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Abstract

In the 2019 decision Rucho v. Common Cause*, the U.S. Supreme Court concluded that federal challenges to partisan gerrymandering—a practice yielding election results that "reasonably seem unjust"—were non-justiciable. If partisan gerrymandering claims are not federally justiciable, and if that conclusion emboldens politicians, how else might incumbents manipulate election mechanics to preserve their political advantage? This Article explores one possibility that was briefly mentioned by the* Rucho *majority: the strategic advancement or delay of the date of a federal election. The strategic shift of election day is not simply a theoretical problem. Foreign politicians have strategically altered their election days for partisan advantage, U.S. states have delayed elections to fill vacant seats in the Senate, and members of the U.S. Congress have repeatedly proposed changing the date of federal elections.*

Because the U.S. Constitution empowers federal legislators to establish the date of a federal election, just as the Rucho *Court emphasized that our charter empowers state legislators to establish federal districts, a court may conclude that any challenge to a shift in the date of an election is non-justiciable. This Article addresses charter provisions not pertinent to partisan gerrymandering that limit legislative discretion*

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regarding a shift in the date of a federal election. Moreover, this Article expands on a growing body of scholarship that recognizes federal legislators as fiduciaries and that imports principles of corporate law to analyze issues of federal election law. Given the foundational importance of the shareholder franchise to corporate law, courts closely scrutinize decisions by directors that impede shareholders' effective franchise, such as a shift in the date that shareholders elect directors. Those corporate law principles should inform a court's analysis of any challenge to a shift in the date of a federal election.

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I. Introduction

In the 2019 decision *Rucho v. Common Cause*,[1] the U.S. Supreme Court unanimously agreed that "[e]xcessive partisanship in districting leads to [election] results that reasonably seem unjust."[2] Nonetheless, a majority of the Court concluded that legal challenges to raw politics practiced by incumbent state politicians, when "cracking" and "packing" that portion of the electorate that favored the challenging party, "present[ed] political questions beyond the reach of the federal courts."[3] If partisan gerrymandering claims are not federally justiciable,[4] and if that conclusion emboldens politicians,[5] how else might incumbents manipulate election mechanics to preserve their political advantage? This Article explores one possibility that was briefly mentioned by the *Rucho* majority:

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1. 139 S. Ct. 2484 (2019).

2. *Id.* at 2506; *see id*. at 2507 ("Our conclusion does not condone excessive partisan gerrymandering."); *id*. at 2512 (Kagan, J., dissenting) ("The majority disputes none of what I have said (or will say) about how gerrymanders undermine democracy. Indeed, the majority concedes (really, how could it not?) that gerrymandering is 'incompatible with democratic principles.'" (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 791 (2015))); *id*. at 2515 ("[T]he majority declares that it can do nothing about an acknowledged constitutional violation . . . .").

3. *Id*. at 2506–07 (majority opinion).

4. *See id*.

5. *See id.* at 2509 (Kagan, J., dissenting) ("[Partisan gerrymandering] encourage[s] a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government."); Vieth v. Jubelirer, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring) ("[I]t is unfortunate that our legislators have reached the point of declaring that, when it comes to apportionment: 'We are in the business of rigging elections.'" (quoting John Hoeffel, *Six Incumbents Are a Week Away from Easy Election*, WINSTON-SALEM J., Jan. 27, 1998, at B1)); Erwin Chemerinsky, *The Supreme Court Just Abdicated its Most Important Role: Enforcing the Constitution*, L.A. TIMES (June 27, 2019, 10:19 AM), https://perma.cc/2VZX-SHVL ("[K]nowing that courts can't intervene, legislators who benefit from partisan gerrymandering will only grow bolder. It is precisely in situations like this, where the political process is unlikely to work, that judicial enforcement of the Constitution is most important.").

the strategic advancement or delay of the date of a federal election.[6]

The strategic shift of election day is not simply a theoretical problem. Foreign politicians have strategically altered their election days for partisan advantage,[7] U.S. states have delayed elections to fill vacant seats in the Senate,[8] and members of Congress have repeatedly proposed changing the date of federal elections,[9] purportedly for partisan advantage.[10]

The U.S. Constitution empowers Congress to establish the date of a federal election.[11] As emphasized by the *Rucho* majority,[12] the U.S. Constitution also empowers state legislators

6. *See Rucho*, 139 S. Ct. at 2495 ("Antifederalists predicted that Congress's power under the Elections Clause would allow Congress to make itself 'omnipotent,' setting the 'time' of elections as never . . . ."); *see generally* Thomas Grove & Georgi Kantchev, *Putin Moves to Shore Up Power, as Prime Minister Resigns*, WALL ST. J. (Jan. 16, 2020), https://perma.cc/LN2R-FYE6 (reporting changes intended by Putin that "would limit the power of a potential successor after 2024, when he is required by law to step down").

7. *See Algerians Protest Bouteflika Decision to Delay Elections*, DEUTSCHE WELLE (Dec. 3, 2019), https://perma.cc/JM57-X3TH; Adrian Blomfield, *Congo Delays Election as Kabila Plots to Keep Power Whatever the Result,* TELEGRAPH (Dec. 20, 2018, 4:51 PM), https://perma.cc/2YAQ-4KLR; Neil Munshi, *Nigeria's Election Delay Sparks Scramble for Digital Reboot*, FIN. TIMES (Feb. 18, 2019), https://perma.cc/F6AT-ZRSN.

8. *See* Zachary D. Clopton & Steven E. Art, *The Meaning of the Seventeenth Amendment and a Century of State Defiance*, 107 NW. U. L. REV. 1181, 1223 (2013) (arguing that "unreasonably delayed elections to fill vacancies . . . violated the democratic spirit of the Seventeenth Amendment").

9. *See* Louise Slaughter Weekend Voting Act, H.R. 5989, 115th Cong. (2018) (proposing new dates for federal elections); S. 1828, 115th Cong. (2017) (same); H.R. 1094, 115th Cong. (2017) (same); H.R. 3910, 114th Cong. (2015) (same); H.R. 1641, 113th Cong. (2013) (same); H.R. 4183, 112th Cong. (2012) (same); S. 149, 111th Cong. (2009) (same); H.R. 254, 111th Cong. (2009) (same); S. 2638, 110th Cong. (2008) (same); H.R. 6240, 110th Cong. (2008) (same); S. 144, 109th Cong. (2005) (same); S. 1320, 107th Cong. (2001) (same); S. 1463, 105th Cong. (1997) (same).

10. *See supra* note 9 and accompanying text. Note that a Democrat proposed each of the bills cited in the preceding footnote. *See* Zachary B. Wolf, *Here's Why Republicans Don't Want an Election Day Holiday*, CNN (Feb. 1, 2019, 11:57 AM), https://perma.cc/Q8PB-RAUC.

11. *See* U.S. CONST. art. I, § 4, cl. 1.

12. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2496 (2019) (concluding that the Constitution permits state legislators to engage in partisan gerrymandering).

to establish federal political districts.[13] So, any federal challenge to a change in the date of a federal election could fail as non-justiciable, consistent with *Rucho*.[14] However, while one provision of the U.S. Constitution does empower Congress to establish the date of federal elections,[15] other provisions impose limits on that exercise of authority,[16] which distinguishes *Rucho*, where there were no limits regarding partisan gerrymandering.[17] Moreover, a growing body of scholarship recognizes politicians as fiduciaries,[18] and fiduciary duties may further limit incumbents' ability to manipulate the timing of a federal election for partisan advantage.[19] This Article expands upon that growing body of scholarship and suggests that constraints, not present in the gerrymandering context, may cabin judicial discretion, rendering justiciable any federal challenge to a congressional shift in the date of a federal election. Finally, in *Rucho*, when concluding that the claims were not federally justiciable, the majority emphasized the availability of relief under state law.[20] In contrast, states are left powerless when Congress exercises its constitutional authority to shift the date for federal elections, further distinguishing *Rucho*.[21]

Recognizing that the U.S. Supreme Court's election-law jurisprudence lacks coherence and that its analyses have yielded dissatisfying results regarding legislative entrenchment, scholars have advocated for the importation of

13. *See* U.S. CONST. art. I, § 4, cl. 1.

14. *See Rucho*, 139 S. Ct. at 2496 (referencing factors to determine whether a claim presents a non-justiciable political question).

15. *See* U.S. CONST. art. I, § 4, cl. 1.

16. *See infra* Part 0.

17. *See Rucho*, 139 S. Ct. at 2507 (noting that the Court has never held partisan gerrymandering unconstitutional).

18. *See infra* Part 0.

19. *See infra* Parts 0, 0, 0.

20. *See Rucho*, 139 S. Ct. at 2507–08 (referencing how some states have addressed partisan gerrymandering).

21. *See* U.S. CONST. art. I, § 4 (empowering Congress to establish the date of a federal election, preempting any date established under state law); *id*. art. VI ("[T]he laws of the United States . . . shall be the supreme law of the land . . . .").

analyses from other fields into the election law space. Noting the similarities between corporate governance and political governance, scholars have extended corporate law analyses into election law. This Article extends that line of scholarship to address the issue of legislators strategically shifting the date of an election. Part II provides background on the regulations applicable to corporate elections and federal elections. Part III argues that federal politicians should be treated as fiduciaries, just as corporate directors are fiduciaries, based upon historical and functional analyses. Part IV addresses the fiduciary duties to which corporate directors are subject, and how courts review alleged breaches of those duties, before extending those principles to federal legislators. Part V sets forth the judicial analysis used when corporate directors strategically alter the date of a shareholder meeting at which directors are elected, and the limited situations in which courts apply that analysis, before extending those principles to federal legislators. Part VI extends that corporate law inquiry to the legislative setting.

II. Regulations Regarding the Timing of Elections

Many election law scholars have shifted their focus from general principles of constitutional law to non-constitutional legal principles that may provide greater coherence.[22] For example, by acknowledging "politics as markets," Samuel Issacharoff and Richard Pildes applied antitrust law to anticompetitive election laws generated by self-interested legislators.[23] The duo prompted others to apply economic

22. *See* David Schleicher, *Overview: Mapping Election Law's Interior*, *in* RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS 75, 76 (Guy-Uriel E. Charles et al. eds., 2011) ("[T]he goal [of election-law scholarship] was . . . to *remove* the study of the legal aspects of self-governance from general constitutional law, because applying ordinary methods in constitutional challenges to election rules caused the Supreme Court to develop deeply inconsistent, theoretically unmoored election law jurisprudence."); Richard H. Pildes, *The Supreme Court 2003 Term—Forward*: *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 40–41 (2004) ("[U]nderstandings of individual rights, associational rights, and conceptions of equality must be modified to develop an appropriate constitutional framework for the increasingly important task of judicial oversight of democratic politics.").

23. *See* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 667 (1998).

analyses to issues of election law. When analyzing partisan gerrymandering by state legislators, D. Theodore Rave applied general corporate law principles to those self-interested legislators.[24] Scholars have emphasized the similarities between corporate governance and political governance, notwithstanding their differences.[25] This Part explores the constitutional and statutory limits on corporate directors altering the date of their election by shareholders before turning to similar limits on federal legislators who might try to alter the date of a federal election.

As a matter of corporate law, directors generally may, consistent with governing regulations and corporate documents, change the date of the election of directors.[26] So too may federal legislators, consistent with the text of U.S. Constitution and of the U.S. Code, change the date of any federal election.[27] Nonetheless, as will be developed in subsequent sections, common law constrains the ability of corporate directors to change the date of an election, given looming concerns of self-interest and given the shareholders' voting rights.[28] Similarly, the common law should constrain federal legislators' ability to change the date of a federal election, given looming concerns of self-interest and given citizens' voting rights.

A. Corporate Elections

Neither the U.S. Constitution nor the U.S. Code speaks to the timing of the election of corporate directors. Federalism allows the states to serve as laboratories experimenting in

24. *See* D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 707 (2013).

25. *See id.* at 719; Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845, 870 (2013); Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 535 (2006). *But see* Ethan J. Leib et al., *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91, 94 (2013) ("[P]olitical relationships and corporate relationships are sufficiently different that one should be wary of seamless application from one context to the other.").

26. *See infra* Part 0.

27. *See* U.S. CONST. art. I, § 4, cl. 1.

28. *See infra* Parts 0, 0.

corporate law.[29] A corporation is a legal entity organized under the law of a particular state, and is subsequently regulated by that state.[30] While state law empowers shareholders to elect directors,[31] state constitutions and state corporate codes generally do not prescribe a particular day for the election of corporate directors.[32] For example, while the Delaware General Corporation Law (DGCL) contemplates an annual election of corporate directors, it also empowers the directors to establish the date of the election.[33] (Because Delaware is the leading provider of corporate law, this Article will emphasize its corporate law.)[34] Aside from public law, a corporation is governed by its certificate of incorporation and bylaws.[35] A corporation's directors must abide by that corporation's

29. *See* New State Ice Co. v. Leibmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments . . . .").

30. *See* Cort v. Ash, 422 U.S. 66, 84 (1975).

31. *See* DEL. CODE ANN. tit. 8, § 216(3) (West 2020) ("Directors shall be elected by a plurality of the votes of the shares present in person or represented by proxy at the meeting and entitled to vote on the election of directors . . . .").

32. *See* DEL. CONST. art. IX, §§ 1–6 (addressing corporations, but not addressing director elections).

33. *See* DEL. CODE ANN. tit. 8, § 211(b) ("[A]n annual meeting of stockholders shall be held for the election of directors on a date and at a time designated by or in the manner provided in the bylaws."); *id.* § 211(a)(1) ("Meetings of stockholders may be held at such place, either within or without this State as may be designated by or in the manner provided in the certificate of incorporation or bylaws, or if not so designated, as determined by the board of directors.").

34. *See* Steven J. Cleveland, *Process Innovation in the Production of Corporate Law*, 41 U.C. DAVIS L. REV. 1829, 1832 n.10 (2008) (articulating reasons for, and collecting sources regarding, Delaware's dominance).

35. *See* DEL. CODE ANN. tit. 8, § 102(b)(1) ("[T]he certificate of incorporation may also [set forth] . . . [a]ny provision for the management of the business and for the conduct of the affairs of the corporation . . . ."); *id.* § 109(b) ("The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to . . . the rights or powers of its stockholders, directors, officers or employees.").

certificate of incorporation and bylaws,[36] but those documents commonly empower the directors to establish the date on which directors will be elected.[37] With some regularity, directors will establish the date of an election, and, after the occurrence of an unexpected event, change the date on which shareholders will elect directors.[38]

Some states require a corporation's bylaws to set forth the date for the election of directors.[39] However, because a corporation's certificate of incorporation commonly empowers the board of directors to amend the bylaws,[40] the directors of those corporations may change the date of the election by amending the bylaws.[41] As shareholders generally elect directors annually, states commonly impose an outside parameter by which an election should be convened; and if not convened, judicial relief is available.[42]

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36. *See* Morgan v. Thornhill, 78 U.S. 65, 72 (1870) (reporting the initiation of judicial proceedings when the corporate directors could not comply with the corporate charter); 8 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 4197, at 803–04 (perm. ed., rev. vol. 2010) ("The corporation, and its directors and officers, are bound by and must comply with [the bylaws].").

37. *See, e.g.*, Facebook, Inc., Bylaws (Form S-1/A), at 1 (Feb. 8, 2012) ("The annual meeting of stockholders shall be held on such date, time and place, either within or without the State of Delaware, as may be designated by resolution of the Board of Directors each year. At the meeting, directors shall be elected . . . .").

38. *See infra* Part 0.

39. *See In re* Tonopah United Water Co., 139 A. 762, 764 (Del. Ch. 1927) (citing DEL. CODE ANN. tit. 8, § 1944 (1915)).

40. *See* DEL. CODE ANN. tit. 8, § 109(a) (West 2020) ("[A]ny corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors . . . ."); *see also* Facebook, Inc., Eleventh Amended and Restated Certificate of Incorporation (Form S-1/A), at 21 (Feb. 8, 2012) ("[T]he Board of Directors of the Corporation is expressly authorized to make, alter or repeal the Bylaws of the Corporation.").

41. *See* Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971) (invalidating the directors' amendment to the bylaws to change the date of the election of directors, but not on statutory grounds).

42. *See* DEL. CODE ANN. tit. 8, § 211(c) (West 2020) ("If there be a failure to hold the annual meeting . . . for a period of 13 months after . . . its last annual meeting . . . , the Court of Chancery may summarily order a meeting to be held upon the application of any stockholder or director.").

Thus, either of the following scenarios may occur: (1) A corporation's bylaws empower directors to establish the date on which shareholders will elect directors, and the directors, after establishing one date for the election, establish a different date for the election; or, (2) A corporation's bylaws establish a date on which shareholders will elect directors, and its board of directors, exercising authority granted in the certificate of incorporation, amend the bylaws to establish a different date for the election. Therefore, directors typically may change the date of the election consistent with statute and consistent with governing corporate documents. So, directors may accelerate an election or delay an election within statutory parameters without giving rise to statutory relief. However, as fiduciaries, directors must also comply with applicable common law.[43] And, common law fiduciary duties may constrain directors' ability to change the date on which shareholders elect directors.[44]

B. Federal Elections

U.S. citizens elect U.S. Senators, U.S. Representatives, and, indirectly, the U.S. President.[45] The U.S. Constitution does not establish a specific date for federal elections.[46] Instead, it empowers each state to establish a date for federal elections, but it also empowers Congress to preempt any such state decision

43. *See In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 52 (Del. 2006) (requiring compliance with statutory and common law); Gilbert v. El Paso Co., 575 A.2d 1131, 1147 (Del. 1990) (same).

44. *See infra* Part 0.

45. *See* U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ."); *id.* amend. XVII, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote."); *id.* amend. XXIV, § 1

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

46. *See id.* art. I, § 4, cl. 1.

via federal legislation.[47] Congress exercised this power to establish as federal election day the "Tuesday after the first Monday in November, in every even numbered year."[48] To change the date of federal elections, Congress need only amend the U.S. Code in accordance with constitutional requirements.[49]

The Constitution, however, seemingly establishes explicit and implicit parameters within which Congress may delay or advance a federal election. As for delay, the Twentieth Amendment provides that "Congress shall assemble . . . at noon on the third day of January . . . ."[50] By establishing a start date in early January, the amendment suggests that the election, because of which any new members of Congress will be seated, has already occurred. Even if that suggestion is accurate, the amendment continues: "The Congress shall assemble . . . at noon on the third day of January, *unless they shall by law appoint a different day*."[51] So, examining only the text, Congress could delay a federal election beyond the third of January, and also delay the beginning of its annual assemblage sometime beyond that delayed election. Nonetheless, the Constitution seemingly limits legislators' ability to indefinitely delay an election. The Constitution contemplates an election every other year: "The House of Representatives shall be composed of Members chosen every second year by the people of the several states . . . ."[52] By specifying an election "every second year," it seems that the Congress could not delay an election until the "third" year, which contradicts the above-quoted language, and

47. *See id.* ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators."); *id.* art. II, § 1, cl. 4 ("The Congress may determine the Time of chusing [sic] the Electors . . . .").

48. 2 U.S.C. § 7 (addressing the election of members of the House); *see id.* § 1 (addressing the election of Senators); 3 U.S.C. § 1 ("The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.").

49. *See* U.S. CONST. art. I, § 7.

50. *Id.* amend. XX, § 2.

51. *Id.* (emphasis added).

52. *Id.* art. I, § 2, cl. 1.

which would extend the terms of representatives and some senators beyond the terms specified in the Constitution.[53] Accepting such constraints, federal legislators still wield discretion to strategically time an election.[54]

Regarding the advancement of a federal election, the "every second year" language of the Constitution also seemingly bars the acceleration of an election by one year.[55] In terms of an implicit limit on the advancement of a federal election, one should be aware that the Constitution once provided for a lengthy lame duck period.[56] Following ratification of the Constitution, the then-existing "Congress designated March 4, 1789 as the official date when the Federal Government, as outlined in the Constitution, would begin operation . . . . [L]egislative and executive offices . . . would commence on March 4 and end in subsequent odd-numbered years on the same date."[57] Moreover, the Constitution once provided that Congress shall assemble annually in early December.[58] Consequently, a Congressman newly elected in an even-numbered year, say November 1876,[59] could not take office

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53. *See id.* (specifying two-year term for representatives); *id.* art. I, § 3, cl. 1 (specifying six-year term for senators).

54. *See* 4 JONATHAN ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 53 (1968) (quoting James Iredell, Convention of North Carolina, July 25, 1788)

> If Congress can prolong the election to any time they please, why is it said that representatives shall be chosen every second year? *They must be chosen every second year*; but whether in the month of March, or January, or any other month, may be ascertained, at a future time, by regulations of Congress. The word *time* refers only to the particular month and day within the two years.

55. *See* U.S. CONST. art. I, § 2, cl. 1 (specifying that an election should occur "every second year").

56. *See* STAFF OF S. SUBCOMM. ON THE CONST. OF THE COMM. ON THE JUDICIARY, 99TH CONG., AMENDMENTS TO THE CONSTITUTION: A BRIEF LEGISLATIVE HISTORY 59–60 (1985) [hereinafter AMENDMENTS].

57. *Id.* at 59; *see* Act to Change the Times for Holding Circuit and District Courts of the United States for the Western District of Virginia, ch. 11, § 3, 17 Stat. 23, 28 (1872) (codified as amended at 2 U.S.C. § 7).

58. *See* U.S. CONST. art. I, § 4, cl. 2, *amended by* U.S. CONST. amend. XX.

59. *See* § 3, 17 Stat. at 28 ("That the Tuesday next after the first Monday in November, in the year eighteen hundred and seventy-six, is hereby fixed

in December 1876, because the incumbent Congressman's term did not expire until March 1877. Moreover, Congress did not sit between March 1877 and December 1877, so the term of the Congressman newly elected in November 1876 would not begin until early December 1877, after more than one year had passed from his election.[60] Though not as lengthy, the presidential lame-duck period once ran four months—early November to early March.[61] To shorten those lame-duck periods and for other reasons, Congress proposed, and the states ratified, the Twentieth Amendment.[62] This background seemingly imposes an implicit limit on Congress's ability to accelerate a federal election. To accelerate the date of a federal election to create a fourteen-month lame-duck period for members of Congress would seemingly contradict the intent of the Twentieth Amendment.[63] It is not, however, immediately apparent why Congress could not accelerate the date of a federal election to lengthen the lame-duck for a period shorter than one year.[64]

Perhaps members of Congress, like corporate directors, should be treated as fiduciaries, and perhaps common law should limit their ability to manipulate the election machinery in self-interested ways.[65]

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and established as the day, in each of the States and Territories of the United States, for the election of Representatives and Delegates to the Forty-Fifth Congress . . . .").

60. *See* AMENDMENTS, *supra* note 56, at 59–60.

61. *See* Sam Barr, *Shorten the Transition Period*, HARV. POL. REV. (Nov. 16, 2008), https://perma.cc/5XUX-XUD6.

62. *See* U.S. CONST. amend. XX, § 1.

63. Perhaps creating a five-month lame-duck period would be problematic, given the shortened lame-duck period for the president; however, it is not immediately apparent why the presidential election must occur on the same day as the election of members of Congress. *See id.* (providing different end dates for their terms).

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

65. *See* Stephen R. Galoob & Ethan J. Leib, *Fiduciary Political Theory and Legitimacy in* FIDUCIARY GOVERNMENT 163, 164 (Evan J. Criddle et al. eds., 2018) (discussing fiduciary duties as a means of constraining political actors); Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 573 (2015) ("[F]iduciary law provides sophisticated mechanisms to address agency problems that arise in legislative settings.").

III. Fiduciaries

While corporate democracy and political democracy may share some similarities,[66] are there bases for courts to rely upon common law fiduciary principles applicable to directors under corporate law when resolving allegations against legislators? Yes. First, leading political and legal thinkers have recognized the historical connections between the governing principles of corporations, states, and the United States.[67] Second, not every relationship gives rise to fiduciary obligations, so, when identifying those relationships that are fiduciary in nature, courts and legal scholars have crafted criteria that apply convincingly to federal politicians, as well as corporate directors, who have long been recognized as fiduciaries of the corporation and its shareholders.[68]

A. Historical Connections

Justices of the Supreme Court, who were contemporaries of the Founders, referred to the United States as a corporation.[69] Chief Justice Marshall wrote, "The United States of America is the true name of that grand corporation which the American people have formed . . . ."[70] Similarly, Founders recognized the United States as a corporation. Alexander Hamilton wrote, "[T]he institution of a government . . . [means] the creation of a body politic, or corporation of the highest nature . . . ."[71] James Madison acknowledged that "[t]here was a gradation . . . from

66. *See supra* Part 0.

67. *See infra* Part 0.

68. *See infra* Part 0.

69. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 447 (1793) ("[N]ot only each State singly, but even the United States may without impropriety be termed 'corporations.'"), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

70. Dixon v. United States, 7 F. Cas. 761, 763 (C.C.D. Va. 1811) (No. 3,934).

71. Alexander Hamilton, *Opinion as to the Constitutionality of the Bank of the United States*, *in* THE FEDERALIST: COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES (Paul Leicester Ford ed., 1898).

the smallest corporation, with the most limited powers, to the largest empire with the most perfect sovereignty."[72]

> As presented by William Blackstone, the towering English legal commentator, . . . and by James Wilson, a leading American legal commentator, leading participant in the Constitutional Convention, and future Supreme Court justice, a corporation is: A body politic created by the sovereign, exercising governmental authority delegated in special fashion by the sovereign, limited by the law of the sovereign, and structured by the sovereign. It is not so hard to imagine that the corporation . . . might become a model for a liberal constitutional republic.[73]

Modern legal thinkers have also recognized the historical connection between corporations and the United States. Akhil Amar wrote of "U.S.A., Inc.,"[74] analogizing government officials to corporate officials, in light of the fact that "the corporate analogy seeped deep into the thought patterns of the men who would eventually label themselves Federalists in 1787."[75] According to David Ciepley, "all American governments qualified as literal corporations . . . ."[76] And, writing specifically about the states, Ciepley emphasized that the "earliest American colonies, pioneers in the use of written constitutions, were pioneers because they were corporations—the Virginia Company, the Massachusetts Bay Company . . . [which] could,

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72. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 463–64 (Farrand, ed., 1911); *see* THE FEDERALIST NO. 49 (James Madison) (ABA Classics ed., 2009) (discussing the power of the "constitutional charter").

73. David Ciepley, *Is the U.S. Government a Corporation? The Corporate Origins of Modern Constitutionalism*, 111 AM. POL. SCI. REV. 418, 420–21 (2017); *see* TAMAR FRANKEL, FIDUCIARY LAW 113 (2011) ("[F]iduciaries hold positions of power, such as . . . government offices . . . ."); *id.* at 279–87 (discussing government officials as fiduciaries).

74. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1517 (1987).

75. *Id.* at 1434; *see* Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077, 1084–86 (2004) (reporting that both proponents and opponents of the U.S. Constitution used fiduciary language—"public trust," "trustees," "entrusted," and "agent").

76. Ciepley, *supra* note 73, at 433.

without changing a word, repurpose [its] company charter as a colonial constitution."[77]

Moreover, legal scholars have referenced the corporate analogy when addressing obligations of legislators in the voting context.[78] This Article builds upon the foundational legislator-as-fiduciary work of Evan J. Criddle, Evan Fox-Decent, Tamar Frankel, Andrew S. Gold, Sung Hui Kim, Ethan J. Leib, Paul B. Miller, Robert G. Natelson, and David L. Ponet,[79] while acknowledging the limitations that they specify in their own work, as well as criticisms identified by Seth Davis, Heather K. Gerken, and Michael S. Kang.[80]

B. Characteristics of Fiduciaries

Courts have long identified certain relationships as fiduciary in nature: trustee-beneficiary, guardian-ward, and attorney-client.[81] Courts, however, have been "extremely vague

77. *Id*. at 423–24.

78. *See* Rave, *supra* note 24, at 676–77; Kim, *supra* note 25, at 871 tbl.1.

79. *See* FRANKEL, *supra* note 73, at 286 ("The different views concerning the fiduciary laws, both private and governmental, relate to where the lines should be drawn rather than to the principles to be followed."); Evan J. Criddle & Evan Fox-Decent, *Guardians of Legal Order: The Dual Commission of Public Fiduciaries*, *in* FIDUCIARY GOVERNMENT 67, 83 (2018) ("[A]ll public institutions—including the various organs of the legislative, executive, and judicial branches—stand in fiduciary relationships to the people over whom they assert jurisdiction . . . ."); Kim, *supra* note 25, at 870 (discussing "Legislators as Fiduciaries"); Miller & Gold, *supra* note 65, at 565 ("The idea that the state and its officials occupy a fiduciary role is longstanding . . . ."); Natelson, *supra* note 75, at 1095–136 (detailing the legal and philosophical influences of the Founders, including Plato and Blackstone, that contemplated fiduciary government); David L. Ponet & Ethan J. Leib, *Fiduciary Law's Lessons for Deliberative Democracy*, 91 B.U. L. REV. 1249, 1255 (2011) ("[T]hinking of public officials as fiduciaries is not only an historical inheritance but is also indicated by functional and structural considerations of the relationship between the ruler and ruled.").

80. *See infra* Part 0 (addressing criticisms set forth in Seth Davis, *The False Promise of Fiduciary Government*, 89 N.D. L. REV. 1145 (2014); Heather K. Gerken & Michael S. Kang, *Deja Vu All Over Again: Courts, Corporate Law, and Election Law*, 126 HARV. L. REV. F. 86 (2013)).

81. *See* Brown v. Legal Found. of Wash., 538 U.S. 216, 220–21 (2003) (referring to attorneys as fiduciaries of clients); Dep't of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 11 (2001) (referring to trustees as

in articulating the standards"[82] to determine whether a relationship is fiduciary in nature.[83] Scholars have surveyed cases to identify those standards. Though, in certain respects, each scholar's theory differs, they have identified some common ground.[84]

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fiduciaries of beneficiaries); Yerger v. Jones, 57 U.S. 30, 33 (1854) (referring to guardians as fiduciaries of wards); *see also* D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1412–13 (2002) (referring to relations identified as fiduciary in nature for centuries).

82. Smith, *supra* note 81, at 1412.

83. *See id*. at 1448–49 ("Fiduciary and nonfiduciary relationships do not occupy wholly separate realms, but instead lie on a continuum. Passage from one side of the continuum to the other is seamless; nevertheless, courts are tasked with locating a seam.").

84. *See* EVAN FOX-DECENT, SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY 93–94 (2011)

> The fundamental conditions which give rise to a fiduciary relationship are the following: (i) the fiduciary has administrative control over the beneficiary or certain of her interests; (ii) the beneficiary is incapable of controlling the fiduciary's exercise of power, or is incapable in principle of exercising the kind of power held by the fiduciary; and (iii) the relevant interests of the beneficiary are capable of forming the subject matter of a fiduciary obligation.

See also Miller & Gold, *supra* note 65, at 549 ("A fiduciary relationship is one in which one person (the fiduciary) enjoys discretionary power to pursue an abstract other-regarding purpose or the significant practical interests of another person (an individual beneficiary or ascertained set of beneficiaries)."); Ponet & Leib, *supra* note 79, at 1255

> In the fiduciary relationship, the beneficiary is dependent on the fiduciary to act after her interests and the fiduciary is, accordingly, obligated to use her entrusted discretionary power in pursuit of the beneficiary's interests. Because they are difficult to monitor, and have wide access to power over beneficiary resources and assets, fiduciaries are under rigorous obligations that ensure compliance with their role responsibilities. (footnotes omitted)

Smith, *supra* note 81, at 1402 ("[F]iduciary relationships form when one party (the 'fiduciary') acts on behalf of another party (the 'beneficiary') while exercising discretion with respect to a critical resource belonging to the beneficiary."); *cf*. Kim, *supra* note 25, at 867–68 ("Instead of deploying a widely accepted, precise, and rule-like definition . . . courts . . . invoke an ad hoc list of vague factors" to identify fiduciaries, including an "imbalance in the relationship," "dominance," or "granting of some form of discretionary authority and a resulting dependency." (internal quotations omitted)).

Tamar Frankel proposes that all fiduciaries share the following characteristics:

> First, fiduciaries offer mainly services (in contrast to products). The services that fiduciaries offer are usually socially desirable, and often require expertise . . . . Second, in order to perform these services effectively, fiduciaries must be entrusted with property or power. Third, entrustment poses to entrustors the risks that the fiduciaries will not be trustworthy. They may . . . misuse the entrusted power . . . . Fourth, there is likelihood that (1) the entrustor will fail to protect itself from the risks involved in fiduciary relationships; (2) the markets may fail to protect entrustors from these risks; and that (3) the costs for the fiduciaries of establishing their trustworthiness may be higher than their benefits from the relationships.[85]

Evan Fox-Decent, Andrew S. Gold, Ethan J. Leib, Paul B. Miller, David L. Ponet, and D. Gordon Smith largely agree with the characteristics identified by Frankel.[86] Corporate directors—long recognized as fiduciaries of the corporation and shareholders—reflect those characteristics, as do federal legislators.[87]

1. Service

Fiduciaries typically provide socially-desirable services, not products, that commonly require expertise.[88] For example, the law has long recognized as fiduciaries doctors and lawyers, who provide socially-desirable services that require expertise.[89] While plumbers provide socially-desirable services that require expertise, the law generally does not recognize plumbers as fiduciaries because they do not adequately meet other criteria outlined in this section.[90] For example, the degree of trust is

85. FRANKEL, *supra* note 73, at 6 (citations omitted).

86. *See supra* note 84 and accompanying text.

87. FRANKEL, *supra* note 73, at 22–23, 113 ("[F]iduciaries hold positions of power, such as . . . government offices . . . ."); *id.* at 279–87 (discussing government officials as fiduciaries).

88. *See id.* at 6.

89. *See id.* at 42–43.

90. *See id.* at 7.

likely lower with respect to a plumber than a doctor—yes, you trust a plumber to unclog the drain, but you place much more trust in a doctor to unclog your artery.[91] Moreover, the entrustor is better able to monitor a plumber ("Is my sink unclogged or not?") relative to monitoring a doctor ("Is my artery unclogged or not?").[92]

a. Directors

Corporate directors provide services that are socially-desirable and require expertise. As a general matter, every state views corporations as socially beneficial: Every state provides for their creation, views directors as providing socially beneficial services, and contemplates that directors will manage those corporations.[93] Directors possess pertinent expertise that contributes to their election or appointment.[94] Corporate directors have long been recognized as fiduciaries.[95]

b. Legislators

Legislators provide services that are socially-desirable and require expertise. "Public offices are . . . delegations of portions of the sovereign power for the welfare of the public . . . ."[96]

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91. *See id.* at 12.

92. *See infra* Part 0.

93. *See, e.g.*, DEL. CODE ANN. tit. 8, §§ 102, 141 (West 2020).

94. *See* Steve Wolosky et al., *Top 5 Things Shareholder Activists Need to Know*, HARV. L. SCH. F. ON CORP. GOV. (Dec. 22, 2017), https://perma.cc/9YVK-QARW ("An activist's likelihood of success in an election contest is inextricably tied to the qualifications and expertise of the activist's director slate."); *see also* Robin Ferracone, *Good Governance: Do Boards Need Cyber Security Experts?*, FORBES (July 9, 2019, 12:42 PM), https://perma.cc/TMU7-TZAY ("It is increasingly accepted that it is important to have a cybersecurity/technology expert on a given company's board to ensure the board is aware of potential business risks.").

95. FRANKEL, *supra* note 73, at 42, 50 (noting that "traditional fiduciaries" include corporate directors).

96. 63C AM. JUR. 2D *Public Officers and Employees* § 1 (2020); *see id.* § 3 ("A public office is created in the interest and for the benefit of the people . . . ."); FRANKEL, *supra* note 73, at 23 ("[A]n entrustment of the power of office . . . must be used for the benefit of the population . . . .").

Members of Congress do not produce products *per se*;[97] they serve their constituents.[98] Members of Congress serve their constituents by enacting legislation,[99] monitoring the executive branch,[100] and convening hearings and conducting investigations regarding public[101] and private parties[102]—perhaps as a prelude to congressional action. Members of the House serve their districts, their states, and the United States;[103] senators serve their states and the United States.[104] While certain fiduciaries, like doctors and lawyers, must pass written exams to demonstrate their expertise,[105] the U.S. Constitution imposes minimal qualifications for service as a senator or representative.[106] Nonetheless, those who campaign

97. However, *some* do consider legislation to be a product. *See* Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 280–81 (1985).

98. *See generally* R.J. DUKE SHORT, THE CENTENNIAL SENATOR 31 (2006) ("Senator Thurmond's constituent service was legendary. . . . [He] called it 'doing the people's work'.").

99. *See* U.S. CONST. art. I, §§ 7–8.

100. *See* Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 889 (2007).

101. *See, e.g.*, Lisa Friedman, *The Investigations That Led to Scott Pruitt's Resignation*, N.Y. TIMES (Apr. 18, 2018), https://perma.cc/W9WK-YHQ5.

102. *See, e.g.*, *Mark Zuckerberg Testimony: Senators Question Facebook's Commitment to Privacy*, N.Y. TIMES (Apr. 10, 2018), https://perma.cc/EZY3-D6LU.

103. *See* Kim, *supra* note 25, at 870–71 ("Consider the following potential beneficiaries [of legislators]: citizens, the legislature (and fellow legislators), and the government that the legislator serves.").

104. *See* THE FEDERALIST NOS. 62, 63 (James Madison).

105. *See* Emma Goldberg, *Bar and Medical Exam Delays Keep Graduates in Limbo*, N.Y. TIMES (Sept. 4, 2020), https://perma.cc/T7BY-8VEV (reporting that COVID-19 prevented the administration of professionally required exams).

106. *See* U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); *id.* art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.").

for federal office tout their qualifications, as well as their areas of pertinent expertise.[107]

2. Entrustment Regarding Power or Property

To perform the services mentioned above, a fiduciary must be entrusted with discretion regarding power or property.[108] Absent such entrustment, the entrusting party does not derive the benefit of the relationship.[109] For example, a principal entrusts an agent—a long-recognized fiduciary—with the power to legally bind the principal.[110] Patients entrust their health—power over their well-being—to their fiduciary doctors.[111] Clients may entrust their liberty—power over their well-being—to their fiduciary lawyers.[112] A trustor entrusts property to a trustee.[113]

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107. *See generally Meet Elizabeth*, WARREN FOR PRESIDENT, https://perma.cc/W3EK-QLLU (touting her expertise in bankruptcy and consumer finance as qualifications to benefit the middle class and to provide a check on corporate power).

108. *See* FRANKEL, *supra* note 73, at 6 ("[F]iduciaries must be entrusted with property or power."); FOX-DECENT, *supra* note 84, at 93–94 (referencing the necessary condition of "administrative power over the beneficiary or certain of her interests"); Ponet & Leib, *supra* note 79, at 1255 (referencing "entrusted discretionary power in pursuit of the beneficiary's interests" and "wide access to power over beneficiary resources and assets"); Smith, *supra* note 81, at 1443 ("[A] critical resource . . . is the basis for imposition of fiduciary duties . . . .").

109. *See* FRANKEL, *supra* note 73, at 8 ("Entrustors entrust property of power to fiduciaries . . . for the purpose of benefiting the entrustors . . . .").

110. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf . . . and the agent manifests assent or otherwise consents so to act.").

111. *See* FRANKEL, *supra* note 73, at 43 (addressing the doctor-patient relationship).

112. *See, e.g.*, La. State Bar Ass'n v. Amberg, 553 So. 2d 448, 450 (La. 1989) (listing the "cherished right[s]" clients entrust to their lawyers: life, liberty, and property).

113. *See* RESTATEMENT (THIRD) OF TRUSTS § 2 (AM. L. INST. 2003)

> A trust . . . is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties

a. Directors

As a legal-fiction entity, a corporation cannot manage itself, so the law entrusts its management to a board of directors,[114] each of whom must be a natural person.[115] As corporations increase in size, they typically exhibit a separation of ownership and control—with shareholders "owning" the corporation, and directors and officers "controlling" the corporation.[116] Corporate shareholders, who elect directors,[117] place their trust in directors to manage the corporation for their benefit.[118]

b. Legislators

The Constitution contemplates a representative government,[119] not direct democracy of the sort practiced in New England town hall meetings.[120] Thus, the electorate does not govern itself; instead, the populace elects others to govern on their behalf. The Constitution grants tremendous discretion to

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to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee.

114. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a) (West 2020) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . . .").

115. *See, e.g.*, *id.* § 141(b) ("The board of directors of a corporation shall consist of 1 or more members, each of whom shall be a natural person.").

116. *See* ADOLPH A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 6–7 (1933). Rather than "owners," shareholders might more accurately be described as "residual claimants." FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 67–68 (1991).

117. *See, e.g.*, DEL. CODE ANN. tit. 8, § 216(3).

118. *See* Schoon v. Smith, 953 A.2d 196, 206 (Del. 2008) (noting that directors owe duties to the corporation and its shareholders); *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 37 (Del. Ch. 2013) (reporting that director-fiduciaries must "maximize the value of the corporation over the long-term" for the benefit of shareholders).

119. *See* THE FEDERALIST NO. 10, at 49 (James Madison) (ABA Classics ed., 2009).

120. *Cf.* Ariz. State Leg. v. Ariz. Ind. Redistricting Comm'n, 576 U.S. 787, 793–94 (2015) (highlighting the novelty of "direct lawmaking by the people" in 1787); FRANKEL, *supra* note 73, at 23 (highlighting the "entrustment of the power of office").

members of Congress over the electorate.[121] The Constitution empowers members of Congress to impact the electorate by taxing them,[122] enacting laws that could result in their incarceration,[123] and subjecting them to war and military service.[124] "[A] public office is considered a public trust."[125]

3. Risk of Untrustworthiness or Abuse of Power

Having been entrusted with power or property, the fiduciary possesses discretion to perform the service or oversee the entrusted property, and that discretion may be abused.[126] Untrustworthiness arises because the entrusting party cannot foresee, and contract for, all eventualities.[127] Of course, any contractual relationship gives rise to issues of trust, which could be exploited, but not every contractual relationship gives rise to a fiduciary relationship.[128] Courts and commentators seek, perhaps as mentioned above, the entrustment of more significant powers or larger amounts of property.[129] And, as mentioned below, a fiduciary relationship arises where the exercise of discretion by the entrusted party cannot be easily and effectively monitored by the entrusting party.[130] For example, a lawyer-fiduciary may draft a flawed will, which flaws

121. *See* U.S. CONST. art. I, § 8 (establishing Congress's legislative powers).

122. *Id.* art. I, § 8, cl. 1.

123. *Id*. art. I, § 8, cls. 6, 10, 18.

124. *Id*. art. I, § 8, cls. 11–16.

125. State *ex rel.* Bonner v. Dist. Ct., 206 P.2d 166, 169 (Mont. 1949).

126. *See* FRANKEL, *supra* note 73, at 6 (discussing the risk of untrustworthy fiduciaries); FOX-DECENT, *supra* note 84, at 93 ("[T]he beneficiary is incapable of controlling the fiduciary's exercise of power . . . ."); Kim, *supra* note 25, at 867–68 (citing courts' references to "discretionary authority," "imbalance in the relationship," and "dominance").

127. Smith, *supra* note 81, at 1448 ("[C]ontracts . . . specifying obligations of the fiduciary are necessarily incomplete . . . .").

128. *See* FRANKEL, *supra* note 73, at 12 ("[T]he necessary degree of trust in fiduciary relationship[s] must be quite high."); Smith, *supra* note 81, at 1438–39 (distinguishing fiduciary relationships from other contractual relationships).

129. *See* FRANKEL, *supra* note 73, at 26 ("Depending on the nature of the services, greater specifications, constraints, or control over the fiduciaries' performance would undermine the very utility of the relationship.").

130. *See infra* Part III.B.4.

may not be identified *ex ante* by the non-lawyer testator or non-lawyer beneficiaries, and which flaws may be identified only after the testator's death.

a. Directors

In managing a corporation, directors enjoy tremendous discretion. Under the business judgment rule, when shareholders challenge decisions by the board of directors, courts defer to those decisions, except in limited circumstances.[131] Such discretion may enable untrustworthy decisions or may result in an abuse of power.[132] Contracts cannot effectively bind directors: How could the parties know, on day one, how a director should vote on a proposed merger or charter amendment that may not arise until day 200, except in

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131. *See* Orman v. Cullman, 794 A.2d 5, 22 n.37 (Del. Ch. 2002) (noting that plaintiff-shareholders must overcome the presumptions of the business judgment rule, such as the presumptions that directors were informed and acted in good faith to further the best interests of the corporation and its shareholders, not to further their self-interest).

132. *See, e.g.*, Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1280 (Del. 1989)

> The board was torpid, if not supine, in its efforts to establish a truly independent auction, free of [one bidder's] interference and access to confidential data. By placing the entire process in the hands of [the chief executive officer, who was also a bidder in the auction], through his own chosen financial advisors, with little or no board oversight, the board materially contributed to the unprincipled conduct of those upon whom it looked with a blind eye.

Steven J. Cleveland, *A Failure of Substance and a Failure of Process: The Circular Odyssey of Oklahoma's Corporate Law Amendments in 2010, 2012, and 2013*, 67 OKLA. L. REV. 221, 227–28 (2015)

> [A]s its stock price plummeted in 2008, Chesapeake's board agreed to purchase from its CEO a number of antique maps for $12 million. The board's generosity seemed tied to the personal needs of its CEO, not to the company's performance. To cover a margin call, McClendon involuntarily sold 30,000,000 shares of Chesapeake—or approximately 94% of the shares he owned—over the course of three days in October 2008. Following those sales, the board responded, but not as the market might have expected; the board amended McClendon's employment agreement to reduce his required investment in Chesapeake, which weakened the link between his personal interests and the interests of Chesapeake's shareholders. (footnotes omitted).

abstract terms—e.g., maximize shareholder value—which terms do not lend themselves to enforceable contracts, but do lend themselves to contextual fiduciary duties?

b. Legislators

Sadly, federal politicians, all too frequently, have proven untrustworthy and have abused their power. Sometimes, such incidents so captured our attention that they become known by short-hand: McCarthyism,[133] Watergate,[134] and the Teapot Dome Scandal.[135] Senators and representatives have used their positions for sexual benefit,[136] conversions of contributions for personal use,[137] and insider trading.[138] Politicians may make unenforceable pledges, but contracts cannot effectively discipline politicians.[139] As a preliminary matter, with whom

133. *See generally* DAVID M. OSHINSKY, A CONSPIRACY SO IMMENSE: THE WORLD OF JOE MCCARTHY (1983).

134. *See generally* CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN (1974).

135. *See generally* LATON MCCARTNEY, THE TEAPOT DOME SCANDAL: HOW BIG OIL BOUGHT THE HARDING WHITE HOUSE AND TRIED TO STEAL THE COUNTRY (2008).

136. *See* Yvonne Wingett Sanchez, *Rep. Raul Grijalva Under Scrutiny by House Ethics Committee over Workplace Allegations*, ARIZ. CENT. (JUNE 14, 2019, 4:42 PM), https://perma.cc/8733-LLYR (reporting allegations that member was repeatedly drunk and created hostile work environment); *90 State Lawmakers Accused of Sexual Misconduct Since 2017*, ASSOCIATED PRESS (Feb. 2, 2019), https://perma.cc/H2PT-2GJS (reporting instances of lawmaker sexual misconduct, including abusing staffers and constituents); *Congressional Misconduct Database*, GOVTRACK, https://perma.cc/VU4V-GFMT (reporting allegations of sexual misconduct).

137. *See Congressional Misconduct Database*, *supra* note 136 (reporting misuse of campaign funds, and bribery).

138. *See* Kim, *supra* note 25, at 846–47 (referencing Representative Spencer Bachus's alleged insider trading during the 2008 financial crisis).

139. *Compare* Ari Shapiro, *The Man Behind the GOP's No-Tax Pledge*, NAT'L PUB. RADIO (July 14, 2011, 4:30 PM), https://perma.cc/42WG-NB6A (quoting Grover Norquist) ("Take the pledge, win the primary. Take the pledge, win the general. Break the pledge, lose."), *with* U.S. CONST. art. VI, § 3 (requiring members of Congress to take oath to support the Constitution), *id.* art. I, § 8, cl. 1 (empowering Congress to impose taxes), *and* John Dean, *Why Grover Norquist's Anti-Tax Pledge is Unenforceable and Unconstitutional*, VERDICT (Nov. 30, 2012), https://perma.cc/S5ZA-KNRV ("There is no

would a politician enter an enforceable contract? And, as was the case with corporate directors, the parties to the contract would be unable to foresee issues that would arise or how those future issues should be resolved *ex ante*, except in abstract terms that do not lend themselves to enforceable contracts, e.g., "When faced with a tax bill, the politician shall vote to further the public interest."[140]

4. Monitoring Costs, Bonding Costs, and Market Discipline

Courts are less inclined to recognize fiduciary relationships where monitoring costs or bonding costs are low or where the market adequately disciplines the supposed fiduciary. As a simple analogy to introduce these concepts, consider the parent-babysitter relationship. A parent, who goes to the movies for date night, and who entrusts a child to a babysitter, bears *monitoring costs* by, for example, purchasing a nanny-cam to ensure that the babysitter is performing the job as desired. A babysitter bears *bonding costs* to align his interests with the parent's interests. For example, a babysitter may regularly charge a standard rate, say $10.00 per hour, but, to *bond* his interests to those of the parent, the babysitter agrees to a lower hourly rate if (i) the child fails to eat a serving of spinach at dinner, (ii) the child fails to complete assigned homework, or (iii) the child fails to brush her teeth before bedtime. Chatter among parents in the neighborhood—an information *market*—may also discipline babysitters who seek additional work. The availability of other local babysitters—a labor *market*—similarly incents compliance with parents' preferences.

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consideration, as would be required for the Norquist pledge to be binding. Rather, the pledge is merely a written campaign promise.").

140. *See* Dean, *supra* note 139 (noting that compliance with the oath to uphold the Constitution requires an exercise of discretion, not compliance with pre-election pledge); Alex Altman, *The Perils of Political Pledges*, TIME (July 1, 2011), https://perma.cc/VK4F-WFUC (exploring the limits of political pledges).

a. Monitoring Costs

Courts and commentators recognize fiduciary relationships where the entrusting party cannot effectively monitor the entrusted party.[141] The following must be relatively cost effective: (1) the accumulation of relevant information, (2) the review and comprehension of that information, and (3) the ability to act on that information in ways that discipline the straying fiduciary.[142] For example, in the doctor-patient fiduciary relationship, the patient may relatively cheaply gather information—consultations pre-treatment and acquisition of medical charts post-treatment. However, the expertise of the doctor fiduciary renders monitoring difficult for patients who lack that expertise.[143] Relatedly, simply examining the results of the treatment provides a poor proxy for the doctor's performance of her duties. Was the patient's death or worsening condition due to the doctor's failure or the patient's poor condition at the time that treatment was sought?

(1) Directors

Monitoring costs commonly inhibit shareholders from disciplining corporate directors. Federal and state law require directors to disclose information to keep shareholders informed generally and in connection with matters subject to a vote by shareholders.[144] However, directors are not obligated to provide information to shareholders simply because that information is

141. *See* Ponet & Leib, *supra* note 79, at 1255 (stating that fiduciaries are "difficult to monitor"); Smith, *supra* note 81, at 1443 ("Where self-help protection of the critical resource is strong, the case for judicial protection through the imposition of loyalty obligations is weak . . . .").

142. *See* EASTERBROOK & FISCHEL, *supra* note 116, at 9–10, 46, 91–92.

143. The beneficiary's possession of expertise does not foil a fiduciary relationship. For example, attorneys are advised not to represent themselves, so an attorney-client benefits from a fiduciary relationship with the retained attorney-fiduciary.

144. *See* 15 U.S.C. § 78m (requiring that publicly-traded corporations file publicly-available, periodic reports); *id.* § 78n (requiring that publicly-traded corporations provide shareholders with information regarding upcoming votes); DEL. CODE ANN. tit. 8, § 251 (West 2020) (requiring that corporations provide information to shareholders regarding votes on mergers).

desired or would be useful.[145] The significant amount of information disclosed may never be read or may not be understood by many shareholders.[146] Notwithstanding significant disclosure, investors may not comprehend the information available.[147]

Third parties may also be retained to provide monitoring services. For example, directors may subject their performance to verification by independent auditors.[148] Independent auditors review the corporation's financial statements to verify that those statements conform to generally accepted accounting principles.[149] Nonetheless, such third-party monitoring may prove ineffective.[150] The financial statements of Enron and WorldCom were audited by independent third parties, which did not prevent those companies from engaging in accounting shenanigans.[151] While third party-verifiers as a whole have strong incentives to protect their reputations,[152] individuals at

145. *See* Basic Inc. v. Levinson, 485 U.S. 224, 239 n.17 (1988) ("Silence, absent a duty to disclose, is not misleading . . . ."); Skeen v. Jo-Ann Stores, Inc., 750 A.2d 1170, 1174 (Del. 2000) (acknowledging that "[p]rojections, more current financials and information about prices discussed with other possible acquirors" may be helpful, but information need not be disclosed "simply because [it] might be helpful"); Stephen M. Bainbridge, *Rethinking the Board of Directors: Getting Outside the Box*, 74 BUS. LAW. 285, 294 (2019) ("Once directors are on the board, they are largely insulated from market forces, because votes are private and decisions are made collectively.").

146. *See* EASTERBROOK & FISCHEL, *supra* note 116, at 297 (noting that unsophisticated investors are uninformed).

147. *See* Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 270–74 (2014) (discussing criticisms of the efficient capital markets hypothesis); *id*. at 289–91 (Thomas, J., concurring) (same).

148. *See Financial Reporting Manual*, U.S. SEC. & EXCH. COMM'N (July 2, 2019), https://perma.cc/73TU-QKVE (noting that for certain companies, "[f]inancial statements . . . must be reviewed by an independent accountant before filing").

149. *See id.*

150. *See* Arthur Andersen LLP v. United States, 544 U.S. 696, 698–702 (2005) (discussing third-party monitoring gone awry).

151. *See id.* at 698–702 (2005) (detailing Enron's dubious accounting practices); *In re* WorldCom, Inc. Sec. Litig., 294 F. Supp. 2d 392, 397–98 (S.D.N.Y. 2003) (detailing WorldCom's dubious accounting practices).

152. EASTERBROOK & FISCHEL, *supra* note 116, at 282.

those firms may face incentive structures that lead them to provide false certifications.[153]

The securities markets provide a means of disciplining directors, but less so if information is not disclosed or is misunderstood and as impediments to acquisitions and activism increase.[154] Shareholders vote, but infrequently,[155] lessening the effect of one avenue of discipline on straying directors.[156] Despite the shareholders' collective power to elect and remove directors,[157] directors rarely face competitive elections, and are rarely removed from office in the middle of their terms.[158] Collective action problems counsel against meaningful participation in the electoral process by holders of a small number of shares.[159] Holders of a large number of shares may abide by the "Wall Street Rule," selling their shares rather than trying to halt an unwise decision or generally trying to improve the governance of a particular corporation.[160] In the end, directors may not be disciplined except *in extremis*. [161]

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153. *See* Robert A. Prentice, *The Case of the Irrational Auditor: A Behavioral Insight into Securities Fraud Litigation*, 95 NW. U. L. REV. 133, 184 (2000).

154. *See* Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 56–57 (Del. Ch. 2011) (expressing doubt that an inadequate offer constitutes a threat against which directors should be able to defend but adhering to binding precedent and upholding the continued maintenance of a poison pill).

155. *See* EASTERBROOK & FISCHEL, *supra* note 116, at 66 ("Because voting is expensive, the participants in the venture will arrange to conserve on its use.").

156. *See id.*

157. *See* DEL. CODE ANN. tit. 8, §§ 141(k), 216 (West 2020).

158. *See* STEVEN J. CLEVELAND, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: A MULTIMEDIA APPROACH loc. 11493 (3d ed. 2018) (ebook) (discussing the infrequency of "proxy contests"); Bainbridge, *supra* note 145, at 294 ("Today, there is no true market in which prospective directors compete for positions." (footnote omitted)); Kelli Alces Williams, *Externalizing Board Governance Means Changing the Board's Function*, 74 BUS. LAW. 297, 298 (2019) (discussing CEOs calling on friends and acquaintances to fill director vacancies).

159. *See* EASTERBROOK & FISCHEL, *supra* note 116, at 71.

160. George W. Dent, Jr., *A Defense of Proxy Advisors*, 2014 MICH. ST. L. REV. 1287, 1288–89.

161. *See* Bainbridge, *supra* note 145, at 286 ("[T]oday there is a general consensus that boards, as currently structured, fail all too frequently.").

(2) Legislators

Voters may not be able to effectively discipline politicians due to monitoring costs and the voters' relative inability to act on available information. C-SPAN, Congress.gov, and other sources provide an abundance of information regarding members of Congress and congressional (in)action.[162] However, C-SPAN is not a ratings killer,[163] and, while Congress.gov had over one million page views one day in January 2017,[164] consider that ESPN.com—a website dedicated to sports—had over ten million page views per day throughout August 2019.[165] Instead of relying upon firehose sources of information, like C-SPAN or Congress.gov, voters may turn to third parties—e.g., the *New York Times* or Fox News—to distill an avalanche of information into digestible morsels.[166] Still, valuable information—e.g., a Congress member's ability to effectively negotiate behind the scenes—may not be available to the voting public.[167]

Scholars commonly claim that voters are rationally ignorant.[168] This theory speaks to voters' incentives to

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162. *See, e.g.*, U.S. CONST. art. I, § 5, cl. 3 (requiring that each house of Congress maintain a publicly-available journal that details proceedings and votes).

163. *Cf.* Nicole Hemmer, *An Ode to C-SPAN in an Era Dominated by Cable TV like Fox News*, NBC (Mar. 27, 2019, 10:35 AM), https://perma.cc/LFS2-UEQF ("[T]here are no ratings figures for C-SPAN to determine if it attracts more eyeballs than, say, MSNBC. (We can assume it does not.)").

164. *Reaching a Web Traffic Milestone on Congress.gov*, LIBR. OF CONG. (Apr. 3, 2017), https://perma.cc/99CC-UKSW.

165. *See ESPN.com Continues to Reign Among Sports Sites; Site Continues to Show Year-Over-Year Growth*, ESPN (Sept. 19, 2019), https://perma.cc/AY9C-VXR5.

166. *See* Hemmer, *supra* note 163 ("These days the American political scene is much more a product of Fox News and CNN than C-SPAN . . . .").

167. *See* Sarah A. Binder & Frances E. Lee, *Making Deals in Congress*, *in* POLITICAL NEGOTIATION: A HANDBOOK 64 (Jane Mansbridge & Cathie Jo Martin eds., 2016) (noting that members of Congress conduct "negotiations . . . behind closed doors").

168. *See, e.g.*, Ilya Somin, *Foot Voting, Decentralization, and Development*, 102 MINN. L. REV. 1649, 1657 (2018) (discussing voters' incentives to be "rationally ignorant").

accumulate and comprehend information,[169] as well as a voter's limited ability to discipline any politician that deviates from a voter's preferred course of action.[170] Voters cannot remove any federal politician from office during the middle of her term; the powers of impeachment and removal are reserved to the House and the Senate through independent processes.[171] This structure lessens accountability to voters. Moreover, federal politicians serve multi-year terms, so there are infrequent opportunities for voters to oust underperforming officials from office.[172] Without an effective challenger, political incumbents face less accountability. Federal elections are generally contested, but competitive campaigns can be extraordinarily expensive.[173] Incumbents enjoy numerous advantages over challengers, including a fundraising advantage.[174] A majority of incumbent legislators routinely retain their seats.[175] Of course,

169. *See id.* ("In addition to acquiring very little information, voters have little incentive to analyze what they do learn in a logical, unbiased way.").

170. *See id.* at 1658 (recognizing the dearth of "clout tha[t] an average ballot-box voter [has] in an election").

171. U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6; *see* Ciepley, *supra* note 73, at 432 (noting that Antifederalists failed in their quest to empower the populace to recall federal politicians in the middle of their terms).

172. *See* U.S. CONST. art. I, § 4, cl. 1 (setting senators' terms of office at six years); *id.* art. I, § 2, cl. 1 (setting representatives' terms of office at two years); *id.* art II, § 1, cl. 1 (setting the President's term of office at four years).

173. *See Statistical Summary of 18-Month Campaign Activity of the 2017–2018 Election Cycle*, FED. ELECTION COMM'N (Aug. 30, 2018), https://perma.cc/92SX-AMSD ("Congressional candidates running in 2017 and 2018 collected $1.7 billion and disbursed $1.1 billion, political parties received $924.3 million and spent $690.9 million, and political action committees (PACs) raised $2.6 billion and spent $2.2 billion during the first 18 months of the 2017-2018 election cycle . . . .").

174. Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2411 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005)) (stating that campaign finance laws "mak[e] it more difficult for challengers to raise sufficient funds to overcome the advantages of incumbency").

175. *See* Paul Bedard, *2020 Swamp: 79 Percent of House Seats Already Rated "Safe"*, WASH. EXAM'R (Jan. 17, 2019, 2:42 PM), https://perma.cc/Y9NL-6SEX ("The first analysis of the upcoming 2020 congressional election shows that already nearly 8 in 10 members are in 'safe' districts . . . ."); Stuart

a single voter is unlikely to impact the outcome of a public election.[176] Collective action problems contribute to federal politicians' lack of accountability.[177] The high cost of educating oneself about competing candidates and their positions, and the low likelihood of one's vote altering the outcome of the election lead to rational ignorance and rational apathy.[178] While there exists a competitive market at the time of the election of a federal politician, and at the time of re-election, the market provides no competition during her term, that is, between elections.[179] This amounts to an important disparity with respect to corporate directors, at least directors of corporations with publicly-traded stock, who face discipline via the stock market between the times of their election.[180]

Even if there is no opposing political candidate to provide accountability, an incumbent may be held accountable by the people, an opposing political party, opposing interest groups, or the press.[181] This is not to say that, with limited accountability, every politician will run amok because honor will lead most politicians to serve with distinction.[182]

Rotenberg, *The 8 Senate Races Likely to Determine Control of the Senate*, ROLL CALL (June 4, 2019, 5:30 AM), https://perma.cc/7EML-6QGS ("[A]lmost two-thirds of Senate contests this cycle start as 'safe' for the incumbent party and are likely to remain that way.").

176. *See* Somin, *supra* note 168, at 1655 ("[I]ndividual voters have almost no chance of actually affecting the outcome of most elections . . . .").

177. *See, e.g.*, FRANKEL, *supra* note 73, at 126 (referencing the "aggregate of unorganized individuals—society").

178. *See* Somin, *supra* note 168, at 1657 ("[I]ndividual voters . . . usually have little or no incentive to make an informed choice.").

179. *But see* Rave, *supra* note 24, at 694 ("Elections can help select agents who are likely to have similar interests as principals and provide incentives for agents to act faithfully to increase their chances of reelection.").

180. *See* EASTERBROOK & FISCHEL, *supra* note 116, at 5 ("The firms and managers that make the choices investors prefer will prosper relative to others.").

181. *See, e.g.*, FRANKEL, *supra* note 73, at xiii ("In America, among social pressures is public opinion, expressed in newspapers, television and mass interaction by electronic devices.").

182. *Cf.* 5 U.S.C. § 3331 (requiring that members of Congress vow to support and defend the U.S. Constitution and to faithfully discharge the duties of office).

b. Bonding Costs

A fiduciary may bond her interests to the interests of the beneficiary.[183] For example, an attorney-fiduciary may represent a client on a contingency fee basis. In theory, the attorney-fiduciary bonds her interest to the interests of her client; as the amount available to the client increases, the attorney's fee increases.[184]

(1) Directors

Directors may bear bonding costs to align their interests with the interests of shareholders. Directors, who pay themselves, may structure their compensation to align their interests with the interests of shareholders.[185] Because shareholders would like the stock price to increase, directors may compensate themselves with stock options,[186] which increase in value as the stock price increases.[187]

Bonding costs may prove ineffective. Stock options may be poorly-crafted, such that directors benefit in situations where shareholders are disappointed by the directors' performance.[188] For example, a corporation may have been outperformed significantly by every member of its peer group, such that the shareholders of that corporation are disappointed in the directors. However, if the overall stock market is performing well, then the stock price of that corporation may have increased, such that any stock options have over-compensated

183. *See* EASTERBROOK & FISCHEL, *supra* note 116, at 10.

184. *Cf.* STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING 7–9 (2009) (discussing the difficulty of crafting effective incentive compensation for agents in the real estate market).

185. *See* DEL. CODE ANN. tit. 8, § 141(h) (West 2020).

186. *See id.* § 157.

187. *See In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 57 (Del. 2006) (en banc).

188. *See* LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 137–46, 159–73 (2004).

the directors in light of the corporation's relatively poor performance.[189]

(2) Legislators

Compared to corporate directors, politicians face even greater difficulties in designing compensation schemes to align their interests with the electorate. Adjustments to congressional salaries cannot take effect until after an intervening federal election.[190] Moreover, corporate performance may be reduced to dollars of profit on an income statement or dollars of increase in a stock price, for which all shareholders' interests align. For politicians, however, measurements of the public's general welfare may not be readily translated to compensatory bonuses or penalties.[191] Also, conflicts may arise among blocs of voters complicating any compensation scheme.[192]

Some special-interest groups advocate for, and some politicians support (or acquiesce by signing), political pledges, perhaps a pledge to oppose new taxes, to oppose any increase to the debt, or to oppose or support abortion.[193] Such pledges are not enforceable,[194] but may serve as a monitoring mechanism during a subsequent election, especially where the candidate otherwise may lack a record on which to campaign.[195]

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189. *See In re Walt Disney Co.*, 906 A.2d at 35, 42, 57 (explaining that, although an executive was terminated as a poor fit for the corporation, the executive received approximately $91.5 million because his stock options increased in value during his brief tenure).

190. *See* U.S. CONST. amend. XXVII.

191. *See* Davis, *supra* note 82, at 1150 ("There is no single maximand that a public official must pursue . . . .").

192. *See* PEW RESEARCH CENTER, ELECTION 2020: VOTERS ARE HIGHLY ENGAGED, BUT NEARLY HALF EXPECT TO HAVE DIFFICULTIES VOTING 35 (Aug. 13, 2020), https://perma.cc/R2FK-MJVA (PDF) (highlighting that Republicans and Democrats express different levels of agreement with their own party on specific issues).

193. *See* Altman, *supra* note 140 ("The political pledge is a handy weapon in the political advocate's arsenal.").

194. Members of Congress are bound by an oath to support the U.S. Constitution. U.S. CONST. art. VI, cl. 3.

195. *See* Altman, *supra* note 140.

c. Market Discipline

Where the market provides meaningful discipline, courts may be less inclined to recognize a fiduciary relationship.[196] An information market and a labor market may discipline a fiduciary.[197] Those markets are addressed above; an information market facilitates monitoring and bonding, and a labor market facilitates periodic competitive elections.[198] There are other markets worth addressing. As an important distinction from the political realm, shareholders of publicly-traded corporations may easily exit, by selling their shares, or attempt to lessen the impact of slack by the directors of one corporation by spreading their investment dollars across many corporations.[199] Voters cannot easily exit one jurisdiction by moving to another jurisdiction nor can voters diversify against the risk of a misbehaving politician by having many politicians represent their district or their state.

"[D]irectors are to shareholders as legislators are to citizens. If there is a fiduciary relationship recognized in the former, it is reasonable to recognize a fiduciary relationship in the latter."[200]

C. Distinguishing Corporate Governance from Political Governance

While corporate democracy and political democracy share important characteristics, perhaps counseling in favor of the usage of corporate common law as an analog to cabin discretion by legislators, there are important distinctions between corporate democracy and political democracy, perhaps undermining the analogy. For starters, federal elections are

196. *See* Roberta Romano, *Comment on Easterbrook and Fischel, "Contract and Fiduciary Duty,"* 36 J.L. & ECON. 447, 449–50 (1993) ("[H]igh-powered incentives provided by markets protect the latter group of principals, making the use of a governance structure—the open-ended fiduciary duty adjudicated by a court—unnecessary.").

197. *See supra* Parts III.B.4.a.–b.

198. *See supra* Parts III.B.4.a.–b.

199. *See* Rave, *supra* note 24, at 707.

200. Kim, *supra* note 25, at 877.

premised on "one-person, one-vote," so no single voter nor small group of voters control the outcome of an election.[201] Corporate elections, however, are premised on "one share-one vote."[202] So, a single shareholder could accumulate enough shares to control an election of a corporation.[203] Moreover, corporations may deviate from the default rule of "one share-one vote," and empower one share with multiple votes.[204] Consequently, one shareholder—say, Mark Zuckerberg—could control the outcome of the election of a corporation—say, Facebook—even though that shareholder held a minority of outstanding shares.[205] This corporate-political distinction loses force when shares are diffusely and widely held, which more closely approximates the political electorate.[206]

Federal law does not allow one to "sell" one's vote;[207] and many critics have expressed concerns about the possibility of "buying" a federal election through indirect means.[208] Corporate law does not necessarily prohibit the sale of one's vote.[209] More directly, one can buy a corporate election, so long as one buys enough shares.[210] However, where shares are widely and

201. *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2495–96 (2019).

202. Providence & Worcester Co. v. Baker, 378 A.2d 121, 123 (Del. 1977).

203. *See* Facebook, Inc., Preliminary Proxy Statement (Schedule 14A), at 38 (Apr. 27, 2016) (reporting Mark Zuckerberg's control of Facebook).

204. *See* DEL. CODE ANN. tit. 8, § 212(a) (West 2020).

205. *See* Facebook, Inc., Preliminary Proxy Statement (Schedule 14A), at 38 (Apr. 27, 2016) (reporting Zuckerberg's control of Facebook due to his super-voting shares).

206. *See, e.g.*, Kim, *supra* note 25, at 876 ("Shareholders are diffuse [and] dispersed . . . .").

207. *See* 18 U.S.C. § 597; 52 U.S.C. § 10307(c).

208. *See* William McGurn, Opinion, *Will Bloomberg Buy the Election?*, WALL ST. J. (Dec. 2, 2019, 6:47 PM), https://perma.cc/TX6X-AVAA; Jeremy W. Peters, *Inside the Biggest 2020 Advertising Against Trump*, N.Y. TIMES, https://perma.cc/4QPR-ERRR (last updated Jan. 23, 2020).

209. *See* Schreiber v. Carney, 447 A.2d 17, 25 (Del. Ch. 1982) ("[T]he rationale that vote-buying is, as a matter of public policy, illegal *per se* is founded upon considerations of policy which are now outmoded as a necessary result of an evolving corporate environment.").

210. *See* 15 U.S.C. § 78n(d) (regulating tender offers); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 949 (Del. 1985) (discussing the tender offer for 37 percent of outstanding shares by an investor who already owned more than 13 percent of those shares).

diffusely held, corporate shareholders more closely resemble the political electorate.[211]

While a candidate for Congress may run unopposed in a primary,[212] congressional elections are generally contested. In the corporate arena, however, annual elections to fill director vacancies are generally not contested.[213] Nonetheless, the infrequency of contested corporate elections does not mean that the law is undeveloped.[214] And, those corporate-law cases that address directors strategically altering the date of a vote by shareholders could guide a court in resolving disputes where political incumbents strategically alter the date of a federal election.[215]

Incumbents—whether corporate directors or federal politicians—enjoy financial advantages, relative to their challengers, and those incumbents spend "other people's money" in their campaigns.[216] Similarly, candidates who challenge incumbent federal politicians spend other people's money when campaigning.[217] However, shareholders challenging incumbent directors for seats on the board expend their own resources

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211. *See* Kim, *supra* note 25, at 877.

212. *See* Troy Griggs & Adam Pearce, *These 20 Representatives Have Not Had a Primary Challenger for at Least a Decade*, N.Y. TIMES, https://perma.cc/KHU2-6VE4 (last updated Sept. 4, 2018) ("Less than 10 percent of incumbents get a serious primary challenger, though it's higher for Republicans, at 20 percent . . . .").

213. *See, e.g.*, Facebook, Inc., Preliminary Proxy Statement (Schedule 14A), at 3 (Apr. 27, 2016) (listing eight nominees for eight vacancies); Cleveland, *supra* note 132, at 287 n.379 (noting that a nominee to Chesapeake Energy Corporation's board received only 26 percent of the vote at the annual shareholder meeting—the lowest for a nominee of an S&P 500 company in the prior five years—but was re-elected because there was no competing candidate that received more votes).

214. *See infra* Part 0.

215. *See infra* Part 0.

216. *See* Bill Allison & John McCormick, *Trump Leverages Incumbent Advantage over Democratic 2020 Pack*, BLOOMBERG (Apr. 16, 2019, 3:00 AM), https://perma.cc/5LTM-3TPR (addressing political incumbents); Rosenfeld v. Fairchild Engine & Airplane Corp., 128 N.E.2d 291, 292–93 (N.Y. 1955) (addressing corporate incumbents).

217. *But see* Alexander Burns, *Michael Bloomberg Joins 2020 Democratic Field for President*, N.Y. TIMES (Nov. 26, 2019), https://perma.cc/4Y6C-FDN4 (last updated Mar. 4, 2020) (reporting that Bloomberg will not accept political donations in his presidential campaign).

when campaigning,[218] and those campaigns may be expensive.[219]

Corporate directors exercise judgment with the primary, but not necessarily exclusive, goal of benefitting investors financially.[220] This single-overarching goal may enable courts to more effectively scrutinize directors' decisions relative to politicians' decisions.[221] While the political electorate certainly is concerned about financial considerations,[222] a wide array of considerations motivates the voting populace, which, in turn, motivates political actors.[223] Without a single overarching goal to guide political actors, except perhaps a standardless "general welfare," courts may not as easily scrutinize their decisions.[224] This distinction may be overstated. If a court reviews a large series of decisions by the board of directors, then the court might be able to determine whether those directors were acting in

218. Corporations could bear such expenses, but generally do not do so. *See* DEL. CODE ANN. tit. 8, §§ 112–113 (West 2020).

219. *See* JESSE H. CHOPER, JOHN C. COFFEE, JR. & RONALD J. GILSON, CASES AND MATERIALS ON CORPORATIONS 535–36 (8th ed. 2013) (reporting that incumbent directors spent $75 million on a proxy campaign); Sharon Terlep & David Benoit, *P&G Says Trian's Nelson Peltz Has Lost Bid for Board Seat; He Disagrees*, WALL ST. J., Oct. 11, 2017, at A7 (reporting that incumbent directors spent $35 million on a proxy campaign).

220. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 710–12 (2014) (listing profit as the "central objective of for-profit corporations," but emphasizing that for-profit corporations may pursue—at the expense of profits—charitable causes, energy-conservation goals, and heightened employee wages and work conditions).

221. *See* Davis, *supra* note 80, at 1158; Miller & Gold, *supra* note 65, at 523.

222. *See, e.g.*, Lily Rothman, *The Story Behind George H.W. Bush's Famous "Read My Lips, No New Taxes" Promise*, TIME (Dec. 1, 2018, 12:32 AM), https://perma.cc/X33X-SH4B.

223. *See* PEW RESEARCH CENTER, ELECTION 2020: VOTERS ARE HIGHLY ENGAGED, BUT NEARLY HALF EXPECT TO HAVE DIFFICULTIES VOTING 35 (Aug. 13, 2020), https://perma.cc/B79L-WCUK (PDF) (reporting that the top issues for voters in 2020 are: the economy, health care, Supreme Court appointments, the coronavirus outbreak, violent crime, foreign policy, gun policy, race and ethnic inequality, immigration, economic inequality, climate change, and abortion).

224. *See* Davis, *supra* note 80, at 1149 ("[I]n the public law context, . . . unlike its private counterpart, there is not a consensus about the interests of beneficiaries . . . .").

furtherance of the shareholders' financial interests.[225] But, if a court reviews an isolated decision by the board, then the court will be ill-equipped to determine whether the directors improperly sacrificed profits if the board pursued some other permissible non-profit goal, like charity.[226] Thus, a court would defer to the directors' decision to pursue that non-profit goal, absent self-interest.[227] Self-interest is exactly what would prompt a court to second-guess a decision by legislators to shift the date of a federal election.[228] Review would be limited to scenarios, such as where the plaintiff could establish that the primary purpose of shifting the date of the federal election was the goal of re-election.[229] Courts already examine legislative purpose in the election context.[230]

Some suggest that the clearly-identified beneficiaries of directors—shareholders—better enable courts to scrutinize directors' decisions relative to those of legislators.[231] Federal

225. *See In re* Topps Co. S'holders Litig., 926 A.2d 58, 84–87 (Del. Ch. 2007) (referencing and upholding a series of decisions by the board).

226. *See* DEL. CODE ANN. tit. 8, § 122(9) (West 2020) ("Every corporation created under this chapter shall have power to . . . [m]ake donations for the public welfare or for charitable . . . purposes . . . ."); BUSINESS ROUNDTABLE—STATEMENT ON THE PURPOSE OF A CORPORATION (Aug. 2019), https://perma.cc/84RN-5LAM (superseding prior statements of shareholder primacy and stating that the purpose is to create value for "all . . . stakeholders," whose long-term interests are inseparable).

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

228. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2495 (2019).

229. *See infra* Part 0.

230. *See* N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 214–15 (4th Cir. 2016) (concluding that legislators acted with discriminatory intent); McCreary Cnty. v. ACLU, 545 U.S. 844, 862 (2005)

> But scrutinizing purpose does make practical sense . . . where an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts. The eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act. (citations omitted).

231. *See* Davis, *supra* note 80, at 1158 ("[P]rivate fiduciaries owe a single beneficiary or a discrete class of beneficiaries a duty of undivided loyalty. It is difficult, however, to specify how politicians and bureaucrats are fiduciaries for a discrete class of beneficiaries."); Miller & Gold, *supra* note 65, at 517, 523

legislators may owe duties to citizens (in their districts, states, and country), fellow legislators, and the U.S. government.[232] Imposing duties on legislators, without a clearly defined beneficiary, may prove a fool's errand. The distinction may be overblown. First, directors owe duties to shareholders *and* the corporation.[233] Their interests generally, but not necessarily, coincide.[234] Even focusing on shareholders, and accepting that directors are to maximize profits—a premise that was disputed in the prior paragraph—are those directors to maximize short-term profits, as favored by some shareholders, like activists and perhaps the elderly, or maximize long-term profits, as favored by other shareholders, like conservative investors?[235] Directors pick winners among a group of beneficiaries in the same sense that legislators, through their policy choices, pick winners among a group of beneficiaries.[236] Even accepting that

("All fiduciary mandates imply purposes inasmuch as the fiduciary's discretion is to be oriented to the achievement of certain objectives. However, purposes are distinctive in governance mandates insofar as they are not identified with determinate persons and their practical interests; they are, in this sense, abstract."); *see also* Samuel Issacharoff, *Judging Democracy's Boundaries*, *in* RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 150, 166 (2011) ("Unlike contracts, there is not a relatively accessible economic presumption that the parties seek to maximize their joint welfare.").

232. *See* Kim, *supra* note 25, at 870–71; Ponet, Leib & Serota, *supra* note 25, at 94–97; *see also* SEC v. Chenery Corp., 318 U.S. 80, 85–86 (1943)

> But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?

233. *See* Davis, *supra* note 80, at 1163–64 ("Traditionally, courts have imposed fiduciary duties on directors in both close and public corporations to protect the interests of the corporation and shareholders.").

234. *See* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 721–22 (Del. 1971) (upholding payment of dividend, which was prompted by the majority shareholder's need for cash, and which payment hobbled the corporation's ability to pursue its business).

235. *See* Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1150 (Del. 1989) (noting that directors may choose the investment time horizon, whether long-term or short-term).

236. *See* Miller & Gold, *supra* note 65, at 524 ("In some cases . . . we can say with reasonable confidence that we know what demographic . . . is intended to benefit from a governance mandate . . . .").

federal legislators may owe duties to citizens (in their districts, states, and country), fellow legislators, and the U.S. government,[237] in the context of altering the date of a federal election, legislators would infringe on citizens' rights to vote,[238] so that is the relationship of focus.

Other differences between the corporate and political realms speak to the accountability provided by an election. In the corporate realm, by default, each shareholder is empowered to vote for every director, and shareholders can oust all of the directors at a single election, enhancing accountability of directors to shareholders.[239] In the political realm, the voters in any district or in any state have no right to unseat the vast majority of legislators.[240] Moreover, given the staggered terms of federal legislators,[241] the voting populace across all jurisdictions cannot unseat all incumbents in a single election.[242] Perhaps, these distinctions might encourage judicial intervention when legislators alter the date of an election, given that courts are prepared to intervene when directors alter the date of an election.[243]

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237. *See* Kim, *supra* note 25, at 870 n.150 ("[T]he STOCK Act explicitly states that members of Congress owe a fiduciary duty 'to the Congress, the United States Government, and the citizens of the United States.'" (quoting 15 U.S.C. § 78u-1(g)(1))).

238. *See* Williams v. Rhodes, 393 U.S. 23, 30 (1968).

239. DEL. CODE ANN. tit. 8, §§ 141(d), 212, 216 (West 2020).

240. *See generally* United States v. Hays, 515 U.S. 737, 745 (1995) (concluding that the plaintiff lacked standing to challenge allegedly unconstitutionally drawn district where the plaintiff did not live).

241. *See* U.S. CONST. art. I, § 2, cl. 1; *id*. art. I, § 3, cl. 1.

242. *See* Chris Cillizza, *You Can't Vote Everyone in Congress Out. So, What Can You Do?*, WASH. POST (Oct. 23, 2013 11:26 AM) https://perma.cc/4ZEP-MTVH (reporting that 60 percent of people polled said they would "replace every member of Congress, including their own, in the next election if they could").

243. *See infra* Part V.

IV. Fiduciary Duties

A. Directors

As fiduciaries, corporate directors owe duties to the corporation and its shareholders, namely the duty of care and the duty of loyalty.[244] Other obligations may be embedded within those duties, like the duty of good faith,[245] and, in certain contexts, those duties may give rise to other obligations.[246] Perhaps most pertinent, because shareholders elect directors, equity bars director-fiduciaries from impeding the shareholders' franchise.[247]

1. Duty of Care

Directors must exercise that amount of care that "ordinarily careful and prudent [people] would use in similar circumstances,"[248] and, when making decisions on behalf of the corporation, directors must consider all material information reasonably available.[249] Courts, however, have created a disparity between the standard of conduct and the standard of

244. *See* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) (en banc).

245. *See id*. ("[T]he obligation to act in good faith does not establish an independent duty that stands on the same footing as the duties of care and loyalty."); Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1986) (en banc) (presuming that the directors acted in good faith when shareholders challenged their fulfillment of the duty of care); *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 745–46 (Del. Ch. 2005) ("[I]ssues of good faith are (to a certain degree) inseparably and necessarily intertwined with the duties of care and loyalty . . . .").

246. *See In re* Transkaryotic Therapies, Inc., 954 A.2d 346, 357 (Del. Ch. 2008) ("Although usually labeled and described as a duty, the obligation to disclose all material facts fairly when seeking shareholder action is merely a specific application of the duties of care and loyalty." (footnotes omitted)); Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1284–85 (Del. 1989) (applying so-called *Revlon* duties when directors agreed to sell control of the corporation for a lesser amount in the face of a superior bid).

247. *See* Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971).

248. *In re Walt Disney Co.*, 907 A.2d at 749.

249. *See id*.

liability.[250] Courts write in aspirational terms when describing the care with which directors should operate, but, when shareholders seek to impose personal liability on directors, courts require little of directors and require that any plaintiff-shareholder establish that the board was grossly negligent as to its decision-making process.[251] When reviewing a shareholder's challenge to a decision by directors, a court will employ the business judgment rule, by which the court defers to the directors, and which presumes that the directors acted with due care, loyalty, and in good faith.[252] Courts do not second-guess decisions of disinterested directors, except in the mostly theoretical case of an irrational decision.[253] While courts routinely defer to board decisions, they are much more skeptical when a plaintiff-shareholder raises the specter that the directors' decision was tainted by self-interest, which implicates the duty of loyalty.[254]

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250. *See* Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 437–38 (1993).

251. *See In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 55 (Del. 2006) (en banc) (describing aspirational, "best practices" that could have been employed by a committee of the board and were not employed, but concluding that liability required the plaintiff-shareholder to prove "gross negligence," a standard that was not met); *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996)

> What should be understood, but may not widely be understood by courts or commentators who are not often required to face such questions, is that compliance with a director's duty of care can never appropriately be judicially determined by reference to the *content of the board decision* that leads to a corporate loss, apart from consideration of the good faith or rationality of the process employed. (footnote omitted).

252. *See* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360–61 (Del. 1993) ("The [business judgment] rule posits a powerful presumption in favor of actions taken by the directors in that a decision made by a loyal and informed board will not be overturned by the courts unless it cannot be 'attributed to any rational business purpose.'" (quoting Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971))).

253. *See* Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000) (en banc) ("Irrationality is the outer limit of the business judgment rule.").

254. *See Cede & Co.*, 634 A.2d at 362 (discussing the relationship between the duty of loyalty and self-interested directors).

2. Duty of Loyalty

When a shareholder establishes that a decision by the directors was tainted by self-interest, a court will not defer to the directors because the shareholder overcame a presumption of the business judgment rule—the presumed absence of self-interest.[255] Courts examine self-interest on a director-by-director basis.[256] Courts' review of self-interested conduct may vary with the circumstances.

For example, when corporate directors transact with the corporation, it is as if those directors are on both sides of the transaction—negotiating for themselves *and* negotiating on behalf of the corporation.[257] So, when directors cause the corporation to pay themselves, whether in fees, bonuses, or stock options,[258] their divided loyalties invite court review, with the burden falling on the interested directors to establish fairness.[259] Fairness might be established via authorization by disinterested directors, approval by disinterested shareholders, or comparable market transactions.[260]

The fairness inquiry may not be applicable in self-interested scenarios when directors do not transact with the corporation. For example, in the past, when a hostile acquirer made a premium offer to shareholders for their shares and the board of directors defended against that acquisition, and a shareholder challenged the board's defensive action, courts initially struggled whether to be deferential to the board under the business judgment rule, or to be skeptical of the board's

255. *See In re* Invs. Bancorp, Inc. S'holder Litig., 177 A.3d 1208, 1217 (Del. 2017) (en banc).

256. *See* Marchand v. Barnhill, 212 A.3d 805, 818 (Del. 2019); Beam v. Stewart, 845 A.2d 1040, 1049 (Del. 2004).

257. *See In re Invs. Bancorp, Inc.*, 177 A.3d at 1217.

258. *See* DEL. CODE ANN. tit. 8, §§ 122, 141(h), 157 (West 2020).

259. *See In re Invs. Bancorp, Inc.*, 177 A.3d at 1217 (holding that, when board members fix their compensation, the decision will generally "lie outside the business judgment rule's presumptive protection" (quoting Texlon Corp. v. Meyerson, 802 A.2d 257, 257 (Del. 2002))).

260. *See* DEL. CODE ANN. tit. 8, § 144.

defensive action under the fairness inquiry.[261] What if the court was deferential and upheld the board's defenses, but the board members were acting self-interestedly to preserve their positions, not loyally to the corporation and its shareholders, as the hostile acquirer would have lined the shareholders' pockets and increased the value of the corporation? On the other hand, what if the court was skeptical of the board's loyalty and invalidated the board's defenses, but the hostile acquirer paid too little to the shareholders for their shares or the acquirer took actions that harmed the corporation? Consequently, in *Unocal Corp. v. Mesa Petroleum Co.*,[262] the Delaware Supreme Court created an intermediate inquiry, requiring the board to establish that it undertook a good-faith, reasonable investigation; that the hostile acquirer posed a threat to the corporation, its shareholders, or a significant corporate policy; and that the defensive action was proportional to the threat, not coercive nor preclusive.[263] The court's inquiry addressed the "omnipresent specter" that the directors, in defending against an acquirer, might be acting to preserve their positions, and further their own interests, rather than the interests of the corporation and its shareholders.[264]

Most relevant for present purposes, and as will be explained in Part IV.A.4, a court may find that the duty of loyalty is implicated when directors strategically alter the date of an election, but the court may not invoke the "fairness" inquiry. Instead, if the plaintiff-shareholder can establish that the primary purpose of the directors' action was to impede the shareholders' franchise, then the court will require the directors to establish compelling justification for their action.[265]

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261. *See* Eisenberg, *supra* note 250, at 458 ("Over the last twenty years, corporation law has tried to come to grips with the hostile tender offer—that is, a general offer to purchase all or a controlling amount of a corporation's shares from the shareholders, over management's objections.").

262. 493 A.2d 946 (Del. 1985).

263. *See id.* at 958–59.

264. *See id*. at 954.

265. *See* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 662 (Del. Ch. 1988).

3. Duty of Good Faith

Directors must act in good faith to further the interests of the corporation and its shareholders.[266] Action designed to violate the law or to harm the corporation results in a violation of the directors' duty.[267] Moreover, directors do not act in good faith if they consciously disregard a known duty to act.[268] For example, because DGCL provides that the business and affairs of a corporation shall be managed by, or under the direction of, the board of directors,[269] those directors must erect an information-and-reporting system reasonably designed to provide the board with timely, accurate information to reach informed judgments regarding the corporation's business performance and its compliance with law.[270] As with the duty of care, with respect to the board's oversight obligations, there is a disparity between the standard of conduct and the standard of liability.[271] Even though the standard of conduct references "reasonabl[eness]," shareholders face great difficulties in trying to impose personal liability on directors for failures of oversight.[272] Shareholders must establish that "the directors utterly failed to implement any reporting or information system or controls; *or* . . . having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."[273]

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266. *See* Stone v. Ritter, 911 A.2d 362, 369–70 (Del. 2006) (en banc).

267. *See id.* at 370; *In re* Massey Energy Co. Derivative Litig., No. 5430, 2011 WL 2176479, at *21 (Del. Ch. May 31, 2011).

268. *See Stone*, 911 A.2d at 370.

269. DEL. CODE ANN. tit. 8, § 141(a) (West 2020).

270. *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996).

271. *Compare id.* (referencing reasonably designed oversight system), *with Stone*, 911 A.2d at 372 (holding that, to impose personal liability, the plaintiff must show "sustained or systematic failure of the board to exercise oversight").

272. *See Stone*, 911 A.2d at 372 ("[A] claim that directors are subject to personal liability for employee failures is 'possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.'" (quoting *Caremark*, 698 A.2d at 967)).

273. *Id.* at 370.

4. Duty Barring Action with Inequitable Purpose

"[W]here corporate directors exercise their legal powers for an inequitable purpose their action may be rescinded or nullified by a court at the instance of an aggrieved shareholder."[274] Thus, directors may be informed (and otherwise in compliance with the duty of care), and act in good faith to further the corporation's interests, not their own interests (in compliance with the duties of good faith and loyalty), yet a court may still invalidate their action, if the action furthers an inequitable purpose.[275] The Delaware Supreme Court announced this principle in a case in which the directors strategically altered the date of an election, due to the significance of the shareholder franchise.[276] "The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests."[277] Courts defer to decisions of the board of directors under the business judgment rule, in part, because the shareholders elected those directors, and soon those shareholders will have the opportunity to elect new directors.[278] If, however, the directors impede the shareholders' ability to vote, then critical support for the business judgment rule is weakened.[279] Given the "central importance of the [shareholder] franchise to the scheme of

274. Stahl v. Apple Bancorp, Inc., 579 A.2d 1115, 1121 (Del. Ch. 1990); *see* FRANKEL, *supra* note 73, at 256 ("Doctrinally, equity is the source of the remedies for violations of fiduciary obligations, because fiduciary obligations originated in the English equity courts.").

275. *See Stahl*, 579 A.2d at 1121 ("An inequitable purpose is not necessarily synonymous with a dishonest motive. Fiduciaries who are subjectively operating selflessly might be pursuing a purpose that a court will rule is inequitable.").

276. *See* Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971) ("[M]anagement has attempted to utilize the corporate machinery and the Delaware Law . . . for the purpose of obstructing the legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest against management. These are inequitable purposes, contrary to established principles of corporate democracy."); *Stahl*, 579 A.2d at 1121 (describing *Schnell* as the leading case on the matter).

277. Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988).

278. *See* DEL. CODE ANN. tit. 8, § 141(d) (West 2020) (establishing, by default, a one-year term for directors).

279. *See Blasius*, 564 A.2d at 659–60.

corporate governance,"[280] courts require that the board of directors establish compelling justification for its action, if a shareholder initially establishes that the board of directors acted with a primary purpose of impeding effective voting by shareholders.[281]

Any inquiry into purpose could become a blunderbuss weapon in the hands of plaintiff-shareholders (inviting non-meritorious litigation), and any inquiry guided by equity could become a means of unbridled court intervention (inconsistent with the business judgment rule).[282] However, two limits merit mention. First, although the principle is phrased broadly,[283] the cases in which courts have resorted to this principle typically involved a contested election,[284] which is atypical in the corporate realm, so the courts' application of the principle has been limited.[285] Second, the courts' own inquiry limits its application[286]: the plaintiff-shareholder must establish that the *primary* purpose of the board's action was to impede the exercise of the shareholders' franchise before the board is

280. *Id.* at 659.

281. *See id.* at 661–62.

282. *See* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360–61 (Del. 1993) (explaining that the business judgment rule "operates to preclude a court from imposing itself unreasonably on the business and affairs of a corporation").

283. *See Schnell*, 285 A.2d at 439 ("[I]nequitable action does not become permissible simply because it is legally possible.").

284. *See Stahl*, 579 A.2d at 1121–22 (collecting cases).

285. *See* Ala. By-Prods. Corp. v. Neal, 588 A.2d 255, 258 n.1 (Del. 1991)

> The invocation of equitable principles to override established precepts of Delaware corporate law must be exercised with caution and restraint. Otherwise, the stability of Delaware law is imperiled. While the doctrine of [*Schnell*] is an important part of our jurisprudence, its application, or that of similar concepts, should be reserved for those instances that threaten the fabric of the law, or which by an improper manipulation of the law, would deprive a person of a clear right. (citation omitted).

286. *See* MM Cos. v. Liquid Audio, Inc., 813 A.2d 1118, 1130 (Del. 2003) ("[T]he non-deferential *Blasius* standard of enhanced judicial review, which imposes upon a board of directors the burden of demonstrating a compelling justification for such actions, is rarely applied . . . .").

required to establish compelling justification.[287] If, for example, the directors delay a vote by shareholders—which vote might have unseated the incumbent directors—primarily to pursue a merger that the directors believe is in the shareholders' interests, then the "compelling justification" standard is not applicable.[288] Moreover, the "compelling justification" standard, though difficult for directors to meet, has been met,[289] so it is not, by analogy, "strict in theory, [but] fatal in fact."[290] These cases and the attendant circumstances will be addressed in subpart V.A.

B. Legislators

If classified as fiduciaries, federal legislators would be subject to the traditional duties of care, loyalty, and good faith.[291] The Founders wrote of expectations of legislators, which correspond to those traditional fiduciary duties.[292] Modern scholars similarly argue that such duties apply to federal

287. *See* Stahl v. Apple Bancorp, Inc., 579 A.2d 1115, 1121–22; Allen v. Prime Comput., Inc., 540 A.2d 417, 420 (Del. 1988). Delaware courts distinguish between an action's purpose and the directors' intent. *See* Linton v. Everett, No. 15219, 1997 WL 441189, at *9 (Del. Ch. July 31, 1997) ("To set aside the election results on the basis of inequitable manipulation of the corporate machinery, it is not required that *scienter*, i.e., actual subjective intent to impede the voting process, be shown.").

288. In such circumstances, a "reasonableness" standard may be applicable. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955–56 (Del. 1985). However, actions by directors routinely survive such "reasonable" scrutiny. *See, e.g.*, *id.* at 950 ("[W]e are satisfied that the device Unocal adopted is reasonable in relation to the threat posed . . . .").

289. *See* Mercier v. Inter-Tel (Del.), Inc., 929 A.2d 786, 788 (Del. Ch. 2007).

290. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (internal quotations omitted).

291. *See, e.g.*, FRANKEL, *supra* note 73, at 286 ("The different views concerning the fiduciary laws, both private and governmental, related to where the lines should be drawn rather than to the principles to be followed."); Miller & Gold, *supra* note 65, at 556 ("[F]iduciaries acting under governance mandates are obligated to be loyal . . . .").

292. *See* Natelson, *supra* note 75, at 1137, 1142–58 (discussing the Founders' understanding of fiduciary concepts, such as the duties of reasonable care, loyalty, and impartiality, and how that understanding informed their drafting of the Constitution).

legislators.[293] Legislators may owe duties to citizens (in their districts, states, or country), fellow legislators, and the U.S. government.[294] In the context of altering the date of a federal election, legislators might infringe on citizens' rights to vote, so that is the relationship of focus, in the same way that directors might infringe on shareholders' rights to vote, giving rise to a direct, not a derivative, cause of action.[295]

1. Duty of Care

Members of Congress are expected to act with due care—not irrationally.[296] When fulfilling their responsibilities, like monitoring the other branches and enacting legislation,[297] members of Congress require information, which they may gather by meeting with colleagues, agencies, constituents, and lobbyists and by convening formal hearings.[298] Members of Congress test their ideas through debate and by proposing

293. *See* Galoob & Leib, *supra* note 65, at 164 (arguing that fiduciary duties are a means of constraining political actors); Natelson, *supra* note 75, at 1137, 1142–58, 1178 (same); Ponet & Leib, *supra* note 79, at 1257–61 (same).

294. *See* Vieth v. Jubelirer, 541 U.S. 267, 332 (2004) (Stevens, J., dissenting) ("Elected officials[] . . . primary obligations are, of course, to the public in general . . . ."); Kim, *supra* note 25, at 870–71 ("Consider the following potential beneficiaries [of legislators]: citizens, the legislature (and fellow legislators), and the government that the legislator serves.").

295. *See In re* Activision Blizzard, Inc. S'holder Litig., 124 A.3d 1025, 1049–50 (Del. Ch. 2015).

296. *See* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 359 (2009) (subjecting legislation that did not infringe a fundamental right to rational basis review); Natelson, *supra* note 75, at 1142–45 (discussing duty of care); *see also* RESTATEMENT (THIRD) OF AGENCY § 8.08 (AM. L. INST. 2006) (discussing a fiduciary-agent's duties of care, competence, and diligence); RESTATEMENT (THIRD) OF TRUSTS § 77 (AM. L. INST. 2012) (imposing on a fiduciary-trustee the duty of prudence which "requires the exercise of reasonable care, skill, and caution").

297. *See* U.S. CONST. art. I, §§ 1; 2, cl. 5; 3, cl. 6.

298. *See* Natelson, *supra* note 75, at 1142 ("James Madison stressed the need for officials to acquire sufficient knowledge to execute their functions . . . .").

legislation.[299] Just as directors are entrusted with discretion to reject the preferences of shareholders—recognizing that shareholders soon will vote upon their retention, members of Congress are entrusted with discretion to reject the preferences of their constituents—recognizing that those constituents soon will vote upon their retention.[300] The quantum of care with which members of Congress must act is contextual. For example, following the events of 9/11, members of Congress may have felt the need to take swift action, which may have inhibited their ability to gather all desirable information and to deeply consider the viewpoints of competing constituencies.[301] However, having taken swift action, and including "sunset" provisions,[302] members of Congress should have, and did, pause—devoting additional efforts to inform themselves, consider alternative viewpoints, and debate the statute's impact—before continuing the effect of those provisions.[303] This Article presumes that, before amending the U.S. Code to alter the date of any federal election, members of Congress would gather information and consider alternatives. Though certain members of Congress may not be acting loyally, in good faith, or

299. *See* Thomas Kaplan & Robert Pear, *Senate Votes Down Broad Obamacare Repeal*, N.Y. TIMES (July 25, 2017), https://perma.cc/3L62-HH9N (describing the intense floor debate surrounding the repeal of the Affordable Care Act).

300. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 793–94 (2015) (distinguishing a representative government from a New England town hall meeting).

301. In response to 9/11, and just a few weeks thereafter, Congress passed the USA Patriot Act on October 26, 2011. *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of U.S.C.).

302. *See id.* § 224 ("[Except as noted,] this title and the amendments made by this title . . . shall cease to have effect on December 31, 2005.").

303. *See* H.R. REP. NO. 109-174, at 5 (2005) (detailing four years of oversight, including hearing testimony, DOJ reports, briefings, and other correspondence); *see also* USA PATRIOT Act Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (codified in scattered sections of U.S.C.); *Reauthorization of the Patriot Act: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. (2001); DEP'T OF JUST., USA PATRIOT ACT: SUNSET REPORT (Apr. 2005).

equitably, those members would likely be acting rationally and with due care.

2. Duty of Loyalty

The duty of loyalty requires a fiduciary to further the beneficiary's interest, not to further the fiduciary's own interests at the expense of the beneficiary.[304] Moreover, the fiduciary cannot benefit herself, even if the beneficiary is not harmed, if the fiduciary exploits her position to gain that advantage.[305] The duty of loyalty is reflected in the U.S. Constitution, which includes provisions designed to prevent legislators from increasing their own compensation, and to prevent their corruption by other branches and by foreign influences.[306]

The Founders—whether Federalists or Anti-Federalists—articulated their concerns that legislators' loyalties would be tested.[307] Madison wrote, "When a strong personal interest happens to be opposed to the general interest, the Legislature cannot be too much distrusted."[308] Hamilton argued that it should be "as difficult as possible for [legislators] to combine in any interest opposite to that of the public good."[309] An Anti-Federalist publication argued that "those, who are

304. *See* Vieth v. Jubelirer, 541 U.S. 267, 317–18 (2004) (Stevens, J., dissenting) (articulating legislators' "duty" to govern impartially); 63C AM. JUR. 2D *Public Officers and Employees* § 1 (2020) ("Public offices are created for the purpose of effecting the end for which government has been instituted, which is the common good, and not for the profit, honor, or private interest of any one person, family, or class of persons.").

305. *See* Kim, *supra* note 25, at 904–08 (collecting and analyzing cases); *see also* Natelson, *supra* note 75, at 1153 (acknowledging that public officials necessarily favor one group over another, but noting that, "[e]ven when . . . [favoring a particular group] was not technically illegal, it [could be] a violation of the public trust").

306. *See* U.S. CONST. art. I, § 6, cl. 2; *id.* amend. XXVII; *see also* Natelson, *supra* note 75, at 1148 (addressing the length-of-residency requirement for senators and the natural-born citizen requirement for the President).

307. *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 99–106 (Max Farrand ed., 1937).

308. *Id.* at 104 (quoting James Madison, Journal (July 24, 1787)).

309. THE FEDERALIST NO. 66, at 446 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

entrusted with the exercise of the higher powers of government, ought to . . . hav[e] no other view than the general good of all without any regard to private interest."[310]

The Founders contemplated several remedies if legislators self-interestedly abused their power.[311] The co-equal branches might check legislators' self-interested legislation via the presidential veto or court review.[312] Additionally, legislators collectively might discipline individual legislators via impeachment.[313] Finally, the electorate may vote out of office those who abuse their office.[314] If, however, legislators self-interestedly alter the date of a federal election, court review may be the only effective check on those legislators. If the President and the self-interested legislators are of the same political party, then the President may support, not veto, such legislation.[315] (Plus, a presidential veto may be overridden.[316]) To be enacted, (self-interested) legislation must enjoy the support of a majority of legislators in each congressional chamber, such that impeachment on the basis of the enacted legislation would never occur, where impeachment requires the majority of one chamber and a supermajority in the other chamber.[317] The concept of strategically altering the date of a

310. Natelson, *supra* note 75, at 1157 (quoting the Antifederalist Impartial Examiner).

311. *See* THE FEDERALIST NO. 51 (James Madison) (ABA Classics ed., 2009).

312. *See* U.S. CONST. art. I, § 7, cl. 2; Marbury v. Madison, 5 U.S. 137, 173–80 (1803).

313. *See* U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6.

314. *Compare* Nicholas Fandos, *Trump Acquitted of Two Impeachment Charges in Near Party-Line Vote*, N.Y. TIMES (Feb. 5, 2020), https://perma.cc/Q9NN-DSDC (reporting that the Senate acquitted President Trump of charges that he abused his power and obstructed Congress), *with* Meg Wagner, et al., *Joe Biden Elected President*, CNN, https://perma.cc/8LB7-7BEG (last updated Nov. 8, 2020, 10:29 A.M.) (reporting that citizens did not re-elect President Trump).

315. *See* Alan Greenblatt, *5 Reasons Vetoes Have Gone Out of Style*, NAT'L. PUB. RADIO (May 9, 2013), https://perma.cc/P6N6-D7EA.

316. *See* U.S. CONST. art. I, § 7, cl. 3.

317. *See id.* art. I, § 2, cl. 5 (granting the House of Representatives the power of impeachment); *id.* art. I, § 3, cl. 6 ("[N]o Person shall be convicted [of impeachment] without the Concurrence of two thirds of the [Senators] present.").

federal election is to ensure an outcome favorable to the self-interested incumbents, so the election itself would prove a poor check on such self-interested behavior, and any subsequent election could be strategically timed. Consequently, judicial review may be essential as a check on legislative abuse.[318]

While judicial review may be essential, the nature of that review could take many forms. By analogizing politicians to corporate directors, scholars have suggested that judicial application of corporate law principles of the duty of loyalty could curb legislators' self-interested acts.[319] In the corporate setting, when plaintiff-shareholders establish self-interested action by directors, courts commonly require those directors to establish "fairness," whether procedural fairness (approval of the action by disinterested directors or shareholders) or substantive fairness (proof that the terms of the self-interested action are comparable to the terms that would have been negotiated by unrelated parties).[320]

For example, with respect to partisan gerrymandering, Rave argues that legislators violate their duty of loyalty and should be subject to the "fairness" inquiry.[321] Rave considers *state* legislators to be interested when drawing federal districts designed to benefit *federal* legislators.[322] Rave acknowledges that, under Madisonian principles, state legislators and federal legislators are independent, with different interests and responsive to different constituencies.[323] Rave, however, contends that state legislators are subject to the control of national political parties, which may choose to support a rival

318. *See* Chemerinsky, *supra* note 5 ("[W]here the political process is unlikely to work, . . . judicial enforcement of the Constitution is most important.").

319. *See* Kim, *supra* note 25, at 893–908; Rave, *supra* note 24, at 708–23.

320. *See* DEL. CODE ANN. tit. 8, § 144 (West 2020).

321. *See* Rave, *supra* note 24, at 671 ("[P]olitical representatives should be treated as fiduciaries, subject to a duty of loyalty, which they breach when they manipulate election laws to their own advantage. Courts can thus check incumbent self-dealing in gerrymandering by taking a cue from corporate law strategies for getting around their institutional incompetence.").

322. *Id*. at 686 ("In a world with national political parties, members of Congress have an interest in state elections and state legislators have an interest in congressional elections.").

323. *Id*. at 685.

candidate in the primary, if the incumbent strays.[324] When a corporate director is beholden to another person, courts are concerned that the director will not exercise discretion to further the interests of the corporation and its shareholders.[325] Rave convincingly argues that state legislators may be beholden to national political parties; however, he is less convincing that any such pressure impacts the state legislators' exercise of discretion when drawing federal districts,[326] because, under corporate law, courts are not troubled by directors, who act to further the best interests of the corporation and its shareholders, but along the way further their own interests.[327] Rave does not persuade the reader that state legislators would behave differently with respect to establishing federal districts due to the theoretical pressures exerted by the national political parties, than those state legislators would have done in the absence of any such pressure.[328] State legislators of a political party generally believe that the country and their constituents would be better served if members of their party represented those newly-crafted federal districts.[329] So, by strategically drawing *federal* districts, *state* legislators would be fulfilling their duty of loyalty by furthering the interests of their constituents and the country, not violating their duty of loyalty.

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324. *Id*. at 686.

325. *See* Beam v. Stewart, 845 A.2d 1040, 1049 (Del. 2004) (en banc).

326. Rave, *supra* note 24, at 686 ("*If* individual state legislators do not want to go along with a congressional gerrymander . . . ." (emphasis added)).

327. *See* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 721–22 (Del. 1971) (applying the "fairness" inquiry when the fiduciary benefits to the detriment of the beneficiary, but "fairness" is not applicable when directors take action that benefits all shareholders, including themselves); *see also* Pildes, *supra* note 22, at 135 (discussing the problem of causation).

328. *See* Rave, *supra* note 24, at 686; *see also* Pildes, *supra* note 22, at 135 ("Corruption might have meant that legislators had shifted their votes in response to contributions, or that the legislative agenda had been altered as a result of such contributions, or that the judgment of policymakers had been altered in some other way.").

329. *See* Jonathan Rauch, *The Gerrymandering Ruling Was Bad, but the Alternatives Were Worse*, ATLANTIC (June 28, 2019), https://perma.cc/8RXK-R4HT ("'I think electing Republicans is better than electing Democrats,' David Lewis, a Republican member of the North Carolina general assembly, told a redistricting committee. 'So I drew this map to help foster what I think is better for the country.'").

Though courts should review partisan gerrymandering with skepticism, the "fairness" inquiry may not be the appropriate corporate law analog. Nor is the "fairness" inquiry the appropriate corporate law analog for the judicial review of a strategic legislative shift of a federal election.

Unlike partisan gerrymandering by *state* legislators that impacts other individuals (*federal* legislators), this Article addresses action by federal legislators—altering the date of a federal election—that impacts themselves. So, on a first-pass analysis, the duty of loyalty is more directly implicated, but ultimately may not justify judicial intrusion under the "fairness" inquiry.[330] Recall that, under corporate law, a court undertakes the self-interested inquiry on a director-by-director basis.[331] If one undertakes the self-interested inquiry on a federal-legislator-by-federal-legislator basis, many—likely a majority of federal legislators—will not be self-interested. Some federal legislators do not intend to run for re-election,[332] so their self-interest is not apparent by an alteration of the date of the next election. Because senators serve six-year terms, most senators will not be up for re-election at the next federal election,[333] so their self-interest is not apparent. And many of those members of the Senate who are up for re-election will not face meaningful challenge at that election.[334] So, their re-election chances are not impacted by whether the election occurs before early November or after early November, and thus their self-interest is not apparent. The same holds true for the many members of the House who will not face meaningful

330. *See infra* Part 0.

331. *See Beam*, 845 A.2d at 1049 ("The independence inquiry requires us to determine whether there is a reasonable doubt that *any one of these three directors* is capable of objectively making [the pertinent] business decision . . . ." (emphasis added)).

332. *See, e.g.*, Sheryl Gay Stolberg, *Jeff Flake, a Fierce Trump Critic, Will Not Seek Re-election for Senate*, N.Y. TIMES (Oct. 24, 2017), https://perma.cc/R6DW-XDMB.

333. *See* U.S. CONST. art. I, § 3, cl. 2.

334. *See* Rotenberg, *supra* note 175 ("[A]lmost two-thirds of Senate contests this cycle start as 'safe' for the incumbent party and are likely to remain that way.").

challenge in the next election.[335] A court would presume that federal legislators are disinterested, and approval by disinterested legislators would cleanse any self-interested action.[336] Whether a challenger could overcome those hurdles is in doubt.[337]

In the corporate setting, courts acknowledge the presence of self-interest of directors seeking re-election.[338] Nonetheless, courts will not presume that a director's interest in seeking re-election is not in furtherance of the best interests of the corporation and its shareholders.[339] A desire to continue serving with like-minded colleagues is not a disabling self-interest that triggers judicial scrutiny under the "fairness" inquiry.[340] So, even though courts may be willing to intervene when incumbent directors manipulate election mechanics and may reference a violation of the duty of loyalty, courts do not employ the

335. *See* Bedard, *supra* note 175 ("The first analysis of the upcoming 2020 congressional election shows that already nearly 8 in 10 members are in "safe districts . . . .").

336. *Cf.* DEL. CODE ANN. tit. 8, § 144 (West 2020) (indicating that "affirmative votes of a majority of the disinterested directors, even though the disinterested directors [are] less than a quorum" cleanses self-interested action by one or more board members).

337. *Cf.* Beam v. Stewart, 845 A.2d 1040, 1050 (Del. 2004) (en banc) ("[T]he plaintiff has the burden to plead particularized facts that create a reasonable doubt sufficient to rebut the presumption that . . . [any of the three directors were] independent.").

338. *See* Aprahamian v. HBO & Co., 531 A.2d 1204, 1206–07 (Del. Ch. 1987) ("A candidate for office, whether as an elected official or as a director of a corporation, is likely to prefer to be elected rather than defeated. He therefore has a personal interest in the outcome of the election even if the interest is not financial . . . .").

339. *See* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 658 (Del. Ch. 1988) ("[The board] acted . . . in a good faith effort to protect its incumbency, not selfishly . . . ."); Wis. Inv. Bd. v. Peerless Sys. Corp., No. 17637, 2000 WL 1805376, at *19 (Del. Ch. Dec. 4, 2000) (finding "no clear conflict of interest between the directors and the shareholders").

340. *See Aprahamian*, 531 A.2d at 1206 ("[I]ncumbent directors . . . seeking reelection . . . are obviously interested in the outcome of the election . . . . In terming these directors 'interested' I am not ascribing any improprieties to them.").

"fairness" inquiry.[341] Rather than applying the "fairness" inquiry to any review of legislative action to shift an election, courts should consider applying the inquiry introduced in Part IV.A.4, which will be examined in Part V.

3. Duty of Good Faith

Federal legislators are required to take an oath to support the Constitution and that oath includes a good faith requirement.[342] Under corporate law, a violation of good faith requires (1) intentional illegality, (2) intent to harm, or (3) a conscious disregard of a known duty to act.[343] Extending this analysis to federal legislators, there currently is no clearly-defined legal obligation that bars legislators from strategically altering the date of a federal election.[344] Second, by strategically altering the date of an election, legislators arguably intend to disenfranchise certain voters or at least lessen the effect of their vote.[345] More accurately, however, the intent of the incumbents—most of whom are not up for re-election or do not face meaningful challenge—may be to perpetuate their vision and policies, which, in their good faith beliefs, operate for the betterment of the country and the

341. *See Blasius*, 564 A.2d at 660–63 (requiring that directors establish "compelling justification" when acting with the "primary purpose of thwarting the exercise of a shareholder vote"); Stahl v. Apple Bancorp, Inc., 579 A.2d 1115, 1121 (Del. Ch. 1990) ("Fiduciaries who are subjectively operating selflessly might be pursuing a purpose that a court will rule is inequitable.").

342. *See* U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives . . . shall be bound by Oath or Affirmation, to support this Constitution."); 5 U.S.C. § 3331 ("I will . . . faith[fully support and defend the Constitution]; and . . . faithfully discharge the duties of the office.").

343. *See In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 64–67 (Del. 2006) (en banc); Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) (en banc). Such claims generally are not fruitful for plaintiff-shareholders. *See id.* at 372 (stating that such a claim is "the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment").

344. *See* Alexander Burns, *Trump Attacks an Election He Is at Risk of Losing*, N.Y. TIMES (July 30, 2020), https://perma.cc/HA64-SHX6 (reporting that the power to move the date of the election rests with Congress and that the "timing of federal elections has been fixed since the 19th century").

345. *See infra* Part 0.

population.[346] (Mixed motives may emerge, but it is the primary purpose of the legislation, not legislators' primary motive, that would drive judicial review.)[347] Third, with respect to conscious disregard of a known duty to act, the allegation, in the corporate setting, typically emerges in cases where the board fails to monitor employees, who commit illegal acts.[348] The corporate analogy regarding monitoring does not apply meaningfully to legislators strategically altering the date of a federal election. Nonetheless, conscious disregard of a known duty to act may apply to other acts by legislators,[349] which are beyond the scope of this Article.

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346. *See supra* note 329 and accompanying text.

347. *See* Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 525 (2016) (arguing that "courts should never invalidate legislation solely because the legislature acted with forbidden intentions"); *id*. at 528 (noting that intent may be considered, "for example, in cases in which an absolute majority of the legislature acts with forbidden intent"); Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 846 ("[P]roof of bad [legislative] intent should be neither necessary nor sufficient for an election law challenge to succeed, though it should be relevant in getting courts to take a hard look at election laws. Rather . . . courts should primarily examine the *effect* of election laws . . . ."); *see also* Davis v. Bandemer, 478 U.S. 109, 132 (1986) (plurality opinion) (addressing the effect of legislation); Rucho v. Common Cause, 139 S. Ct. 2484, 2514 (2019) (Kagan, J., dissenting) ("[T]he districters have set out to reduce the weight of certain citizens' votes, and thereby deprive them of their capacity to 'full[y] and effective[ly] participat[e] in the political process[].'" (alterations in original)); Vieth v. Jubelirer, 541 U.S. 267, 318 (2004) (Stevens, J., dissenting) ("[W]hen partisanship is the legislature's sole motivation—when any pretense of neutrality is forsaken unabashedly . . . —the governing body cannot be said to have acted impartially."); *id.* at 350 (Souter, J., dissenting) ("I would, however, treat any showing of intent in a major-party case as too equivocal to count unless the entire legislature were controlled by the governor's party (or the dominant legislative party were vetoproof)."); Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1161 (2018) ("[M]otives inquiries are easier to administer than commonly believed. Most motive standards do not require the factfinder to excavate and weigh all motives, nor to predict counterfactual results if one motive or the other were subtracted[,] . . . because most motive standards focus on only one motive as directly relevant."); *id*. at 1134–43 (noting the seeming simplicity of intent inquiries: any, but for, primary, sole).

348. *See Stone*, 911 A.2d at 364–65; *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 960 (Del. Ch. 1996).

349. *See* Ian Lovett, *Oregon Police Seek GOP Senators*, WALL ST. J., June 21, 2019, at A4

4. Duty Barring Action with Inequitable Purpose

In certain respects, the duties of care, loyalty, and good faith are broad, free-ranging, and highly contextual.[350] While judges, lawyers, and professors routinely resort to analogies as intuitive and persuasive, analogies may be overbroad, and may lack firm foundational similarities.[351] This section strengthens

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> [T]he entire GOP Senate delegation . . . left the state and went into hiding . . . in an attempt to stop a cap-and-trade bill to address climate change from passing. . . . [T]he Senate cannot achieve a quorum without at least some of the Republicans and therefore cannot vote on the climate legislation without them.

Nick Madigan, *On the Lam, Texas Democrats Rough It*, N.Y. TIMES (Aug. 1, 2003), https://perma.cc/DJ8W-THZ4 (reporting that eleven Democratic state senators fled Texas to deny their Republican counterparts a quorum in an attempt to prevent a redistricting effort); Bob Bauer, *Can the Senate Decline to Try an Impeachment Case?*, LAWFARE (Jan. 21, 2019, 11:10 AM), https://perma.cc/7DKD-RCKK

> [T]he Senate does have this duty to try any impeachment voted by the House. . . . But such a duty is not the same as a clear-cut constitutional obligation expressed in the text, and, depending on events and their political impacts, the Republicans may be motivated to exploit the difference. . . . No one disputes that there is no judicial remedy or other means of enforcing the constitutional duty . . . .

Compare Carl Hulse, *That Supreme Court Stonewall May Not Crumble Anytime Soon*, N.Y. TIMES (Nov. 3, 2016), https://perma.cc/554H-P9WX

> The idea of denying Mrs. Clinton a court pick has been quietly simmering in conservative circles as Republicans held firm in their refusal to take up the president's nomination of Merrick B. Garland before the election. . . . Senator Richard M. Burr of North Carolina . . . promis[ed] to "do everything I can do to make sure four years from now, we still got an opening on the Supreme Court."

with Brian Naylor, *McConnell Would Fill Potential Supreme Court Vacancy in 2020, Reversal of 2015 Stance*, NAT'L PUB. RADIO (May 29, 2019, 10:50 AM), https://perma.cc/VMX6-XUCE (reporting a reversal by Senate Majority Leader Mitch McConnell, a Republican, who refused to allow the Senate to consider a Supreme Court nominee by a Democratic President during the 2016 presidential campaign, but who would allow the Senate to consider and confirm a Republican nominee during the 2020 presidential campaign).

350. *See supra* Part 0.

351. *See* Kim, *supra* note 25, at 853, 892–93 (noting that zebras may be viewed as analogous to barber poles because both are striped); Richard A. Posner, *Reasoning by Analogy*, 91 CORNELL L REV. 761, 765 (2006) ("One

the director-legislator analogy by examining foundational similarities.

A court will defer to a rational decision by a corporation's board of directors, when a shareholder challenges the decision, in part, because judges—trained in law—are not well-suited to second-guess policy decisions by directors, and because the shareholders elected those directors, and soon those shareholders can elect new directors.[352] If, however, the directors impede the shareholders' ability to vote, then a critical check on director discretion goes wanting, and courts act to preserve the shareholders' statutory authority to vote.[353] Similarly, courts defer to rational decisions by legislators, in part, because judges—trained in law—are not well-suited to second-guess policy decisions by legislators, and because the voters elected those legislators, and soon those voters can elect new legislators.[354] Akin to the foundational importance of director elections to corporate governance, "[e]lection day . . . is the foundation of democratic governance."[355] "Voters . . . choose their representatives, not the other way around."[356] Legislators,

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always requires a general understanding of some sort in order to determine relevant similarities. In a legal case it is an understanding of rules, principles, doctrines, and policies. It is they that do the work in reasoning by analogy."); Ponet, Leib & Serota, *supra* note 25, at 92–93 (critiquing another scholar's work for making "too-direct" a comparison of fiduciary concepts to election law).

352. *See* DEL. CODE ANN. tit. 8, § 141(d) (West 2020) (contemplating that, by default, each director serves a one-year term); *id.* § 141(a) (allocating decision-making authority to the board of directors, not the court); Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000) (en banc) ("Irrationality is the outer limit of the business judgment rule.").

353. MM Cos. v. Liquid Audio, Inc., 813 A.2d 1118, 1130–1131 (Del. 2003) (requiring that directors establish "compelling justification" when "the primary purpose of the board's action is to interfere with" the shareholders' right to vote).

354. *See* U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XVII, cl. 1; *id.* amend. XXIV, § 1.

355. Rucho v. Common Cause, 139 S. Ct. 2484, 2512 (2019) (Kagan, J., dissenting).

356. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2677 (2015) (internal quotation marks omitted) (citing Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 781 (2005)); *see* THE FEDERALIST NO. 37, at 199 (James Madison) (ABA Classics ed., 2009)

through manipulation of election mechanics, cannot be permitted to "rig[] elections," otherwise democracy is imperiled.[357] "[A]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[358]

By strategically altering the date of a federal election, incumbent legislators might act to ensure their re-election.[359] The Founders—both Federalists and Anti-Federalists—acknowledged this problem.[360] It was argued that the legislature ought not be capable of "alter[ing] itself by modifying the elections of its own members."[361] Otherwise, the "great law of self-preservation will prevail."[362] In *The Federalist No. 60*, Hamilton acknowledged that incumbent legislators, by establishing the time of an election, might perpetuate their rule, and, as a remedy, he envisioned—what today seems an unrealistic solution—"an immediate revolt of the great body of the people."[363] Akin to limitations on directors under corporate law, legislators should not be permitted to deprive voters of their capacity for "full and effective participation in the political process."[364] Part V will argue for extending the "primary purpose-compelling justification" inquiry, which was introduced

("[R]epublican liberty . . . [requires] that those intrusted [sic] with [power] should be kept in dependence on the people . . . ." (citation omitted)).

357. Vieth v. Jubelirer, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring) (internal quotations omitted).

358. Reynolds v. Sims, 377 U.S. 533, 562 (1964).

359. *See Rucho*, 139 S. Ct. at 2495.

360. *See* 2 THE FOUNDERS' CONSTITUTION 249 (Philip B. Kurland & Ralph Lerner eds., 1987).

361. *Id.*

362. *Id.* at 257 (quoting Charles Turner, Argument and Speech, *in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 1, 30 (Jonathan Elliot ed., 1836)); *see* 3 ELLIOT, *supra*, at 9 ("Congress might cause the election[] to be held . . . at so inconvenient a time . . . as to give them the most undue influence over the choice, nay, even to prevent the elections from being held at all—in order to perpetuate themselves [in office]." (citation omitted)).

363. THE FEDERALIST NO. 60, at 345 (Alexander Hamilton) (ABA Classics ed., 2009).

364. *Reynolds*, 377 U.S. at 565; *see* Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined.").

in Part IV.A.4, from the corporate law setting to the legislative setting.

C. Distinguishing Corporate Fiduciaries from Legislative Fiduciaries

Part III.C noted several distinctions between corporate democracy and political democracy, and those distinctions will not be repeated here. Scholars have emphasized other important distinctions. While acknowledging the historical evidence and the conceptual appeal of treating legislators as fiduciaries, Seth Davis criticizes the extension of fiduciary duties from the private realm—say, corporate law—to the public realm and to legislators.[365] Assuming that legislators are fiduciaries and subject to the classic duties, Davis finds no historical support that any breach of those duties by legislators was intended to be privately enforceable.[366] Moreover, he asserts that any enforcement mechanisms were enshrined in the Constitution—e.g., ousting via impeachment or by the electorate—not generally bestowed on the courts.[367] And to the extent that the judiciary has a role, Davis envisions its role would be limited to invalidating "repugnant" laws, which review is not grounded upon classic fiduciary duties.[368] As mentioned above, if legislation shifted the date of any federal election, such legislation would have majority support in both chambers, rendering impeachment an impossibility.[369] And, if the shift in the election date ensured the re-election of the incumbents, then the ballot box proves an ineffective check, leaving the judiciary, as a co-equal branch, to check mischief.[370]

V. Primary Purpose & Compelling Justification

In the corporate law setting, the plaintiff-shareholder "rarely" establishes that the primary purpose of the directors'

365. *See* Davis, *supra* note 80, at 1171–78.
366. *See id.* at 1171–73.
367. *See id.* at 1173, 1201.
368. *See id.* at 1176.
369. *See supra* Part 0.
370. *See supra* Part IV.B. 2.

action was to impede the shareholders' franchise.[371] Part V.A describes several of those rare situations in which courts determined that the plaintiff-shareholder did establish such a primary purpose, which flipped the burden to the directors to establish compelling justification, a difficult, but not impossible, onus.[372] Part V.B presents concerns of legislator entrenchment articulated by the U.S. Supreme Court in scenarios that map onto the corporate law scenarios of Part V.A. It then discusses the U.S. Supreme Court's analysis of such scenarios, as well as the resemblance of that analysis to the analysis of courts presented in Part V.A.

A. Corporate Elections

When directors authorize an act with a primary purpose of impeding the shareholders' franchise, courts invalidate the act unless the directors establish compelling justification for the act.[373] Altering the date of a vote by shareholders commonly invites court scrutiny of the directors' action.[374] Even though the directors' intent—to the extent that a group of individuals may act with an intent[375]—is not specifically at issue,[376] directors may defend against the plaintiff-shareholder's allegations by referencing legitimate reasons for taking the act.[377] Directors

371. *See* MM Cos. v. Liquid Audio, Inc., 813 A.2d 1118, 1130 (Del. 2003).

372. *See* Mercier v. Inter-Tel (Del.), Inc., 929 A.2d 786, 819 (Del. Ch. 2007).

373. *See Liquid Audio*, 813 A.2d at 1132.

374. This Article focuses on common law, but any advance or delay of an election must comply with pertinent statutory requirements. *See, e.g.*, DEL. CODE ANN. tit. 8, § 213(a) (West 2020) (providing that record date for shareholder's entitlement to vote at a meeting "shall not be more than 60 nor less than 10 days before the date of such meeting"); *id.* § 222(b) (requiring notice of meeting "not less than 10 nor more than 60 days before the date of the meeting to each stockholder entitled to vote").

375. *Cf.* Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 254 (1992) ("Individuals have intentions and purpose and motives; collections of individuals do not.").

376. *See* Stahl v. Apple Bancorp, Inc., 579 A.2d 1115, 1121–22 (Del. Ch. 1990) ("[I]nequitable conduct does not necessarily require an evil or selfish motive.").

377. *See* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 655 (Del. Ch. 1988) (concluding that the board expanded its size to impede the shareholders'

may not be forthcoming regarding improper motivations and may downplay any disenfranchising purpose.[378] Thus, a court will focus on the act itself and its effect,[379] as well as circumstances surrounding the directors' decision to alter the date of the shareholders' vote, as illuminating of the primary purpose of the action.[380] Courts have concluded that the primary purpose of director action was to impede the shareholders' franchise when: (1) the dissident has, or apparently has, assembled a majority voting bloc, and the incumbents delay the vote to retain control or to extend their campaign in hopes of swinging votes their way; (2) acceleration of the election would preclude victory by the dissidents or meaningfully hamper their campaign efforts; (3) a delay in the election would invalidate previously solicited proxies by the dissident; and (4) the incumbent directors act to accelerate or delay the meeting in close temporal proximity to the original meeting date.[381]

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franchise, notwithstanding the court's conclusion that the "addition of Mr. Winters, an expert in mining economics, and Mr. Devaney, a financial expert employed by the Company, strengthened the Atlas board and, should anyone ever have reason to review the wisdom of those choices, they would be found to be sensible and prudent").

378. *See id.* at 656 ("It is difficult to consider the timing of the [board's expansion] . . . as simply coincidental with the pressure that [the hostile acquirer] was applying.").

379. *See* Wis. Inv. Bd. v. Peerless Sys. Corp., No. 17637, 2000 WL 1805376, at *11 (Del. Ch. Dec. 4, 2000) ("The question of *purpose* asks for what ultimate ends were the acts committed.").

380. *See Blasius*, 564 A.2d at 655–56 (emphasizing that the board's challenged action occurred immediately after the dissidents' attempt to gain control of the corporation).

381. Other actions by directors—not directly related to shifting the date of an election—may trigger "primary purpose-compelling justification" judicial scrutiny. For example, incumbent directors facing defeat at the polls may issue outcome-determinative voting shares to parties that support them, triggering heightened judicial scrutiny. *See* Packer v. Yampol, No. 8432, 1986 WL 4748, at *1, *9, *15 (Del. Ch. Apr. 18, 1986) (enjoining, during a proxy contest, incumbent directors' issuance of shares (1) to parties that supported the incumbent directors, (2) that constituted 44 percent of the total vote, and (3) at a price below fair market value, when that issuance delivered a "severe, if not fatal, wound upon the [dissidents'] proxy solicitation," and that issuance had the "primary purpose . . . to obstruct [dissidents'] ability to wage a

1. Delay to Retain Control or Extend Campaign

In political elections, the electorate may vote by absentee ballot,[382] without visiting a voting booth on election day; similarly, shareholders may vote by proxy, without attending the shareholders' meeting.[383] To ensure a quorum and in hopes of securing support for their recommendations, directors solicit proxies in advance of a vote by shareholders.[384] During any contested campaign, incumbent directors will have a sense of whether shareholders support their candidacy, even though independent third parties may officially tabulate the votes.[385] Fearing defeat, incumbent directors may delay the meeting to extend their control and to extend their campaign, inviting court scrutiny upon a shareholder's challenge.

In *Aprahamian v. HBO & Co.*,[386] the board, in February 1987, announced that the annual meeting—at which shareholders would elect directors—would be convened on April

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meaningful proxy contest in order to maintain themselves in control" (citation omitted)); Can. S. Oils, Ltd. v. Manabi Expl. Co., 96 A.2d 810, 813 (Del. Ch. 1953) ("When the undisputed facts are viewed cumulatively I find it reasonably to infer that the primary purpose behind the sale of these shares was to deprive plaintiff of the majority voting control."); Condec Corp. v. Lunkenheimer Co., 230 A.2d 769, 775 (Del. Ch. 1967)

> In view of the haste with which the [directors issued] . . . 75,000 new shares, when a substantially smaller number of shares would have served the[ir claimed] purpose . . . , I have reached the conclusion that the primary purpose of the issuance of such shares was to prevent control of [the corporation] from passing to [the dissident]. (citation omitted).

382. *See* CAL. ELEC. CODE § 3001 (West 2020); N.Y. ELEC. LAW § 8-400 (McKinney 2020).

383. *See* DEL. CODE ANN. tit. 8, § 212 (West 2020) (authorizing proxies).

384. *See* 15 U.S.C. § 78n (regulating the solicitation of proxies); DEL. CODE ANN. tit. 8, § 212 (authorizing proxies).

385. *See* DEL. CODE ANN. tit. 8, § 231; *see also* Aprahamanian v. HBO & Co., 531 A.2d 1204, 1205 (Del. Ch. 1987) (reporting that the proxy solicitor updated incumbent directors of the ongoing vote tally); ExxonMobil Corp., Proxy Statement (Schedule 14A), at 5 (Apr. 12, 2018) ("Independent inspectors count the votes."). While one's "individual vote [may be] kept confidential" from the incumbents, no confidentiality is assured regarding an aggregate assessment of the ongoing tally. *Id.*

386. 531 A.2d 1204 (Del. Ch. 1987).

30, 1987.[387] In late March 1987, dissident shareholders proposed for election a rival slate of nominees, who would explore a sale of the corporation, which sale had been opposed by the incumbent directors.[388] In late April, the incumbent directors reversed their position and agreed to explore the possibility of a sale of the corporation, but that reversal did not yield adequate support from shareholders to assure their re-election.[389] So, on the eve of the election, with their likely defeat at the polls imminent, the incumbent directors postponed the annual meeting by almost five months.[390] When the postponement was challenged, the court concluded that the shareholders established that the "election machinery . . . had been manipulated," resulting in the incumbent directors bearing the "burden of persuasion to justify their actions."[391] While accepting the incumbent directors' argument that shareholders should be informed when they vote, the court ultimately rejected their argument that disclosure justified the delayed vote because the board had ample time to educate shareholders about the rival slate of nominees, and because the incumbent directors' new plan of sale was substantially similar to the dissidents' plan of sale, such that additional time for disclosure was not warranted.[392] The court preliminarily enjoined the directors' attempt to delay the vote.[393]

In *Lerman v. Diagnostic Data, Inc.*,[394] the incumbent directors learned, in late March, that their re-election would be challenged by the nominees of a dissident shareholder.[395] The

387. *Id.* at 1205.

388. *Id.*

389. *Id.*

390. *Id.*

391. *Id.* at 1207.

392. *See id.* ("If the incumbent directors were truly sincere in their desire to make sure that the stockholders are fully informed before voting, they would . . . not have waited until the evening before the meeting date.").

393. *Id.* at 1209; *see* MFC Bancorp v. Equidyne Corp., 844 A.2d 1015, 1022 (Del. Ch. 2003) (ordering incumbent directors to convene a meeting of shareholders, when they inequitably delayed a meeting in the face of a contested election).

394. 421 A.2d 906 (Del. Ch. 1980).

395. *Id.* at 909.

corporate bylaws provided for an annual meeting in mid-June.[396] In mid-April, the incumbent directors amended the bylaws to grant themselves discretion to establish the date of the annual meeting and to require any dissident shareholder that would be proposing nominees for election to provide specified information seventy days before the annual meeting.[397] On August 1, 1980, the board fixed October 3, 1980 as the date of the annual meeting of shareholders; that is, the board established the date of the meeting sixty-three days before it was to be held, precluding the dissident from complying with the seventy-day notice requirement to initiate a contested election.[398] The court invalidated the contested bylaw amendment.[399] Rejecting the incumbent directors' claimed test of "reasonableness" and finding irrelevant their claim that the bylaw was not "specifically adopted to thwart the intentions of the challenger [as evidenced by] the time and assistance [they] afforded [the dissident],"[400] the court concluded that the directors' actions, "whether designedly inequitable or not, . . . had a terminal effect on the aspirations" of the dissident shareholder.[401]

In *Danaher Corp. v. Chicago Pneumatic Tool Co.*,[402] dissident shareholders began accumulating shares of a corporation, which originally was to have an annual meeting of shareholders on May 13, 1986.[403] After the dissident shareholders acquired a majority of outstanding shares and announced their intention to nominate and elect a rival slate of candidates for the open board seats, the incumbent directors cancelled the shareholder meeting scheduled for May.[404] The board rescheduled the election for June, but the board

396. *Id.*

397. *Id.*

398. *Id.* at 911.

399. *Id.* at 914.

400. *Id.* at 913.

401. *Id.* at 912 (citation omitted).

402. No. 86 Civ. 3499, 1986 WL 7001 (S.D.N.Y. June 19, 1986).

403. *Id.* at *1–2 (interpreting New Jersey corporate law).

404. *Id.* at *2. Because the corporation had a staggered board of directors, only three of eight board seats were up for election. *Id.*

revealed—during litigation—that it may postpone the election of directors again, perhaps indefinitely.[405] Under New Jersey corporate law, courts apply "special scrutiny" when directors "manipulate the timing of the shareholders' annual meeting to perpetuate [their] reign of control" by "restrict[ing] the ability of shareholders to replace them."[406] The court preliminarily enjoined the incumbent directors from postponing the annual meeting of shareholders from the rescheduled date that they had already noticed.[407] Delaware courts similarly have struck down incumbent directors' actions to delay the effect of the will of the majority of shares, but in the context of shareholders taking action outside of a duly-convened meeting.[408]

Judicial skepticism extends beyond delayed director elections to other delayed votes. In *State of Wisconsin Investment Board v. Peerless Systems Corp.*,[409] the board of directors convened an annual meeting of shareholders, and those directors were re-elected, but a board-sponsored proposal would have been defeated by shareholders.[410] Rather than accept defeat, the board adjourned the meeting without closing the polls on that proposal.[411] Thirty days later, the board reconvened the meeting and secured slim passage for its proposal.[412] The board delayed the vote to overcome the shareholders' defeat of the proposal, not to increase low voter participation, otherwise, the board would have alerted

405. *Id.* at *3, *12.

406. *Id.* at *13.

407. *See id.* at *12.

408. *See* DEL. CODE ANN. tit. 8, § 228 (West 2020) (empowering shareholders to act by written consent outside of a duly-convened meeting, without prior notice, and without a formal vote); Allen v. Prime Comput., Inc., 540 A.2d 417, 420 (Del. 1988) (finding that a "bylaw whose real purpose is delay of shareholder action is per se unreasonable"); Datapoint Corp. v. Plaza Sec. Co., 496 A.2d 1031, 1036 (Del. 1985) (striking down a bylaw adopted by defendant-directors that arbitrarily delayed shareholder action to "provide the incumbent board with time to seek to defeat the shareholder action by management's solicitation of its own proxies, or revocations of outstanding shareholder consents").

409. No. 17637, 2000 WL 1805376 (Del. Ch. Dec. 4, 2000).

410. *Id.* at *3–4.

411. *Id.* at *4.

412. *Id.* at *5–6.

shareholders that the polls remained open and encouraged their participation in the vote, which did not occur.[413] The directors effectively conceded that, if there had been enough votes to secure passage of the proposal at the regularly-scheduled meeting, then there would have been no adjournment of that meeting.[414] While not disputing the directors' good faith nor their disinterestedness, the court concluded that the board acted with a primary purpose to impede the shareholders' franchise and denied the directors' motion for summary judgment.[415] The court expressed doubt that the board could establish compelling justification for its actions but allowed it the opportunity to do so.[416]

An oral ruling by a federal district court reached a similar conclusion, applying similar logic, regarding a contested acquisition.[417] In *Norfolk Southern Corp. v. Conrail, Inc.*,[418] the directors of Conrail solicited shareholders to approve the corporation's proposed sale to CSX.[419] However, Conrail's directors notified its shareholders that the meeting would be convened only if there was sufficient support to approve the transaction with CSX, otherwise the meeting would be postponed or cancelled.[420] The judge orally ruled that Conrail's directors could not "disenfranchise the shareholders by putting off a stockholder meeting until [they have] enough support for a merger with CSX," otherwise the meeting and the vote would amount to a "sham."[421]

413. *Id.* at *10–12.

414. *Id.* at *11.

415. *See id.* at *11–12.

416. *See id.* at *19.

417. *See* Frank Reynolds et al., *Judge Says Conrail Cannot Delay Merger Vote Until It Is Sure that It Will Win*, 1997 ANDREWS DEL. CORP. LITIG. REP. 19611, 19624.

418. No. 96-7167, 1997 WL 33463657 (E.D. Pa. Jan. 9, 1997).

419. *See* Reynolds et al., *supra* note 417, at 19624.

420. *Id.*

421. *Id.* at 19625.

2. Acceleration that Precludes or Hampers the Dissident's Campaign

Usually, corporate elections to fill director vacancies are not contested, as there is usually only one nominee per vacancy.[422] When incumbent directors face a contested election, directors may accelerate the date of the vote, which may preclude dissidents from attaining any seats on the board or which may limit their opportunity to campaign and significantly hamper their success in attaining any seats on the board. Courts view such actions with skepticism.

In *Schnell v. Chris-Craft Industries, Inc.*,[423] the corporation's bylaws established an annual meeting at which shareholders would elect directors for the second Tuesday in January.[424] In mid-October, almost immediately after the incumbent directors learned that dissident shareholders would nominate a rival slate of candidates for election to the board, the incumbent directors amended the bylaws to accelerate the meeting by approximately one month, from early January to early December.[425] The Chancery Court concluded that the incumbent directors "disingenuously resisted the production of a list of its stockholders," which was necessary for the dissidents' campaign, and that the incumbent directors accelerated the meeting "for the purpose of cutting down on the amount of time which would otherwise have been available to [dissidents] for the waging of a proxy battle."[426] The Delaware Supreme Court emphasized that dissidents would gear the timing of their election campaign to the date set forth in the

422. *See* Peter Dodd & Jerold B. Warner, *On Corporate Governance: A Study of Proxy Contests*, 11 J. FIN. ECON. 401, 408 (1983) (identifying only ninety-six proxy contests over a sixteen-year period, or an average of six proxy contests per year); Facebook, Inc., Preliminary Proxy Statement (Schedule 14A), at 3 (Apr. 27, 2016) (listing eight nominees for eight vacancies).

423. 285 A.2d 430 (Del. Ch.), *rev'd*, 285 A.2d 437 (Del. 1971).

424. *Id.* at 431–32.

425. *See id.* at 431–32, 434.

426. *Id.* at 434; *see* DEL. CODE ANN. tit. 8, § 219 (West 2020) (requiring a corporation to prepare a list of all stockholders entitled to vote at least ten days before a meeting to, among other things, allow the dissidents to compete for shareholders' votes).

bylaws.[427] Because the incumbent directors accelerated the date of the vote, the dissidents were "given little chance" to unseat the incumbent directors "because of the exigencies of time, including that required to clear material at the SEC, to wage a successful proxy fight."[428] The Delaware Supreme Court struck down the bylaw amendment accelerating the date of the vote because the directors "attempted to utilize the corporate machinery . . . for the purpose of perpetuating [their time] in office . . . and . . . for the purpose of obstructing the legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest."[429] Over time, this inquiry from 1971 evolved to become the "primary purpose-compelling justification" inquiry utilized in Delaware and other jurisdictions.[430]

In *Shoen v. AMERCO*,[431] the District Court of Nevada, interpreting Nevada corporate law, adopted Delaware's "compelling justification" standard if the incumbent directors' action had "the primary purpose of interfering with the effectiveness of a stockholder vote."[432] Akin to the *Schnell* case, the incumbent directors, in early May, amended the bylaws to accelerate the date of the meeting at which shareholders would

427. *See Schnell*, 285 A.2d at 439.

428. *Id.*; *see* 15 U.S.C. § 78n (regulating the solicitation of proxies); 17 C.F.R. § 240.14.a (2020) (same); *Filing Review Process*, U.S. SEC. & EXCH. COMM'N, https://perma.cc/PN66-XYTS (last modified Sept. 27, 2019) (requiring companies to file documents "when they engage in . . . proxy solicitations").

429. *Schnell*, 285 A.2d at 439 (citation omitted); *see* Lenahan v. Nat'l Comput. Analysts Corp., 310 A.2d 661, 664 (Del. Ch. 1973) (declining to enjoin election on claim that dissident lacked sufficient time to solicit proxies, where notice of meeting complied with bylaws and dissident belatedly launched proxy contest after being dropped from incumbents' slate of nominees shortly before the annual meeting).

430. MM Cos. v. Liquid Audio, Inc., 813 A.2d 1118, 1131 (Del. 2003) ("Accordingly, the incumbent board of directors had the burden of demonstrating a compelling justification for that action to withstand enhanced judicial scrutiny . . . ." (citation omitted)); Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988) (assessing whether a board of directors had a compelling reason to "validly act for the principal purpose of preventing the shareholders from electing a majority of new directors"), *vacated by settlement*, No. CV-N-94-0475, 1995 WL 936692 (D. Nev. Feb. 10, 1995).

431. 885 F. Supp. 1332 (D. Nev. 1994).

432. *Id.* at 1341 (quoting *Blasius*, 564 A.2d at 659).

elect directors from September 24 to July 21.[433] The incumbent directors controlled the corporation because they controlled the votes of shares subject to a shareholders' agreement, which included transfer restrictions.[434] However, the dissident shareholder was arbitrating the validity of the transfer restrictions included in that agreement.[435] The arbitration was expected to be resolved in early September, before the election of directors, and, if the dissident was successful in the arbitration, then the incumbents likely would have lost control of the corporation.[436] Fearing that the dissident might succeed in the arbitration, the incumbent directors, in late April, caused the corporation to seek an order restraining the arbitration, but the court rejected the request.[437] So, in early May, the incumbent directors amended the bylaws to accelerate the election by two months.[438] By accelerating the date of the election, the incumbent directors "narrowed . . . the range of choices available" to shareholders, due to the dissident's "consequent inability to campaign."[439] While the court suspected that the incumbent directors were aware of the dissident's intent to campaign for board seats at the time of their decision to accelerate the date of the election, the court emphasized the incumbent directors' knowledge of the dissident's attempt to terminate the shareholder agreement, and their own failed attempt to enjoin the arbitration that could result in a loss of the incumbents' control of the corporation.[440] The court rejected as pretextual the incumbents' asserted business justifications for accelerating the date of the election,[441] and concluded that they "advanced [the vote] for the purpose of interfering with the free and fair voting by the shareholders, . . . afraid that they

433. *Id*. at 1341–42.
434. *Id*. at 1336.
435. *Id*. at 1336–37.
436. *See id*. at 1338.
437. *Id*.
438. *Id*.
439. *Id*. at 1342.
440. *Id*. at 1343–44.
441. *Id*. at 1342–44.

would lose an election" if held as originally scheduled.[442] Given that the dissident shareholder carried his burden, the incumbents were required to establish "compelling justification," but they offered "no justification that [was] convincing, let alone compelling."[443]

3. Alteration of the Meeting Date Would Invalidate Proxies

Though some shareholders attend the annual meetings at which directors are elected, shareholders generally do not attend such meetings, and instead, they vote by proxy.[444] Altering the meeting date could invalidate the dissident's previously solicited proxies, which consequently invites court scrutiny.[445]

In *Aprahamian v. HBO & Co.*,[446] discussed in Part V.A.1, the court enjoined the incumbent directors' attempt to further postpone the annual meeting of shareholders by five months.[447] The court expressed concern regarding the impact of delay upon the proxies that had already been solicited by the dissident shareholders.

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442. *Id.* at 1344.

443. *Id.* at 1355; *see id.* (enjoining the meeting to allow solicitation of proxies); *see generally* Airgas, Inc. v. Air Prods. & Chems., Inc., 8 A.3d 1182, 1194–95 (Del. 2010) (en banc) (preventing insurgent from amending the bylaws to accelerate the date of the annual meeting by approximately eight months, where the board served staggered terms and the applicable statute contemplated each election would be separated by about one year).

444. *See* DEL. CODE ANN. tit. 8, § 212 (West 2020); *see also* John D. Stoll, *Are Annual Meetings Still Necessary?*, WALL ST. J. (June 9, 2015, 4:03 PM), https://perma.cc/XGU4-RAQ6 ("GM's annual meeting [of shareholders] took place with less than three dozen attendees . . . . Influential investors aren't showing up.").

445. In 2019, Facebook, Inc. solicited proxies that contemplated the possibility of an adjournment or postponement, but not an advancement of the scheduled meeting date. Facebook, Inc., Definitive Proxy Statement (Schedule 14A), at 74 (Apr. 12, 2019) ("The undersigned hereby appoints David . . . and Colin . . . , as proxy holders . . . to vote . . . [at] the Annual Meeting of Stockholders, to be held *on May 30, 2019 . . . and at any adjournments or postponements thereof*." (emphasis added)).

446. 531 A.2d 1204 (Del. Ch. 1987).

447. *See id.* at 1205.

> [They] expended considerable sums of money on th[e] proxy contest. If the meeting [had been] postponed, arguably, the proxies solicited and returned in good faith by the stockholders w[ould have] become void and a postponement may well [have] defeat[ed] the[ir] efforts . . . and the will of the majority of the stockholders. Irreparable harm may be assumed in such a case.[448]

In *Gintel v. Xtra Corp.*,[449] the court distinguished *Aprahamian* and authorized a brief delay of the annual meeting of shareholders at which directors would be elected.[450] The court emphasized that, while the directors in *Aprahamian* sought a five-month delay, the incumbent directors in *Gintel* sought only a thirty-day delay, and the court approved only a fifteen-day delay.[451] Moreover, in *Aprahamian*, the incumbent directors would have had to set a new "record date" that jeopardized the validity of previously solicited proxies, while in *Gintel*, "the same record date [was] preserved [and] the proxies . . . in hand [remained] effective."[452]

Relatedly, courts are less troubled by a delayed election when the parties have not yet commenced competing for shareholders' votes, as there would be no invalidation of any proxies and any such delay is less likely to have a primary purpose of impeding the shareholders' franchise. In *Stahl v. Apple Bancorp*,[453] the incumbent directors intended to hold the election for directors in mid-May, and they, in mid-March, established the "record date," which, in turn, established the fifty-day timeframe within which the election would be held.[454] In late March, the dissident shareholder alerted the incumbent

448. *Id.* at 1208.

449. No. 11422, 1990 WL 1098684 (Del. Ch. Feb. 27, 1990).

450. *See id.* at *1.

451. *See id.* at *1, *3 (concluding that a fifteen-day delay appropriately balanced the shareholders' interest in reviewing new information while also preventing the incumbent board from negotiating a transaction before the shareholder meeting).

452. *Id.* at *1.

453. 579 A.2d 1115 (Del. Ch. 1990).

454. *Id.* at 1119 (citing DEL. CODE ANN. tit. 8, § 213 (West 2020) ("[T]he board of directors may fix a record date, which . . . shall not be more than 60 nor less than 10 days before the date of such [a] meeting [of shareholders].")).

directors of his intent to nominate a rival slate of candidates and to acquire the company by a tender offer.[455] Soon thereafter, and before specifying the election date, the incumbent directors withdrew the record date, thereby enabling them to hold the election later than originally intended; but, they did so not with a primary purpose to forestall the election of directors—instead they sought additional time to explore an alternative transaction to the one proposed by the dissident.[456] As the primary purpose of the delay was not to impede the shareholders' franchise, the "compelling justification" standard was not implicated.[457] Because no meeting date had been set and because no proxies had been solicited, the delayed meeting did not impair the shareholders' franchise.[458] The court was comforted by the temporal separation between the board's act and the originally intended meeting date.[459]

4. Temporal Proximity Between the Directors' Action and the Meeting Date

Closeness in time between the board's act to alter the date of an election and the election itself invites judicial scrutiny.[460] The DGCL once required that the bylaws establish the date on which directors would be elected and also barred any change of that date within sixty days of the election.[461] The purpose of that former statutory provision was to "insure against a sudden change" of the date of the election.[462] Though the Delaware legislature subsequently eliminated the statutory bar to last

455. *Id.* at 1117.

456. *Id.* at 1119–20, 1122–23.

457. *See id.* at 1124 (applying the intermediate scrutiny of *Unocal* and finding that the incumbent directors' action passed muster).

458. *See id.* at 1123.

459. *Id.* at 1125 ("As one moves closer to a meeting date and closer to the announced conclusion of a contested election, attempts to postpone a meeting would likely require a greater and greater showing of threat in order to justify interfering with the conclusion of an election contest.").

460. *See id.*

461. *See In re* Tonopah United Water Co., 139 A. 762, 764 (Del. Ch. 1927) (citing DEL. CODE ANN. tit. 8, § 1944 (1915)).

462. *See id.*

minute changes of the date of the directors' election,[463] common law may bar such changes.

Closeness in time between an originally scheduled vote and the directors' decision to change the date of the vote, standing alone, may not justify application of the "compelling justification" standard.[464] Nonetheless, such closeness in time will arouse a court's suspicions. "As one moves closer to a meeting date and closer to the announced conclusion of a contested election, attempts to postpone a meeting would likely require a greater and greater showing . . . to justify interfering with the conclusion of an election contest."[465] In *Aprahamian v. HBO & Co.*,[466] the directors waited until the eve of the meeting date before attempting to postpone the election, which attempt was enjoined.[467] While directors and courts favor an informed vote, the court doubted that "the incumbent directors were truly sincere in their desire to make sure that the stockholders [were] fully informed before voting," otherwise the delay could have been announced earlier, as opposed to the eve of the election, when they learned of their likely defeat.[468] Similarly, in *Condec Corp. v. Lunkenheimer Co.*,[469] the court invalidated director action taken in close temporal proximity to the meeting, which action had a disenfranchising effect.[470]

B. Political Elections

When addressing voting rights cases, the U.S. Supreme Court has articulated concerns that mirror certain of those identified and addressed by courts in the corporate law setting: incumbent entrenchment, limitation of voter choice by limitation on dissident candidates and dilution of blocs of voters.

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463. *See* DEL. CODE ANN. tit. 8, § 211 (West 2020).

464. *See* Hubbard v. Hollywood Park Operating Co., No. 11902, 1991 WL 1182611, at *3 (Del. Ch. Jan. 14, 1991) ("[D]elay alone [does not] produc[e] . . . irreparable harm.").

465. Stahl v. Apple Bancorp, Inc., 579 A.2d 1115, 1124–25 (Del. Ch. 1990).

466. 531 A.2d 1204 (Del. Ch. 1987).

467. *Id.* at 1208–09.

468. *Id.* at 1207.

469. 230 A.2d 769 (Del. Ch. 1967).

470. *Id.* at 775.

In addressing those concerns, the justices have resorted to various theories when addressing partisan legislative action that insulates incumbents from challengers, including the association and free speech rights under the First Amendment, the Due Process and the Equal Protection Clauses of the Fourteenth Amendment, and more abstract structural principles of democracy.[471] Moreover, the justices have applied levels of review ranging from strict scrutiny to rational basis.[472] Regarding the Court's analysis in voting rights cases, there is "little sense of an organizing principle."[473] Part V.B.1 addresses those areas that raise judicial concern in both corporate elections and political elections. Part V.B.2 addresses the U.S. Supreme Court's analysis in voting rights cases that present issues of entrenchment and notes similarities between that analysis and the analysis of Delaware courts when addressing allegations regarding entrenching actions by corporate directors.

1. Entrenching Political Incumbents

The U.S. Supreme Court has repeatedly expressed concern that political incumbents may legislate to entrench themselves

471. *See* Vieth v. Jubelirer, 541 U.S. 267, 356–60 (2004) (Breyer, J., dissenting) (applying structural principles of democracy); Norman v. Reed, 502 U.S. 279, 288 & n.8 (1992) (applying rights derived from the First and Fourteenth Amendments, but specifically not applying the Equal Protection Clause); Williams v. Rhodes, 393 U.S. 23, 29 (1968) (applying the Equal Protection Clause).

472. *See* Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184–85 (1979) (requiring that state legislation that imposed signature requirements that varied by office to further "compelling interest" by "least drastic means"); Rosario v. Rockefeller, 410 U.S. 752, 762 (1973) (upholding legislation that delayed enrollment in a political party because it was "tied to a particularized legitimate purpose, and [was] in no sense invidious or arbitrary").

473. Pildes, *supra* note 22, at 39; *see id.* at 97 ("[L]egal academics and many judges . . . are better trained to think in terms of rights, participation, representation, and quality than in terms of material issues of political power.").

or members of their party.[474] While, in the corporate setting, the Delaware courts have addressed the issue of incumbent directors strategically altering the date of an election to entrench themselves in office,[475] the U.S. Supreme Court has not addressed a similar scenario involving federal legislators. The U.S. Supreme Court, however, has addressed other legislative action that entrenches incumbent politicians in scenarios like those addressed by Delaware courts with respect to entrenching action by incumbent corporate directors.[476]

a. Limitation of Voter Choice by Limitation on Dissident Candidates

In the corporate setting, shareholders typically are not presented with alternatives to the corporation's own nominees to fill director vacancies; typically, there is only one nominee per vacancy.[477] So, in the atypical situation, when a dissident shareholder proposes a rival slate of nominees to fill director vacancies, the incumbent directors—who seek re-election—may take action that limits the choices available to shareholders. As discussed in Part V.A, courts review such actions by incumbent directors with skepticism.

In the political setting, citizens generally are presented with two candidates (a Republican and a Democrat), but either or both of those parties may take action to limit the choices available to citizens by limiting the participation of third-party

474. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 791 (2015) (criticizing partisan legislative action that "subordinate[s] adherents of one political party and entrench[es] a rival party in power"); League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 419 (2006) (criticizing partisan legislative action that "entrenches an electoral minority"); Jenness v. Fortson, 403 U.S. 431, 439 (1971) (criticizing partisan legislative action that "freeze[s] the status quo"); Rucho v. Common Cause, 139 S. Ct. 2484, 2509 (2019) (Kagan, J., dissenting) (criticizing partisan legislative action that "enable[s] politicians to entrench themselves in office as against voters' preferences").

475. *See supra* Part 0.

476. *See, e.g.*, *Ill. State Bd. of Elections*, 440 U.S. at 184 (protecting voters' rights by invalidating legislation limiting ballot access).

477. *See* Facebook, Inc., Preliminary Proxy Statement (Schedule 14A), at 3 (Apr. 27, 2016) (listing eight nominees for eight vacancies).

candidates.[478] The Supreme Court has viewed such actions with skepticism.[479] Importantly, the Court has protected voters, who suffered a legal harm when the legislature took action that limited a dissident's access to the ballot as an infringement on voters' rights.[480]

Whether in a corporate election or a political election, the courts have struck down regulations that preclude a dissident candidate from appearing on the ballot. Consider first a corporate election. In *Lerman v. Diagnostic Data, Inc.*,[481] the incumbent directors crafted a bylaw that required any dissident shareholder to notify the corporation "x" number of days before the election of the dissident's nominees, but the incumbent directors announced the date of the election less than "x" days before the election was to occur, entirely precluding the shareholders' consideration of the dissident's nominees.[482] The court refused to enforce the bylaw, which "had a terminal effect on the aspirations" of the dissident shareholder.[483] Turning to the political realm, in *Williams v. Rhodes*,[484] the Supreme Court struck down state election laws that made it "virtually

478. *See* Williams v. Rhodes, 393 U.S. 23, 31 (1968) (criticizing regulations that "give the two old, established parties a decided advantage over any new parties").

479. *See Ill. State Bd. of Elections*, 440 U.S. at 184 ("Restrictions on access to the ballot burden two distinct and fundamental rights, 'the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters . . . to cast their votes effectively.'"); *Williams*, 393 U.S. at 24 (finding that the state failed to show any compelling interest to justify its burden restricting new political parties' placement on the ballot).

480. *See* Anderson v. Celebrezze, 460 U.S. 780, 786 (1983) ("Our primary concern is with the tendency of ballot access restrictions 'to limit the field of candidates from which voters might choose.'" (quoting Bullock v. Carter, 405 U.S. 134, 143 (1972))); *Ill. State Bd. of Elections*, 440 U.S. at 184 ("By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences.").

481. 421 A.2d 906 (Del. Ch. 1980).

482. *Id.* at 911.

483. *Id.* at 912.

484. 393 U.S. 23 (1968).

impossible" for a new political party to have its candidates placed on the ballot.[485]

If incumbent politicians accelerate the date of an election to hamstring the campaign efforts of any challengers, then those incumbent politicians will deprive the voters of information about those challengers, effectively limiting the voters' choices, which should invite judicial scrutiny.[486]

b. Dilution

Under corporate law, incumbent directors cannot dilute the will of a majority of shares by, for example, issuing additional shares.[487] Similarly, "in the original malapportionment cases, . . . judicial review was necessary to ensure majoritarianism."[488] "[W]hen qualified voters elect members of Congress, each vote [is] to be given as much weight as any other vote . . . ."[489] "To say that a vote is worth more in one district than in another . . . run[s] counter to . . . fundamental ideas of democratic government . . . ."[490] The Supreme Court has repeatedly expressed concern about legislative action that

485. *Id.* at 24; *see id.* at 31 (criticizing regulations that "give the two old, established parties a decided advantage over any new parties"). Nonetheless, whether in a corporate election or a political election, the courts have permitted an early notification process by which the incumbents and the voters may learn about new candidates when the process does not meaningfully limit the dissident candidate's appearance on the ballot. *See* Burdick v. Takushi, 504 U.S. 428, 434–35 (1992) (upholding bar on write-in candidates because of the relative ease by which dissidents may appear on ballots); Openwave Sys. Inc. v. Harbinger Cap. Partners Master Fund I, Ltd., 924 A.2d 228, 238–39 (Del. Ch. 2007) (upholding advance notice bylaw).

486. *See* McConnell v. FEC, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in part and dissenting in part) ("The first instinct of power is the retention of power, and under a Constitution that requires periodic elections, that is the best achieved by the suppression of election-time speech.").

487. *See* Condec Corp. v. Lunkenheimer Co., 230 A.2d 769, 776 (Del. Ch. 1967); Can. So. Oils, Ltd. v. Manabi Expl. Co., 96 A.2d 810, 813 (Del. Ch. 1953).

488. Pildes, *supra* note 22, at 72; *see* Rucho v. Common Cause, 139 S. Ct. 2484, 2513–14 (2019) (Kagan, J., dissenting) ("Partisan gerrymandering operates through vote dilution—the devaluation of one citizen's vote as compared to others . . . .").

489. Wesberry v. Sanders, 376 U.S. 1, 7 (1964).

490. *Id.* at 8.

dilutes one's voting power.[491] Legislative action should not render votes that would otherwise constitute a majority as insufficient to carry the election.[492]

Will third-party aggregators of information enable increasingly accurate predictions of election outcomes that approach prescience?[493] Will technological advancements result in the populace voting, perhaps by phone application, prior to the election date?[494] As legislators gain access to likely election outcomes prior to the elections themselves, will those legislators act so as to upset an anticipated, unfavorable outcome?[495] If, fearing defeat as the election drew near,[496] incumbent legislators altered the date of the election and secured their re-election, then the legislative action would effectively dilute the votes that *would have* comprised a majority (and *would have* supported opposition candidates) during the regularly scheduled election. This would enhance the voting power of those voters who *did* support the incumbents and *did* comprise a majority at the time of the rescheduled election. True, the legislation would not directly dilute (or enhance) anyone's vote,

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491. *See id*. at 7 ("The apportionment statute thus [impermissibly] contracts the value of some votes and expands that of others."); Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote . . . ."); Gray v. Sanders, 372 U.S. 368, 379 (1963) ("How . . . can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county?").

492. *See Reynolds*, 377 U.S. at 559 ("[L]egislatures may not . . . give some voters a greater voice in choosing a Congressman than others."); *Gray*, 372 U.S. at 379–81 (striking down a state election scheme where one who secures the most counties secured the vacant seat, even though that candidate may not have secured a majority of votes).

493. *See Rucho*, 139 S. Ct. at 2511–13 (2019) (Kagan, J., dissenting) (discussing the effects of advancements in computer technology on gerrymandering).

494. *Cf. Mobile Passport Control*, U.S. CUSTOMS & BORDER PROT., https://perma.cc/B5DZ-7E5K (last updated June 17, 2020, 3:35 PM) (discussing a phone application that dispenses with the need for paperwork upon re-entry to the United States).

495. *Cf*. Bush v. Gore, 531 U.S. 98, 104–05 (2000) (barring disparate review of voters' intent during recount, due to risk of partisan manipulation controlling the election outcome).

496. *See* Williams v. Rhodes, 393 U.S. 23, 35 (1968) (acknowledging last-minute concerns, especially with respect to absentee voters).

but courts review the effect of legislation, and its effect would be dilutive. Diluting the vote by stuffing the ballot box is illegal.[497] Delaying an election to enable additional favorable votes, though technically permissible, should be met with judicial skepticism, like in the corporate setting.[498]

c. Absentee Voting

In the corporate setting, shareholders may vote by proxy without attending the meeting at which the election is held.[499] Similarly, states commonly allow qualified voters to vote in-person before the date of the election and by absentee ballot without visiting a voting booth on the day of the election.[500] In the corporate setting, courts view with skepticism action by incumbent directors that invalidates shareholders' proxies.[501] If federal legislators accelerate the date of a federal election, but not well in advance of that election, such action could limit the window in which voters could qualify for absentee voting.[502] If federal legislators delay the date of a federal election, but not well in advance of that election, such action *might* invalidate absentee ballots.[503] Courts should scrutinize federal legislative action that invalidates votes that would have been valid but for the legislation action.[504] Federal legislators, however, could likely skirt such dire consequences. The Constitution empowers

497. *See* United States v. Saylor, 322 U.S. 385, 389 (1944); *Ex parte* Siebold, 100 U.S. 371, 378 (1879).

498. *See supra* Part 0.

499. *See* DEL. CODE ANN. tit. 8, § 212(b) (West 2020) (authorizing proxies).

500. *See, e.g.,* CAL. ELEC. CODE §§ 3000–3001, 3017–3018 (West 2020) (addressing vote-by-mail); N.Y. ELEC. LAW §§ 8-400, 8-600 (McKinney 2020) (addressing early in-person voting and vote-by-mail).

501. *See supra* Part 0.

502. *See* CAL. ELEC. CODE § 3001 (requiring application for absentee ballot be submitted "between the 29th and 7th day prior to the election"); N.Y. ELEC. LAW § 8-400(d) (requiring the state to mail an absentee ballot to eligible voters "not earlier than the thirtieth day nor later than the seventh day before the election").

503. *See* CAL. ELEC. CODE § 3001 (requiring application for absentee ballot be submitted "between the 29th and 7th day prior to the election").

504. *See* Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY L.J. 545 (2018).

federal legislators not only to specify the date of federal elections, but also to specify the manner of holding federal elections.[505] Thus, regarding a new election date, Congress could legislate a safe harbor for votes that would have been valid when cast in connection with the original election date.

2. Analyzing Entrenching Legislation

When addressing entrenching legislation in voting rights cases, the U.S. Supreme Court's analysis somewhat resembles the analysis employed by Delaware courts when addressing directors undertaking entrenching action. Though the U.S. Supreme Court considers the right to vote to be a fundamental right,[506] and though the Court, in earlier decisions, applied strict scrutiny to infringement of that right,[507] the Court's analysis generally has become less demanding.[508] Only if legislation subjects voting rights to "severe" restrictions must that legislation be narrowly drawn to advance a compelling governmental interest; legislation that imposes "reasonable, nondiscriminatory" restrictions on voting rights generally will be upheld as furthering governmental regulatory interests.[509]

Recall the analysis of Delaware courts: if the action by incumbent directors had a primary purpose of impeding an effective vote by shareholders, then the incumbent directors

505. *See* U.S. CONST. art. I, § 4, cl. 1 ("The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations . . . .").

506. *See* Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) (emphasizing that "voting is of the most fundamental significance under our constitutional structure"); *Williams*, 393 U.S. at 30 (emphasizing that the right to vote "rank[s] among our most precious freedoms"); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (describing the right to vote as a "fundamental political right").

507. *See Ill. State Bd. of Elections*, 440 U.S. at 184–85 (requiring that state legislation further a "compelling interest" by "least drastic means").

508. *See* Burdick v. Takushi, 504 U.S. 428, 432–34 (1992) ("[T]o subject every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.").

509. *Id*. at 434; *see* Anderson v. Celebrezze, 460 U.S. 780, 788 (1983).

must establish compelling justification for their action.[510] The U.S. Supreme Court's analysis embraces components of that corporate law analysis. First, those courts do not simply protect the hollow act of voting. Instead, the electorate must enjoy an "effective" right to vote.[511] For example, neither shareholders nor citizens would enjoy "effective" voting rights if their votes were diluted or if dissidents were precluded from the ballot.[512] Second, those courts acknowledge that rules are necessary to ensure fair elections free of fraud and to avoid an endless array of frivolous candidates.[513] Consequently, those courts are prepared to give credence to such rules without subjecting them to heightened scrutiny.[514] For example, because incumbents and voters should have an opportunity to learn about dissident candidates, rules that require advance notice of their candidacy are enforceable.[515] Incumbent directors and legislators are given leeway to regulate elections.[516] Third, however, as voting

510. *See* MM Cos. v. Liquid Audio, Inc., 813 A.2d 1118, 1130 (Del. 2003); Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 660–61 (Del. Ch. 1988).

511. *See* Williams v. Rhodes, 393 U.S. 23, 30 (1968) (discussing "the right of qualified voters . . . to cast their votes effectively"); *Ill. State Bd. of Elections*, 440 U.S. at 184 (same); *Celebrezze*, 460 U.S. at 787 ("vote[] effectively"); *Blasius Indus., Inc.*, 564 A.2d at 660–61 (Del. Ch. 1988) ("[C]orporate acts intended primarily to thwart effective exercise of the [shareholders'] franchise . . . [will be invalidated absent] . . . compelling justification.").

512. *See supra* Part 0.

513. *See* Storer v. Brown, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."); Openwave Sys. Inc. v. Harbinger Cap. Partners Master Fund I, Ltd., 924 A.2d 228, 239 (Del. Ch. 2007) (holding that advance notice bylaws "permit orderly meetings and election contests and . . . provide fair warning [that allows] sufficient time to respond").

514. *See Burdick*, 504 U.S. at 432 ("Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold."); *id*. at 433 ("[T]o subject every voting regulation to strict scrutiny . . . as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently."); *MM Cos.*, 813 A.2d at 1130 (noting that heightened scrutiny is "rarely" applied).

515. *See supra* notes 485–486 and accompanying text.

516. *See Storer*, 415 U.S. at 730 ("It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases."); *Openwave Sys. Inc.*, 924 A.2d at 239 (upholding advance notice bylaw).

restrictions become more severe, those courts require rule-makers to establish "compelling" justification for those restrictions.[517] The U.S. Supreme Court's test expressly references the concept of narrow tailoring, and, in practice, the Delaware courts impose a similar requirement, even though the Delaware Supreme Court's test does not expressly reference narrow tailoring.[518] Fourth, those courts focus upon the purpose and effect of legislation, not the legislators' motivations.[519] Legislators' motivations, though not the focus, may inform a court's inquiry into purpose.[520] The corporate law inquiry into "primary purpose" is consistent with the proposals of election law scholars.[521]

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517. *See Burdick*, 504 U.S. at 434 (requiring that "severe" restrictions be narrowly drawn to advance the governmental interest of "compelling" importance); *MM Cos.*, 813 A.2d at 1129 ("compelling justification").

518. *See* Norman v. Reed, 502 U.S. 279, 289 (1992) (requiring that severe restrictions must be "narrowly drawn to advance a [governmental] interest of compelling importance"); Mercier v. Inter-Tel (Del.), Inc., 929 A.2d 786, 810 (Del. Ch. 2007) (holding that the challenged action must be "reasonably necessary to advance a compelling . . . interest").

519. *See Williams*, 393 U.S. at 24 (invalidating legislation because it was "virtually impossible" for dissidents to appear on the ballot, without inquiring into legislators' intent); United States v. O'Brien, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."); Rucho v. Common Cause, 139 S. Ct. 2484, 2516 (2019) (Kagan, J., dissenting) ("[B]y requiring plaintiffs to make difficult showings relating to both purpose and effects, the standard invalidates the most extreme, but only the most extreme, partisan gerrymanders."); Stahl v. Apple Bancorp Inc., 579 A.2d 1115, 1121–22 (Del. Ch. 1990) ("[I]nequitable conduct does not necessarily require an evil or selfish motive.").

520. *Rucho*, 139 S. Ct. at 2517 (2019) (Kagan, J., dissenting) ("But when political actors have a specific and predominant intent to entrench themselves in power by manipulating district lines, that goes too far."); Vieth v. Jubelirer, 541 U.S. 267, 318 (Stevens, J., dissenting) ("[W]hen partisanship is the legislature's sole motivation—when any pretense of neutrality is forsaken unabashedly . . . the governing body cannot be said to have acted impartially."); *id.* at 350 (Souter, J., dissenting) ("I would, however, treat any showing of intent in a major-party case as too equivocal to count unless the entire legislature were controlled by the governor's party (or the dominant legislative party were vetoproof).").

521. Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 175 (2008) (proposing analysis that requires consideration of the "predominant effect of directly burdening individual

VI. Extending the Corporate Inquiry to the Legislative Setting

In the corporate setting, when incumbent directors act with a primary purpose of impeding the shareholders' franchise, then the incumbent directors must establish compelling justification for their action.[522] Courts have applied the inquiry to situations in which incumbent directors strategically shifted the date of an election.[523] What if a court extended the inquiry from corporate law to the legislative setting when incumbent legislators strategically altered the date of an election? Part IV.A applies the inquiry to a few basic scenarios. Part IV.B briefly sketches out related issues that merit deeper consideration than space allows.

A. Three Scenarios

This Part sets forth three basic scenarios. In the corporate setting, the demands of fiduciary duties vary with the context, requiring courts to make detailed factual findings, which, if varied slightly, could significantly impact any conclusion.[524] Slightly varying the facts of the basic scenarios below could easily vary the outcome.

As mentioned at the beginning of this Article, incumbent politicians in the House and in the Senate have proposed many bills over the years that would shift federal elections from Tuesday in early November to a weekend (Saturday *and* Sunday) in early November.[525] Each of those bills was proposed by a Democrat, so there may be a partisan advantage

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voters"); Hasen, *supra* note 347, at 846 ("[C]ourts should primarily examine the *effect* of election laws on the rights of individuals . . . ."); *id.* at 846 ("[P]roof of . . . bad [legislative] intent should be neither necessary nor sufficient for an election law challenge to succeed, though it should be relevant in getting courts to take a hard look at election laws."); Pildes, *supra* note 22, at 76 ("[L]aws whose sole or predominant purpose is political self-entrenchment, of incumbents or parties, should be unconstitutional in principle.").

522. *See* MM Cos. v. Liquid Audio, Inc., 813 A.2d 1118, 1118 (Del. 2003).

523. *See* Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 440 (Del. 1971).

524. *See supra* notes 446–452 and accompanying text (emphasizing factual distinctions between *Aprahamian*, in which the court enjoined the board's action, and *Gintel*, in which the court upheld the board's action).

525. *See supra* note 9 and accompanying text.

motivating this proposed shift.[526] Most people do not work on the weekend; most people, however, work on Tuesday. Even though most states require employers to allow employees time away from the jobsite to vote, many states do not impose this requirement on employers.[527] For that reason, among other reasons, many eligible voters do not vote in federal elections.[528] So legislators may attempt to increase voter participation, which is generally accepted as a positive goal.[529] Assume that such a bill was enacted shortly after a federal election, so that its practical impact was almost two years away. Increasing voter turnout appears to be the primary purpose of shifting federal elections from Tuesday to the weekend.[530] It may be that (1) increased voter turnout favors Democrats, or (2) the primary purpose of the legislation is not realized, because people may favor leisure on the weekend over voting, and because people may have been willing to vote on Tuesday to take time away from their jobs, but those two considerations are largely beside the point. So long as the *primary* purpose was not to impede effective voting, a court would not apply heightened scrutiny.[531] Moreover, the court would not focus on the primary purpose of the legislation without considering its actual effect,[532] and its

526. *See supra* note 10 and accompanying text.

527. *See* CAL. ELEC. CODE § 14000 (West 2020); N.Y. ELEC. LAW § 3-110 (McKinney 2020); Jacey Fortin, *Why Only Some Workers Get Time Off to Vote on Election Day*, N.Y. TIMES (Nov. 6, 2018), https://perma.cc/T55D-VLKL.

528. *Compare* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES tbl.9 at 12 (2012) (indicating approximate voting-age population of 235 million in 2010), *with* FED. ELECTION COMM'N, FEDERAL ELECTIONS 2012 (July 2013) (indicating total votes of approximately 129 million in the presidential election of 2012).

529. Arian Campo-Flores, *Kentucky's New Governor Restores Voting Rights to Nonviolent Felons*, WALL ST. J. (Dec. 12, 2019), https://perma.cc/3447-EDYM (last updated Dec. 12, 2019, 4:03 PM) ("We have a moral responsibility to protect and extend the right to vote . . . ." (quoting Ky. Gov. Andy Beshear)).

530. *See* Fortin, *supra* note 527.

531. *See* Burdick v. Takushi, 504 U.S. 428, 428 (1992) ("Where the burden on voters' rights is slight, the state need not establish a compelling interest to tip the constitutional scales in its direction.").

532. *See* Storer v. Brown, 415 U.S. 724, 738 (1974) ("We must, therefore, inquire as to the nature, extent, and likely impact of the California requirements.").

actual effect seemingly would not impede citizens' ability to vote effectively, as citizens had ample notice of, and time to adjust to, the new election date.

While the first example involved a shift well in advance of any election, the next two examples involve last-minute shifts in the date of the election. Assume that, as a federal election drew near, U.S. intelligence agencies discovered evidence that foreign nationals violated our campaign laws and corrupted our states' election machinery.[533] Those developments led Congress to amend the U.S. Code to delay the election to allow the impact of the illegal messaging to dissipate and to allow debugging of election machinery. Congress feared that proceeding with the election as originally scheduled would have produced results not reflective of the electorate's true intentions, perhaps impacted by illegal campaigning. Here, it seems that the primary purpose of the legislation was to disenfranchise the electorate in early November by displacing the majority's will at that time. Given that primary purpose, a court would review the challenged legislation under heightened scrutiny.[534] Nonetheless, on these bare facts, the court likely would conclude that the government had a compelling interest in ensuring that the election was not tainted by fraud.[535] Limited court relief might be appropriate, as infringements on the right to vote must be tailored to the extent necessary.[536] A delayed election may not be necessary in some states if those states' election machinery had not been

533. *See* Scott Shane & Mark Mazzetti, *The Plot to Subvert an Election*, N.Y. TIMES (Sept. 20, 2018) https://perma.cc/6TEG-4U3B (discussing the 2016 Russian attacks on the United States' presidential election); *see generally* Morley, *supra* note 504 (addressing election delays in the case of emergencies).

534. *See* Norman v. Reed, 502 U.S. 279, 288–89 (1992) (applying strict scrutiny to legislation that "severely" restricts voting rights). Of course, a court might conclude that a nondiscriminatory, broadly applicable law that briefly delayed an election did not "severely" restrict voting rights, but simply inconvenienced voters. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 205–06 (2008) (Scalia, J., concurring in judgment).

535. *See* Storer v. Brown, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest . . . ."); *Crawford*, 553 U.S. at 191 (plurality) (acknowledging governmental interest in "protecting the integrity and reliability of the electoral process").

536. *See Burdick*, 504 U.S. at 434.

hacked and their citizens had not been subjected to illegal campaigning.

The third scenario also involves a last-minute delay in the date of the election, where the incumbents' defeat was imminent and where they collectively and boldly asserted partisan reasons for "rigging" the election to ensure their re-election.[537] The primary purpose of the legislation would trigger heightened scrutiny and, on these bare facts, the incumbents have offered no compelling justification for the delayed election.

B. Other Considerations

1. Private Enforcement

Some scholars generally would oppose private enforcement of duties imposed on federal legislators because the U.S. Constitution expressly empowers other actors to police straying legislators.[538] When legislators breach their duties, the Constitution expressly contemplates policing by the co-equal branches, by colleagues through impeachment, and by voters at the polls.[539] However, the President, if aligned with the incumbents who enacted entrenching legislation, would refuse to police any such breach by refusing to veto the legislation. Impeachment is a non-starter, given that the challenged legislation passed both chambers with majority support. And,

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537. *See* Vieth v. Jubelirer, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring) ("[I]t is unfortunate that our legislators have reached the point of declaring that, when it comes to apportionment: 'We are in the business of rigging elections.'" (quoting John Hoeffel, *Six Incumbents Are a Week Away from Easy Election*, WINSTON-SALEM J., Jan. 27, 1998, at B1)).

538. *See* Davis, *supra* note 80, at 1174 (describing the Framers' views on impeachment); Miller & Gold, *supra* note 65, at 554–55

> Fiduciary accountability under governance-type mandates . . . do[es] not imply a correlative claim right that is enjoyed and may be asserted by a right holder in her personal capacity . . . . [T]he undefined and contingent nature of individuals' beneficial interests in governance mandates makes it impossible to recognize individuated claims rights in them.

539. Davis, *supra* note 80, at 1174 ("Impeachment . . . was the principal punitive measure associated in the public mind with an official's breach of trust."); *id* at 1175 ("[T]he ballot box provides an additional remedy for a legislator's derogation of political duties.").

the premise is that legislators ensured their re-election, emasculating discipline by voters. That leaves the judiciary as the source of any potential relief.[540] And someone must appeal to the judiciary. Given that the challenged legislation infringes on a citizen's right to vote at a regularly scheduled election, a citizen should be able to seek relief.[541] In *Rucho*, a citizen's right to vote was impaired by dilution, yet the Court concluded that the claim was non-justiciable; however, the Court emphasized that the states were able to act, and some states had already acted, to remedy the citizen's concerns.[542] In contrast to *Rucho*, the states would be preempted by federal legislation that altered the date of a federal election.[543]

2. Judicial Relief

Assuming the existence of such duties, some scholars would generally oppose judicial enforcement of the fiduciary duties of

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540. Rucho v. Common Cause, 139 S. Ct. 2484, 2523 (2019) (Kagan, J., dissenting) ("[P]oliticians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms." (quoting Gill v. Whitford, 138 S. Ct. 1916, 1941 (2018) (Kagan, J., concurring))); Issacharoff, *supra* note 231, at 165 ("[C]onstitutional courts . . . typically . . . overs[ee] . . . the electoral process itself, reaching in many cases to election administration . . . and electoral challenges.").

541. *See* Gray v. Sanders, 372 U.S. 368, 375 (1963) ("[A]ny person whose right to vote is impaired, has standing to sue." (citations omitted)); United States v. Bathgate, 246 U.S. 220, 227 (1918) ("The right to vote is personal . . . ."); Reynolds v. Sims, 377 U.S. 533, 561 (1964) (same) (quoting *Bathgate*, 246 U.S. at 227).

542. *See Rucho*, 139 S. Ct. at 2507–08 (majority opinion).

543. *See* U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ."); *id.* art. VI ("[T]he laws of the United States . . . shall be the supreme law of the land . . . .").

federal legislators.[544] Though similar in certain respects,[545] the *Rucho* Court's non-justiciable conclusion is distinguishable with respect to crafting a remedy.[546] Regarding *Rucho*'s partisan gerrymandering, the state legislature periodically must re-draw federal districts, given the Malapportionment Cases,[547] and the federal courts are ill-equipped to draw those districts.[548] If, however, federal legislators violated the Constitution by altering the date of a federal election, a court would not be required to identify a new date for the election;[549] the court could simply bar the effect of the legislation that otherwise would

544. *See* Davis, *supra* note 80, at 1171–78 ("To the extent that the Founders thought of judicial review of legislative action in private law terms, there is strong evidence they would have looked to the corporate law doctrine of repugnancy rather than to private fiduciaries' duties of loyalty and care."); Gerken & Kang, *supra* note 80, at 89. ("There is a world outside the judiciary . . . ."). *But see* FRANKEL, *supra* note 73, at 256 ("Doctrinally, equity is the source of the remedies for violations of fiduciary obligations, because fiduciary obligations originated in the English equity courts."); Morley, *supra* note 504, at 586–95 (addressing judicial review).

545. Just as the judiciary may lack competence to determine whether politics played too great of a role when state legislators drew a federal district, so too may the judiciary lack competence to determine whether politics played too great of a role when the federal legislature shifted the date of a federal election. *See Rucho*, 139 S. Ct. at 2549 ("[F]ederal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so.").

546. *See id.* ("The question here is whether there is an 'appropriate role for the Federal Judiciary' in remedying the problem of partisan gerrymandering—whether such claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere." (quoting Gill v. Whitford, 138 S. Ct. 1916, 1920 (2018))).

547. *See, e.g.*, Gray v. Sanders, 372 U.S. 368, 375 (1963).

548. *See Rucho*, 139 S. Ct. at 2549 ("[F]ederal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so.").

549. *Cf.* Ocilla Indus., Inc. v. Katz, 677 F. Supp. 1291, 1302 (E.D.N.Y. 1987) ("[C]onfusion . . . could ensue if another date were arbitrarily selected by the court . . . .").

have shifted the date of a federal election.[550] Elegantly crafted relief would not be necessary.[551]

VII. Conclusion

Notwithstanding federal legislators' constitutional authority to shift the date of a federal election, courts should review any such shift with skepticism. Delaware courts have long viewed with skepticism any action by corporate directors to alter the date of a vote by shareholders.[552] A rich body of corporate law—which reflects entrenchment concerns previously articulated by the U.S. Supreme Court in the legislative setting—provides a helpful analog.[553] The analog is consistent with a growing body of scholarship that recognizes federal legislators as fiduciaries, like corporate directors, and

550. *See* MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 93 (Farrand ed., 1966) ("A law violating a constitution established by the people themselves, would be considered by the Judges as null & void."); FRANKEL, *supra* note 73, at 245 ("[W]hen the fiduciaries' actions are devious and self-interested the courts will interfere."); *id*. at 249 (discussing injunctions as relief for breach of fiduciary duties); Amar, *supra* note 74, at 1434 (analogizing government officials to corporate officers and concluding that any limits imposed by the charter could be enforced by courts); Pildes, *supra* note 22, at 84 ("[C]ourts are . . . better at vetoing exercises of governmental power than at mobilizing power affirmatively."). The reach of any such injunction could be a contentious issue. *See* Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 993–1008 (2020)). A claim for damages would fail. *See* THE FEDERALIST NO. 66, at 169 (Alexander Hamilton) (ABA Classics ed., 2009) ("[T]he members of [the Senate] should be exempt from punishment for acts done in a collective capacity . . . ."); Davis, *supra* note 80, at 1201–03 (rejecting remedies for breach of fiduciary duty, but mentioning disgorgement, restitution, punitive damages, and removal from office, *not injunctions*).

551. *See* Vieth v. Jubelirer, 541 U.S. 267, 354 (2004) (Souter, J., dissenting) ("To devise a judicial remedy . . . it is not necessary to . . . [furnish] a precise measure of harm caused by divergence from the ideal in each case."); *id*. at 365 (Breyer, J., dissenting) ("[C]ourts should be able to identify . . . unjustified entrenching in power of a political party that the voters have rejected . . . . And they should be able to design a remedy for extreme cases.").

552. *See supra* Part 0.

553. *See supra* Part 0.

imports corporate law analysis to address action by legislators.[554]

554. *See supra* Part 0.