

9. *Id.* (citing Bruce K. Behn, David D. Dawley, Richard Riley & Ya-wen Yang, *Deaths of CEOs: Are Delays in Naming Successors and Insider/Outsider Succession Associated with Subsequent Firm Performance?*, 18 J. MANAGERIAL ISSUES 32 (2006)).

10. Francesco Celentano & Antonio S. Mello, *Why Do Firms Often Not Have a CEO Succession Plan?* (Eur. Corp. Governance Inst., Working Paper No. 1023, 2024).

11. See Harrell, *supra* note 8 (citing Per-Ola Karlsson, Gary L. Neilson & Juan Carlos Webster, *CEO Succession 2007: The Performance Paradox*, STRATEGY+BUS. (June 10, 2008), <https://www.strategy-business.com/article/08208> [<https://perma.cc/QX6K-8PAV>]) (noting that “poor succession planning often extends the tenure of ineffective CEOs, who end up lingering in office long after they should have been replaced” and citing a study finding that “on average, firms with stock returns in the lowest decile underperformed their industry peers by 45 percentage points over a two-year period—and yet the probability that their CEOs would be forced out was only 5.7%”).

approximately 57% of respondents reported low confidence in their organization's process for CEO succession planning,¹² and another recent survey found that approximately one-third of corporate directors do not believe their boards spend enough time on succession planning.¹³ Family firm data is more troubling still, with recent survey results indicating that only 34% of family businesses have "a robust, documented and communicated succession plan in place."¹⁴ Considered alongside estimates that more than one in ten CEOs turn over each year¹⁵ and reports that a record-setting 4.1 million Americans reached retirement age in 2024,¹⁶ the implications are striking. Succession is serious business, yet the spotlights shone in newspapers, streaming services, and literary canons are insufficient to adequately motivate effective planning on the ground. The market has not, as of yet, solved the problem. This Article proposes an innovative enforcement solution: a reimagining of fiduciary duty analysis centering issues of entrenchment and proposing,

12. HEIDRICK & STRUGGLES, CEO AND BOARD CONFIDENCE MONITOR: A WORRIED START TO 2024, at 4 (2024). While survey results vary, succession planning among U.S. companies leaves much to be desired. *See, e.g.*, NATALIE COOPER, BOB LAMM & RANDI VAL MORRISON, DELOITTE, BOARD PRACTICES QUARTERLY: CEO SUCCESSION PLANNING PROCESSES 2 (2023) (finding that, among approximately 100 public company respondents of different sizes and representing different industries, while 80% said they have a succession plan in place for emergency (unplanned) CEO departure, only 67% said they have a succession plan in place for planned CEO departure); DAVID F. LARCKER & STEPHEN A. MILES, ROCK CTR. FOR CORP. GOVERNANCE & HEIDRICK & STRUGGLES, 2010 SURVEY ON CEO SUCCESSION PLANNING 2, 8 (2010) (finding, in an older yet still oft-cited survey of 140 board directors and CEOs of both public and private companies in North America, that an alarming 51% of respondents could not, if needed, immediately name a successor to their current CEO).

13. GOVERNANCE INSIGHTS CTR., PWC, TODAY'S BOARDROOM: CONFRONTING THE CHANGE IMPERATIVE, PWC'S 2023 ANNUAL CORPORATE DIRECTORS SURVEY 23 (2023).

14. PwC, PwC's 2023 US FAMILY BUSINESS SURVEY 6 (2023).

15. DAVID F. LARCKER & BRIAN TAYAN, CORP. GOVERNANCE RSCH. INITIATIVE, CEO SUCCESSION: DATA SPOTLIGHT (2022), <https://www.gsb.stanford.edu/faculty-research/publications/ceo-succession-data> [<https://perma.cc/946C-26BK>].

16. Andy Markowitz, *Are the Last Boomers Ready for Retirement?*, AARP (Apr. 19, 2024), <https://www.aarp.org/money/retirement/peak-boomer-readiness/> [<https://perma.cc/922Q-EFFV>] (citing ROBERT SHAPIRO & LUKE STUTTGEN, RET. INCOME INST., THE PEAK BOOMERS IMPACT STUDY 12 (2024)). Put differently, this figure amounts to over 10,000 people a day. Guillaume Vandenbroucke, *How Many People Will Be Retiring in the Years To Come?*, FED. RSRV. BANK ST. LOUIS: ON ECON. BLOG (May 30, 2019), <https://www.stlouisfed.org/on-the-economy/2019/may/how-many-people-will-be-retiring-in-the-years-to-come>.

for the first time, an intermediate standard of review for failure to engage in succession planning.¹⁷

Failing to succession plan, as this Article will demonstrate, is antithetical to the very foundations of corporate law. It is well established that a corporation is a distinct legal entity, separate from its owners and managers.¹⁸ It is on this footing that the fundamental building blocks of corporate law stand, chief among them separation of ownership and control—with its signature agency problems—and fiduciary duties of care and loyalty. Failed succession, whether primarily due to negligence or conflicts of interest, defies these duties. Despite popular wisdom regarding family founders and “celebrity CEOs” being indistinguishable from the companies they run, the core tenets of corporate law make clear that the leader does not, in the eyes of the law, define the company. The disentangling of ego and entity inherent in succession efforts is difficult work. Difficult, but not impossible. With diligent, thoughtful planning bolstered by coordinated legal systems, an approaching transition need not be frightening. Instead, leaders can let go and look forward with confidence.

Scholars have explored various judicial, legislative, and private-ordering solutions to encourage succession planning. This Article contributes to the literature by (1) providing a richly layered account of the corporate governance challenges associated with succession; (2) contending that a board cannot satisfy its fiduciary duties unless it ensures that a reasonable succession plan is in place for senior management; and (3) proposing an intermediate standard of review for fiduciary duty claims in succession planning, more rigorous than the deferential business judgment rule but more forgiving than exacting entire fairness review, informed by the enhanced scrutiny standard of review imposed

17. Scholars have described fiduciary duty as “a critical enforcement angle on governance that overlays the operation and execution of nearly every . . . corporate governance rule” that “matter[s] a significant amount: even an act that appears to be completely consistent with the formal mechanics of governance may still trigger liability and/or negation if it is consummated in violation of a corporate insider’s fiduciary duties.” Robert P. Bartlett & Eric Talley, *Law and Corporate Governance*, in 1 THE HANDBOOK OF THE ECONOMICS OF CORPORATE GOVERNANCE 177, 186–87 (Benjamin E. Hermalin & Michael S. Weisbach eds., 2017).

18. See Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99, 100 (2014) (“[C]ourts understand the fact that the corporate form is supposed to be a juridical entity with the characteristic of legal ‘personhood.’”). While the corporation is consistently understood to be a separate legal entity, the scope of corporate personhood is more nuanced—and more controversial. See Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1630 (arguing that, while the doctrine of corporate personhood is rooted “in concerns about the property and contract interests of shareholders,” the Supreme Court, over time, has “expanded the doctrine without a coherent explanation or consistent approach”).

by Delaware courts in certain mergers and acquisitions (M&A) contexts. This Article suggests that, while private ordering alone is not enough to motivate healthy levels of succession planning, largely due to the same issues of entrenchment that support invocation of enhanced scrutiny, these frictions are not insurmountable. More can be done *ex ante* to facilitate robust succession planning. Building on existing innovations in corporate form, entity certification, and voluntary disclosure, a reimagined vision of institutional identity emerges which, alone or coupled with strengthened enforcement of fiduciary duties, would do much to effect impactful incentives among businesses.

Any enforcement proposal, of course, begs the basic question: What exactly would be enforced? Or, here, what exactly is succession planning? The most obvious reason for the allure and avoidance of succession—its push and pull—is its inexorable entanglement with death. To state the obvious, imagined immortality does not count as succession planning.¹⁹ What *does* count proves less obvious and, for purposes of this Article, will be informed by timely business literature on industry practices and creative solutions, as explored in more detail in Sections I.A and II.A.

What counts as succession planning also depends on business characteristics. Appropriate plan features will necessarily vary as between large, publicly traded corporations and closely held companies. This Article will drill down on those distinctions—and identify instructive similarities. While the thesis offered here applies to corporations of all sizes and ownership structures, this Article will acknowledge that issues of succession are uniquely salient for family businesses. Despite family business succession's robust treatment in the modern zeitgeist writ large, the topic remains relatively underexplored in legal scholarship.²⁰ This inattention mirrors an academic blind spot for private companies in

19. Nonetheless, some of the world's toughest tycoons have proven vulnerable to visions of invulnerability. See, e.g., Nick Richardson, *Sumner Redstone: The Other Media Baron Who Inspired Succession Was More Toxic and Dysfunctional than Logan Roy*, CONVERSATION (May 21, 2023, 4:00 PM), <https://theconversation.com/sumner-redstone-the-other-media-baron-who-inspired-succession-was-more-toxic-and-dysfunctional-than-logan-roy-204035>. Indeed, reports suggest that when Jesse Armstrong, creator of *Succession*, was asked about similarities between the fictional family he created and real-world media moguls Sumner Redstone and Rupert Murdoch, "Armstrong's answer was simple: when Redstone and Murdoch had been asked about their succession plans, both had joked they didn't plan to die." *Id.*

20. See Allison Anna Tait, *Corporate Family Law*, 112 NW. U. L. REV. 1, 7 (2017); Means, *King Lear*, *supra* note 3, at 1244 ("While the [legal] literature covers relevant doctrinal issues including tax reduction strategies, valuation techniques, estate planning, and corporate restructuring, more fundamental issues concerning the alignment of family and business value systems have not received comparable scrutiny." (footnote omitted)).

general.²¹ Most family firms are small, privately held entities, and privately held businesses—despite constituting an estimated 99% of American companies²²—remain overshadowed by public companies in the legal literature. Such imbalance leaves the distinct features of governance and planning within private and family businesses underexamined. This Article supports a growing effort to bridge the gap.

The distinct gravity of succession in family firms, however, is but part of this Article's broader thesis. By expanding the scope of inquiry into business succession more broadly, this Article encourages lateral thinking about the wider implications of succession planning across entity types. Corporate attributes often overlap in unexpected ways; for example, while most family businesses are small and closely held,²³ many public companies are family controlled,²⁴ and it is estimated that family-run businesses make up more than one-third of Fortune 500 companies and contribute up to 64% of the U.S. gross domestic product.²⁵ Business

21. Business scholarship has long devoted more vigorous treatment to family firm succession issues. See Wendy C. Handler, *Succession in Family Business: A Review of the Research*, 7 FAM. BUS. REV. 133 (1994).

22. Hal Weitzman, *Is the US Economy 'Going Dark'?*, CHI. BOOTH REV. (May 30, 2023), <https://www.chicagobooth.edu/review/is-us-economy-going-dark> [https://perma.cc/CGM3-2KLJ]; Abby Copeland, *Why Your Favorite Companies Are Privately Held*, BUS. REV. BERKELEY (Mar. 28, 2022), <https://businessreview.studentorg.berkeley.edu/why-your-favorite-companies-are-privately-held/> [https://perma.cc/N2NQ-K362] (citing Mary Ellen Biery, *4 Things You Don't Know About Private Companies*, FORBES (May 26, 2013, 6:45 AM), <https://www.forbes.com/sites/sageworks/2013/05/26/4-things-you-dont-know-about-private-companies/> [https://perma.cc/DGQ3-NKKH]).

23. See Tait, *supra* note 20, at 3 & n.5.

24. See, e.g., Deborah A. DeMott, *Guests at the Table?: Independent Directors in Family-Influenced Public Companies*, 33 J. CORP. L. 819, 825–29 (2008) (discussing empirical data and defining characteristics of “the phenomenon of family firms that are public companies”); *How the Largest Family Enterprises Are Outstripping Global Economic Growth*, ERNST & YOUNG GLOB. LTD. (Jan. 16, 2023), https://web.archive.org/web/20250106000310/https://www.ey.com/en_gl/insights/family-enterprise/family-business-index (summarizing findings from the 2023 Ernst & Young and University of St. Gallen Family Business Index, which examined the world's 500 largest family businesses by revenue, and noting that “new entrants [to the 2023 Index] are far more likely to be public rather than private – in fact, 62% of new entrants are publicly listed”).

25. *Family Business Facts*, CONWAY CTR. FOR FAM. BUS., <https://www.familybusinesscenter.com/resources/family-business-facts/> [https://perma.cc/98GN-7KJH]. It is estimated that approximately 87% of businesses in the United States are family businesses, employing approximately 59% of the workforce in the private sector. TORSTEN M. PIEPER, FRANZ W. KELLERMANN & JOSEPH H. ASTRACHAN, FAM. ENTER. USA, UPDATE 2021: FAMILY BUSINESSES' CONTRIBUTION TO THE U.S. ECONOMY 3, 8, 13 (2021) (revisiting two articles published in the *Family Business Review* in 1996 and 2003 by Melissa Carey Shanker and Joseph H. Astrachan that assessed the economic impact

literature has explored the diversity of family firms in considerable detail,²⁶ and legal scholarship has aptly observed that “any single definition of family business will struggle to account for a wide variety of family and business contexts.”²⁷ This Article will thus consider questions of succession in family businesses and all businesses, in various industries and with various capitalization structures, while operationalizing a broad formulation of succession planning—namely, planning for transfer of leadership.²⁸ Or, to put it colloquially, “passing the baton.”²⁹

This Article proceeds as follows. Part I explores succession design, engaging with embedded tensions between the innovation and stagnation

of family businesses). These figures were calculated using a broad formulation of what constitutes a family business. *See id.*

26. *See, e.g.,* PIEPER, KELLERMANN & ASTRACHAN, *supra* note 25, at 4–5, 5 fig.1 (conceptualizing family businesses using concentric circles to represent broad, medium, and narrow formulations). Pursuant to the “bull’s eye” model described in this report, a broadly defined family business would feature either strategic control or familial participation and strategic influence; a medium-level conception of family business would feature at least one family manager and multi-generational ownership; and an exclusive (or narrowly defined) family business requires a family holding strategic control and managerial responsibility in the hands of at least two members of the family. *Id.*

27. Benjamin Means, *The Contractual Foundation of Family Business Law*, 75 OHIO ST. L.J. 675, 691 (2014). Accordingly, and in a spirit of optimism that the observations set forth here will apply across precise designations, this Article adopts the simple ownership-plus-control definition of the family business: a business both “owned and controlled by members of the same family.” Means, *King Lear*, *supra* note 3, at 1246.

28. The clearest example of this is executive succession. Shareholders elect directors, and directors appoint officers. *See, e.g.,* DEL. CODE ANN. tit. 8, §§ 211–33 (2025). Succession planning for officers thus requires detailed board governance and can, if implemented and managed well, be a comparatively controlled process. Succession planning for directors is different, with the board focused mainly on identifying and promoting strong candidates for directorship, often through the work of nomination committees, with shareholders making the ultimate decision through casting of their votes. *See infra* notes 47, 59 and accompanying text. Of course, in closely held family businesses, succession also involves questions of inheritance—in other words, the private passing of stock ownership from one generation to the next. Part II of this Article will touch on this ownership aspect of succession planning.

29. Means, *King Lear*, *supra* note 3, at 1270 (quoting Ben Dooley & Hisako Ueno, *This Japanese Shop Is 1,020 Years Old. It Knows a Bit About Surviving Crises*, N.Y. TIMES, <https://www.nytimes.com/2020/12/02/business/japan-old-companies.html> (Jan. 7, 2021)); Allan Discua-Cruz & Bingbing Ge, *Succession Planning: Not All Family Businesses Feud – Here’s How They Help Younger Generations Take Over*, CONVERSATION (Mar. 24, 2023, 8:05 AM), <https://theconversation.com/succession-planning-not-all-family-businesses-feud-heres-how-they-help-younger-generations-take-over-197855> [<https://perma.cc/6JVP-TGUE>]; *see also* Handler, *supra* note 21, at 134 (citing Bernard Barry, *The Development of Organization Structure in the Family Firm*, J. GEN. MGMT., Sept. 1975, at 42, 42–60) (noting that some family business researchers “have divided the ‘leadership baton’ into two axes—that of ownership and management”).

that are characteristic of private ordering in business planning. Part II features the family firm as a case study, examining the scholarly dialogue on family business succession and surveying existing literature through temporal and psychological lenses that emphasize the fundamentally person-centered nature of succession inquiry. The observations in Parts I and II underpin the prescriptive argument in Part III, which proposes a reframing of corporate foundations as applied to succession planning. This Part analogizes succession and M&A as critical inflection points in the lifecycle of a company and argues that courts should apply intermediate scrutiny, similar to the analysis applied by Delaware courts in certain sale and takeover situations, to fiduciary duty analysis in the context of succession planning. Part IV considers alternative questions of private ordering and institutional identity, calling on legal systems and private actors to build creative, integrated incentive structures that center succession planning and fortify corporate foundations through coordinated governance design and fiduciary enforcement. In arguing for the application of enhanced scrutiny, this Article relocates private ordering within succession planning analysis. Where entrenchment is at issue in a corporate transition, the integrity of private ordering is likewise compromised, and it should not be viewed as a panacea.³⁰ Instead, this Article envisions private ordering as one part of a larger governance structure, beneficial in its own right and likewise instrumental to enhanced fiduciary compliance in the succession context.

I. SUCCESSION DESIGN

When succession planning works, *how* does it work? Broadly speaking, effective succession plans are part of larger corporate governance efforts aimed at resiliency and sustainability. Leaders are expected to stay abreast of developments and ahead of challenges in an ever-changing landscape, ranging from cybersecurity to climate change, global pandemics to artificial intelligence, and everything in between.³¹

30. Cf. Means, *King Lear*, *supra* note 3, at 1245 (recommending “a range of legislative, judicial, and private ordering initiatives and best practices” to facilitate timely and effective intergenerational succession).

31. GEORGE VLACHOS & JAMES BEASLEY, NASDAQ & STANTON CHASE, FORWARD-LOOKING BOARDS & SUCCESSION PLANNING 2 (2022).

This work requires qualified and capable people installed in leadership roles at the right time.³² Governance specialists put it plainly:

Succession planning is no longer just a box to tick or a “nice to have” when looking at board governance. It is an integral part of effective supervision and stewardship, indelibly linked to core board responsibilities such as oversight of strategy implementation and risk management. Having the right people around the table at the right time can add immeasurable value, whilst their absence, even temporarily, has been a key component of governance failures.³³

This Part examines the state of the art in succession design. Section I.A explores the approaches taken by leading governance specialists in modern succession planning, considering formal and informal strategies and industry practices. Section I.B ponders the practical effect of these strategies in light of recent statistics on succession planning engagement, and Section I.C widens the analytical lens, considering broader implications for private ordering in business planning and setting the stage for the prescriptive discussions set forth in Parts III and IV.

A. The State of the Art

Modern companies face a myriad of challenges, but resources are available to make those challenges surmountable. Advancements in leadership development science, for example, present opportunities for identification and nurturing of future leaders earlier in their careers, helping companies develop a deep leadership bench regardless of individual choice or strategic adjustment.³⁴ Furthermore, as will be

32. *Id.* at 2–3. Unfortunately, when succession planning is delayed, the successors who are ultimately selected may not be ready for the job. See Suzanne Bates & Sarah Woods, *Debunking the Myth of the Fast and Successful Succession Plan*, NACD: DIRECTORSHIP MAG. (Feb. 20, 2024), <https://www.nacdonline.org/all-governance/governance-resources/directorship-magazine/winter-2024-issue/debunking-the-myth-of-the-fast-and-successful-succession-plan/> [<https://perma.cc/S3DC-DFSE>] (“[M]ost professionals who assume executive roles admit they weren’t prepared for the job”); KATI NAJIPOOR-SCHUETTE & DICK PATTON, EGON ZEHNDER, THE CEO: A PERSONAL REFLECTION 18 (2018), <https://ceostudy.egonzehnder.com/The-CEO-report-Egon-Zehnder.pdf> [<https://perma.cc/4ZJT-RB2C>] (finding that only 32% of respondent CEOs indicated they were “fully” prepared for their position).

33. VLACHOS & BEASLEY, *supra* note 31, at 2 (quoting James Beasley, Senior Director & Head of Board Advisory, Europe, Middle East & Africa, Nasdaq).

34. Bonnie W. Gwin & Jeffrey S. Sanders, *CEO Succession in Turbulent Times*, HEIDRICK & STRUGGLES, https://www.heidrick.com/en/insights/boards-governance/ceo_succession_in_turbulent_times [<https://perma.cc/3JNX-KWHZ>].

explored in this section, innovative succession guidance is readily available. From “shadow boards” to co-leader models to advisory councils, business planners have designed a variety of planning features with meaningful potential for succession planning across business types. And while it is true that “there is no set formula for CEO succession,”³⁵ three guiding principles weave through much of the practice literature: early start, rigor of process, and contextual awareness.³⁶

The Avedis Zildjian Company, the oldest family firm in the United States and a leading maker of cymbals and other percussion instruments, exemplifies this paradigm. Starting early is non-negotiable in the Zildjian family: Any family member hoping to work for the business must intern with the company, graduate from college (ideally with a business degree), and work outside the family business to build diverse professional experience.³⁷ Directorship transitions are systematically supported through mentoring and education, and each new generation of Zildjian leaders brings fresh perspective required to evolve with a changing world.³⁸ At over 400 years old,³⁹ Zildjian has much to teach the business world about succession. Its story demonstrates that templates do exist for planning processes that make succession less daunting. This section will survey industry practices in succession planning. As we will see in later Parts, however, the potential of these practices has yet to be fully realized.

35. *Id.*

36. *See id.*; Kathi Graham-Leviss, *Succeed at Succession: Five Steps for Building an Executive Succession Plan*, FORBES (Feb. 26, 2019, 8:30 AM), <https://www.forbes.com/sites/forbescoachescouncil/2019/02/26/succeed-at-succession-five-steps-for-building-an-executive-succession-plan/> [https://perma.cc/N3BL-8JD3] (identifying five high-level steps businesses can take to ensure readiness for leadership transition: (1) process institutionalization, which counteracts bias in decision-making; (2) identification of key criteria for executive success; (3) establishing fulsome transition and onboarding processes; (4) starting leadership development early; and (5) ensuring flexibility in selection criteria for leadership candidates as the needs of the business shift over time).

37. Kim Gittleston, *Trade Secrets of Oldest Family Firm in US*, BBC (June 7, 2012), <https://www.bbc.com/news/business-18261045> [https://perma.cc/BG96-SSWN].

38. Amanda Breen, *A 400-Year-Old Family Business Remains the ‘Gold Standard’ in Its Category—Its First Women Leaders Reveal the Secret*, ENTREPRENEUR (Mar. 8, 2023), <https://www.entrepreneur.com/leadership/what-it-takes-to-keep-a-400-year-old-family-business-on-top/446721> [https://perma.cc/98FA-Z223].

39. The Zildjian company started in 1623 in what is now Turkey and relocated to the United States in the early twentieth century, incorporating in Quincy, Massachusetts, in 1929. *The Zildjian Brand Journey*, ZILDJIAN, <https://zildjian.com/pages/brand> [https://perma.cc/9HJ7-D886].

1. Formal Mechanisms

Succession planning has been described as “the never-ending story,”⁴⁰ and all stories must start somewhere. Or, as we have seen, they often do not start at all. Reports suggest that, while companies understand how important succession planning is, they still fail to do it.⁴¹ And when succession planning is addressed, it is often too little, too late.⁴² Succession, if it is to succeed, must be attended to early and often, and the best way to kickstart and maintain systematic succession planning is to embed it into a business’s procedural DNA. This section will discuss the “formal” mechanisms being utilized in modern succession planning.⁴³

As a preliminary matter, succession plans should be clearly documented.⁴⁴ Development and maintenance of written succession plans require commitment from existing leadership, including corporate officers.⁴⁵ A corporate secretary, for example, can act as a governance gatekeeper and guiding oar, “ensuring succession planning is appropriately represented on calendars and agendas as well as being linked to other processes such as effective evaluations, director and management appraisals, and skills profiling.”⁴⁶ Including succession planning as part of the regular corporate cadence keeps succession front of mind for key decision-makers. Over time, this encourages alignment among leaders and bolsters efforts to build strong talent pipelines.

40. Carey Oven & Bob Lamm, *The Never-Ending Story: CEO Succession Planning*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 11, 2023), <https://corpgov.law.harvard.edu/2023/06/11/the-never-ending-story-ceo-succession-planning/>.

41. DAVID F. LARCKER & SCOTT SASLOW, INST. OF EXEC. DEV. & ROCK CTR. FOR CORP. GOVERNANCE, 2014 REPORT ON SENIOR EXECUTIVE SUCCESSION PLANNING AND TALENT DEVELOPMENT 1 (2014), <https://www.gsb.stanford.edu/sites/default/files/publication-pdf/cgri-survey-2014-senior-executive-succession.pdf> (“The problem tends to be cultural: the majority of companies do not have honest and open discussions about executive performance, nor do they allocate sufficient time to the process of identifying and grooming successors.”).

42. See *infra* notes 86–89 and accompanying text.

43. For ease of organization—and not for designation of value—the definitional line between “formal” and “informal,” in this context, is drawn based on written documentation. The formal mechanisms discussed here include key governance documents such as charters, bylaws, and corporate policies and procedures. Informal factors include unwritten norms, personal tendencies, and interpersonal considerations.

44. Maria Castañón Moats & Paul DeNicola, *How the Best Boards Approach CEO Succession Planning*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 20, 2021), <https://corpgov.law.harvard.edu/2021/09/20/how-the-best-boards-approach-ceo-succession-planning/> [<https://perma.cc/K89W-H5RW>] (stating that written succession plans should include, inter alia, procedural timelines, renewal processes, and emergency response mechanisms).

45. VLACHOS & BEASLEY, *supra* note 31, at 2.

46. *Id.*

Committees also play a crucial role. Research shows that nomination committees are essential to effective board and officer succession: By leading appointment processes and overseeing pipeline development, all in coordination with the board chair, a nomination committee can guide companies toward “optimal board composition” over time.⁴⁷ Other formal governance strategies that encourage effective succession planning include governance renewal efforts such as term limits for board participants,⁴⁸ rigorous leadership evaluation processes designed to test individual contributions and identify capability gaps,⁴⁹ phased integration

47. *Id.* at 4 (citing research by the Corporate Governance Institute and noting that it is best practice “for the Nomination Committee to re-evaluate the succession planning process by assessing periodically whether desired outcomes have been achieved and where improvements can be made”).

48. *See, e.g., id.* at 5. Of course, an incumbent board may be reluctant to impose term limits on itself. This friction will be explored in more detail in Section III.A.

49. *See, e.g., id.*; *see also* Richard Holt & Amerino Gatti, *Better Succession Planning Starts with Knowing Your CEO*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 19, 2022), <https://corpgov.law.harvard.edu/2022/08/19/better-succession-planning-starts-with-knowing-your-ceo/> (arguing that regular feedback and performance evaluations of top executives can familiarize boards with the characteristics they want—and do not want—in future corporate officers, and that an aligned board can efficiently build a pool of qualified internal and external candidates based on evaluation-informed leadership profiles). Regular evaluations would also evidence the reasonableness (or lack thereof) of succession planning efforts, *e.g.*, if a CEO regularly receives subpar evaluations but retains the top leadership position, this might support application of enhanced scrutiny as discussed more fully in Section III.B.4. *See also supra* note 11 and accompanying text.

of successors,⁵⁰ and regular utilization of outside advisors.⁵¹ In the family firm context, family participation plans are highly regarded among advisors as holistic tools that help business families clarify rules and expectations about employment, management, evaluation, professional development, compensation, and options for exit.⁵² Succession planning in family firms and other closely held companies must also address, with meticulous detail, transfer or redemption of stock upon death of a shareholder. Key considerations include identification of permitted transferees, valuation and payment terms, and use of life insurance proceeds.⁵³

These formal mechanisms are only part of the story, however. Beneath every corporate governance regime lies a network of undeniably human corporate actors, and governance systems—including succession plans—must leave room for the personal. As one legal scholar observed of family businesses, with a sentiment applicable to entities of all kinds: “[S]uccession requires a separation of personal identity and business status; unless the incumbents are prepared to give up control, the formal

50. See, e.g., LISA BAIRD, RICHARD GREENE, TODD MONTI & TODD TAYLOR, HEIDRICK & STRUGGLES, SUCCESSION PLANNING COMES TO FOUNDER-LED INVESTMENT FIRMS 2–3 (2019), <https://www.heidrick.com/-/media/heidrickcom/publications-and-reports/succession-planning-comes-to-founderled-investment-firms.pdf> [<https://perma.cc/XAR7-BCF8>] (observing novel leadership structures being explored among investment firms, including a co-president model with co-presidents dividing their focus on the basis of product, geography, function, or expertise); ERNST & YOUNG, DEMYSTIFYING FAMILY BOARDS: STRONG GOVERNANCE BUILDS A LEGACY FOR GENERATIONS TO COME 3 (2016), https://web.archive.org/web/20220110181246/https://assets.ey.com/content/dam/ey-sites/ey-com/en_us/topics/tax/ey-demystifying-family-boards.pdf (using family firm case studies to discuss next-generation observation of board meetings through silent “shadow board” positions designed to expose and prepare successors for future leadership roles). Early integration of successors, in effect, expands and relaxes the succession timeline. See *infra* text accompanying note 122. Saving seats at the table for the next generation of business leaders also serves larger procedural justice initiatives by accepting input from multiple voices. See Means, *King Lear*, *supra* note 3, at 1267.

51. See, e.g., BAIRD, GREENE, MONTI & TAYLOR, *supra* note 50, at 3. These experimental governance structures can ease transitions and accelerate leadership development among prospective future leaders. *Id.* at 6.

52. See, e.g., *The Guide to Family Participation Planning*, FAMILY.INC., <https://family.inc/family-participation-plan/> [<https://perma.cc/F95H-9Y22>]. This approach finds support in legal scholarship. See Means, *King Lear*, *supra* note 3, at 1267–68 (“[F]amily business owners should engage all stakeholders in dialogue, establish clear criteria for choosing among various alternatives, and, once a decision has been made, articulate the reasons supporting that decision.”).

53. See Means, *King Lear*, *supra* note 3, at 1269 (observing that choices about intergenerational transfer of family business assets involve questions of business needs, family values, and stakeholder preferences).

clarity of financial and legal arrangements . . . will not matter.”⁵⁴ Informal dynamics matter too.

2. Informal Mechanisms

Strong formal fixtures allow for flexibility within the frame. Literature on succession planning is replete with visions of balance: stability and agility, expertise and innovation, internal clarity and external awareness. Boards must prioritize succession planning for top roles, and they must also address the needs of managers in supporting positions. Directors should consider talent and experience in their search for potential successors, and they should also consider broader questions of corporate mission, vision, and strategic growth. Succession planning “cannot be a static process.”⁵⁵ Particularly compelling is the call for “forward-looking boards” defined by a “culture of responsibility.”⁵⁶ To wit:

There is no doubt that the socio-economic environment and overall global context in which corporations operate has altered dramatically over the past few years, and this poses a number of challenges for top management, business leaders, and entrepreneurs. . . . [B]oards have faced major pressure to reassess and enlarge their function, reposition, and also become more active in the critical operations of their businesses.⁵⁷

As board function expands, so too must a board’s way of thinking about succession—and successors. Indeed, “[o]ne of the worst mistakes a board can make is not looking beyond its traditional networks and unconscious biases.”⁵⁸ Nomination committees play a formal role in succession processes, but there are also informal mechanisms at play. For example, nomination committees’ identification of leadership candidates often incline toward individuals with skills and backgrounds

54. *Id.* at 1262.

55. Nicole Lewis, *Succession Planning Is Back in the Spotlight*, SHRM (Oct. 30, 2023), <https://www.shrm.org/topics-tools/news/organizational-employee-development/succession-planning-is-back-in-the-spotlight> [https://perma.cc/T696-982U].

56. VLACHOS & BEASLEY, *supra* note 31, at 2.

57. *Id.* at 3 (quoting Panos Manolopoulos, Managing Partner, Middle East, Russia & Greater China, Stanton Chase).

58. *Id.* at 5.

similar to those of committee members.⁵⁹ And even if corporate executives are not charged with selecting their own successors, research indicates that a leader's selection and cultivation of mentees—often, individuals whose demographic characteristics resemble those of the incumbent—informally, yet powerfully, influences formal candidate selection.⁶⁰ “Forward-looking boards” must use both formal and informal tools to challenge these tendencies.⁶¹

External advisors, too, might be utilized both formally and informally for succession support. An independent advisory council can be a solid bulwark against groupthink and entrenchment, and individual corporate actors can also seek unbiased counsel from professional advisors and other outside sources. Even the most formal governance features, such as voting, are regularly influenced by informal or extra-governance maneuvers. Family businesses, for example, might engage in behind-the-scenes faction voting to determine director votes. And, on a larger scale, recent research has illustrated the extent to which powerful proxy advisors influence—and are influenced by—client preferences.⁶² In each of these examples, informal forces are at work within a formal apparatus. The prescriptive proposals in Parts III and IV endeavor to capture and address the delicate balance of succession planning: formal and informal; duty and loyalty; and syndicate and self.

59. Darren Rosenblum & Yaron Nili, *Board Diversity by Term Limits?*, 71 ALA. L. REV. 211, 228 (2019) (“The leaders of the corporation view themselves as the standard-bearers for the corporation’s success; their skills prove essential for the firm’s continued profitability.”).

60. See Thomas Hutzschenreuter, Ingo Kleindienst & Claas Greger, *What Determines Demographic Similarity Between Incumbent CEOs and Their Successors? A CEO Informal Power Perspective*, 36 MANAGERIAL & DECISION ECON. 421, 421 (2015) (presenting empirical research on diversified companies in Germany suggesting that “the more informal power incumbent CEOs have, the greater the demographic similarity between them and their successors”).

61. See, e.g., Rosenblum & Nili, *supra* note 59, at 230 (arguing, in the context of corporate boards, that imposing term limits—and thus speeding up board turnover—might “advance diversity, breaking the hold of incumbency on boards”). Formal term limits thus influence informal—though entrenched—processes of selection within the succession apparatus.

62. Chong Shu, *The Proxy Advisory Industry: Influencing and Being Influenced*, J. FIN. ECON., April 2024, at 1, 1–2.

B. Alternatives

Succession sometimes fails.⁶³ Why, then, contend with planning for it? In terms of transaction cost, effective succession planning requires significant investments of time and resources. Importantly, corporate transition of any kind also involves loss of institutional memory. This is especially true—and especially costly—if the incumbent in question is a founder or seasoned director.⁶⁴ When leader identity becomes entwined with corporate identity, the knots are difficult to untangle.⁶⁵ The shadowing and training explored in Section I.A would do much to extricate incumbent leaders from the broader leadership system. By formalizing training processes and involving potential successors in board activities, companies can preserve valuable institutional knowledge and prepare future leaders for their roles. Unfortunately, however, these methods are not always used—and, if they are, they are often implemented too late.

M&A might be a viable alternative. In fact, a sale may be preferable to succession in certain instances,⁶⁶ for example, where a company is strapped for cash and faces uncertain prospects for the enterprise absent a significant investment or business combination. Disinterest or antagonism among potential successors might also encourage corporate leaders to consider sale, instead of succession, as the best path forward. Sales, though, are likewise not immune to complication.⁶⁷ Furthermore,

63. See Melanie Hughes, *How Executives Can Measure Success in the First 6 Months*, FORBES (Jan. 18, 2024, 11:44 AM), <https://www.forbes.com/sites/melaniehughes/2024/01/18/how-executives-can-measure-success-in-the-first-6-months/> [https://perma.cc/PUU2-9VRJ] (citing studies by the Center for Creative Leadership and LeadershipIQ showing executive failure rates between 30% and 50% in the first eighteen months).

64. In the context of term limits on independent directors, for example, it has been argued that experienced board members “make a positive contribution to strategic and monitoring decisions,” “provide a balance of power in the boardroom,” and “make a valuable contribution to corporate governance within firms”—observations that challenge, in certain contexts, the utility of term limits in negating board entrenchment and complacency. Ying Dou, Sidharth Sahgal & Emma Jincheng Zhang, *Should Independent Directors Have Term Limits? The Role of Experience in Corporate Governance*, 44 FIN. MGMT. 583, 585–86, 617–18 (2015).

65. The implications of this entanglement will be explored in more detail in Section III.A.

66. See Means, *King Lear*, *supra* note 3, at 1259 n.120 (observing the position of some commentators that, with respect to a family business, “[i]n most cases, it should not pass to family members and should be sold” (quoting MYRON E. SILDON, *GETTING THE FAMILY BUSINESS READY TO SELL* 5 (2012))).

67. See, e.g., *Willard v. Moneta Bldg. Supply, Inc.*, 515 S.E.2d 277 (Va. 1999) (affirming the trial court’s dismissal of a derivative action claiming, inter alia, that directors of a closely held corporation breached their fiduciary duties in approving an

succession planning and M&A can influence each other, and inadequate succession planning might impair the prospects of a successful M&A exit event.⁶⁸ In the words of one buy-side CEO: “We’re not doing deals so that the founder can leave in a year.”⁶⁹ Relying on sale as a stand-in for succession planning will often prove misguided.

C. Complexities

Succession planning is but one component of corporate governance. Professors Dorothy Lund and Elizabeth Pollman have described the “corporate governance machine” as “a complex governance system in the United States composed of law, institutions, and culture that orients corporate decisionmaking toward shareholders.”⁷⁰ Whether one adheres to traditional notions of shareholder primacy, contemporary stakeholder theory, or otherwise, this envisioning of corporate governance as a complex, reinforcing system is instructive.⁷¹ Operating on macro and micro levels, succession informs and reinforces the larger governance system while also being informed and reinforced by its own formal and informal mechanisms. Furthermore, just as shareholder primacy is informed by stakeholderism in the corporate governance discourse more

asset sale to the son of two directors, where the corporation had received a higher competing bid from a minority shareholder). The Virginia Supreme Court thus declined to adopt *Revlon* duties in Virginia and clarified the broad deference given to directors under Virginia law. *See id.*; *see also infra* note 216 and accompanying text. *Willard* is but one example of the complications inherent to M&A, which are discussed in more detail in Part III.

68. *See Means, King Lear, supra* note 3, at 1244 n.17; Holly Deaton, *How a Lack of Succession Planning Can Kill M&A Deals*, INSTITUTIONAL INV. (May 1, 2023), <https://www.institutionalinvestor.com/article/2blw6vi04eogigqa8z11c/ria-intel/how-a-lack-of-succession-planning-can-kill-m-a-deals> [https://perma.cc/3SW2-JXCD] (observing that M&A does not necessarily supplant succession; instead, buyers often work with sellers on multi-year succession plans that culminate post-closing); *see also* Ira S. Rosenbloom, *In an M&A Deal, Buyers Often Have a Succession Plan Too*, VA. SOC’Y CPAs (Aug. 20, 2021), <https://www.vscpa.com/article/in-ma-deal-buyers-often-have-succession-plan-too> (describing buyers’ own succession issues impacting their acquisition strategies in accounting firm M&A, including timing, selectivity, practice perpetuity, and timeline to closing).

69. Deaton, *supra* note 68 (quoting Bob Oros, CEO of Hightower Advisors).

70. Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2565 (2021).

71. *Id.* at 2634 (“Understanding the complex and reinforcing nature of the U.S. corporate governance system is essential for understanding corporate decisionmaking and how to reform it.”).

broadly,⁷² formal succession plans that protect shareholders' investments impact—and are impacted by—nonowner stakeholders, implicit biases, and societal values.⁷³ And while there is no one-size-fits-all governance solution, be it for succession planning or otherwise,⁷⁴ succession planning of some kind is necessary for sustainable corporate function.⁷⁵

This Part has explored the complexities of succession design. Part II will elaborate on these points, using the family firm as a framing device to explore the theoretical and behavioral underpinnings of business succession. If corporate governance is a machine, then systematic safeguards are required. The dysfunction of succession as it currently stands begs adjustment and reworking, upending and interrogation. Parts III and IV will undertake these tasks.

72. *Id.* at 2634 (“[S]takeholderism is unlikely to dethrone shareholder primacy; however, it may gain ground by shaping the meaning of shareholder primacy to encompass stakeholder interests.”).

73. Means, *King Lear*, *supra* note 3, at 1286 (arguing, in the context of family firms, that “governance of family business impacts non-family stakeholders”). This sentiment is readily extendable to businesses of all kinds; *i.e.*, corporate governance undeniably influences non-shareholders. *Cf.* Leo E. Strine, Jr., Aneil Kovvali & Oluwatomi O. Williams, *Lifting Labor’s Voice: A Principled Path Toward Greater Worker Voice and Power Within American Governance*, 106 MINN. L. REV. 1325, 1333–35 (2021) (advocating for strategic policy changes aimed at expanding stakeholder influence on corporate decision-making vis-à-vis “board codetermination,” or having a company’s workforce elect some fraction of its board of directors). Further research might explore the social welfare function of succession planning, considering, *e.g.*, the significant social, human, and financial capital that can be sacrificed when corporate leaders die or become incapacitated without a plan in place.

74. Lund & Pollman, *supra* note 70, at 2577 (noting the “lack of conclusive empirical support” for “‘best practices’ for ‘good governance’”); Dorothy S. Lund, *In Search of Good Corporate Governance*, 131 YALE L.J.F. 854, 855 (2022); DAVID F. LARCKER & BRIAN TAYAN, ROCK CTR. FOR CORP. GOVERNANCE, LOOSEY-GOOSEY GOVERNANCE: FOUR MISUNDERSTOOD TERMS IN CORPORATE GOVERNANCE 1 (Oct. 7, 2019), <https://gsbpreserve.stanford.edu/view/cgri-closer-look-79-loosey-goosey-governance/loosey-goosey-governance-four-misunderstood-terms-in-corporate-governance> [<https://perma.cc/8QFD-T6EU>] (“Our understanding of governance suffers from . . . the tendency to overgeneralize across companies—to advocate common solutions without regard to size, industry, or geography, and without understanding how situational differences influence correct choices.”); Gwin & Sanders, *supra* note 34.

75. LARCKER & TAYAN, *supra* note 74, at 2–3 (observing the complexity and poor understanding of board oversight, which includes wide-ranging responsibilities such as strategic guidance, risk management, performance evaluation, and succession planning, among others).

II. FAMILY BUSINESS SUCCESSION: LITERATURE REVIEW AND THEORETICAL FRAMEWORK

Small and family-owned businesses dominate the U.S. economy.⁷⁶ This alone should demand the attention of the legal academy, and a growing but still nascent coalition of corporate law scholars is heeding the call. Legal scholarship on the whole, however, continues to lag behind.⁷⁷ By way of example, agency theory, a central framework in corporate governance literature,⁷⁸ maps unevenly onto the family firm. The prototypical agency problem arises in corporate law when a corporation's shareholders, as principals, engage managers, as agents, to act on behalf of the shareholders and manage the shareholders' property. In this scenario, if principal and agent are both "utility maximizers[,] there is good reason to believe that the agent will not always act in the best interests of the principal."⁷⁹ Work on privately held corporations has drawn a salient distinction within the literature, observing that agency costs are most pronounced in large, publicly traded corporations with dispersed shareholders, and that conflict in closely held corporations more often lies within the shareholder ranks.⁸⁰ Scholars categorize these governance disputes as "vertical" (namely, principal-agent problems) and "horizontal" (exemplified by conflicts among shareholders, such as minority shareholder oppression).⁸¹ Recent scholarship has convincingly challenged this dichotomous view of corporations, arguing that static

76. See *supra* notes 22–25 and accompanying text.

77. See *supra* note 20 and accompanying text; cf. Bartlett & Talley, *supra* note 17, at 185–86 (describing the "increasing concentration of economic value in private companies" as "a challenge for corporate governance scholars, both empirically and theoretically").

78. Elizabeth Pollman, *Startup Governance*, 168 U. PA. L. REV. 155, 176 (2019) (citing Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 248 (1999)).

79. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976).

80. Pollman, *supra* note 78, at 158 (first citing Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271, 1279–80 (2017); then citing Benjamin Means, *A Contractual Approach to Shareholder Oppression Law*, 79 FORDHAM L. REV. 1161 (2010); and then citing Douglas K. Moll, *Shareholder Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 DUKE L.J. 293 (2004)).

81. Bartlett & Talley, *supra* note 17, at 179–80. See also Benjamin Means, *A Voice-Based Framework for Evaluating Claims of Minority Shareholder Oppression in the Close Corporation*, 97 GEO. L.J. 1207, 1209 (2009) [hereinafter Means, *Voice-Based Framework*] (describing the risk of minority shareholder oppression "as an inherent structural characteristic of the close corporation form" in which shareholders have no public market to sell their shares).

vertical/horizontal bifurcation overlooks unique features of other common business types, namely startups, whose stakeholders regularly hold multiple and variable roles.⁸² The same is true of family businesses, and intergenerational changeover and shifting roles within a family further complicate governance analysis.⁸³

Family business, put simply, is an uneasy fit within many traditional models of corporate law and theory. Succession is no less complicated, typically relegated to the realm of private ordering despite its inescapable integration with governance. Considered together, succession in family business is thorny at best, presenting an intimidating challenge to corporate scholars and lawyers alike.⁸⁴ This Part will examine existing literature on family business succession, situating that work within broader themes of particular significance to family firms. Section II.A will examine fundamental questions of timing in family succession, exploring legal and business scholarship on delay and avoidance in corporate governance. Section II.B will engage social science literature and locate critical conflicts—and opportunities—for family businesses at the intersection of law and psychology. Building upon the broad-based design observations in Part I and the precise, family-focused observations in this Part II, Parts III and IV will apply these concepts to other entity types and develop an expansive thesis applicable to business associations more broadly.

82. Pollman, *supra* note 78, at 159–60 (noting, *e.g.*, that a typical startup structure in which an investor holds stock and also holds a board seat “complicates conventional applications of principal-agent theory as participants may have dual status as both principal in one context and agent in another” and citing Robert P. Bartlett III, *Venture Capital, Agency Costs, and the False Dichotomy of the Corporation*, 54 UCLA L. REV. 37, 108–14 (2006) for the observation that venture capitalist financing structures introduce nuanced dimensionality to traditional understandings of horizontal conflict in corporate governance).

83. Means, *King Lear*, *supra* note 3, at 1250 (“In situations where multiple siblings or cousins are in a position to inherit, . . . the ownership structure is inherently unstable when each potential allocation of power can be undermined by a different alliance.” (citing Varouj A. Aivazian & Jeffery L. Callen, *The Coase Theorem and the Empty Core*, 24 J.L. & ECON. 175, 179 (1981) for application of the “empty core” problem in economics)). See also, in the context of publicly traded family firms, DeMott, *supra* note 24, at 825 (“Although it has long been theorized that family control should reduce agency costs stemming from the separation of ownership and control that is associated with diffusely owned public firms, other sorts of agency costs appear worrisome in some publicly held family firms.”).

84. Of note, however, family businesses also boast unique attributes allowing for agility, innovation, and mission cohesion, as will be explored further below. See Frederik Otto & Michael Reed, *Sustainability Board Preparedness in Large Family Businesses*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 26, 2024), <https://corpgov.law.harvard.edu/2024/05/26/sustainability-board-preparedness-in-large-family-businesses/> [https://perma.cc/LE88-GT88].

A. Succession over Time

In business planning, as in life, one of the most difficult questions to grapple with is that of timing. When should succession be addressed?⁸⁵ To pull through the Shakespearean thread: to wait, or not to wait? On the one hand, intuition suggests that carefully considered decisions, free of temporal pressure and supported by critical thinking, should yield better results.⁸⁶ On the other hand, however, research has shown that planning too far ahead may have unintended implications for decision-making: Where a decision's consequence is delayed, that consequence is imagined in less detail, and attendant rewards are often perceived as less attractive.⁸⁷ So, from a cognitive perspective, planning early versus planning late may be a draw. The practical implications of delay,

85. See Tim Blumentritt, Timothy Mathews & Gaia Marchisio, *Game Theory and Family Business Succession: An Introduction*, 26 FAM. BUS. REV. 51, 54–55 (2012) (observing that “[s]uccession in family businesses is a process that occurs over a long period of time punctuated by decision points” and identifying a staged succession sequence beginning with rule establishment, followed by pipeline development, identification of a successor, and “the final hand-off” (citing Isabelle Le Breton-Miller, Danny Miller & Lloyd P. Steier, *Toward an Integrative Model of Effective FOB Succession*, 28 ENTREPR'SHIP THEORY & PRAC. 305, 318–19 (2004))). This Article focuses on the rule establishment stage of this process, *i.e.*, development and establishment of a succession plan and related processes.

86. See, *e.g.*, Christopher P. Dwyer, *An Evaluative Review of Barriers to Critical Thinking in Educational and Real-World Settings*, 11 J. INTEL. 105, 105 (2023) (“Critical thinking (CT) is a metacognitive process—consisting of a number of skills and dispositions—that, through purposeful, self-regulatory reflective judgment, increases the chances of producing a logical solution to a problem or a valid conclusion to an argument.” (citations omitted)). *But see* Tobias Teichert, Vincent P. Ferrera & Jack Grinband, *Humans Optimize Decision-Making by Delaying Decision Onset*, PLOS ONE, Mar. 2014, at 1, 1 (“[I]t is typically assumed that subjects increase accuracy by prolonging the decision process rather than delaying decision onset . . . [but] findings show that decision onset is a critical aspect of the decision process and can be adjusted to effectively improve decision accuracy.”); Florian Klapproth, *Time and Decision Making in Humans*, 8 COGNITIVE AFFECTIVE & BEHAV. NEUROSCIENCE 509, 520 (2008) (“The effect of time pressure on decision making is ambivalent, leading to both negative and positive consequences, depending on how many cognitive resources are still available for making ‘good’ decisions.”).

87. Klapproth, *supra* note 86, at 509 (“Anticipating delays in realizing an option not only reduces the value of that option, but also alters its mental representation. For example, consequences occurring in the far future are represented with less detail than are consequences occurring in the near future.”); *see also* Hasaan Mansoor, *The Psychology of Procrastination: Why We Delay and How To Overcome It*, LINKEDIN: PSYCH.'S NOTEBOOK (June 1, 2023), <https://www.linkedin.com/pulse/psychology-procrastination-why-we-delay-how-overcome-mansoor-mbpss/> [https://perma.cc/FG5E-46T4] (“Temporal discounting is a cognitive bias that causes us to place less value on future rewards compared to immediate rewards.”).

however, yield the advantage to early planning advocates.⁸⁸ Delayed or neglected succession plans regularly result in costly litigation, corporate harm, and diminished exit opportunities.⁸⁹ This section will review legal and business literature on family firm succession through a temporal lens, considering various prescriptive arguments along the timeline of a family business's lifecycle.

1. Legal Literature

The developing legal scholarship on family business succession, though limited,⁹⁰ offers compelling perspective on obstacles and opportunities in intergenerational transfers of power. Acknowledging barriers is imperative in any effort to propose effective solutions, and scholars point to issues of incumbent identity,⁹¹ shifting roles,⁹² and process inconsistency⁹³ as among the most powerful disincentives to succession planning. While these obstacles can arise and evolve at any point in the life of a corporation, prescriptive measures must be implemented with precision along the corporate timeline in order to maximize impact.⁹⁴

One of the most fascinating developments in recent succession scholarship is the proposition of a new form of business association

88. Succession plans should also be revisited and updated regularly, if not annually. See VLACHOS & BEASLEY, *supra* note 31, at 4; *infra* text accompanying note 171.

89. Means, *King Lear*, *supra* note 3, at 1243–44 (“The predictable consequence of [Sumner] Redstone’s neglect was protracted litigation that harmed the businesses he controlled.”); *id.* at 1244 n.17 (“Even if incumbents do not plan to preserve family ownership and control, they must still devise an exit strategy to capture the value of the business. Delay can damage the prospects for a sale.”). Delay also invites the possibility of cognitive incapacity of incumbent leaders, which further complicates succession efforts. *Id.* at 1283.

90. See *supra* note 20 and accompanying text.

91. *E.g.*, Means, *King Lear*, *supra* note 3, at 1261 (“Apart from economic considerations, the incumbent’s individual identity may be entwined with the status that comes from leadership.” (citing Matthias Waldkirch, *Social Identity Theory and the Family Business*, in THEORETICAL PERSPECTIVES ON FAMILY BUSINESSES 137 (Mattias Nordqvist, Leif Melin, Matthias Waldkirch & Gershon Kumeto eds., 2015))).

92. *E.g.*, *id.* at 1263 (“Family members who work together in a business must navigate multiple roles. Parents, for instance, may also be employers. Role confusion can endanger family-business succession.” (footnote omitted)); see also *supra* note 82 and accompanying text.

93. *E.g.*, Means, *King Lear*, *supra* note 3, at 1267 (“To avoid violating business or family values, families must create a fair set of procedures for making decisions about succession.”).

94. *Id.* at 1269 (“What matters, then, is not *what* the family decides, but *how* it decides and *when* it decides.”).

referred to as the “F Corp.”⁹⁵ Inspired by the benefit corporation or “B Corp,” a social enterprise business entity now recognized in forty-three states,⁹⁶ the F Corp. business entity would, in theory, “establish a structure for the dual family and business purposes typical of a family firm.”⁹⁷ F Corp. proponents suggest that model legislation mandate independent committees to guide hiring and assessment of relatives, retirement policies applicable to senior officers and directors, and organizational designation based on family ownership and/or control.⁹⁸ These individual components of the proposed model statute, each valuable in its own right, would enjoy amplification as a legislated collective. This is due, in part, to timing: Incorporating as an F Corp. would require careful consideration of succession issues at the time of formation, and any later conversion to an F Corp.—if permitted by applicable law—would allow for coordinated restructuring within a family-focused model, engendering intentional reimagining of a company’s institutional priorities at mid-life.⁹⁹

Related strands of literature take aim at the uncomfortable fit between corporate law and family business more broadly, arguing that lawmakers should look to other disciplines, namely family law, to better protect uniquely vulnerable family members in the corporate context.¹⁰⁰ The limited protections of corporate law, in this view, are anchored in expectations of bargaining efficiency and benefit maximization among corporate actors,¹⁰¹ and such assumptions fall flat when applied to family

95. *Id.* at 1270–77.

96. *Social Enterprise Businesses Now Recognized*, CAPITOL SERVS., <https://www.capitol-services.com/benefit-corporations-and-beyond/> [https://perma.cc/6PLA-8Z83].

97. Means, *King Lear*, *supra* note 3, at 1271.

98. *Id.* at 1271–73.

99. If converting from another entity type to an F Corp. were permitted, one might expect onerous approval requirements similar to those required to convert to a B Corp. See Elizabeth K. Lange & Jennifer M. Lucas, *Shareholder Proposals Requesting Conversion to Public Benefit Corporations: A Fleeting Trend or the Future?*, FAEGRE DRINKER, at 4 n.4 (Aug. 11, 2021), <https://www.faegredrinker.com/en/insights/publications/2021/8/shareholder-proposals-requesting-conversion-to-public-benefit-corporations> [https://perma.cc/VFW2-6Y2A] (“A majority of states that have adopted benefit corporation legislation require a supermajority (typically two-thirds) vote to approve conversion to benefit corporation status, and several states provide for appraisal rights.”).

100. Tait, *supra* note 20, at 5 (noting that “corporate family members . . . operate from a position of bounded self-interest: they are idiosyncratic bargainers who may prioritize values over profits and family legacy over maximal efficiency”).

101. *Id.* at 4 (“[P]arties who want liberal dissolution rights may bargain for them . . . before investing.” (citing STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 830 (2002))).

businesses. Indeed, perhaps the most familiar succession scenario among family businesses is the transfer of shares from generation to generation, a process that creates majority/minority shareholder tensions but is devoid of presumed market-based rationality or meaningful bargaining, which corporate law assumes will provide *ex ante* protection.¹⁰² This scholarship identifies an intervention opportunity at exit, or termination of the business relationship, calling on concepts from inheritance law and divorce law as models for protection of vulnerable family members in the division of corporate assets.¹⁰³

Scholars have also pointed to specific governance solutions as a counterweight to the distinct challenges of family business. Independent directors are highlighted in the literature, with concomitant real-world examples contrasting independent directors' advantages to informal family processes' failings.¹⁰⁴ Notably, from a process standpoint, "formal institutions of governance may represent the sole vehicle through which action may be taken when a corporation's controlling family is unable to reach agreement."¹⁰⁵ The utility of independent board directors has also been observed in other unique business scenarios, such as startups, with scholars pointing to independent directors' potential for management monitoring and dispute arbitration between investors and founders.¹⁰⁶ While the practical influence of independent directors is not without skeptics,¹⁰⁷ unconflicted board participants are widely understood to be

102. *Id.* at 24. This theory of "[b]ounded [r]ationality" in family businesses applies beyond basic share ownership; operational matters in the workplace require bargaining, and "[a]nother fallacy . . . is that corporate family members bargain at arm's length, unencumbered by personal obligations or family intimacies." *Id.*

103. *Id.* at 6–7.

104. *See, e.g.,* Means, *King Lear*, *supra* note 3, at 1271–72 (discussing successful use of independent committees in well-known family businesses such as *The New York Times* and the Brown-Forman Corporation); DeMott, *supra* note 24, at 859–60 (referencing informal procedures by which the now familiar patriarch, Sumner Redstone, changed his mind regarding selection of the next chairman of CBS and Viacom).

105. DeMott, *supra* note 24, at 860; *see also* Jennifer S. Fan, *The Landscape of Startup Governance in the Founder-Friendly Era*, 18 N.Y.U. J.L. & BUS. 317, 333 (2022) ("Scholars have argued that independent directors are the swing vote in decisions made by the board." (citing Brian J. Broughman, *The Role of Independent Directors in Startup Firms*, UTAH L. REV. 461, 464 (2010))).

106. *See, e.g.,* Pollman, *supra* note 78, at 207.

107. *See, e.g.,* Fan, *supra* note 105, at 344–45 (describing findings from a small qualitative empirical analysis of startup corporate governance and observing that "[t]he interviews . . . controvert the theory that independent directors play a tiebreaker role; in fact, the reality is that they exert far less influence than prior legal scholarship purports"); Kobi Kastiel & Yaron Nili, "Captured Boards": The Rise of "Super Directors" and the Case for a Board Suite, 2017 WIS. L. REV. 19, 23 ("Independent board members suffer from what we term as 'informational capture.' As part-time employees who often sit on

useful at any stage of a corporation's lifecycle. They are seen as particularly valuable at key moments of transition.¹⁰⁸

Legal scholars studying family businesses and issues of succession have thus begun to explore a range of issues and have proposed a range of solutions, slotting into various phases of a company's lifespan. Still other proposals would seek to adjust the timeline itself, encouraging earlier consummation of succession plans through lifetime transfers.¹⁰⁹ Each of these solutions may, if implemented, prove impactful in incentivizing early, robust family succession planning. Furthermore, family businesses and their advisors are already engaging in creative private ordering techniques, such as those discussed in Part I, aimed at encouraging the successful implementation of succession planning; in addition, regulatory initiatives have proposed and implemented rulemaking designed to encourage succession planning within particular industries.¹¹⁰ However, it remains the unfortunate case that successful initiatives of this nature are outliers, and other proposed solutions have not been widely implemented among family businesses. As heads of families barrel toward retirement age, the businesses they lead require

multiple boards, outside directors lack the time, adequate resources, and the industry-specific knowledge to properly obtain, digest, and analyze the extensive and complex information that modern boards are tasked with evaluating." (footnote omitted)).

108. See, e.g., Means, *King Lear*, *supra* note 3, at 1271–72 (proposing that any model legislation for the F Corp. business model require that such entities establish independent committees that could “play an important mediating role and could help family constituents sidestep the role conflicts that can endanger family-business succession”); Fan, *supra* note 105, at 350 (observing that recruitment of “true independent directors” often occurs while companies prepare to launch initial public offerings (IPOs)); *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1375 (Del. 1995) (stating that, in enacting defenses to a hostile takeover attempt, a target board's good faith determination that a bidder's actions presented a threat warranting a defensive response is more likely to be considered reasonable where a majority of the target's board consisted of outside independent directors).

109. Means, *King Lear*, *supra* note 3, at 1277–78 (“Family businesses often lack the accumulated assets necessary to buy out incumbent owners who are ready to retire [T]o reduce the financial burden, thereby incentivizing lifetime transfers of ownership and control, lawmakers could offer low-cost loans, tax subsidies, bidding preferences for government contract work, and free counseling.”).

110. See, e.g., *Rule 4370: Business Continuity Plans and Emergency Contact Information*, FINRA (Feb. 12, 2015), <https://www.finra.org/rules-guidance/rulebooks/finra-rules/4370> [<https://perma.cc/9TN7-VGUE>] (requiring member firms to establish and maintain continuity plans for emergencies or significant business disruptions). While FINRA has not gone so far as to require succession plans for its members, it does require adoption of business continuity plans by member firms, and it recently issued substantive guidance encouraging firms to establish succession plans. *Regulatory Notice 22-23: FINRA Provides Guidance on Succession Planning*, FINRA (Nov. 1, 2022), <https://www.finra.org/rules-guidance/notices/22-23> [<https://perma.cc/ANT6-D6F7>].

plans for the future. Comprehensive solutions are essential, and legal scholars have much to add to the conversation.

2. Business Literature

Notwithstanding the dearth of legal scholarship on family businesses, “corporate families” have long enjoyed more fulsome attention in the business literature.¹¹¹ Business scholars observed more than three decades ago that “[r]esearchers in the field of family business agree that succession is the most important issue that most family firms face.”¹¹² Complementary streams of business scholarship on family firm succession include research on process, founders’ roles, next-generation perspectives, and characteristics of successful succession.¹¹³

In terms of process, some business scholars have organized succession into dichotomous pre- and post-arrival stages,¹¹⁴ while others embrace a lifecycle methodology tracing a family firm’s progress from founding through training, partnership, and, ultimately, transfer of power.¹¹⁵ While models vary from study to study, researchers consistently suggest that a company’s process of succession should begin,

111. Tait, *supra* note 20, at 7 (first citing Francesco Chirico, *Knowledge Accumulation in Family Firms: Evidence from Four Case Studies*, 26 INT’L SMALL BUS. J. 433 (2008); then citing Bart J. Debicki, Curtis Matherne, Franz W. Kellermanns & James J. Chrisman, *Family Business Research in the New Millenium: An Overview of the Who, the Where, the What, and the Why*, 22 FAM. BUS. REV. 151 (2019); then citing A. B. Ibrahim, K. Soufani & J. Lam, *A Study of Succession in a Family Firm*, 14 FAM. BUS. REV. 245 (2001); then citing Pramodita Sharma, *An Overview of the Field of Family Business Studies: Current Status and Direction for the Future*, 17 FAM. BUS. REV. 1 (2004); then citing Timothy G. Habbershon & Mary L. Williams, *A Resource-Based Framework for Assessing the Strategic Advantages of Family Firms*, 12 FAM. BUS. REV. 1 (1999); then citing Danny Miller, Isabelle Le Breton-Miller & Barry Scholnick, *Stewardship vs. Stagnation: An Empirical Comparison of Small Family and Non-Family Businesses*, 45 J. MGMT. STUD. 51 (2008); and then citing Andy Yu, G. T. Lumpkin, Ritch L. Sorenson & Keith H. Brigham, *The Landscape of Family Business Outcomes: A Summary and Numerical Taxonomy of Dependent Variables*, 25 FAM. BUS. REV. 33 (2012)) (referencing family business case studies and outcome inquiries among business scholars).

112. Handler, *supra* note 21, at 133.

113. *Id.* at 134. Questions of successor perspective and effective succession were considered in Section I.A, and the role of the founder—from family businesses to tech startups—will be explored in more detail in Section III.A.

114. *Id.* at 135 (citing Gil E. Gordon & Ned Roson, *Critical Factors in Leadership Succession*, 27 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 227 (1981)).

115. *Id.*

if not at founding, then at least early on in the life of an heir apparent.¹¹⁶ Research on independent boards, a topic of interest in the legal scholarship discussed in Section II.A.1,¹¹⁷ might fall into the process category as well.¹¹⁸ Business scholars emphasize that well-functioning boards with independent directors can encourage and support effective succession in family businesses, neutralizing emotion-laden issues such as succession,¹¹⁹ “but only if the incumbent is ready to listen to their recommendations.”¹²⁰

Therefore, the succession process, although independently vital and likewise instructive to the broader enforcement considerations discussed in Part III, is easily stilted by its human components. Family business participants, replete with conflicting motivations and layered interpersonal dynamics, often fail to act in economically rational ways.¹²¹ In this multifaceted environment, the guiding principles of a business enterprise—whether related to mission and vision, succession and sustainability, or otherwise—should be introduced to stakeholders early and often, woven throughout an entity’s institutional design, and

116. Ibrahim, Soufani & Lam, *supra* note 111, at 245 (first citing Eleni T. Stavrou, *Succession in Family Businesses: Exploring the Effects of Demographic Factors on Offspring Intentions To Join and Take Over the Business*, J. SMALL BUS. MGMT., July 1999, at 43; then citing JOHN L. WARD, KEEPING THE FAMILY BUSINESS HEALTHY: HOW TO PLAN FOR CONTINUING GROWTH, PROFITABILITY, AND FAMILY LEADERSHIP (1987); and then citing Stanley M. Davis, *Entrepreneurial Succession*, 13 ADMIN. SCI. Q. 402 (1968)).

117. See *supra* notes 104–07 and accompanying text.

118. Alternatively, any discussion of independent directors would also fit comfortably within larger surveys of successful succession characteristics. Indeed, many aspects of succession planning could logically be overlaid across multiple streams of family business succession literature. See Handler, *supra* note 21, at 134 (acknowledging that the streams into which she organizes family business succession “are not meant to be distinctly different,” but “[r]ather . . . complementary and sometimes overlapping ways of viewing the topic of succession”).

119. Ibrahim, Soufani & Lam, *supra* note 111, at 256 (describing the modified case study of Quebecor, a large family firm with global operations, and observing that a “nonfamily management team could play an important role” and “could provide mediation and help diffuse tensions between family members”).

120. Le Breton-Miller, Miller & Steier, *supra* note 85, at 311. Scholars have equated outside advisors to family surrogates capable of effecting unbiased monitoring, mediation, and oversight. See Brooke Harrington & Vanessa M. Strike, *Between Kinship and Commerce: Fiduciaries and the Institutional Logics of Family Firms*, 31 FAM. BUS. REV. 417, 437 (2018).

121. See Shainaz Firfiray & Luis R. Gomez-Mejia, *When Is Ambivalence Good for Family Firms? Understanding the Impact of Family Managers’ Emotional Ambivalence on Decision Making*, 11 ENTREPRENEURSHIP RSCH. J. 177, 178 (2021).

bracketed by familiar concepts of ex ante incentives and ex post enforcement.¹²² This Article will reinforce those bookends.

B. Succession and Psychology

Having explored legal and business literature on family firm succession planning, this section will now discuss select psychological underpinnings of those concepts. Questions of succession are imbued with humanity,¹²³ and this section will delve into two essential aspects of human behavior and the mind, each of which influences and complicates succession planning in interrelated ways: decision-making delays and family dynamics. Turning first to decisions and delays, research clearly indicates that emotions influence and interact with decision-making in many powerful ways.¹²⁴ These various affective influences are not always compatible. Researchers therefore use the term *ambivalence* to describe “a state in which an individual experiences conflicting situations which give rise to emotions and attitudes that are complex and incongruous.”¹²⁵

One would be hard pressed to find a more fitting case study for ambivalent decision-making than family firm succession planning. Scholars have demonstrated that family business owners regularly make decisions from a place of internal (if not interpersonal) conflict: economic considerations matter, but so do socioemotional wealth (SEW)

122. See *supra* note 89 and accompanying text regarding unintended consequences of delayed succession planning.

123. See, e.g., Celentano & Mello, *supra* note 10, at 3–4 (observing no significant downswing in company performance around the time CEO succession plans are adopted and suggesting that, when considered alongside the substantial benefits of succession planning, “this lack of negative impact suggests that boards face personal costs rather than financial constraints when deciding whether to adopt a succession plan”).

124. See, e.g., George Loewenstein & Jennifer S. Lerner, *The Role of Affect in Decision Making*, in HANDBOOK OF AFFECTIVE SCIENCES 619, 636 (Richard J. Davidson, Klaus R. Scherer & H. Hill Goldsmith eds., 2003) (comparing the impact of expected emotions and immediate emotions on decisions and challenging the untenable maxim that “all affect is irrational”). Scholars have defined *expected emotions* as “cognitive predictions about the emotional consequences of decision outcomes,” while *immediate emotions* “are real emotions experienced at the time of decision making.” OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES 111 (David Sander & Klaus R. Scherer eds., 2009). But see Hans-Rüdiger Pfister & Gisela Böhm, *The Multiplicity of Emotions: A Framework of Emotional Functions in Decision Making*, 3 JUDGMENT & DECISION MAKING 5, 13 (2008) (“Emotions do not merely influence an otherwise non-emotional process, as the influence-on metaphor holds, but are part of virtually any decision making process.”).

125. Firfiray & Gomez-Mejia, *supra* note 121, at 179 (citations omitted); see also Pfister & Böhm, *supra* note 124, at 15 (defining ambivalence as “a conflict that arises when different emotional mechanisms exert incompatible influences on behavior”).

objectives.¹²⁶ SEW is defined in the literature as “the affective endowment that enables family owners to assert their authority over the firm, maintain attachment with the firm through the appointment of family members to key positions, and continue the dynastic legacy.”¹²⁷ Decisions preserving SEW buttress familial control and reinforce the role of family within a firm’s institutional identity.¹²⁸ SEW priorities in family business are often at odds, however, and “[g]iven the emphasis on kinship ties within family firms, there are strong incentives to act self-interestedly or focus on overly family-centric or restricted SEW objectives that often conflict with the long-term interests of nonfamily stakeholders.”¹²⁹ These conflicts can engender ambivalence for decision-makers within family firms, with significant implications for the quality of their choices.¹³⁰

One strategy researchers have identified for managing ambivalence is avoidance.¹³¹ The significant business risks associated with avoiding

126. Firfiray & Gomez-Mejia, *supra* note 121, at 178.

127. *Id.* (first citing Pascual Berrone, Cristina Cruz & Luis R. Gomez-Mejia, *Socioemotional Wealth in Family Firms: Theoretical Dimensions, Assessment Approaches, and Agenda for Future Research*, 25 *FAM. BUS. REV.* 258 (2012); then citing Luis R. Gomez-Mejia, Martin Larraza-Kintana, Jose Moyano-Fuentes & Shainaz Firfiray, *Managerial Family Ties and Employee Risk Bearing in Family Firms: Evidence from Spanish Car Dealers*, 57 *HUM. RES. MGMT.* 993 (2018); and then citing Luis Gomez-Mejia, Cristina Cruz & Claudia Imperatore, *Financial Reporting and the Protection of Socioemotional Wealth in Family-Controlled Firms*, 23 *EUR. ACCT. REV.* 387 (2014)).

128. *Id.*

129. *Id.* (citations omitted) (first citing Luis R. Gomez-Mejia, Manuel Nuñez-Nickel & Isabel Gutierrez, *The Role of Family Ties in Agency Contracts*, 44 *ACAD. MGMT. J.* 81 (2001); then citing Luis R. Gomez-Mejia, Martin Larraza-Kintana & Marianna Makri, *The Determinants of Executive Compensation in Family-Controlled Public Corporations*, 46 *ACAD. MGMT. J.* 226 (2003); then citing Luis R. Gomez-Mejia, Ionela Neacsu & Geoffrey Martin, *CEO Risk-Taking and Socioemotional Wealth: The Behavioral Agency Model, Family Control, and CEO Option Wealth*, 45 *J. MGMT.* 1713 (2019); then citing Michael H. Lubatkin, William S. Schulze, Yan Ling & Richard N. Dino, *The Effects of Parental Altruism on the Governance of Family-Managed Firms*, 26 *J. ORG. BEHAV.* 313 (2005); and then citing Danny Miller & Isabelle Le Breton-Miller, *Deconstructing Socioemotional Wealth*, 38 *ENTREPR'SHIP THEORY & PRAC.* 713 (2014)).

130. *Id.*

131. *Id.* at 179 (“[A]voidance is a strategy that focuses on moving away from the object of ambivalence by suppressing the psychological pressure of ambivalent emotions to a tolerable level.”); *see also* Itamar Shatz, *Why People Procrastinate: The Psychology and Causes of Procrastination*, SOLVING PROCRASTINATION, <https://solvingprocrastination.com/why-people-procrastinate/> [<https://perma.cc/7XJY-8FV5>] (“People procrastinate because their *drive to delay* is irrationally stronger than their *drive to act*. This happens when their self-control and motivation are weakened by issues like exhaustion, and are opposed by issues like fear.”). Other studies have shown that “fearful people made pessimistic judgements of future events whereas angry people

succession planning have been explored in Section II.A.¹³² While the pros and cons of early planning may be debatable from a cognitive perspective, avoidance is simply not an operable strategy in effective corporate governance. Putting off succession decisions does not allow the next generation of leaders to prepare, train, or participate in the transition process. This can lead to hurried choices, surprise, and distress at already-charged moments—for example, at the time of an incumbent leader’s illness or death.¹³³ Protracted disputes often result. The cost of delay is further crystallized when compared against the integrated, iterative approaches discussed in Part I.

An original impetus for the labyrinthine nature of family business decision networks is the family dynamic itself.¹³⁴ Family business decision-making, tangled with conflicting SEW objectives, economic goals, and external stakeholder considerations, is also guided by an undercurrent of intricate interfamilial connections. Perhaps the most obvious of these is the parent-child relationship. Research indicates that parental commitment to child successors is holistically beneficial to succession, having positive impacts on parent, child, family, and business.¹³⁵ Parental commitment can be complicated, however, by deep-

made optimistic judgments.” Jennifer S. Lerner & Dacher Keltner, *Beyond Valence: Toward a Model of Emotion-Specific Influences on Judgement and Choice*, 14 COGNITION & EMOTION 473, 473 (2000). It may be the case that incumbent leaders, experiencing feelings of fear when contemplating their own aging and death, make pessimistic judgments regarding the capabilities of their prospective successors, further fueling ambivalence and avoidance. I am not aware of studies exploring this particular possibility; future research on this topic could further examine this and other complex questions regarding the unique decision-making landscape within family firms.

132. See *supra* notes 88–89 and accompanying text.

133. Fraught situations such as these may not be ideal settings for exemplary decision-making. Research on decision fatigue, “the impaired ability to make decisions and control behavior as a consequence of repeated acts of decision-making,” indicates that “individuals experiencing decision fatigue demonstrate an impaired ability to make trade-offs, prefer a passive role in the decision-making process, and often make choices that seem impulsive or irrational.” Grant A. Pignatiello, Richard J. Martin & Ronald L. Hickman, Jr., *Decision Fatigue: A Conceptual Analysis*, 25 J. HEALTH PSYCH. 123, 123 (2020) (citing John Tierney, *Do You Suffer from Decision Fatigue?*, N.Y. TIMES (Aug. 17, 2011), <https://www.nytimes.com/2011/08/21/magazine/do-you-suffer-from-decision-fatigue.html>).

134. Means, *King Lear*, *supra* note 3, at 1267 n.170 (“The impact of family dynamics on business decisionmaking is often most apparent at the time of a generational transition.” (quoting KELLY LeCOUVIE & JENNIFER PENDERGAST, *FAMILY BUSINESS SUCCESSION: YOUR ROADMAP TO CONTINUITY* 3 (2014))).

135. Diane Arijis & Anneleen Michiels, *Mental Health in Family Business and Business Families: A Systematic Review*, INT’L J. ENV’T RSCH. & PUB. HEALTH, Mar. 2021, at 1, 9 tbl.1 (“By supporting the child-successor’s satisfaction of his/her needs for autonomy, relatedness and competence (his/her perceptions), parent-founders can encourage intrafamily succession that simultaneously benefits the parent-founder,

seated gender biases that privilege male heirs.¹³⁶ Furthermore, sibling rivalries, common in any family, can be provoked by the intergenerational transfers that define succession.¹³⁷

The impact of family dynamics is not limited to pre-transition planning. Family climate also impacts a company's future success as a going concern.¹³⁸ Studies indicate that effective leadership and positive engagement of next-generation leaders in family firms are positively influenced by a "shared vision" of the family business, creation of which is encouraged by openness of communication—and discouraged by senior leaders exerting unchallenged authority.¹³⁹ Even the best-laid processes, then, depend on people. Despite the burgeoning influence of artificial intelligence on business and the law, businesses themselves remain distinctly human. This underlying humanity is nowhere more pronounced than at the moment of succession.

* * *

This Part has used family firms as a framing device to develop central themes of succession planning. From designation of corporate form at founding through exit opportunities informed by divorce and

child-successor, the family and the [family business]." (citing Jeffrey S. McMullen & Benjamin J. Warnick, *To Nurture or Groom? The Parent-Founder Succession Dilemma*, 39 ENTREPRENEURSHIP THEORY & PRACTICE 1379 (2015))).

136. See, e.g., Alison Sheridan, Lucie Newsome, Tanya Howard, Andrew Lawson & Skye Saunders, *Intergenerational Farm Succession: How Does Gender Fit?*, LAND USE POL'Y, Oct. 2021, at 1, 1 (exploring intergenerational succession among family farms in Australia and finding that "gender norms continue to privilege sons and dismiss daughters"); Means, *King Lear*, *supra* note 3, at 1263–64 ("Because family roles are often gendered, the expectations imposed on women can limit their opportunities to take on leadership responsibilities."); Breen, *supra* note 38 (outlining the history of the 400-year-old Avedis Zildjian Company, a percussion instrument manufacturer whose first female leader did not step into the top role until 1999). But see Means, *King Lear*, *supra* note 3, at 1265 ("[W]hile family relationships tend to make gender roles more salient, parents also typically want the best for all their children and may reject the idea that gender should limit their daughters' opportunities in life.").

137. Arijis & Michiels, *supra* note 135, at 12 tbl.1 ("The division of ownership via inheritance can generate psychological stress and anxiety which motivates siblings to compete with each other." (citing Victor Zheng, *Inheritance, Chinese Family Business and Economic Development in Hong Kong*, 10 J. ENTERPRISING CULTURE 287 (2002))).

138. See, e.g., Daniel Thomas, *Split Decisions: How Siblings Succeed—and Fail—in Business Together*, FIN. TIMES (Nov. 27, 2022), <https://www.ft.com/content/5008140b-2ab9-4d0f-ab6e-cc4eb01a901c> [<https://perma.cc/J6BZ-PE2B>] (observing that, while sibling teams are among the most difficult to manage in family firms, procedural clarity "can help avoid unnecessary tensions").

139. Stephen P. Miller, *Next-Generation Leadership Development in Family Businesses: The Critical Roles of Shared Vision and Family Climate*, FRONTIERS PSYCH., Dec. 2014, at 1, 3–4.

inheritance law, the legal and business literature surveyed here offer persuasive perspective on the challenges and opportunities of family business succession throughout the corporate lifecycle. Social science scholarship, moreover, presents pertinent insight into the minds and behaviors of individual stakeholders: Informed by theories of ambivalence and avoidance, parental commitment, gender bias, and sibling rivalries, psychology research emphasizes the value of “shared vision” in business planning—and, in so doing, serves as a reminder of shared experience in corporate law. The issues examined in this Part are both markedly sensitive to family firms and endemic to businesses of all kinds and, together with the broader observations in Part I, set the stage for the larger prescriptive points argued in Parts III and IV.

III. ENHANCED SCRUTINY

If there is no single solution for problems of succession planning—or corporate governance more broadly—what, then, can be done?¹⁴⁰ After all, different companies have different needs. Public and private companies, for example, experience vertical and horizontal frictions in distinct ways,¹⁴¹ and the exceptional characteristics of family firms, as we have seen, require further specialized analysis. One might point to private ordering and argue that it should be up to businesses themselves to work things out.¹⁴² Who better, after all, to understand the unique “situational differences [that] influence correct choices”?¹⁴³ Private ordering certainly has a part to play in succession planning, as will be explored in more detail in Part IV, but it cannot carry the show alone. Succession involves inherent conflicts of interest and risks of entrenchment: Leaders, tasked with planning for their own replacement or that of their contemporaries, may not be able to separate their self-interest from the best interest of the company. Implementing succession plans lowers the cost of leadership transition, which can facilitate management changeover and cloud director decision-making with ambivalence and avoidance.¹⁴⁴ Corporate agents contemplating succession thus confront profound economic and psychological

140. Cf. George S. Geis, *Ex-Ante Corporate Governance*, 41 J. CORP. L. 609, 610 (2016) (describing the corporate governance “tightrope” walked by lawmakers and governance designers attempting to balance the interests of corporate owners, managers, suppliers, lenders, and other corporate players).

141. See *supra* notes 81–82 and accompanying text.

142. Governments often delegate regulatory authority to private actors and regularly enforce private agreements. Steven L. Schwarz, *Private Ordering*, 97 NW. L. REV. 319, 326–29 (2002); see also, e.g., *infra* note 254 and accompanying text.

143. LARCKER & TAYAN, *supra* note 74, at 1.

144. See *supra* notes 125 and 131 and accompanying text.

conflicts.¹⁴⁵ And where decision-maker independence is called into question, private accountability and business judgment may be compromised. Private ordering is therefore better suited to a supporting role.

Fiduciary duty is the superior protagonist. Fiduciary duties' comprehensive overlay across nearly every aspect of corporate governance allows situation- and company-specific application for different companies in different circumstances.¹⁴⁶ The two core duties—care and loyalty—map cleanly onto the core issues of succession discussed in this Article: issues of avoidance and issues of self. Moreover, courts are well-equipped to handle issues of entrenchment, such as those prevalent in succession planning, through fiduciary duty analysis. In the M&A context, Delaware courts have applied enhanced scrutiny to transactions raising the “omnipresent specter” of a target's board acting to entrench itself.¹⁴⁷ This Article proposes that succession raises the same specter, and the same scrutiny should apply.

To set the stage for this core prescriptive argument, this Part will first consider the basic questions of identity that underlie entrenchment. From well-known tech founders to heads of family firms, incumbent identity can complicate and exacerbate assumptions of agency and independence. Section III.A asks whether it is possible to separate the leader from the entity—and, if not, how that entanglement should inform judicial deference to corporate decisions. Section III.B suggests that broad deference is often inappropriate in succession planning cases and calls on courts to invoke an enhanced scrutiny standard of review for fiduciary analysis in this context. Part III.C synthesizes these claims and engages counterarguments regarding the appropriate role of courts in corporate governance.

A. Corporate Identity: Founders and Figureheads

A corporation enjoys legal personhood that is separate and apart from that of its officers, directors, and shareholders.¹⁴⁸ Nonetheless, corporate identity is often closely tied to leader identity, such that legal

145. As a practical matter, succession plans often include governance renewal features such as term limits, which an incumbent board may be reluctant to impose on itself. *See supra* note 48 and accompanying text.

146. *See supra* note 17.

147. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985).

148. *See supra* note 18.

person and natural person are conflated.¹⁴⁹ Herein lies succession planning's chief imperative:

The CEO is, in many cases, the alter ego of the company to many of its constituencies and is inevitably intertwined with its strategic direction, operations, and reputation. It is therefore not surprising that many posit that CEO succession planning is among the board's primary responsibilities.¹⁵⁰

And herein also lies succession planning's chief impediment, namely, the necessary yet tortured separation of an individual from their corporate role.¹⁵¹ For founders, especially, companies are embodiments of professional accomplishment. To relinquish control of a life's work is uncomfortable and, as discussed in Section II.B, one way of dealing with this discomfort is to avoid it altogether.¹⁵² Advisors' reticence to press the issue only compounds the problem.¹⁵³

The "celebrity CEO" is illustrative. Many leaders experience feelings of fear and trepidation when considering stepping down,¹⁵⁴ and these feelings are undoubtedly amplified in the limelight. Scholars have argued that a CEO's celebrity engenders outsized confidence in the specific behaviors that made them famous.¹⁵⁵ Societal pressures and deferential privileges reinforce ongoing behavioral alignment with the established image, resulting in mental and behavioral rigidities.¹⁵⁶ And

149. See, e.g., Manfred F.R. Kets de Vries, *The Dark Side of CEO Succession*, HARV. BUS. REV., Jan.-Feb. 1988, at 56, 57 ("Founders who see their companies as symbols of their success and as extensions of their own personalities . . . often have a particularly hard time letting go. Relinquishing power is a kind of death for executives long accustomed to great power.").

150. COOPER, LAMM & MORRISON, *supra* note 12, at 1. CEO succession is the most visible, but similar considerations apply to boards.

151. See *supra* note 54 and accompanying text.

152. As this Article has also demonstrated, even when succession planning is addressed, the self can still get in the way. See, e.g., *supra* note 60 and accompanying text.

153. See BAIRD, GREENE, MONTI & TAYLOR, *supra* note 50, at 1 (observing, in the context of investment firms, that "no one wants to tell a founder that it's time to leave, which can inhibit the kind of long-term CEO succession planning other companies increasingly rely on").

154. E.g., Kets de Vries, *supra* note 149, at 56-57.

155. Jeffrey B. Lovelace, Jonathan Bundy, Donald C. Hambrick & Timothy G. Pollock, *The Shackles of CEO Celebrity: Sociocognitive and Behavioral Role Constraints on "Star" Leaders*, 43 ACAD. MGMT. REV. 419, 420 (2018).

156. *Id.* at 420-21. Cognitive rigidity has also been observed among CEOs more broadly, particularly late in their tenure, though scholars suggest that the "cognitive and behavioral lock-in or shackles that accompany success will be especially pronounced" for the celebrity CEO, with substantial implications for business performance. *Id.* at 435.

where conditions in a business environment change, such rigidities become serious liabilities.¹⁵⁷ There is arguably no time in the lifecycle of a company when the business environment changes more significantly than at and around the moment of succession.¹⁵⁸ A celebrity CEO's reluctance to pass the baton, then, may prove especially problematic.

Traditional applications of agency theory are likewise complicated by issues of identity in succession planning. Where the line between individual and entity is blurred, any effort at categorical distinction of agency costs will be frustrated. Vertical disputes slant horizontal, horizontal disputes trend vertical, and the overlapping roles of stakeholders in startups and family firms introduce particularly confounding agency puzzles.¹⁵⁹ This entanglement underscores the call for enhanced judicial scrutiny in succession planning. When corporate decision-makers grapple with issues of self—and, what's more, when the "self" is entangled with the body corporate—those decision-makers' actions require a closer look. Section III.B makes this case.

B. Fiduciary Duty

Outsized individual influence is misplaced and harmful in corporate law. A corporation, at its core, is a network of individuals operating within a hierarchy of delegated power. This network is overlaid with statutory, judicial, and private systems that regulate behavior with varying degrees of austerity. Among the most critical foundations in these systems are fiduciary duties. Directors and officers, having been elected and appointed as representatives of the shareholders in order to manage corporate activities, hold solemn positions of trust and, in fulfilling their corporate obligations, must set their own interests aside in favor of the entity and its shareholders.¹⁶⁰ The fiduciary charge is an

157. *Id.* at 420–21.

158. Another defining moment of corporate transformation, the M&A transaction, will be discussed in detail in Section III.B.3.

159. For further discussion on principal-agent theory, *see supra* notes 78–83 and accompanying text.

160. *Gantler v. Stephens*, 965 A.2d 695, 708–09 (Del. 2009); *see, e.g.*, Fan, *supra* note 105, at 323 (articulating a view of corporate governance inspired by Delaware's highest court: "[t]he most fundamental principles of corporate governance are a function of the allocation of power within a corporation between its stockholders and its board" (quoting *MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1126 (Del. 2003))). Fiduciary duties may be more or less onerous in different states and for different entity types. *See, e.g.*, Laurence V. Parker Jr., *Virginia Is for Lovers and Directors: Important Differences Between Fiduciary Duties in Virginia and Delaware*, 2 WM. & MARY BUS. L. REV. 51, 56–59 (2011); Benjamin Means, *The Value of Insider Control*, 60 WM. & MARY L. REV. 891, 926 (2019) [hereinafter Means, *The Value of Insider*

especially tall order in moments of transition: Faced with loss of position and power, even the most trustworthy of fiduciaries may find themselves digging in. In such instances, Delaware courts have acknowledged the need for enhanced scrutiny in reviewing claims of fiduciary duty breach in the M&A context, less deferential than the business judgment rule but less onerous than entire fairness.¹⁶¹ Similar enhanced scrutiny should be applied to fiduciary duty analysis in succession planning.

Fiduciary duties of care and loyalty, designed to regulate relationships between the trusting and the trusted, are particularly well suited to the task of enforcing—and, thereby, incentivizing—effective succession planning. The distinctly human intricacies of succession lend themselves to the well-developed, yet ever evolving, fiduciary standards of Delaware caselaw.¹⁶² As this Article has illustrated, failure to engage in succession planning exposes companies to serious and unnecessary risks, including costly litigation and derailed transaction opportunities. Professor Benjamin Means has argued that this failure should constitute a per se duty of care violation.¹⁶³ The duty of loyalty is also implicated: Issues of identity and entrenchment raise major conflicts questions when succession planning is avoided or delayed, and family succession in particular invokes independence concerns when kinship preferences drive transition decisions.¹⁶⁴ Fiduciary duty thus provides an appropriate framework for considering, encouraging, and enforcing matters of succession planning.¹⁶⁵ And, as discussed below, succession planning raises novel questions of entrenchment that justify invocation of a new, enhanced standard of review.

Control]. This Article focuses on Delaware due to its dominating influence on corporate law. See Stephen M. Bainbridge, *Do We Need a Restatement of the Law of Corporate Governance?*, 78 BUS. LAW. 439, 443 (2023) (“Indeed, Delaware law is so dominant that, in many respects, it functions as a de facto national corporate law.”).

161. See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954–55 (Del. 1985); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986). Other states have declined to adopt enhanced scrutiny standards of review in similar circumstances. See, e.g., *WLR Foods, Inc. v. Tyson Foods, Inc.*, 65 F.3d 1172, 1182 (4th Cir. 1995) (applying a more deferential statutory standard to directors’ actions in response to takeover attempts under Virginia law); *Willard v. Moneta Bldg. Supply, Inc.*, 515 S.E.2d 277, 284 (Va. 1999) (declining to adopt the *Revlon* test).

162. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1014–17 (1997) (arguing that standards, not rules, dominate Delaware’s corporate law, and that these “reasonably determinate guidelines” proceed through Delaware courts “through the elaboration of the concepts of independence, good faith, and due care through richly detailed narratives of good and bad behavior, of positive and negative examples, that are not reducible to rules or algorithms”).

163. Means, *The Value of Insider Control*, *supra* note 160, at 927–28.

164. *Id.* at 931.

165. See *id.* at 928–29.

1. Duty of Care

The fiduciary duty of care requires that directors fully inform themselves and exercise reasonable care when making decisions and acting on behalf of a corporation;¹⁶⁶ it demands from directors “that amount of care which ordinarily careful and prudent men would use in similar circumstances.”¹⁶⁷ In other words, the duty of care establishes a “minimum standard of competence.”¹⁶⁸

Business succession is high priority and high stakes for all companies. If corporate leaders are to exercise reasonable care in making decisions and taking actions on behalf of their corporations, succession planning must be part of that endeavor. As has been argued in the literature, failure to succession plan should clearly constitute a duty of care violation.¹⁶⁹ Courts, however, have not agreed.¹⁷⁰ Furthermore, the hasty and slapdash planning that often occurs upon a corporate leader’s death or decline might not satisfy the duty of care. Candidates should be carefully vetted and trained, and plans should be implemented, revisited, and revised over time as corporate needs change.¹⁷¹ Plans need not be

166. See, e.g., *Smith v. Van Gorkom*, 488 A.2d 858, 872–73 (Del. 1985) (“Thus, a director’s duty to exercise an informed business judgment is in the nature of a duty of care, as distinguished from a duty of loyalty.”). Officers of a Delaware corporation owe the same fiduciary duties to the corporation as do its directors. *Gantler v. Stephens*, 965 A.2d 695, 708–09 (Del. 2009).

167. *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963).

168. Means, *King Lear*, *supra* note 3, at 1281 (observing, as such, that “the fiduciary duty of care cannot be leveraged to require directors to follow ‘ideal corporate governance practices’” (quoting *Brehm v. Eisner*, 746 A.2d 244, 256 (Del. 2000))).

169. Means, *The Value of Insider Control*, *supra* note 160, at 927–28. In light of the abundant resources (and cautionary tales) readily available online and elsewhere, one might argue that succession planning falls squarely within the basic obligation to pay attention required by the duty of care. Cf. AM. BAR ASS’N, CORPORATE DIRECTOR’S GUIDEBOOK 11–12 (7th ed. 2020).

170. *Zucker v. Andreessen*, No. 6014, 2012 WL 2366448, at *11 (Del. Ch. June 21, 2012) (dismissing, on demand futility grounds, a derivative claim that the board’s failure to succession plan breached the fiduciary duty of care, and declining to establish a rule that would require boards to enact succession plans under the duty of care); see also *Zucker v. Bowl Am., Inc.*, No. 21-01967, 2022 WL 1720151, at *10 (D. Md. May 27, 2022) (citing *Andreessen* in finding that “allegations regarding the Company’s long-term succession plan . . . do not support a claim for fiduciary breach”).

171. See Means, *The Value of Insider Control*, *supra* note 160, at 928 (noting, in the context of family businesses, that nepotism would not satisfy the duty of care and that, “[t]o the extent family members participate in management, . . . a succession plan should establish criteria to ensure that only well-qualified family members will be eligible for high-level managerial positions”).

perfect in order to satisfy the duty of care, but they must be careful and considered. If not, shareholders should be able to demand it.¹⁷²

Litigation, however, is costly, and prospects of relief are uncertain.¹⁷³ Indeed, in practice, courts show considerable latitude when it comes to most board actions and decisions. Boards' significant discretion in this regard is based on the business judgment rule, which presumes that directors' actions were informed and taken in good faith on the honest belief that such actions were in the company's best interest.¹⁷⁴ The business judgment rule acts as insulation, protecting directors from individual liability for breach of fiduciary duty unless the rule's presumptions are rebutted.¹⁷⁵ Commentators have argued that the business judgment rule does quite a lot of work in gutting the duty of care.¹⁷⁶ The efficacy of duty of care claims is thus debatable.¹⁷⁷

172. See *id.* at 928 (“[I]nvocation of the duty of care could help minority investors insist that controlled companies engage in proper succession planning and, if necessary, would provide grounds for obtaining injunctive relief.”).

173. *Id.* at 928 n.212 (citing *Emerald Partners v. Berlin*, 787 A.2d 85, 91–92 (Del. 2001)) (observing that litigation is prohibitively expensive for many shareholders and that monetary damages are not ordinarily available for shareholders bringing duty of care claims).

174. *E.g.*, *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993). The conventional justification for the business judgment rule is that judges are not businesspeople. See, *e.g.*, *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919). As such, judges are typically hesitant to replace boardroom decisions with bench decisions.

175. See, *e.g.*, *In re McDonald's Corp. S'holder Derivative Litig.*, 291 A.3d 652, 685 (Del. Ch. 2023) (“The business judgment rule thus provides ‘something as close to non-review as our law contemplates.’ This standard of review ‘reflects and promotes the role of the board of directors as the proper body to manage the business and affairs of the corporation.’” (internal citations omitted)).

176. See, *e.g.*, STEPHEN M. BAINBRIDGE, CORPORATE LAW 125 (Saul Levmore et al. eds., 4th ed. 2020) (describing two ways in which judges and commentators attempt to reconcile the business judgment rule and the duty of care, one that treats the business judgment rule as a standard of review, and another that “treats the rule as an abstention doctrine that creates a presumption against judicial review of duty of care claims”); Means, *The Value of Insider Control*, *supra* note 160, at 928 (observing, in the context of insider-controlled businesses, that “some commentators might object that the duty of care is toothless in controlled companies because boards lack independence”). Of significant note, Delaware law also permits statutory exculpation of corporate officers and directors for breach of duty of care claims. DEL. CODE ANN. tit. 8, § 102(b)(7) (2025).

177. The analysis is complicated further with respect to derivative claims based on board inaction or failure to enact succession plans. A shareholder may not bring a derivative suit unless they make a demand on the corporation's board of directors to bring the suit on behalf of the corporation—or unless demand is excused as futile. FED. R. CIV. P. 23.1; DEL. CH. CT. R. 23.1. If a plaintiff makes a demand on the board, the board's actions in response to such demand will be protected by the business judgment rule unless the plaintiff's allegations are sufficient to rebut the rule's deferential presumptions. See,

Fiduciary duties also have persuasive potential, however,¹⁷⁸ and the insulation of the business judgment rule is not impenetrable.¹⁷⁹ A plaintiff can rebut the presumptions of the business judgment rule by showing, for example, that a majority of directors were not disinterested, or that a controlling shareholder or interested director acted to dominate or control other shareholders.¹⁸⁰ And, if the plaintiff satisfies its burden of establishing facts rebutting the presumptions of the business judgment rule, such that the court reasonably determines the board did not act in the best interest of the shareholders, then the standard of review used by the court will not be business judgment, but an elevated standard: enhanced scrutiny or entire fairness.¹⁸¹

In these elevated standards lies the distinct potential of fiduciary duty in succession planning. As presently applied, neither the business judgment rule nor the entire fairness standard of review precisely captures the unique challenges faced by companies in planning for transition. The business judgment rule, if applied as the default standard of review for boards' succession planning actions, will miss most cases

e.g., *In re Kraft Heinz Demand Refused Derivative S'holder Litig.*, No. 2022-0398, 2024 WL 3493957, at *6 (Del. Ch. July 19, 2024). Because boards refusing demand enjoy the significant protections of the business judgment rule, shareholders typically plead, instead, that a demand would be futile and should thus be excused. Delaware courts evaluate demand futility under a three-part test examining material personal benefit, likelihood of personal liability, and lack of independence in order to determine whether directors could consider a demand impartially. *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1059 (Del. 2021) (streamlining prior standards as established under *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984) and *Rales v. Blasband*, 634 A.2d 927 (Del. 1993)). Much of the entrenchment discussed in Section III.C is motivated by the material personal benefits and lack of independence endemic to corporate leadership; as such, demand would often be futile under either or both of these prongs where boards fail to enact succession plans.

178. Means, *King Lear*, *supra* note 3, at 1283 (“By holding that the duty of care requires the board of directors to plan for succession, courts can motivate board members to act, thereby ensuring that succession planning will not be ignored or made subject to the whims of a controlling owner.”); Means, *The Value of Insider Control*, *supra* note 160, at 928 (“[T]he presence of fiduciary obligations can still shape behavior.”).

179. Scholars have argued that the business judgment rule does not protect against the failure to succession plan. Means, *King Lear*, *supra* note 3, at 1284 & n.262; *see also* STEPHEN A. RADIN, *THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS* 88 (6th ed. 2009) (“Technically speaking, [the business judgment rule] has no role where directors have either abdicated their functions, or absent a conscious decision, failed to act.” (quoting *Aronson*, 473 A.2d at 813)). *But see Zucker v. Andreessen*, No. 6014, 2012 WL 2366448, at *9 (Del. Ch. June 21, 2012).

180. *See N.J. Carpenters Pension Fund v. Infogroup, Inc.*, No. Civ.A. 5334, 2011 WL 4825888, at *8 (Del. Ch. Sept. 30, 2011).

181. *See, e.g., Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361, 368 (Del. 1993); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985); *Frederick Hsu Living Trust v. ODN Holding Corp.*, No. 12108, 2017 WL 1437308, at *33–34 (Del. Ch. Apr. 14, 2017).

of delay and negligence that should not go unchecked. And entire fairness, considered below, will often go too far. Certainly, there will be explicit conflicts in certain cases of succession planning for which entire fairness would be appropriate. For the vast majority of succession scenarios, however, the challenge will be more subtle: directors will feel the pull of entrenchment, the weight of the self. A conflict on the cusp. Courts should acknowledge this heightened state with a heightened standard of review.

2. Duty of Loyalty

The duty of loyalty requires that directors and officers act in the best interests of their corporations.¹⁸² Loyalty is called into question, for example, by a conflicted transaction in which a director or officer directly or indirectly transacts with the corporation they serve.¹⁸³ The duty of loyalty is typically considered to flash more teeth than the duty of care: For one thing, the business judgment rule does not apply to self-dealing.¹⁸⁴ For another, because it is so common for Delaware certificates of incorporation to exculpate officers and directors for duty of care breaches,¹⁸⁵ a successful effort at imposing liability on directors often requires a finding of disloyalty. The duty of loyalty thus differs both in kind and degree from the duty of care.¹⁸⁶ In challenges to conflicted transactions, Delaware courts have applied their most rigorous standard of review: the “unflinching” entire fairness standard.¹⁸⁷ In order to satisfy this most careful scrutiny, defendant directors have carried the burden of

182. Joan MacLeod Heminway, *What the Roys Should Learn from the Demoulas Family (But Probably Won't)*, 73 DEPAUL L. REV. 825, 828 (2024).

183. BAINBRIDGE, *supra* note 176, at 176.

184. *Id.* at 175.

185. See DEL. CODE ANN. tit. 8, § 102(b)(7) (2025).

186. Stephen Bainbridge explains this difference in his *Corporate Law* textbook:

[D]ecisions implicating the duty of care typically are collective actions of the board as a whole. In making such decisions, the board is constrained to exercise reasonable care in decision making by a combination of external market forces and internal team governance structures. Judicial review thus is at best redundant and may, in fact, have deleterious consequences for the efficiency of decision making.

In contrast, self-dealing typically is more difficult to detect than is negligence. Self-dealing transactions rarely implicate the entire board. To the contrary, they often involve misconduct by a single director. . . . Courts appropriately are less concerned about destroying internal team relationships in such cases.

BAINBRIDGE, *supra* note 176, at 175.

187. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983).

demonstrating “their utmost good faith and the most scrupulous inherent fairness of the bargain.”¹⁸⁸

In the succession context, Means has argued that succession decisions based on family preference constitute conflicts of interest.¹⁸⁹ This argument is easily extended to non-family firms: The clear strictures of the duty of loyalty prohibit placing personal relationships of any kind ahead of the best interests of the corporation in making business decisions. Consider, for instance, a director who is also a controlling shareholder and thus holds considerable sway in board elections,¹⁹⁰ a director who jockeyes for their own officer appointment,¹⁹¹ or a director who champions revision of bylaw provisions that lengthen term limits.¹⁹² And consider the CEO who is also board chair or otherwise wields significant influence on officer appointments and board activity more generally, including, for example, succession planning. In situations of existing and exhibited conflicts of interest, where someone in control sits on both sides of a bargain, the duty of loyalty should apply.

The duty of loyalty also includes a duty of oversight.¹⁹³ This may seem, at first blush, an obvious contender for succession planning enforcement, due in part to its clear-day formulation: Oversight and planning both require proactive engagement, designed to identify and minimize risk in advance of an emergency. But mapping such oversight claims, known in Delaware as *Caremark*¹⁹⁴ claims, onto succession planning would present several challenges. First, failure to succession plan may not qualify for *Caremark* relief in its current form. Under the

188. *Id.*

189. Means, *The Value of Insider Control*, *supra* note 160, at 931.

190. Delaware directors “owe[] fiduciary duties to the corporation, the shareholders, and the minority shareholders; and a majority or controlling shareholder owes fiduciary duties to the minority shareholders, especially in transactions that result in a change of control of the corporation.” Parker, *supra* note 160, at 56–57 (footnotes omitted).

191. Heminway recounts a scene from Season One, Episode Two of HBO’s *Succession* in which three children of Waystar Royco CEO Logan Roy jostle for the interim chief executive office while their father is in the hospital. Heminway, *supra* note 182, at 842 (“Bottom line: each of the three children acts more in their own self-interest and to belittle the others than with the best interests of Waystar Royco in mind.”).

192. *Cf.* Geis, *supra* note 140, at 611 (describing bylaws as “the rare unilateral tool in the workshop of corporate governance” due to the fact that they can be adopted without shareholder approval). Bylaws may also be later amended by the board if the corporation’s certificate of incorporation confers such power on the directors. DEL. CODE ANN. tit. 8, § 109(a) (2025).

193. *See In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996); *Stone v. Ritter*, 911 A.2d 362, 369–70 (Del. 2006); *In re McDonald’s Corp. S’holder Derivative Litig.*, 289 A.3d 343, 349 (Del. Ch. 2023) (extending *Caremark* oversight duties to officers).

194. *In re Caremark*, 698 A.2d 959.

Caremark line of cases, oversight liability applies only to “mission critical” risks or to cases where managers ignored “red flags” that should have put them on notice of simmering problems.¹⁹⁵ Absent legislative initiative or proliferation of regulatory reforms such as those discussed in Section II.A.1,¹⁹⁶ no positive legislative or regulatory obligation currently exists of the type likely to trigger *Caremark*. Moreover, even in a ripe regulatory landscape, *Caremark* claims are extremely difficult to plead and prove: Plaintiffs must not only allege that corporate managers completely failed to implement or monitor reasonable risk management and compliance systems; they must also show that the board acted in bad faith.¹⁹⁷ And bad outcomes cannot, in retrospect, be equated with bad faith.¹⁹⁸ While recent years have seen a more receptive Delaware bench with respect to *Caremark* claims,¹⁹⁹ oversight liability still applies only sparingly. In the words of a recent decision quoting the original case, the “*Caremark* claim is ‘possibly the most difficult theory in corporation law upon which a plaintiff might hope to win judgment.’”²⁰⁰ Further study would be required to fully consider *Caremark* as a viable path to relief for succession planning claims.²⁰¹

195. See, e.g., Stephen F. Arcano, Jenness E. Parker & Matthew P. Majarian, ‘Mission Critical’ Issues and ‘Red Flags’: What It Means for a Board To Exercise Oversight, SKADDEN: THE INFORMED BD. (Sept. 22, 2022), <https://www.skadden.com/insights/publications/2022/09/the-informed-board/mission-critical-issues-and-red-flags> [<https://perma.cc/VGU6-HKWW>]; Gail Weinstein, Philip Richter & Steven Epstein, 2024 *Caremark* Developments: Has the Court’s Approach Shifted?, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 20, 2024), <https://corpgov.law.harvard.edu/2024/05/20/2024-caremark-developments-has-the-courts-approach-shifted/> [<https://perma.cc/8QFY-6NJR>] (noting Delaware courts’ emphasis on “the high bar to success on *Caremark* claims” in recent cases, despite a conspicuous (yet subtle) uptick in receptivity to allowing *Caremark* claims to survive pleadings).

196. See *supra* note 110 and accompanying text.

197. *Stone*, 911 A.2d at 369–70.

198. *Id.* at 373. Delaware courts have repeatedly emphasized that bad faith is difficult to prove. E.g., *In re McDonald’s*, 289 A.3d at 376 (“The pled facts must support an inference that the failure to take action was sufficiently sustained, systematic, or striking to constitute action in bad faith.”).

199. As Vice Chancellor Sam Glasscock III vividly described in a recent opinion, “*Caremark* claims, once relative rarities[,] have in recent years bloomed like dandelions after a warm spring rain.” *Constr. Indus. Laborers Pension Fund v. Bingle*, No. 2021-0940, 2022 WL 4102492, at *1 (Del. Ch. Sept. 6, 2022), *aff’d*, 297 A.3d 1083 (Del. 2023).

200. *Segway Inc. v. Cai*, No. 2022-1110, 2023 WL 8643017, at *5 (Del. Ch. Dec. 14, 2023) (quoting *In re Caremark Int’l Inc.*, 698 A.2d 959, 967 (Del. Ch. 1996)).

201. Delaware courts have also found, in the M&A context, that a board of directors’ failure to employ a poison pill in response to a takeover threat, “together with other suspect conduct,” supported a reasonable inference that directors breached their duty of loyalty. *La. Mun. Police Emps.’ Ret. Sys. v. Fertitta (Landry’s)*, No. 4339, 2009

The duty of loyalty can be applied in many different ways, several of which are explored above. Some of these, including *Caremark* claims, may face obstacles in the succession planning context. Others, such as conflicted interest transactions, can certainly arise in the context of corporate governance and succession planning, and, in those contexts, the rigorous scrutiny of entire fairness review would be appropriate. But entire fairness is not suitable for most succession planning analyses. Overextension of the duty of loyalty risks undermining the business judgment rule, interfering with board function, and miring courts in unnecessary litigation about whether succession plans were truly fair.²⁰² In most cases of failed or inadequate succession planning, the duty of care is insufficient, and the duty of care is overreaching. The next section will map a middle route.

3. The M&A Analogy

Scholars have argued that the fiduciary duty of care should require, at minimum, establishment of a succession plan.²⁰³ Furthermore, the duty of care requires reasonable effort, including due diligence into potential successors' qualifications.²⁰⁴ However, as discussed in Section III.B.1, claims alleging breach of the duty of care are difficult to prove due to the presumptions of the business judgment rule and other procedural roadblocks.²⁰⁵ When decision-makers are conflicted—or confronted with conflict—the business judgment rule gives too much deference, and the duty of care proves inadequate to protect the best interests of corporations and shareholders.²⁰⁶ Succession, with its embedded tensions of identity

WL 2263406, at *8 n.34 (Del. Ch. July 28, 2009). While one could analogize failure to respond to a takeover threat and failure to address succession risk, the court in *Landry's* made clear that “there is no *per se* duty to employ a poison pill” and that it was only this failure in combination with “other suspect conduct”—which included termination of a merger agreement so the controlling stockholder would not have to pay the reverse termination fee—that “support[ed] a reasonable inference . . . that the board breached its duty of loyalty in permitting the creeping takeover.” *Id.* While this case does not further the cause of heightened fiduciary duty analysis for succession planning, the M&A analogy deserves broader attention and will be explored in detail in Section III.C.3.

202. See, e.g., Means, *The Value of Insider Control*, *supra* note 160, at 932–33.

203. Means, *King Lear*, *supra* note 3, at 1283; Means, *The Value of Insider Control*, *supra* note 160, at 927–28.

204. Means, *The Value of Insider Control*, *supra* note 160, at 928.

205. See *supra* notes 174–77 and accompanying text.

206. See, e.g., *Cheff v. Mathes*, 199 A.2d 548, 554–55 (Del. 1964) (acknowledging that objective decision-making is difficult in the context of a threat to corporate control and, rather than automatically granting directors the advantageous presumptions of the business judgment rule, instead placing the initial burden of proof on

and independence, requires more. The fiduciary duty of loyalty may be the more appropriate protection against certain succession failures, such as conflicted transactions in which incumbents make decisions based on personal preferences.²⁰⁷ However, the duty of loyalty is likely overly scrutinizing for most succession cases. Entire fairness, which applies in conflict-of-interest transactions, is the most onerous standard of review in Delaware fiduciary duty law.²⁰⁸ But actual conflicts do not always exist in succession planning, and assuming they did would establish a too-high burden of proof. What does exist in succession planning—and consistently so—is the “omnipresent specter”²⁰⁹ of leaders acting, or failing to act, in order to entrench themselves. Delaware courts have long recognized the central procedural role of scrutiny in adjudicating fiduciary duty claims and have been charting a path since the 1960s, from *Cheff*²¹⁰ to *Unocal*²¹¹ and its progeny, to address issues of entrenchment in the M&A context.²¹² Succession jurisprudence should follow suit.²¹³

When directors or officers face situations in which self-interest is likely to flare up, but which fall short of explicit conflicts, Delaware courts apply intermediate scrutiny.²¹⁴ This enhanced scrutiny, more exacting than the business judgment rule and more forgiving than entire

directors employing takeover defenses to justify their actions by showing that they had reasonable grounds to believe corporate policy and effectiveness were in danger, and that their actions were not taken “solely or primarily because of the desire to perpetuate themselves in office”).

207. Means, *The Value of Insider Control*, *supra* note 160, at 931.

208. *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 44 (Del. Ch. 2013). Means has argued that “courts should apply closer scrutiny to ensure that the duty of care has been met in cases involving insider control.” Means, *The Value of Insider Control*, *supra* note 160, at 929. This Article extends that argument and proposes application of enhanced scrutiny to ensure appropriate enforcement of fiduciary duties in the succession context. Indeed, if all corporate actors viewed judicial relief as realistic and meaningful, “companies would have a reason to adopt succession plans. When necessary, shareholders could use the prospect of litigation to force corporations to engage in meaningful succession planning or to adjust outdated plans that might already exist.” *Id.*

209. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985).

210. *Cheff v. Mathes*, 199 A.2d 548 (Del. 1964).

211. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

212. See, e.g., *Cheff*, 199 A.2d 548; *Unocal*, 493 A.2d 946; *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361 (Del. 1995); *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48 (Del. Ch. 2011).

213. Scholars have recognized the challenges and opportunities of scrutiny in other contexts. Means, for example, has argued for variable scrutiny in shareholder oppression cases, with minority shareholders’ level of participation in corporate governance as the indicator that ratchets up (or down) the level of scrutiny. Means, *Voice-Based Framework*, *supra* note 81.

214. See, e.g., *Unocal*, 493 A.2d at 954–55; *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 180 (Del. 1986); Heminway, *supra* note 182, at 830.

fairness review, applies when a board takes defensive action in response to the threat of a hostile takeover²¹⁵ or when a board approves a change of control transaction.²¹⁶ In each case, heightened scrutiny is imposed due to the inherent risk that corporate managers will act to entrench themselves—and current management—instead of, and at the expense of, the best interests of the corporation.²¹⁷ *Unocal* analysis applies if plaintiffs establish that directors took defensive measures in response to a reasonably perceived threat to the corporate enterprise.²¹⁸ If so, the burden of proof shifts to defendant directors, who must prove that their defensive actions were reasonable in relation to (*i.e.*, proportionate to) the threat posed.²¹⁹ Only if defendants sustain their burden will their decisions receive the court's deference under the business judgment rule.²²⁰ *Revlon*²²¹ analysis applies if plaintiffs establish that a change of control is inevitable, and if so, the burden of proof shifts to the defendant directors to prove that they exercised their fiduciary obligations in service of obtaining the highest possible price for the shareholders—and, in so doing, that they acted reasonably and were adequately informed.²²² Again here, the business judgment rule will only be restored if defendants can sustain their burden of proof.

215. *Unocal*, 493 A.2d at 954–55. Claims of entrenchment in this context are known as “*Unocal* claims.”

216. *Revlon*, 506 A.2d at 181–84. Boards' obligations in such instances are referred to as “*Revlon* duties.”

217. *Unocal*, 493 A.2d at 954; *Revlon*, 506 A.2d at 180.

218. *See Unocal*, 493 A.2d at 954.

219. *Id.* at 955. Where directors take inequitable actions interfering with contested board elections, the Delaware Supreme Court will apply a unique heightened scrutiny analysis unifying the *Unocal* standard with other doctrines establishing “special sensitivity” in the shareholder disenfranchisement context. *Coster v. UIP Cos.*, 300 A.3d 656, 671–72 (Del. 2023) (quoting *Strategic Inv. Opportunities LLC v. Lee Enters., Inc.*, No. 2021-1089, 2022 WL 453607, at *15 (Del. Ch. Feb. 14, 2022)). This specific application of enhanced scrutiny would map cleanly onto succession scenarios in which directors interfere with shareholder voting in the election of successors. It may also suggest the Court of Chancery's receptivity to more expansive applications of enhanced scrutiny in other contexts.

220. *Unocal*, 493 A.2d at 954. In the words of the *Unocal* court, “[b]ecause of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred.” *Id.* Later cases have clarified that board actions in this context are proportional if they are not preclusive or coercive (*i.e.*, not draconian) and, if not draconian, are within the range of reasonableness. *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1367 (Del. 1995).

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

222. *Id.* at 182; *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 44–45 (Del. 1994).

While M&A and succession are certainly different in many ways,²²³ they share several defining characteristics. Each represents a major inflection point in the life cycle of a company: a moment of transition implicating questions of leadership, control, strategic vision, and corporate sustainability. Each also, and relatedly, involves unique sensitivities of self and self-interest. The risk of entrenchment in M&A arises when directors are faced with a contingency that might be in the best interest of the corporation, such as a change of control, but that might also result in directors (and their managerial compatriots) losing their jobs. The board's decision-making process in deciding how to proceed is key. Risk of entrenchment in succession planning is similar. Succession might involve an explicit change of control, of course, but it might also be more nuanced, involving, for example, imposition of director term limits through bylaw amendment or planning for identification, training, and installation of the next chief executive whose mission, vision, leadership style, and networks will significantly impact company culture and shareholder engagement. And entrenchment risk arises not only at the moment of transition, but also, and importantly, during planning: Implementing a succession plan lowers the cost of leadership changes, making such changes easier. This can easily provoke ambivalence and avoidance in director decision-making.²²⁴ Succession planning can thus influence the likelihood of reelection and reappointment for directors and officers in direct and indirect ways, creating an entrenchment scenario more nuanced but no less powerful than that of M&A change of control. In heightened scenarios such as these, the need for careful procedures is likewise heightened.²²⁵

The burden-shifting framework of *Unocal* and *Revlon* provides a useful and flexible foundation for improving adjudication of succession disputes while maintaining consistency with current law. To be clear, the suggestion is not to create any new fiduciary duty for succession planners; instead, the suggestion is to reimagine the scrutiny applied to certain questions of succession. The extent to which courts defer to

223. Importantly, M&A is a distinct moment in time, while succession planning is ongoing. See Blumentritt, Mathews & Marchisio, *supra* note 85, at 54–55 (discussing the sequential stages of succession).

224. See *supra* notes 125–31 and accompanying text.

225. Cf. Means, *King Lear*, *supra* note 3, at 1267 (describing the need for fair procedures in making succession decisions in the family firm context). M&A and succession planning already share several procedural best practices, such as the use of independent directors in support of fair process, further signaling analogous features of M&A and succession. See *supra* Section I.A.1.

directors and officers in corporate decision-making matters a great deal in adjudication of such claims.²²⁶

4. Bringing a Claim

Enhanced scrutiny should apply to succession planning scenarios in which, as with a hostile takeover or change of control, directors and officers might be motivated to act in their own self-interest instead of the interest of the corporation and its shareholders. To activate enhanced scrutiny, plaintiffs would be required to allege that directors or officers (1) perceived a threat to their corporate position; and (2) acted or failed to act in implementing a reasonable succession plan (or features thereof) in furtherance of entrenching themselves.²²⁷ If a plaintiff survives the pleading stage, the burden would shift to defendant directors or officers to prove that their actions were adequately informed and reasonably taken. Only if defendants can sustain this burden would the business judgment rule, and its attendant deference, be restored.²²⁸

When might officers or directors perceive a threat to their corporate position, or, in other words, when would enhancement be triggered? In *Unocal* and *Revlon*, the trigger is contingent: If there is a hostile takeover attempt and the board takes defensive measures, or if a change of control becomes inevitable, then enhanced scrutiny applies. With succession, however, the contingency is less obvious. Leaders will not live forever and cannot serve forever, and so the need for a succession plan—if the corporation is to survive—is inevitable. While it would be ideal to require basic succession planning from the moment of incorporation,²²⁹ courts are unlikely to go this far. More palatable triggers might include board rejection of shareholder proposals requesting specific succession

226. See Means, *Voice-Based Framework*, *supra* note 81, at 1212.

227. If a plaintiff cannot satisfy this two-pronged pleading requirement, then, absent explicit conflicts of interest, director and officer decisions would receive the deference of the business judgment rule.

228. In the context of a derivative suit, demand futility analysis would likely consider many of the same independence factors that would activate enhanced scrutiny and shift the burden of proof to the defendants. Demand futility and enhanced scrutiny analyses might thus support and reinforce each other, streamlining one aspect of an otherwise complex derivative litigation process. See *supra* note 177 and accompanying text.

229. See *infra* Part IV.

features,²³⁰ inadequate disclosures,²³¹ failed investments or M&A opportunities due to lack of adequate succession plans,²³² or adoption of governance documents requiring enactment of succession plans coupled with failed or inadequate efforts to do so.²³³ Once enhanced scrutiny attaches and the burden shifts, defendants would bear the burden of proving that their actions were informed and reasonable. Board materials, meeting minutes, and director testimony could establish whether or not board actions were informed, and the reasonableness inquiry would consider whether a succession plan was documented, communicated, current, and substantively adequate.²³⁴

Application of such enhanced scrutiny would play out differently in public and private companies, and each would involve case- and company-specific considerations. The diversity of experience in corporate governance demands flexibility in adjudication, and the burden-shifting regime proposed here is well suited to the task. Perhaps the cleanest application would be to the publicly traded company.²³⁵

230. In 2009, the SEC clarified its position on companies' no-action requests that seek to exclude shareholder proposals requesting adoption and disclosure of written, detailed succession policies, stating the SEC's view that "a company generally may not rely on Rule 14a-8(i)(7) to exclude a proposal that focuses on CEO succession planning." *Shareholder Proposals: Staff Legal Bulletin No. 14E (CF)*, U.S. SEC. & EXCH. COMM. (Oct. 27, 2009), <https://www.sec.gov/rules-regulations/staff-guidance/staff-legal-bulletins/shareholder-proposals-staff-legal-bulletin-no-14e-cf>.

231. See *infra* note 269 and accompanying text.

232. See *supra* note 69 and accompanying text.

233. See *infra* Sections IV.A-B. The foregoing list is far from exhaustive; these are not, of course, the only instances in which fiduciary issues might occur, but they are illustrative of moments when a shareholder might bring suit and entrenchment risk might be found. Evidence of executive incompetence, carefully documented through meaningful performance evaluations, might also serve as a trigger for enhanced scrutiny. See, e.g., *supra* notes 46, 49 and accompanying text.

234. Substantive adequacy would look different for different businesses (*i.e.*, more formal and comprehensive planning would be required of large, public companies) and would, by necessity, require a case-by-case, facts and circumstances analysis.

235. Consider a mid-2010s hypothetical: If shareholders of CBS and Viacom had submitted a proposal recommending identification and grooming of two or more executive successors due to Sumner Redstone's advanced age, and directors had rejected such proposal, then, under the proposed enhanced scrutiny paradigm, shareholders might have brought suit and successfully pled that corporate decision-makers chose not to implement the recommended plan features due to a perceived threat to their positions. Cf. Jeffrey Sonnenfeld, *How Viacom Could Have Avoided Its 'Game of Thrones' Leadership Saga*, FORTUNE (May 26, 2016, 3:42 PM), <https://fortune.com/2016/05/26/viacom-sumner-redstone-succession-saga/> [<https://perma.cc/37VN-N9R4>] (discussing, in the context of Sandy Weill's leadership at Citigroup, the inclination of certain executives to undercut or oust potential successors, noting that "[s]trong lieutenants are often undercut, if not ousted, as they can be viewed as threats"). The burden would then shift to defendants to prove that their actions were adequately informed and reasonably

Public companies are often immune to the complications of overlapping roles that are characteristic of startups and family firms.²³⁶ The board of a public corporation owes strong fiduciary duties to the business, not just to the controlling owner, so the basic understanding of who owes fiduciary duties to whom,²³⁷ a prerequisite to any fiduciary duty claim,²³⁸ is thus easier to establish for public companies. The question of who owes fiduciary duties in close and family businesses—and, in turn, who can bring claims for breach of those duties—is tougher. Application of enhanced scrutiny to closely held companies and family firms is thus a tougher case, though not without merit for the reasons discussed in Part II. Indeed, the need for heightened protection is perhaps even more pronounced for private companies and family firms where shareholders lack the market remedies available to public investors.²³⁹ Moreover, analogous convergence of ownership and management has not precluded fiduciary duty scrutiny in other contexts, such as M&A; instead, it has served as justification for enhancement of that scrutiny. This Article therefore declines to limit its thesis to any single entity type. The flexible procedural approach proposed here can be applied, and adjusted, across businesses of various structures and sizes.²⁴⁰

The ultimate goal, of course, is not protracted litigation, but fewer governance disputes leading to lawsuits. Flexible standards that incentivize manager behavior are uniquely capable of doing just that. The *Corwin* principle, which refers to the process of “cleansing” a transaction and restoring the business judgment rule in conflicted-board M&A transactions if the deal is approved by a fully informed, uncoerced vote of a majority of the disinterested shareholders, offers a compelling model.²⁴¹ Cleansing in the succession context might involve, *e.g.*,

taken. Redstone’s plan not to die, while certainly communicated and perhaps documented, *see supra* note 19, was not reasonable and would not be likely to survive enhanced scrutiny.

236. *See supra* note 159 and accompanying text.

237. *See supra* note 190.

238. *See, e.g., Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 113–14 (Del. 2006).

239. *See Geis, supra* note 140, at 610; Tait, *supra* note 20, at 8–29 (discussing unique vulnerabilities of corporate family members).

240. More precise application is beyond the scope of this Article and reserved for future work. Arguments might be developed by comparing public and private governance principles or by analogizing dual-class stock (which can be used as a tool for retention of power in succession planning) to shareholder oppression concepts in the close company setting.

241. *See Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015). Compliance with these procedural safeguards is known as “*Corwin* cleansing.” *Corwin*’s future applicability in light of the Delaware General Assembly’s passage of Senate Bill

disclosure of entrenchment risk and ratification of succession decisions by independent directors or shareholders.²⁴² If courts applying enhanced scrutiny to succession questions were to bless some form of procedural cleansing analogous to *Corwin*, this would close the motivational loop for corporate managers: Not only would they be incentivized to engage in reasonable, informed, and independent succession planning by the burden of enhanced judicial scrutiny; they would also have a roadmap for how to ensure their decisions and actions would be protected by the business judgment rule.

This motivational aspect is, in fact, the point.²⁴³ Even if cleansing is unavailable or inapplicable and defendant directors are found to have acted on an unreasonable, uninformed basis in making succession decisions, that conduct may only constitute a breach of the duty of care. And because Delaware law permits exculpation of directors and officers for breach of the duty of care, establishing liability may require proving disloyalty. This is a high bar, as explored in Section III.B. But it is not insurmountable, and, regardless, the prospect of judicial scrutiny under a heightened standard of review carries substantial behavioral weight.²⁴⁴ The enhanced scrutiny standard proposed here acknowledges this potential. This intermediate level of scrutiny respects the protections and associated efficiencies of the business judgment rule, while acknowledging the heightened risk of self-interest and entrenchment in moments of corporate transition. M&A and succession planning are both unique systems in need of unique checks. Delaware courts would go far in incentivizing efficient governance and minimizing succession disputes by giving succession the scrutiny it deserves.

No. 21 (signed Mar. 25, 2025) is yet to be seen, but its utility as a prototype for succession analysis remains persuasive.

242. This formulation recalls what scholars have proposed in the context of expressly conflicted succession decisions, *i.e.*, “[t]o avoid the prospect of judicial scrutiny after the fact, controlling owners may choose to disclose the existence of the conflict and seek ratification by independent board members or shareholders.” Means, *The Value of Insider Control*, *supra* note 160, at 931.

243. Succession designers are well aware of this, observing the positive influence of effective succession planning, as well as the negative effects of its failure; succession planners are likewise at the forefront of recognizing that succession is a key part of strategy implementation and risk management. *See supra* notes 31–33 and accompanying text.

244. *See* Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and ESG Strategy*, 106 IOWA L. REV. 1885, 1896–97 (2021) (noting that, “[a]lthough liability under *Caremark* is hard to prove, scholars have viewed the case as having enormous value in encouraging more intensive diligence in the area of compliance” (footnotes omitted)).

C. Anticipated Challenges

The role of corporate boards is changing,²⁴⁵ and this new normal heightens the call for an elevated standard of fiduciary review in succession planning. Succession planning is no longer an “aspirational ideal”²⁴⁶ (if it ever was). Instead, in the modern era, succession planning is a core responsibility of reasonable corporate governance.²⁴⁷

Commentators may express concerns regarding judicial overreach in applying a heightened standard of review for succession planning. Risk of inappropriate interference, however, is minimal. Delaware courts have made clear their deferential proclivities in matters of corporate law. The proposed framework proposed here also benefits from decades of Delaware caselaw grappling with the balance of oversight and deference in another instance of momentous corporate transition: the M&A deal. By building upon the foundations of *Unocal*, *Revlon*, and their progeny, succession scrutiny thus aligns itself along the middle path: business judgment, if earned.

It might also be argued that the very analogy between M&A and succession is strained. After all, many M&A deals are exit events focused on maximizing value, while succession planning is often used as a tool for continuity and legacy preservation. The reverse, though, can also be true: Strategic M&A transactions are designed to encourage growth, synergy, and operational efficiency, all of which support corporate continuity and preserve institutional legacy, and succession planning is frequently informed by retirement planning, where exit optimization and value maximization are front and center. On closer inspection, the defining features of M&A and succession are often so similar as to be, in many instances, interchangeable.

The corporate reach extends far beyond the C-suite and the board room. Corporate decisions affecting transition, such as those related to succession planning, are bound up in questions of identity that complicate assumptions of independence and good faith. This Part has drawn on foundational corporate law frameworks, applying concepts of identity, control, and fiduciary duty in a novel reframing of incentives and

245. VLACHOS & BEASLEY, *supra* note 31, at 2 (“Amid possible global supply chain breakdowns, new and evolving regulations, cyber risks, changing political and economic climates, and concerns about sustainability, directors’ tasks—and the scope of their oversight role—seem to have expanded exponentially.”).

246. *Brehm v. Eisner*, 746 A.2d 244, 256 (Del. 2000) (“Aspirational ideals of good corporate governance practices for boards of directors . . . are highly desirable, often tend to benefit stockholders, sometimes reduce litigation and can usually help directors avoid liability. But they are not required by the corporation law and do not define standards of liability.”).

247. See *supra* notes 31–33 and accompanying text.

enforcement in succession planning. Enhanced scrutiny for fiduciary duty claims in the succession context would motivate decision-makers to think critically about self-interest in succession. It follows, then, that the appropriate role for private ordering is to operationalize succession plans and bolster the motivational effects of the larger fiduciary paradigm.²⁴⁸ Part IV presents a modernized vision of institutional identity which, through the comprehensive strengthening of corporate norms, encourages and rewards timely, robust succession planning.

IV. PRIVATE ORDERING

Whether or not Delaware courts implement the enhanced fiduciary scrutiny proposed above, private ordering will play an important role in promoting effective succession planning. What's more, private ordering presents the *ex ante* opportunity to shape corporate activity—and thus influence judicial inquiry at any level.²⁴⁹ The private innovations explored in Part I would do much to fortify succession planning efforts. Other approaches are also available which, if adopted, would further innovate and animate private ordering efforts in support of fulsome succession plans. This Part will explore several of those models, which strike at the very heart of institutional identity.

A. Chartering Commitment

1. Certificates and Bylaws

The chief governing document of a Delaware corporation is its certificate of incorporation, also referred to as the corporate charter. By statute, Delaware law requires that the charter set forth “[t]he nature of the business or purposes to be conducted or promoted.”²⁵⁰ The stated purpose may be general in nature, effectively encompassing all lawful activities absent separate express limitation, but special purpose statements are permitted.²⁵¹ Delaware courts have emphasized that

248. Implementation of private ordering solutions such as those discussed in Parts I and IV, for instance, might support a finding that directors' succession planning efforts were reasonable.

249. See Geis, *supra* note 140, at 610–11 (“By shaping key aspects of corporate governance, before a specific incident arises, both directors and shareholders aim to establish structural rules that are favorable to their causes.”).

250. DEL. CODE ANN. tit. 8, § 102(a)(3) (2025).

251. *McRitchie v. Zuckerberg*, 315 A.3d 518, 574 (Del. Ch. 2024) (“Absent a narrow purpose clause, directors have the flexibility to pursue the business they believe to be the value-maximizing option. But if the charter contains a limited purpose clause, then that provision constrains the choice set.”).

corporate planners may “tailor the powers of corporate fiduciaries and the duties they owe . . . through a limited purpose clause” in a charter,²⁵² and a recent Chancery decision elaborated on this private ordering option in painstaking detail.²⁵³ In dismissing a claim suggesting that fiduciary duties should be exercised in service of diversified investors, Vice Chancellor Travis Laster pointed to private ordering as the preferred mechanism for steering fiduciary standards toward targeted goals.²⁵⁴

In the succession context, establishing a purpose grounded in sustainable corporate governance would not be so far-fetched: For example, a charter could state that “the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware, provided that any business of the corporation shall be pursued in accordance with reasonable corporate governance practices designed to encourage continuity of business operations.” Such a purpose clause might require directors to engage in more vigorous, forward-thinking governance efforts than would otherwise be required.

Charters or bylaws could also more explicitly require implementation and maintenance of reasonable succession plans. Chancery decisions suggest that board action in violation of the corporation’s charter—or other corporate contract—may give rise to a claim against directors for breach of their fiduciary duties.²⁵⁵ Charter or bylaw provisions requiring succession plans would put directors and officers on notice of their duty to execute such plans, which could

252. *Id.* (quoting *New Enter. Assocs. 14, L.P. v. Rich*, 295 A.3d 520, 553 (Del. Ch. 2023)).

253. *Id.* at 574–75.

254. *Id.*

255. *See, e.g., Se. Pa. Transp. Auth. v. Volgenau*, No. 6354, 2012 WL 4038509, at *3 (Del. Ch. Aug. 31, 2012) (holding that plaintiff was entitled to bring a direct claim that defendants breached their fiduciary duties by approving a merger that violated an equal pay provision in the company’s charter); *Ryan v. Gifford*, 918 A.2d 341, 357–58 (Del. Ch. 2007) (holding that “intentional violation of a shareholder approved stock option plan, coupled with fraudulent disclosures regarding the directors’ purported compliance with that plan, constitute conduct that is disloyal to the corporation and is therefore an act in bad faith”). Scholars have questioned the precise contours of “corporate contracts” and their efficacy in effecting ex ante corporate governance. Geis, *supra* note 140, at 611–12 (noting that it is not entirely clear who the parties to charters and bylaws are—shareholders and entity, entity and state, or individual shareholders?—and observing that “contract law may not be particularly well suited to preside over [certain] ex-ante governance disputes”). Deficiencies of contract law qua corporate governance notwithstanding, it is sufficient for purposes of this Article to emphasize that the characterization of charters and bylaws as corporate contracts has been asserted “as a self-evident truth for almost a century.” *Id.*

establish the “known duty to implement” required by the *Zucker* court and thus support a finding of fiduciary duty breach.²⁵⁶

2. Access

Widely available charter and bylaw forms that include succession planning requirements would familiarize corporate planners with basic succession concepts, build network effects, and increase implementation.²⁵⁷ Simplicity and accessibility would be key in any effort to maintain and disperse succession-conscious corporate contract templates. Some states and localities have developed model guidance, plan templates, and succession checklists for state departments and agencies, small businesses, and lawyers.²⁵⁸ Secretaries of State could further this initiative by linking succession guidance and fillable forms to heavily trafficked state websites, such as those used for filing incorporation documents and annual reports. This would not be state-imposed succession planning, but state-*supported* succession planning, providing access to clear and vetted resources to reinforce succession awareness.

256. *Zucker v. Andreessen*, No. 6014, 2012 WL 2366448, at *11 (Del. Ch. June 21, 2012). While regulatory guidance encouraging succession planning is likely insufficient to establish a “known duty to implement,” more expansive rulemaking might justify a finding of such duty in certain industries. *See supra* note 110 and accompanying text.

257. *Cf.* Carrie Stanton, *Risk, Reimagined: The Untold Story of Liability Laddering in Modern Commercial Dealmaking*, J. CORP. L. (forthcoming 2025) (manuscript at 25) (on file with author) (asserting the influence of templates in commercial contracting). *See generally* Mark R. Patterson, *Standardization of Standard-Form Contracts: Competition and Contract Implications*, 52 WM. & MARY L. REV. 327 (2010).

258. *See, e.g., State of California Succession Management Model*, CAL. DEP’T HUM. RES., <https://www.calhr.ca.gov/state-hr-professionals/Pages/State-of-California-Succession-Management-Model.aspx> [<https://perma.cc/8JFC-64NX>] (providing guidance and templates to state departments for use in succession planning); SEATTLE OFF. OF ECON. DEV., SUCCESSION PLANNING TOOLKIT (n.d.), <https://www.seattle.gov/economic-development/start-a-business/handbook-and-support#successionplanningtoolkit> [<https://perma.cc/J97F-AMNZ>] (providing succession planning information, definitions, checklists, and worksheets for small businesses); Nevada Department of Administration Division of Human Resource Management, *Succession Planning Documents*, NV.GOV, https://hr.nv.gov/Resources/Forms/SuccessionPlanning/Succession_Planning/ [<https://perma.cc/3K5R-KY83>] (providing links to succession plan guidance and a template plan for state agencies); *Succession Planning: Additional Resources*, IDAHO ST. BAR, <https://isb.idaho.gov/member-services/programs-resources/succession-planning/additional-resources/> [<https://perma.cc/V4GK-NS32>] (providing succession planning resources for lawyers).

3. Norms and Narratives

Professor Jennifer Fan uses a “normative/narrative framework” to explore corporate governance in the context of venture capital-backed startups.²⁵⁹ For startups, Fan argues, fiduciary duties interact with contractual obligations and best practices in a three-part model of corporate governance, and “it is the narrative constructed from the best practices framework that form[s] the norms under which corporate governance in VC-backed private companies operate.”²⁶⁰ While startups certainly have unique governance features, as Fan convincingly explains, the normative/narrative model is a useful framing device for thinking about succession planning qua corporate governance in entities of all kinds.²⁶¹ Norms, for better or worse, create feedback loops that both create and reinforce “market” governance practices. In the context of succession, norms are anchored in human psychology and corporate law,²⁶² subtly drifting over time with the pull of scientific and cultural developments²⁶³ and legal innovations. The fiduciary model proposed in Section III.C, supported by private ordering innovations both existing and imagined as explored in Part I and this Part IV, could input positive change into the system, thus shifting the narrative of succession toward sustainability.

B. Signaling Commitment

Certificates and bylaws constitute a corporation’s *core* governance documents, but they are not the *only* governance documents. Recent corporate governance research explores the scope and impact of “shadow

259. Fan, *supra* note 105, at 321. Fan uses Professor Edward Rock’s norms-and-narratives model to explore early-stage private companies’ use of “best practices” or norms in lieu of precise rules—and the governance flexibility this allows. *Id.* at 321 n.6.

260. *Id.* at 324–25.

261. While differences certainly exist between public and private companies, family and non-family firms, startups and mature entities, and otherwise, there are also marked similarities. *See supra* notes 23–29 and accompanying text; *cf.* Bartlett, *supra* note 82, at 40 (arguing, in the context of agency problems, that corporate theory had imposed a “false dichotomy” as between private and public companies). Furthermore, breaking down the silos of entity categorization can encourage innovative cross-pollination. *See, e.g.,* Otto & Reed, *supra* note 84 (“[N]on-family businesses can learn a lot from their family peers. Most obviously the courage to think long term.”); Means, *The Value of Insider Control*, *supra* note 160, at 935 (suggesting that “controlled companies can soften the harder edges of capitalism by bringing the values of controlling owners into the marketplace”).

262. *See supra* Parts II–III.

263. *Cf.* Ferris Jabr, *How Long Can We Live?*, N.Y. TIMES, <https://www.nytimes.com/2021/04/28/magazine/human-lifespan.html> (June 15, 2023).

governance documents” on corporate behavior.²⁶⁴ Shadow governance documents include committee charters, governance guidelines supplementing corporate bylaws, codes of conduct, and voluntary disclosures.²⁶⁵ Each of these documents could be used as a tool to shape and incentivize corporate conduct—and as a signal of corporate values and priorities. As the scholarship convincingly demonstrates, “[s]hadow governance documents set the board’s agenda, both procedurally and substantively, and can have profound effects on decision-making.”²⁶⁶ For example, with respect to succession planning, selection and nomination of successor candidates is often spearheaded by nomination committees, whose charters establish committee responsibilities that shape and strengthen the succession process.²⁶⁷ Committee charters thus represent another opportunity for shaping corporate behavior, and, in turn, institutional identity, in a way that prioritizes effective succession planning. Governance guidelines, too, might address succession and thus encourage effective planning,²⁶⁸ and disclosures are a powerful tool for public companies in signaling commitment to business continuity and operational sustainability through succession planning.²⁶⁹

264. Yaron Nili & Cathy Hwang, *Shadow Governance*, 108 CALIF. L. REV. 1097, 1105 (2020) (“Put simply, a shadow governance document is any non-charter, non-bylaw document that speaks to issues of corporate governance.”).

265. *Id.* at 1110–18.

266. *Id.* at 1141.

267. NASDAQ Stock Market and New York Stock Exchange listing rules require formation of nominating/governance committees, adoption of committee charters, and disclosure of committee charters. *See id.* at 1110–11; *see also supra* note 47 and accompanying text.

268. Nili & Hwang, *supra* note 264, at 1112.

269. *See, e.g.*, Lynn Jokela, *Succession Planning: Reassuring Investors with Disclosure*, THECORPORATECOUNSEL.NET (Feb. 8, 2021), <https://www.thecorporatecounsel.net/blog/2021/02/succession-planning-reassuring-investors-with-disclosure.html> [<https://perma.cc/NL48-HGNF>] (citing a report by SquareWell Partners for the observation that, “when it comes to succession planning, . . . investors want reassurance that boards are ready to act”); *Equilar: Only 3.3% of S&P 500 Companies Disclose CEO Succession Plans*, EQUILAR (Dec. 13, 2016), <https://www.equilar.com/press-releases/62-only-3.3percent-of-s&p-500-companies-disclose-ceo-succession-plans.html> [<https://perma.cc/G29D-PRN3>] (quoting Belen Gomez, Director of Research and Board Intelligence Services at Equilar, for the observation: “Shareholders have a deep interest in how their portfolio companies prepare to handle major events like a CEO transition. . . . There needs to be sufficient information to ease shareholder anxiety . . . without compromising the strategic position of the company.”).

But see, e.g., *Form 10-K Human Capital Disclosures Continue To Evolve*, GIBSON DUNN (Nov. 21, 2023), <https://www.gibsondunn.com/form-10-k-human-capital-disclosures-continue-to-evolve/> [<https://perma.cc/2GME-95NT>] (reviewing trends in public company disclosures among S&P 100 companies in the wake of the SEC’s adoption of human capital resource disclosure rules in 2020 and finding that “[o]nly 21 %

These “shadow” governance mechanisms offer unique opportunities to bring succession commitment into the light. By signaling to investors and other stakeholders that a sustainable and hygienic governance model is in place, corporations can attract business opportunities, influence peers, and create new norms—all without the need for state influence or judicial intervention.²⁷⁰ And, as a bonus benefit, if more exacting legislative initiatives or judicial standards are developed, robust shadow governance documents would help ensure corporate compliance.

* * *

If companies weave their own narratives, then institutional identity is an intricate braid of corporate law, contractual agreements, and best practices.²⁷¹ This Part has explored how corporations can fold succession planning into their core identities. From charters and bylaws to stakeholder signals, companies already have many of the tools they need to solidify succession within the corporate constitution. But too few use them. Not only do these mechanisms offer independent value—from procedural clarity to operational stability and from investment incentives to partner accountability—they would also bolster a company’s compliance with an enhanced enforcement paradigm such as that proposed in Part III. In short, an institutional identity built on operational continuity and stakeholder accountability will, in one way or another,

of companies surveyed addressed their succession planning efforts”); Jennifer O’Hare, *Corporate Governance Guidelines: How To Improve Disclosure and Promote Better Corporate Governance in Public Companies*, 49 FLA. ST. U. L. REV. 257, 297–98 (2022) (analyzing a survey of corporate governance guidelines (CCGs) of the fifty largest public companies in the United States and observing that, while the New York Stock Exchange’s Listed Company Manual requires boards of listed companies to disclose CCGs, which must address several governance topics, including management succession, and while all CCGs of the companies surveyed did address managerial succession, “companies generally limited their disclosures to who was responsible for CEO succession planning; succession policies were not disclosed”). To be useful, disclosures must be substantively meaningful.

270. Coordinated signaling of corporate standards exists in other contexts, to notable effect. B Corp Certification, for example, is a third-party designation achievable by businesses that satisfy designated standards of performance, transparency, and accountability on factors such as charitable giving, employee benefits, and supply chain procedures. *About B Corp Certification: Measuring a Company’s Entire Social and Environmental Impact.*, B LAB, <https://www.bcorporation.net/en-us/certification/> [https://perma.cc/P2CT-C454]. Future work could examine the viability and efficacy of private certification as a change agent for corporate governance, including succession planning.

271. Cf. Fan, *supra* note 105, at 381 (“In essence, each VC-backed private company forms its own narrative . . . based on a set of norms that is influenced by case law, contracts, and best practices—to varying degrees.”).

push a company toward effective succession planning—and, in turn, stronger corporate governance.

CONCLUSION

Innovative design structures emerge and evolve more swiftly than the laws governing them. Modern succession planners are well aware of the gravity and urgency attached to their work, and they use sophisticated strategies to create rigorous, research-backed succession plans. If only more businesses would use them. Unfortunately, businesses continue to delay and ignore succession planning—to their peril. An entrenchment-centered enforcement model, applying enhanced judicial scrutiny to corporate managers who fail to adequately plan for succession, would establish balanced incentives, encourage design efficiency and innovation, and align corporate law with modern succession design.