
CEOs and Presidents

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This Article deciphers a long-standing paradigm of power — the President as CEO — and offers an original and better legal understanding of executive governance. This Article presents the first sustained, comparative study of CEOs and presidents, the theoretical ties that bind them in the popular imagination of law and society, and the practical truths that sever their bonds in the real world of politics and business. It argues that this overused but understudied construct of law and society illuminates these two chief executives, but also obscures and distorts them with dangerous consequences. This Article suggests that in better understanding the laws and powers of those who lead and govern, we can learn better ways to be led and governed, as shareholders and citizens alike.

This Article begins with a normative and historical analysis that challenges conventional comprehensions of the President as CEO paradigm. It then charts the parallel promises and perils of power shared by CEOs and presidents. Drawing from constitutional law, corporate law, and organizational theory, it explains how promises of unity, accountability, and effectiveness converge with perils of capture, deference, overconfidence, and aggrandizement. Next, this Article highlights critical divergences between CEOs and presidents in connection with their elections, objectives, and constituents. Because of these divergences, it argues that popular movements to conflate presidents and democracy with CEOs and corporations can undermine American democracy and American corporations. Instead of quixotic conflations, this Article calls for deeper comparative examinations of these chief executives as a way to unlock new insights into corporate democracy, corporate purpose, government privatization, and executive power.

* Copyright © 2014 Tom C.W. Lin. Associate Professor of Law, Temple University Beasley School of Law. Many thanks to Erwin Chemerinsky, Stuart Cohn, Craig Green, Joan Heminway, David Hoffman, Duncan Hollis, Jerold Israel, Lyrisa Lidsky, Gregory Mandel, Eleanor Myers, Jason Nance, William Page, Martin Redish, Sharon Rush, and Peter Spiro for helpful comments and exchanges. Additionally, I am grateful to Amanda Brooks, Giselle Gutierrez, Amanda Harris, and Sara Hoffman for their extraordinary research assistance.

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INTRODUCTION

Chief executives run the world. CEOs manage companies that touch every corner and curve of the earth. Presidents execute policies that affect people and populations across the globe.¹ Together, CEOs and presidents form a double helix of executive power at the core of modern law and society.²

This Article is about that power, and a paradigm of that power: the President as CEO. This Article deciphers this longstanding paradigm and offers a new and better understanding of executive power in law, business, and politics. This Article comparatively examines CEOs and presidents, the theoretical ties that bind them in the popular imagination of law and society, and the practical truths that sever their bonds in the real world of politics and business. It argues that this overused but understudied paradigm of law and society illuminates these two chief executives, but also obscures and distorts them with dangerous consequences.

The paradigm of the President as CEO is reflective of a larger development in contemporary law and society: the convergence of the public sphere of government and the private sphere of business. In recent years, the government has taken over major businesses in an unparalleled fashion, and major businesses have wielded significant influence over government in unprecedented ways.³ Moreover, a multi-decade trend towards privatization of government functions has further blurred the traditional boundaries of government and business.⁴

¹ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010) (“[T]he Executive Branch . . . now wields vast power and touches almost every aspect of daily life . . .”).

² See Richard L. Hansen, *The “Political Market” Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 *STAN. L. REV.* 719, 719 (1998) (“Outside of the family, economic markets and various governmental bodies dominate and define power relationships more than any other forces.”).

³ See *infra* Part I.A and notes 12-34.

⁴ See JOHN D. DONAHUE & RICHARD J. ZECKHAUSER, *COLLABORATIVE GOVERNANCE* 4 (2011) (noting “the escalation of private-sector involvement in undertakings traditionally considered the province of government”); JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* 181-92 (2005) (predicting the continued growth of corporate influence in public affairs); MICHAEL J. SANDEL, *WHAT MONEY CAN’T BUY* 5-6 (2012) (observing the rise of market values in governmental affairs); DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE FOR THE WORLD ECONOMY* 338-78 (2002) (chronicling the rise of corporate ideology in public governance); Jon D. Michaels, *Privatization’s Progeny*, 101 *GEO. L.J.* 1023, 1026-29 (2013) (discussing the growth and evolution of privatization of government services).

Given this recent, growing convergence of government and business, the relationship between CEOs and presidents warrants a long overdue, closer study. And such a study offers a rich opportunity for intellectual arbitrage between two of the most intriguing and influential figures in law and society: the President of the United States and the CEO of a large corporation.

This Article seizes that opportunity by offering the first sustained, comparative study of these chief executives and the laws that govern them, through an examination of the intellectual and rhetorical construct of the President as CEO. While there are voluminous legal writings on CEOs⁵ and presidents,⁶ respectively, there is surprisingly little meaningful legal scholarship that comparatively studies these chief executives. This Article bridges that gulf in existing scholarship.

The objective of this Article is not to advocate for an ideal, archetypal CEO or president, nor is it to advance an elegant, unified legal theory of executive power across corporate and constitutional law. Rather, the objective is less grandiose, more focused, and twofold. First, this Article aims to offer a new and better understanding of the links and breaks between CEOs and presidents, their powers, and

⁵ See generally, e.g., Lucian A. Bebchuk et al., *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751 (2002); Sanjai Bhagat & Roberta Romano, *Reforming Executive Compensation, Focusing and Committing to the Long-Term*, 26 YALE J. ON REG. 359 (2009); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981); Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987 (2010) [hereinafter *Embattled CEOs*]; Jonathan R. Macey, *Smith v. Van Gorkom: Insights About C.E.O.s, Corporate Law Rules, and the Jurisdictional Competition for Corporate Charters*, 96 NW. U. L. REV. 607 (2002); Charles K. Whitehead, *Why Not A CEO Term Limit?*, 91 B.U. L. REV. 1263 (2011).

⁶ See generally, e.g., Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 664-65 (2000); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 691 (2008); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 UC DAVIS L. REV. 1, 17-18 (2006); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963 (2001); Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605 (2003).

their governance — the ways they govern and the ways they are governed. Second, leveraging that new understanding of executive governance, this Article aims to reveal the vices and virtues of fusing presidents and democracy with CEOs and corporations. In pursuit of this binary objective, this Article seeks to add new insights into the discourse and debates surrounding corporate democracy, corporate purpose, government privatization, and executive power. In doing so, this Article extends an instructive bridge across the existing gulf between corporate law scholarship that studies CEOs and constitutional law scholarship that studies presidents.⁷

This Article constructs that bridge in five parts. Part I lays the foundation. It utilizes the construct of the President as CEO as a starting point. Part I revisits traditional understandings of the corporate democracy narrative that attempt to analogize the corporation to the state and the CEO to the President. It then presents a normative and historical analysis that complicates the conventional view of voters preferring executives as presidents to further ground this exploration of presidents and CEOs.

Part II builds on that foundation with a critical study of similarities. It examines parallel promises and perils shared by presidents and CEOs. Drawing from constitutional law, corporate law, and

⁷ While other scholars have previously written about the potential conceptual linkages between corporate law and constitutional law, there nonetheless exists a dearth of legal writings that concurrently examines the paramount personalities of each discipline. See, e.g., ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 313 (rev. ed. 1968) (“The law of corporations . . . might well be considered as a potential constitutional law for the new economic state”); Douglas M. Branson, *Corporate Governance “Reform” and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605, 621 (2001) (“Corporate law is like constitutional law with a small ‘c.’”); Anupam Chander, *Minorities, Shareholder and Otherwise*, 113 YALE L.J. 119, 120 (2003) (comparing minority rights in corporate law and constitutional law); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 644-50 (1998) (leveraging corporate law principles to address election law issues); Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1698 (1999) (addressing linkages between corporate concepts and constitutional concepts); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 677-79 (2013) (transposing corporate fiduciary duties to political actors); Usha Rodrigues, *The Seductive Comparison of Shareholder and Civic Democracy*, 63 WASH. & LEE L. REV. 1389, 1389-90 (2006) (comparing shareholder and civic democracy); Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk’s Solution for Improving Corporate America*, 119 HARV. L. REV. 1759, 1759-62 (2006) [hereinafter *True Corporate Republic*] (applying principles in political governance to corporate governance); Robert B. Thompson, *Exit, Liquidity, and Majority Rule: Appraisal’s Role in Corporate Law*, 84 GEO. L.J. 1, 1-2 (1995) (analogizing corporate law to constitutional law).

organizational theory, it explains how promises of unity, accountability, and effectiveness can converge with perils of capture, deference, overconfidence, and aggrandizement.

Part III moves from similarities to contrasts. It highlights distinct differences between presidents and CEOs across three common axes demarcated by constitutional law and corporate law: elections, objectives, and constituents. Through juxtapositions of these differences, Part III reveals that the popular narrative of the President as CEO distorts and obscures deeper, more complicated truths about the power and governance of each chief executive.

Part IV advances the movement towards contrasts. It argues against popular tendencies in law and society to conflate CEOs and presidents, to import democratic principles to corporations, and to export corporate principles to democratic institutions. In doing so, Part IV explains the harms of democratizing American corporations and the harms of corporatizing American democracy.

Part V returns to common ground. Building on the studies of symmetries and asymmetries of the preceding parts, Part V comments on the mutually instructive intersection shared by presidents and CEOs. To illustrate the intellectual richness of this junction, it offers two lessons as examples: a lesson in collaboration that presidents can learn from CEOs and a lesson in legacy that CEOs can learn from presidents.

This Article closes with a brief conclusion. It reminds that these chief executives are distinct principals of power, and thus, should be understood distinctly. And it renews, with hope, the call for further, comparative legal studies of those who lead and govern in business and government as a means to better serve those who are led and governed — we the people.

I. THE PRESIDENT AS CEO

The government and the corporation are two of the most powerful entities in modern law and society.⁸ Their centrality to modern life lends both entities, their leaders, and their principles to frequent conceptual comparisons and exchanges.⁹ These comparisons and

⁸ For the purposes of this Article, the term “government” generally refers to the federal government, and the terms “corporation” or “company” generally refer to large public corporations. The Model Business Corporation Act defines a public corporation as “a corporation that has shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national securities association.” MODEL BUS. CORP. ACT § 1.40 (18A) (2007).

⁹ See, e.g., Richard A. Epstein, *Executive Power in Political and Corporate Contexts*,

exchanges have become so ingrained in the popular consciousness that the President is often considered the CEO of the nation¹⁰ and conventional political wisdom suggests that the electorate prefers a candidate with executive experience to serve as the nation's leader.¹¹ This Part revisits these two narratives: First, it explores the paradigm of the President as CEO by examining popular understandings of corporate democracy; then it analyzes the American electorate's perceived preferences for presidential candidates with executive experience in the historical context of election results.

12 U. PA. J. CONST. L. 277, 281 (2010) ("It is a commonplace observation that there is much overlap between public and private systems of governance."); Rodrigues, *supra* note 7, at 1389 ("[M]any commentators cannot resist comparing the workings of democracy within the corporation with those of democracy in the more familiar political realm.").

¹⁰ See, e.g., MICHAEL BROWN & TED SCHWARZ, *DEADLY INDIFFERENCE: THE PERFECT (POLITICAL) STORM: HURRICANE KATRINA, THE BUSH WHITE HOUSE, AND BEYOND* 101 (2011) (stating "the President is CEO" of the country); IVO H. DAALDER & JAMES M. LINDSAY, *AMERICA UNBOUND: THE BUSH REVOLUTION IN FOREIGN POLICY* 74 (2003) (commenting on the vision of "president-as-CEO"); GIDEON HAIGH, *FAT CATS: THE STRANGE CULT OF THE CEO* 81 (2005) ("General Electric's top job has been described as the 'corporate equivalent of the American presidency.'"); Epstein, *supra* note 9, at 282 (comparing Congress and the President to a board of directors and CEO); Christopher S. Yoo, *Presidential Power in Historical Perspective: Reflections on Calabresi and Yoo's the Unitary Executive*, 12 U. PA. J. CONST. L. 241, 247 (2010) (comparing the operational frameworks of presidents and CEOs); *America's Next CEO?*, *ECONOMIST*, Jan. 14, 2012, at 9 (terming the American President as America's CEO); James Bennet, *The Bush Years: C.E.O., U.S.A.*, *N.Y. TIMES MAG.*, Jan. 14, 2001, at 24, available at <http://partners.nytimes.com/library/magazine/home/20010114mag-bennet.html> (reporting on the characterization of President George W. Bush as the CEO of the country); Joshua Green, *The MBA Candidate Meets the Mad-As-Hell Electorate*, *BUS. WK.*, Jan. 30–Feb. 5, 2012, at 29-30 (calling Mitt Romney "the beau ideal of the CEO President" in theory).

¹¹ See, e.g., SALADIN M. AMBAR, *HOW GOVERNORS BUILT THE MODERN AMERICAN PRESIDENCY* 4-15 (2012) (suggesting that the electorate preferred former governors as presidents because of their executive experience); JAMIN SODERSTROM, *QUALIFIED: CANDIDATE RÉSUMÉS AND THE THRESHOLD FOR PRESIDENTIAL SUCCESS* 51-52 (2011) ("Clearly, voters sought presidents with prior executive experience from the nation's very beginning."); Ronald Brownstein, *Looks Like Bullish Year for Business Candidates*, *L.A. TIMES*, Mar. 20, 2002, at A1 (commenting on the rising appeal of business executives as political candidates); Bob Burnett, *The CEO President*, *HUFF. POST* (May 1, 2008), http://www.huffingtonpost.com/bob-burnett/the-ceo-presidency_b_99580.html ("[F]or most voters the notion of an effective executive running the White House has enduring appeal."); Adam Nagourney, *Democrats Flood States with Ads as Tuesday Nears*, *N.Y. TIMES*, Feb. 3, 2008, at A1 (reporting on political appeals to perceived voter preferences for gubernatorial and business experience); Andrew Romano & Michael Hirsch, *America, Inc.*, *NEWSWEEK*, Feb. 22, 2010, at 36.

A. Revisiting Corporate Democracy

The conception of the President as CEO is rooted in an intellectual synecdoche of the democratic state as a corporation, a corporate democracy.¹² Corporate democracy utilizes political democracy as the governing principle for corporations. Contemporary interplays between government and corporations should elicit a deeper look at corporate democracy as the business of politics converges with the politics of business.

Corporate democracy stands for the idea that corporations should operate like a democratic state.¹³ Corporate democracy is rooted in the premise that shareholders are analogous to voters in a democracy, and that just as democracy is government “of the people, by the people, and for the people,”¹⁴ corporate governance should be governance that is of the shareholder, by the shareholder, and for the shareholder. To extend the analogy, if the corporation is a state and the shareholders are the voters, then the CEO of the corporation is the president of the corporate democracy.

In recent years, there has been an unprecedented convergence between American corporations and American democracy. Government has increased its presence and influence in business affairs like never before.¹⁵ The government has bailed out and taken controlling interests in a number of large corporations in recent years.¹⁶ In 2008, the government invested \$85 billion in the insurance company, AIG, in exchange for a majority ownership stake.¹⁷ Between 2008 and 2009, the government purchased \$45 billion of securities in the financial conglomerate, Citigroup, amounting to a 34% ownership stake.¹⁸ During that same period, the government also invested \$82 billion in the American auto industry.¹⁹ As a result of its various

¹² See discussion *infra* Part IV.A; see also MARY MEEKER, USA INC.: A BASIC REVIEW OF AMERICA'S FINANCIAL STATEMENTS, at ii (2011).

¹³ H. Rodgin Cohen & Glen T. Schleyer, *Shareholder vs. Director Control over Social Policy Matters: Conflicting Trends in Corporate Governance*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 81, 133-34 (2012).

¹⁴ President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

¹⁵ See Marcel Kahan & Edward B. Rock, *When the Government Is the Controlling Shareholder*, 89 TEX. L. REV. 1293, 1301-07 (2011).

¹⁶ See *Bailout Recipients*, PRO PUBLICA, <http://projects.propublica.org/bailout/list> (last updated March 4, 2014) (cataloguing significant bailout recipients).

¹⁷ Press Release, Bd. of Governors of the Fed. Reserve Sys. (Sept. 16, 2008), available at <http://www.federalreserve.gov/newsevents/press/other/20080916a.htm>.

¹⁸ See Jeff Zeleny & Eric Dash, *Citigroup Nears Deal to Return Billions in Bailout Funds*, N.Y. TIMES, Dec. 14, 2009, at A1.

¹⁹ Nick Bunkley, *G.M. Repays U.S. Loan, While Chrysler Posts Improved Quarterly*

investments, the government, at one time, owned 8% of Chrysler,²⁰ 60% of General Motors,²¹ and 56% of GMAC,²² General Motors's financing affiliate. And in 2009, exercising its prerogative as majority shareholder, the government fired General Motors's CEO, Rick Wagoner.²³ Despite a history of government intervention in business, there is arguably no real precedent for the type of government involvement that has occurred over the last few years.²⁴

Conversely, corporations have also increased their presence and influence in traditional governmental affairs.²⁵ Traditional functions of government have been taken over by businesses, leading to unprecedented growth in for-profit schools, hospitals, prisons, and private contractors in defense and diplomacy.²⁶ Corporations have also used current government employees and officials who moonlight as consultants while on the government payroll.²⁷ Following the United

Results, N.Y. TIMES, Apr. 22, 2010, at B3.

²⁰ *Id.*

²¹ See Bill Vlastic & Nick Bunkley, *Obama Is Upbeat for G.M. Future on a Day of Pain*, N.Y. TIMES, June 2, 2009, at A1.

²² Binyamin Appelbaum, *U.S. to Give \$3.6 Billion More in Aid to GMAC; Move Makes Government the Majority Owner of Troubled Auto Lender*, WASH. POST, Dec. 31, 2009, at A1; David Teather, *U.S. Bails out General Motors-Related Company GMAC with Further \$3.8bn*, GUARDIAN (Jan. 1, 2010), <http://www.theguardian.com/business/2010/jan/01/us-bails-out-gmac-general-motors>.

²³ Sheryl Gay Stolberg & Bill Vlastic, *President Gives a Short Lifeline to Carmakers*, N.Y. TIMES, Mar. 31, 2009, at A1.

²⁴ See J.W. Verret, *Treasury Inc.: How the Bailout Reshapes Corporate Theory and Practice*, 27 YALE J. ON REG. 283, 293 (2010) (noting the historical uniqueness of the government's recent intervention in private business).

²⁵ See DAVID ROTHKOPF, *POWER INC.: THE EPIC RIVALRY BETWEEN BIG BUSINESS AND GOVERNMENT—AND THE RECKONING THAT LIES AHEAD* 195 (2012) (“[C]orporations have grown in influence worldwide and in every instance have played a role in paring away key prerogatives of the state.”); ALLISON STANGER, *ONE NATION UNDER CONTRACT: THE OUTSOURCING OF AMERICAN POWER AND THE FUTURE OF FOREIGN POLICY* 1-11 (2012); Joshua Green, *CEOs Can't Get Enough of the Capital*, BUS. WK., Oct. 14–20, 2013, at 34.

²⁶ See SANDEL, *supra* note 4, at 7; TIM SHORROCK, *SPIES FOR HIRE: THE SECRET WORLD OF INTELLIGENCE OUTSOURCING* 1-8 (2008); Allison Stanger, *Addicted to Contractors*, FOREIGN POL'Y (Dec. 1, 2009), http://www.foreignpolicy.com/articles/2009/12/01/addicted_to_contractors?print=yes&hidecomments=yes&page=full (“In 2008, 82 percent of the Defense Department's budget went out the door in contracts and grants. About 83 percent of the State Department's requested budget did the same. At USAID, contracts and grants represented 96 percent of the net cost of operations.”).

²⁷ See EAMON JAVERS, *BROKER, TRADER, LAWYER, SPY: INSIDE THE SECRET WORLD OF CORPORATE ESPIONAGE* 180 (2010) (discussing moonlighting programs for officers of the Central Intelligence Agency); Raymond Hernandez, *Weiner's Wife Didn't Disclose Consulting Work She Did While Serving in State Dept.*, N.Y. TIMES, May 17, 2013, at A16.

States Supreme Court's ruling in *Citizens United*,²⁸ corporate interests have expanded their influence in the political system by contributing millions of dollars into the political process, directly to campaigns and indirectly through intermediaries.²⁹

Furthermore, large modern corporations can operate and exist like "private empire[s],"³⁰ commercial nation-states devoid of borders and sovereignty.³¹ Wal-Mart employs more than two million individuals and "supports an employee/family community of eight to ten million, which is about the size of Austria, Switzerland, or Israel, and larger than a hundred other countries."³² BlackRock, the world's largest asset manager, oversees a \$3.3 trillion portfolio that rivals the total currency reserves of China and Japan combined.³³ Exxon has 2.5 million shareholders, operations in almost every country, and annual sales around \$400 billion, which rivals the gross domestic product of Sweden.³⁴

As a result of recent convergences between government and corporations, "corporate democracy" takes on dual meanings: one that is idealistic, another that is descriptive. Corporate democracy continues to hold the traditional, quixotic definition of corporate governance centered on democratic ideals. But corporate democracy also holds the descriptive, lamenting definition that describes the uneasy and unhealthy merger of government and corporations.

As the lines between government and business blur, the executives that lead the realms of government and corporations frequently also fuse in the eyes of the shareholders and citizens. This fusion of chief executives creates a conflation of expectations that may lead one to

²⁸ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

²⁹ See LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS — AND A PLAN TO STOP IT* 183-84 (2011) (discussing the pervasive and corrosive influence of corporate interests in American politics); Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 *GEO. L.J.* 923, 930-37 (2013) (summarizing direct and indirect corporate political spending in recent years); Richard Briffault, *Super PACs*, 96 *MINN. L. REV.* 1644, 1656-66 (2012) (chronicling the growing influence of Super PACs on political campaigns); Dan Eggen, *Super PACs Dominate Republican Primary Spending*, *WASH. POST*, Jan. 16, 2012, at A6; Steven Greenhouse, *Here's a Memo from the Boss: Vote This Way*, *N.Y. TIMES*, Oct. 27, 2012, at A1; Mike McIntire & Nicholas Confessore, *Groups Shield Political Gifts of Businesses*, *N.Y. TIMES*, July 8, 2012, at A1.

³⁰ STEVE COLL, *PRIVATE EMPIRE: EXXONMOBIL AND AMERICAN POWER* 19 (2012).

³¹ ROTHKOPF, *supra* note 25, at 30.

³² *Id.* at 310.

³³ *Id.* at 311.

³⁴ *Id.* at 314.

believe that executive success in business assures executive success in politics.

B. Historical Electoral Preferences

Every four years, America engages in the ultimate executive search: the presidential election.³⁵ Recent popular political wisdom has held that the American electorate prefers a candidate with “executive experience,” either in government or business, to serve as the nation’s leader.³⁶ Since the election of John F. Kennedy in 1960, the only other legislator to be elected to the presidency has been Barack Obama. Does the electorate really prefer executives as presidents?

1. Summary of Findings

America, thus far, has had fifty-seven presidential elections; from those elections, forty-three men have had the honor of serving as president.³⁷ Of the fifty-seven presidential elections, forty were true contests between a major candidate with meaningful executive experience and a major candidate without any meaningful executive experience.³⁸ In forty true contests, the candidate with executive experience won twenty-four times, or 60% of the time.³⁹ Of the forty-three individuals to serve as president, twenty of them, or 46.51%, were former governors.⁴⁰ Notably, despite President Coolidge’s observation that “[t]he business of America is business,”⁴¹ no major corporate CEO has ever ascended to the presidency.⁴²

The analysis, herein, considered executive experience to include serving as governor of a state or U.S. territory, mayor of a metropolis,

³⁵ U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice-President chosen for the same Term, be elected, as follows: . . .”).

³⁶ See, e.g., sources cited *supra* note 11 (discussing the electorate’s preference for candidates with executive experience).

³⁷ Grover Cleveland has the distinction as the only man to serve two non-consecutive terms as president. Grover Cleveland also has the distinction as the only man to win the popular vote in three presidential elections: 1884, 1888, and 1892. See HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II, at 111 (2008).

³⁸ See *infra* app. Figure 1 and Table 1.

³⁹ See *infra* app. Figure 1 and Table 1.

⁴⁰ See *infra* app. Figure 2 and Table 2.

⁴¹ JOHN STEELE GORDON, THE BUSINESS OF AMERICA 247 (2002).

⁴² See *infra* app. Table 1.

or senior executive of a large business enterprise. Although corporate executive experience is of emphasis in this Article, this broader definitional parameter was set to generate a definition that is reflective of popular political understandings of “executive experience.” Understandably, this definition is subject to legitimate debate from those who may also equate other vocational experiences, such as military service, with executive experience.⁴³

2. Analysis of Findings

At first glance, the findings clearly suggest that the electorate prefers a presidential candidate with executive experience. When pitted against a candidate without executive experience, the candidate with executive experience won 60% of the time.⁴⁴ However, upon closer examination, the findings become less definitive. The true picture of the electorate’s preference is much more complicated and kaleidoscopic for a number of factors related to the sample, in terms of size and substance.

First, the relevant sample size is fairly small. There have only been fifty-seven presidential elections to date, and only forty true contests between candidates with executive experience versus those without it. Statisticians have long held that probabilistic projections improved in accuracy in correlation with the number of trials.⁴⁵ More trials generally mean greater accuracy, so the findings here are limited by the small sample.⁴⁶

Second, presidential elections have evolved greatly over time, so individual elections may not serve as comparable samples.⁴⁷ The amount of resources that goes into an election, for instance, has risen dramatically over time.⁴⁸ Furthermore, changes in information

⁴³ See, e.g., AMBAR, *supra* note 11, at 14-15 (defining executive experience of presidents in terms of only gubernatorial experience); SODERSTROM, *supra* note 11, at 51-72 (using a more expansive definition of executive experience).

⁴⁴ See *infra* app. Figure 1.

⁴⁵ See LEONARD MLODINOW, *THE DRUNKARD’S WALK: HOW RANDOMNESS RULES OUR LIVES* 50 (2008) (tracing the law of large numbers back to 14th century Italian mathematician Gerloamo Cardano). *But see* Edward K. Cheng, *When 10 Trials Are Better than 1000*, 160 U. PA. L. REV. 955, 957-58 (2012) (suggesting that smaller samples can generate better projections under some conditions).

⁴⁶ THOMAS S. FERGUSON, *A COURSE IN LARGE SAMPLE THEORY* 19 (1996).

⁴⁷ See generally PAUL F. BOLLER, JR., *PRESIDENTIAL CAMPAIGNS: FROM GEORGE WASHINGTON TO GEORGE W. BUSH*, at ix (2004) (“[P]residential campaigns have been multifarious.”).

⁴⁸ Dave Gilson, *The Crazy Cost of Becoming President, from Lincoln to Obama*, POLITICAL MOJO (Feb. 20, 2012, 3:00 AM), <http://www.motherjones.com/mojo/2012/>

technology, and the diversification and geographic dispersion of the electorate, have also altered elections significantly as modern presidents campaign to a country that is very different than that of their early predecessors.⁴⁹ Thus, comparing George Washington's re-election campaign in 1792 and George W. Bush's re-election campaign in 2004 is not entirely appropriate.

Third, voters consider a number of factors beyond executive experience when choosing a president. While it may be appealing for pundits, pollsters, and politicians to distill voting for a president into simplified narratives, it nonetheless remains a complex, multivariate decision. For instance, recent studies in neuroscience and psychology suggest that visual appearance, emotional stimuli, moral intuition, and subconscious factors all play significant roles in voter preferences.⁵⁰

Fourth, former governors and business executives may have had and may continue to have more success as presidential candidates not because of their executive experience, but rather, because their background may arguably create less damaging and voluminous material for negative campaigning given the more opaque nature of state government and private business. For instance, senators and congressmen vote on numerous bills running thousands of pages with a host of riders and amendments, some of which can turn into poison pills during heated political campaigns.⁵¹ Governors and executives do not create similarly perilous political paper trails (but their experiences nonetheless have their own drawbacks).⁵² Additionally,

02/historic-price-cost-presidential-elections.

⁴⁹ See, e.g., BOLLER, *supra* note 47 (discussing presidential campaigning in the larger context of American history); SASHA ISSENBERG, *THE VICTORY LAB: THE SECRET SCIENCE OF WINNING CAMPAIGNS* 12-13 (2012) (examining the rise of data analytics in American politics); cf. Tom C.W. Lin, *The New Investor*, 60 *UCLA L. REV.* 678, 683-93 (2013) (discussing information technology advances).

⁵⁰ See JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 72-91 (2012) (explaining the effect of moral intuition on voting); GEORGE LAKOFF, *THE POLITICAL MIND: WHY YOU CAN'T UNDERSTAND 21ST-CENTURY AMERICAN POLITICS WITH AN 18TH-CENTURY BRAIN* 1-16 (2008); LEONARD MLODINOW, *SUBLIMINAL: HOW YOUR UNCONSCIOUS MIND RULES YOUR BEHAVIOR* 137-42 (2012); DREW WESTEN, *THE POLITICAL BRAIN* 3 (2008); James N. Druckman, *The Power of Televised Images: The First Kennedy-Nixon Debate Revisited*, 65 *J. POL.* 559, 565-68 (2003); Shawn W. Rosenberg et al., *Creating a Political Image: Shaping Images and Manipulating the Vote*, 13 *POL. BEHAV.* 345, 346-47 (1991); Shawn W. Rosenberg et al., *The Image and the Vote: The Effect of Candidate Presentation on Voter Preference*, 30 *AM. J. POL. SCI.* 108, 109-10 (1986).

⁵¹ See generally DAVID MARK, *GOING DIRTY: THE ART OF NEGATIVE CAMPAIGNING* 6-10, 94-102 (2009) (illustrating the use of Senate voting records in negative campaigning).

⁵² See, e.g., Jim Rutenberg, *The Lowest Common Denominator and the 2012 Race for*

governors and business executives can run for president on the frequently appealing mantle of an “outsider” seeking to fix a dysfunctional Washington.

Fifth, every presidential election is unique. Presidential elections are like snowflakes: no two are perfectly identical.⁵³ Presidential elections are just as much about the candidates in the race as they are about the time and setting of the race. One need not be a revisionist historian or a historical novelist to imagine how certain presidential elections would have had different results but for one event or another.⁵⁴

In sum, the popular political narrative of the President as CEO may have rhetorical appeal and some historical evidence as support, but the reality is less definitive and more complicated, given the unique and kaleidoscopic nature of presidential elections.

II. CRITICAL CONVERGENCES

CEOs and presidents offer many promises to their constituents, but those promises can be illusory, empty, and full of peril.⁵⁵ Nonetheless, the allure of such promises is frequently too tempting to resist, and the governed frequently consent to giving more power to the executive. As a result, CEOs can govern firms like corporate emperors and empresses, holding primacy over shareholders, directors, and managers.⁵⁶ Similarly, presidents can govern the nation like unitary executives of a superior branch of government exercising dominion over the legislative and judicial branches.⁵⁷ The promises and perils of presidents and CEOs converge on a common ground of power where interrelated promises of unity, accountability, and effectiveness coexist

President, N.Y. TIMES, Aug. 17, 2012, at A15 (describing attacks against Mitt Romney’s executive experience at Bain Capital).

⁵³ See KENNETH LIBBRECHT, *KEN LIBBRECHT’S FIELD GUIDE TO SNOWFLAKES* 7-10 (2006) (explaining the unique crystal formations of snowflakes).

⁵⁴ See generally JEFF GREENFIELD, *THEN EVERYTHING CHANGED: STUNNING ALTERNATE HISTORIES OF AMERICAN POLITICS: JFK, RFK, CARTER, FORD, REAGAN* (2012) (narrating alternative histories of American politics).

⁵⁵ See, e.g., David Leonhardt & Andrew Ross Sorkin, *Reining in the Imperial C.E.O.: Handshakes Are Becoming a Bit Less Golden*, N.Y. TIMES, Sept. 15, 2002, at BU1.

⁵⁶ See Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 913-14 (2005); Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1366 (1932) (opining that corporate managers generally operate “more as princes and ministers than as promoters or merchants”).

⁵⁷ For an overview of the unitary executive model of the presidency, see generally STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE* 3-10 (2008).

with the perils of capture, deference, overconfidence, and aggrandizement.

A. *The Promises*

1. Unity

Presidents and CEOs frequently promise unity in exchange for accumulating executive power. They often pledge a unity of vision, purpose, and power to their governance. This promised unity serves as a bulwark against different stakeholders with disparate, competing, and conflicting interests.

In the corporate context, a strong CEO personifies the promise of unity: a unity of corporate purpose, vision, and personality. A unitary CEO serves as a corporation's chief executive and chief manager by virtue of concurrently being CEO and chairman of the board.⁵⁸ The unity of these roles is intended to build "greater integration of policy and execution."⁵⁹ In terms of corporate governance, the unitary CEO, in theory, personally creates and efficiently executes a singular, purposeful vision without dilutions from other stakeholders.⁶⁰ This unitary paradigm of governance is perceived by some as superior to models that share power among multiple stakeholders because it enhances strategic cohesiveness and reduces agency costs.⁶¹

Steve Jobs, the late CEO and chairman of Apple, was a paragon of this unitary CEO model. Jobs reportedly micromanaged almost every aspect of Apple, including long-term strategy, product design, manufacturing, store layouts, advertisements, and investments.⁶² His prolific micromanagement is reflected in 313 Apple patents that bear his name as inventor or co-inventor, relating to inventions ranging

⁵⁸ See JONATHAN R. MACEY, *CORPORATE GOVERNANCE* 62 (2008) ("[B]oard chairmen of 70 percent of [American] public companies serve concurrently as CEO of the company . . .").

⁵⁹ See Epstein, *supra* note 9, at 283. *But cf.* Joel Seligman, *A Modest Revolution in Corporate Governance*, 80 *NOTRE DAME L. REV.* 1159, 1175-79 (2005) (explaining the rationale behind separating the two roles).

⁶⁰ See Kahan & Rock, *Embattled CEOs*, *supra* note 5, at 993.

⁶¹ For an overview of corporate agency costs, see generally Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 *J. POL. ECON.* 288 (1980); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. FIN. ECON.* 305 (1976).

⁶² See Alan Deutschman, *Exit the King*, *NEWSWEEK*, Sept. 5, 2011, at 30 ("[Steve Jobs] proved himself the ultimate willful leader, forging his singular vision through a combination of inspiration, unilateralism, and gut instinct."); Adam Lashinsky, *The Decade of Steve*, *FORTUNE*, Nov. 23, 2009, at 92-100.

from the glass staircases in its stores to the power adapters on its computers.⁶³ Many investors and analysts attribute Apple's incredible success over the last two decades to Jobs's monolithic embodiment and control of the company.⁶⁴

In the political context, a unitary president serves as the singular epitome of political vision and electoral mandate, for the President is one individual elected by a national electorate.⁶⁵ As Justice Jackson observed, "Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations."⁶⁶ This unitary vision of the presidency has persisted since the founding of our republic, with the presidency changing hands and parties over two centuries, but frequently growing in power.⁶⁷ In terms of political governance, unitary presidents can, in theory, efficiently and effectively execute a national objective without dilutions and distractions from other governing stakeholders, be it vertically with the states or horizontally with the other branches of the federal government.⁶⁸

The unitary executive theory of the presidency is viewed by some scholars as necessary for governing a complex country in a complicated world.⁶⁹ Through executive orders, signing statements,⁷⁰

⁶³ See Miguel Helft, *A Chief Executive's Attention to Detail, Noted in 313 Patents*, N.Y. TIMES, Aug. 26, 2011, at B4.

⁶⁴ *Id.*

⁶⁵ See NANCY GIBBS & MICHAEL DUFFY, *THE PRESIDENTS CLUB: INSIDE THE WORLD'S MOST EXCLUSIVE FRATERNITY* 8 (2012) ("[O]ne man must conscientiously, deliberately, prayerfully scrutinize every argument, every proposal, every prediction, every alternative, every probable outcome of his action, and then — all alone — make his decision." (quoting Dwight Eisenhower)); WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 68 (1908) (calling the President "the only national voice in affairs" and "the representative of no constituency, but of the whole people"); Lessig & Sunstein, *supra* note 6, at 105-06 (stating that "the President has a national constituency"). *Contra* Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1231-43 (2006) [hereinafter *Fable*] (explaining the myth of the "nationalist president").

⁶⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

⁶⁷ CALABRESI & YOO, *supra* note 57, at 3, 35-36.

⁶⁸ See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 42 (1994) ("Any deviation from the principle of unitariness in the executive structure immediately opens up a crack into which the state and local pressures described above will tend to insinuate themselves.").

⁶⁹ See Kagan, *supra* note 6, at 2247. *But see* Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1386-90 (2008).

⁷⁰ See T.J. HALSTEAD, CONG. RESEARCH SERV., RL33667, *PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS* 1-5 (2007);

agency actions, personnel decisions, and military commands, presidents can unilaterally execute national policy without meaningful consent or counsel from the other branches.⁷¹ Throughout history, presidents of both parties have acted like unitary executives, accumulating power (or attempting to do so) in the name of unity, term after term, administration after administration — a constant practice in the winds of political change.⁷²

2. Accountability

Linked to the promise of unity, presidents and CEOs often promise more accountability in exchange for more power. In the corporate context where power and influence are diffused among a plurality of managers, responsibility, and accountability, likewise, are diffused. Such fragmentation sometimes renders it more difficult for shareholders and other stakeholders to accurately cast blame or give credit to the responsible parties. However, with a unitary CEO, because vision, strategy, and execution concentrate within one corporate actor, it is distinctly and theoretically easier to hold that one actor responsible for the successes and failures of the corporation.

In the political context, the unitary executive theory of the presidency suggests that more power is permissible because the President is uniquely accountable to a national electorate in our constitutional system.⁷³ As Justice Kagan previously observed, “The

Developments in the Law — Presidential Authority: II. The President's Role in the Legislative Process, 125 HARV. L. REV. 2068, 2069-84 (2012) [hereinafter *Presidential Authority*] (explaining the use of presidential signing statements to expand executive power into the legislative process).

⁷¹ See, e.g., WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* 55-75 (2003) (discussing how the unilateral presidential model relates to the real-world politics of direct presidential action); Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES, Apr. 23, 2012, at A1 (describing President Obama's use of executive powers to bypass congressional limitations).

⁷² See, e.g., ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 6 (2010) (“Executive agencies have been brought under increasingly firm control by the White House”); cf. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 412-17 (2012) (using a systematic approach to analyzing the role of historical practice in discerning the separation of powers).

⁷³ See Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Counter-majoritarian Difficulty*, 145 U. PA. L. REV. 759, 875-76 (1997) (suggesting that presidential power is checked by the national electorate); Calabresi, *supra* note 68, at 59 (“[T]he President is unique in our constitutional system as being the only official who is accountable to a national voting electorate and no one else.”).

Presidency's unitary power structure, its visibility, and its 'personality' all render the office peculiarly apt to exercise power in ways that the public can identify and evaluate."⁷⁴ The same cannot be said of the parochially elected members of Congress. As the Supreme Court opined in *Myers v. United States*,⁷⁵ "[T]he President, elected by all the people, is rather more representative of them all than are the members of either body of the Legislature, whose constituencies are local and not country wide"⁷⁶ Thus, the argument goes, because of the presidency's unitary structure and singular personhood, it is easier — rightly or wrongly — for the electorate to hold him or her accountable every four years.

3. Effectiveness

Presidents and CEOs frequently promise that more power will come with not only more unity and accountability, but also more effectiveness. Because vision, power, and execution are centralized in one actor, a strong chief executive can act in a more effective manner than executives who do not wield similar managerial power and influence.⁷⁷ Because of their unitary nature, powerful chief executives are less beset with the indecisions and inefficiencies that often plague and characterize the actions of pluralities.⁷⁸ Organizations and institutions governed by multiple managers often suffer more from collective action constraints and information asymmetries that lead to indecisiveness, infighting, and inefficiency.⁷⁹

In the corporate context, CEO promises of effectiveness are particularly seductive in modern times as success today frequently requires swift and bold decisions in a rapidly shifting marketplace.⁸⁰

⁷⁴ See Kagan, *supra* note 6, at 2332.

⁷⁵ 272 U.S. 52 (1926).

⁷⁶ *Id.* at 123.

⁷⁷ See generally KENNETH J. ARROW, *THE LIMITS OF ORGANIZATION* 68-70 (1974) (discussing the general effectiveness of power centralized in one actor).

⁷⁸ See Kagan, *supra* note 6, at 2339 ("Because [the President] is a unitary actor, he can act without the indecision and inefficiency that so often characterize the behavior of collective entities."). See generally Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937) (discussing the lower transactional costs of the corporate form).

⁷⁹ Cf. Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 *Nw. U. L. REV.* 547, 555-56 (2003) [hereinafter *Means and Ends*] (discussing how power vested in a centralized decision-maker can "lower costs associated with uncertainty, opportunism, and complexity").

⁸⁰ Cf. ARROW, *supra* note 77, at 71 ("Under conditions of widely dispersed information and the need for speed in decisions, authoritative control at the tactical

This is especially true of large, modern corporations, which can consist of numerous divisions and departments that span industries, time zones, and nation-states. General Electric in 2013, for example, operated in more than 160 countries and employed about 300,000 people worldwide with enterprises related to aircraft engines, power generation, financial services, and medical imaging.⁸¹

In the political context, the promise of increased effectiveness by a president becomes similarly alluring in the face of modernity's pressing demands. Proponents of unitary presidencies argue that modernity demands a stronger executive within our constitutional framework to more swiftly and smoothly navigate the nation.⁸² Like corporate decisions decided by committees and pluralities, legislative action through Congress, which consists of 535 voting members representing 435 different congressional districts and all fifty states, naturally requires much more time and resources than executive action from the President.⁸³ Congressional actions can be, as Woodrow Wilson termed, "meddlesome and inefficient."⁸⁴ As such, in modern times, presidents are perceived by many as the most effective vessels for effectuating public policy.

level is essential for success."); CLAYTON M. CHRISTENSEN & MICHAEL E. RAYNOR, *THE INNOVATOR'S SOLUTION* 35-38 (2003) (illustrating the need for innovation and swift corporate action in the face of increasing competitive pressures in the steel industry).

⁸¹ GEN. ELEC. CO., *Fact Sheet*, <http://www.ge.com/company/factsheets/corporate.html> (last visited Dec. 1, 2013).

⁸² See Lessig & Sunstein, *supra* note 6, at 91-92 (suggesting that modern circumstances may make the unitary executive model more attractive relative to models with greater plurality); cf. Saikrishna Bangalore Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361, 1362 (2013) ("[T]he President can make rapid, even hasty, decisions because they are his alone to make."). But see Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 374 (2010) ("President-centered government cannot deliver what it promises — in part because of the very circumstances of modern life that makes unitary executive theory so deeply appealing.").

⁸³ See Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 146 (1999) ("[T]ransaction costs of Congressional action are enormous."); Nzelibe, *Fable*, *supra* note 65, at 1246-47 (commenting on the decisively lower transactional costs of presidential action over congressional action).

⁸⁴ WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* 205 (Johns Hopkins ed. 1981) (1885).

B. The Perils

1. Capture

Presidents and CEOs operate within organizations that are susceptible to being perilously captured by powerful chief executives.

In the corporate context, corporations are particularly vulnerable to CEO capture as deference to executives is innate to the corporate form. Shareholders own the corporation, but directors and officers manage it.⁸⁵ Accordingly, shareholders lack meaningful supervisory powers over their firms and its managers, which can lead to significant agency costs.⁸⁶ And as a matter of law, the “original and undelegated” governance powers of the corporation reside with directors and authorized officers on most issues.⁸⁷

Due to organizational dynamics, powerful CEOs can capture much of this deference and dominate a corporation.⁸⁸ First, CEOs, especially those who are concurrently chairmen of their corporations, wield incredible influence over the composition and operation of their boards of directors, senior managers, senior staff, outside advisors, and gatekeepers.⁸⁹ With regards to directors, executives often engage in

⁸⁵ See BERLE, JR. & MEANS, *supra* note 7, at 6-8; Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1599 (2005).

⁸⁶ See Dodd, *supra* note 5, at 1147 (stating that corporate managers are “free from any substantial supervision by stockholders”).

⁸⁷ See *Manson v. Curtis*, 119 N.E. 559, 562 (N.Y. 1918); STEPHEN M. BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* 11-12 (2008).

⁸⁸ See Charles M. Elson, *Director Compensation and the Management-Captured Board — The History of a Symptom and a Cure*, 50 SMU L. REV. 127, 127-30 (1996) (“[T]he most significant problem facing corporate America today is the management-dominated, passive board of directors.”); Benjamin E. Hermalin & Michael S. Weisbach, *Endogenously Chosen Boards of Directors and Their Monitoring of the CEO*, 88 AM. ECON. REV. 96, 97 (1998); Donald C. Langevoort, *Resetting the Corporate Thermostat: Lessons from the Recent Financial Scandals About Self-Deception, Deceiving Others, and the Design of Internal Controls*, 93 GEO. L.J. 285, 293-95 (2004); Tom C.W. Lin, *Undressing the CEO: Disclosing Private Materials of Public Company Executives*, 11 PA. J. BUS. L. 383, 392-95 (2009) (discussing the rise of modern CEOs); Randall S. Thomas & Harwell Wells, *Executive Compensation in Courts: Board Capture, Optimal Contracting, and Officers’ Fiduciary Duties*, 95 MINN. L. REV. 846, 852-55 (2011) (summarizing board capture theory in connection with executive compensation); Whitehead, *supra* note 5, at 1264 (“A firm’s success or failure often turns on the CEO’s decisions — more so than on decisions of the board.”).

⁸⁹ See Vidhan K. Goyal & Chul W. Park, *Board Leadership Structure and CEO Turnover*, 8 J. CORP. FIN. 49, 65 (2002) (observing that individuals concurrently serving as CEO and chairman possess disproportionate corporate influence); see generally James D. Westphal & Edward J. Zajac, *Who Shall Govern? CEO/Board Power*,

“homosocial reproduction”⁹⁰ and select like-minded individuals to work with them to execute their visions.⁹¹ Moreover, directors can become entrenched with long tenures and enamored with their positions, thereby rendering them reluctant to question their chairman and CEO.⁹² As a result, many technically independent⁹³ boards are not objectively independent.⁹⁴

With regards to outside gatekeepers, such as attorneys, accountants, and bankers, CEOs often hire parties who subscribe wholesale to their views as opposed to parties who can check and refine their views.⁹⁵ As a result of these practices, shareholders are deprived of meaningful sentinels for their interests.⁹⁶ While personnel and gatekeeper selection of similar-minded individuals can enhance corporate cohesion, such incest and insularity can also lead to unhealthy capture

Demographic Similarity, and New Director Selection, 40 ADMIN. SCI. Q. 60, 60-65 (1995) (discussing CEO control over board selection based on demographic similarities).

⁹⁰ ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 48 (1977).

⁹¹ See Barry Baysinger & Robert E. Hoskisson, *The Composition of Boards of Directors and Strategic Control: Effects on Corporate Strategy*, 15 ACAD. MGMT. REV. 72, 72-73 (1990) (“[M]anagers dominate their boards by using their de facto power to select and compensate directors and by exploiting personal ties with them.”).

⁹² See Carol Hymowitz & Jeff Green, *Not Going Anywhere*, BUS. WK., May 27–June 2, 2013, at 23, 23-24 (discussing the dynamics of entrenched directors); Jeffrey Sonnenfeld et al., *What CEOs Really Think of Their Boards*, HARV. BUS. REV., Apr. 2013, at 98, 98-102.

⁹³ The New York Stock Exchange (NYSE) and NASDAQ Stock Market require the boards of most of its listed companies to consist of a majority of independent directors. See *Listed Company Manual*, NYSE, INC., <http://nysemanual.nyse.com/lcm/> (last visited Dec. 26, 2013) (listing § 303A.01); *NASDAQ Stock Market Rules*, NASDAQ, INC., <http://nasdaq.cchwallstreet.com/> (last visited Dec. 26, 2013) (listing Rule 5605(b)(1)).

⁹⁴ See MACEY, *supra* note 58, at 84 (“[E]ven boards that appear from the outside to be independent, professional, and highly qualified are susceptible to board capture.”); Renée B. Adams & Daniel Ferreira, *A Theory of Friendly Boards*, 62 J. FIN. 217, 217-19 (2007); Byoung-Hyoun Hwang & Seoyoung Kim, *It Pays to Have Friends*, 93 J. FIN. ECON. 138, 139 (2009); Antony Page, *Unconscious Bias and the Limits of Director Independence*, 2009 U. ILL. L. REV. 237, 238-45.

⁹⁵ See generally Andrew F. Tuch, *Multiple Gatekeepers*, 96 VA. L. REV. 1583, 1599-1601 (2010) (explaining the importance and interdependence of corporate gatekeepers).

⁹⁶ See John C. Coffee, Jr., *Understanding Enron: “It’s About the Gatekeepers, Stupid,”* 57 BUS. LAW. 1403, 1403-08 (2002); see, e.g., BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM* 406-08 (2003) (discussing how deficient gatekeeping led to the demise of Enron). See generally Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950–2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1471 (2007) (“[G]enuinely independent directors might create significant value in the allocation of resources, not just in their firm but more generally as other firms are forced to adapt to the best performers.”).

by powerful CEOs and unduly damage the stability and long-term corporate interests as thoughtful counsel gives way to blind consent.⁹⁷

Second, powerful CEOs can form and execute fundamental corporate strategies with little organizational debate and dissent, endogenously and exogenously. Endogenously, the self-selected boards⁹⁸ and managers of many powerful CEOs are reluctant to question the decisions of their handsomely paid⁹⁹ and potently powerful chief executive.¹⁰⁰ In fact, many directors limit themselves from any meaningful, engaged management of corporations, and allow CEOs to make most of the critical decisions.¹⁰¹

Exogenously, few outside parties are capable of meaningfully critiquing and checking executive decisions, given the economic and organizational advantages of incumbent corporate executives.¹⁰² For instance, only incumbent executives are permitted to use corporate funds to solicit proxy votes, which can be a very expensive and time-consuming process;¹⁰³ and shareholder lawsuits must traverse paths

⁹⁷ Cf. David A. Carter et al., *Corporate Governance, Board Diversity, and Firm Value*, 38 FIN. REV. 33, 51 (2003) (suggesting that board diversity leads to better corporate results); M. Andrew Fields & Phyllis Y. Keys, *The Emergence of Corporate Governance from Wall St. to Main St.: Outside Directors, Board Diversity, Earnings Management, and Managerial Incentives to Bear Risk*, 38 FIN. REV. 1, 12-13 (2003) (opining that board diversity is strongly correlated with superior financial performance); Anil Shivdasani & David Yermack, *CEO Involvement in the Selection of New Board Members: An Empirical Analysis*, 54 J. FIN. 1829, 1852 (1999) (suggesting higher market capitalization for firms that select directors without CEO input).

⁹⁸ See, e.g., Gordon, *supra* note 96, at 1496 (discussing the inordinate influence CEOs have in board membership).

⁹⁹ See LUCIAN A. BEBCHUK & JESSE M. FRIED, PAY WITHOUT PERFORMANCE 1 (2004) (“Between 1992 and 2000 [alone,] the average real (inflation-adjusted) pay of chief executive officers (CEOs) of S&P 500 firms more than quadrupled, climbing from \$3.5 million to \$14.7 million.”); Daniel Costello, *The Drought Is Over (at Least for C.E.O.’s)*, N.Y. TIMES, Apr. 10, 2011, at BU1 (“[In 2010,] [t]he median pay for top executives at 200 major companies was \$9.6 million . . . a 12 percent increase over 2009.”).

¹⁰⁰ See, e.g., JAMES B. STEWART, DISNEYWAR 531 (2005) (discussing how Disney’s CEO, Michael Eisner, manipulated his passive board members to serve his ends); see also Hwang & Kim, *supra* note 94, at 144; Steven A. Ramirez, *The End of Corporate Governance Law: Optimizing Regulatory Structures for a Race to the Top*, 24 YALE J. ON REG. 313, 332 (2007) (“CEOs of public companies have the unique privilege of picking their own nominal supervisors — the board of directors.”).

¹⁰¹ Whitehead, *supra* note 5, at 1272.

¹⁰² See Ramirez, *supra* note 100, at 349 (“CEOs are simply better organized and have superior economic and political resources than the investing public.”). But see Kahan & Rock, *Embattled CEOs*, *supra* note 5, at 989 (arguing that CEOs are losing power to boards and shareholders).

¹⁰³ See Marcel Kahan & Edward Rock, *The Insignificance of Proxy Access*, 97 VA. L.

filled with many procedural hurdles.¹⁰⁴ Furthermore, information asymmetry, collective inaction, and investor apathy weaken shareholder activism as an exogenous organizational check on powerful CEOs.¹⁰⁵ Institutional and individual shareholders frequently lack proper economic incentives and organizing mechanisms to meaningfully engage in sustained activism.¹⁰⁶ Additionally, “[t]he political system is custom-made for those with great stakes in corporate governance — the CEOs of America’s public corporations — to dominate the content of corporate governance.”¹⁰⁷ CEOs, therefore, can use their considerable personal and corporate clout to influence regulatory efforts aimed at curtailing their expansive powers and interests.¹⁰⁸

REV. 1347, 1384-93 (2011) [hereinafter *Insignificance of Proxy Access*] (summarizing the various costs related to proxy solicitations).

¹⁰⁴ See *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009) (“To be successful, a securities class-action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action.”); BEBCHUK & FRIED, *supra* note 99, at 46-47 (outlining procedural obstacles faced by shareholders in connection with derivative suits). See generally STEPHEN M. BAINBRIDGE, *CORPORATION LAW AND ECONOMICS* 385 (2002) (“Derivative suits in fact are relatively rare.”).

¹⁰⁵ See Bainbridge, *Means and Ends*, *supra* note 79, at 571-72 (“Even the most active institutional investors devote only limited resources to corporate governance”); Tom C.W. Lin, *A Behavioral Framework for Securities Risk*, 34 SEATTLE U. L. REV. 325, 349-56 (2011) (critiquing the informational shortcomings of the disclosure-oriented securities regulation); David Arthur Skeel, Jr., *The Nature and Effect of Corporate Voting in Chapter 11 Reorganization Cases*, 78 VA. L. REV. 461, 472-73 (1992) (highlighting shareholder collective action problems). *But see* Bebchuk, *supra* note 56, at 888-92 (positing that institutional investors would engage in more shareholder activism absent certain legal constraints); *but cf.* Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811, 827-49 (1991) (suggesting institutional equity ownership can enhance corporate governance). See generally Justin Fox & Jay W. Lorsch, *What Good Are Shareholders?*, HARV. BUS. REV., July–Aug. 2012, at 50-57 (discussing shareholders’ roles and power in corporations).

¹⁰⁶ See Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1751-54 (2006) [hereinafter *Shareholder Disempowerment*] (describing the lack of incentives for firms to engage in shareholder activism). See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 33-36 (2d ed. 1971) (discussing relative efficiencies of groups of varying sizes in collective actions); Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO. L.J. 445, 465-66 (1991) (noting the dearth of rational incentives for institutional investors to engage in prolonged shareholder activism).

¹⁰⁷ Ramirez, *supra* note 100, at 355.

¹⁰⁸ See ROBERT G. KAISER, *ACT OF CONGRESS: HOW AMERICA’S ESSENTIAL INSTITUTION WORKS, AND HOW IT DOESN’T* 127-41 (2013) (describing the lobbying efforts in connection with recent financial reform legislation); Dorie Apollonio, Bruce E. Cain &

In the political context, our constitutional framework and the modern administrative state also make the government susceptible to capture by unitary presidents despite our founders' best intentions to diffuse power with the designing principles of federalism and separation of powers.¹⁰⁹ Presidents oversee the expansive executive branch's policies and personnel without meaningful structural checks.¹¹⁰ The net effect is that, because of a number of factors, the President "subsumes much of the tripartite structure of government."¹¹¹ After all, "[p]residential power is the power to persuade."¹¹²

First, presidents can frequently set forth new policy or re-prioritize existing policy without any meaningful constraints from the other branches.¹¹³ Through executive orders, signing statements, agency

Lee Drutman, *Access and Lobbying: Looking Beyond the Corruption Paradigm*, 36 HASTINGS CONST. L.Q. 13, 47-48 (2008); cf. Edward J. McCaffery & Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collective Action*, 84 N.C. L. REV. 1159, 1161, 1233 (2006) (discussing the pervasive influence of special interest groups, including corporations, on the political process); Brendan Greeley & Alison Fitzgerald, *Pssst... Wanna Buy A Law?*, BUS. WK., Dec. 5-11, 2011, at 68-72 (reporting on how corporations influence model legislation). See generally Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 219-25 (2012) (explaining the influence of lobbying); Tom C.W. Lin, *Executive Trade Secrets*, 87 NOTRE DAME L. REV. 911, 923-25 (2012) (commenting on the rising influence of CEOs over the last seven decades).

¹⁰⁹ See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."); THE FEDERALIST NO. 51, at 323-24 (James Madison) (Clinton Rossiter ed., 1961) (explicating on the Madisonian ideal to protect the people through federalism and separation of powers).

¹¹⁰ See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010) ("The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people."); Kagan, *supra* note 6, at 2246-52 (noting the historical growth of presidential power); William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 507-09 (2008); Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1757-59 (2013) (discussing presidential review of the rules of executive agencies).

¹¹¹ Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2316 (2006).

¹¹² RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* 11 (1990).

¹¹³ This is not to suggest that Congress and courts cannot create roadblocks for presidents. See, e.g., THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS*

directives, and the bully pulpit, the President can shape national policy without meaningful consent or counsel of Congress.¹¹⁴ For instance, with an executive order in 1942, President Franklin Roosevelt ordered the internment of thousands of Japanese Americans.¹¹⁵ And likewise, with an executive order in 1948, President Harry Truman desegregated the armed forces.¹¹⁶

Additionally, congressional delegation to administrative agencies has also increased executive power.¹¹⁷ This is evident by the vast expansion of the administrative state since our nation's founding, which Justice Jackson called "probably . . . the most significant legal trend of the last century."¹¹⁸ Accordingly, some scholars have noted that the President's powers have also expanded dramatically¹¹⁹:

OF EXTREMISM, at ix-x, 3 (2012); NOLAN MCCARTY ET AL., POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 13-14 (2006); Charles O. Jones, *Preparing to Govern in 2001: Lessons from the Clinton Presidency*, in THE PERMANENT CAMPAIGN AND ITS FUTURE 185, 197-99 (Norman J. Ornstein & Thomas E. Mann eds., 2000); Carl Hulse & Helene Cooper, *Obama and Leaders Reach Debt Deal*, N.Y. TIMES, Aug. 1, 2011, at A1; David A. Moss, *Fixing What's Wrong with U.S. Politics*, HARV. BUS. REV., Mar. 2012, at 134; Bill Scher, *How Liberals Win*, N.Y. TIMES, July 1, 2012, at SR8; Jonathan Weisman & Ashley Parker, *Republicans Back Down, Ending Crisis over Shutdown and Debt Limit*, N.Y. TIMES, Oct. 17, 2013, at A1. *But see, e.g.*, AMY GUTMANN & DENNIS THOMPSON, THE SPIRIT OF COMPROMISE 5-7, 104-05 (2012) (detailing presidential and congressional compromises regarding the Tax Reform Act of 1986 and the Civil Rights Act of 1964); CHRIS MATTHEWS, TIP AND THE GIPPER: WHEN POLITICS WORKED, at xiv-xv (2013) (chronicling the compromises between a Republican President and a Democratic Speaker of the House).

¹¹⁴ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653-54 (1952) (Jackson, J., concurring) ("By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness."); *see, e.g.*, Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1267 (2006) (noting that regulatory review "provides a sitting President, Democrat or Republican, with a powerful tool to promote his political agenda . . ."); *Presidential Authority*, *supra* note 70, at 2070-84 (discussing the increased use of signing statements by presidents to circumvent the legislative branch). *But see* GEORGE C. EDWARDS, III, ON DEAF EARS: THE LIMITS OF THE BULLY PULPIT 241-46 (2003) (explicating on the limited power of presidential persuasion).

¹¹⁵ Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

¹¹⁶ Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

¹¹⁷ See Julian Ku & John Yoo, *Globalization and Structure*, 53 WM. & MARY L. REV. 431, 452 (2011) ("In order to regulate an economy of [great] scope and complexity effectively, Congress delegated broad authority to independent agencies that stressed technical expertise over partisan politics."); Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 404-06 (2007).

¹¹⁸ *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

¹¹⁹ *See, e.g.*, Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of*

The President leads a federal bureaucracy that, among other powers, sets pollution standards for private industry, regulates labor relations, creates food and product safety standards, manages the nation's lands and natural resources, enforces the federal criminal law, oversees the banking industry, and governs a host of other activities too numerous to mention.¹²⁰

In recent years, agencies have promulgated ten times as many rules each year as Congress does statutes.¹²¹ And the President, as the head of this large administrative state, wields significant procurement powers that amount to hundreds of billions dollars annually.¹²² The President, thus, controls what amounts to a "fourth branch of the Government."¹²³

Second, modern politics has largely replaced separation of powers with "separation of parties,"¹²⁴ undermining the Madisonian principle of inter-branch ambitions to "counteract ambition."¹²⁵ Therefore, the House or the Senate, when led by the same party as the President, serves as a weak bulwark against presidential capture. Given the increased and unparalleled party polarization,¹²⁶ rather than serve as a check, Congress can actually facilitate presidential capture when the same party leads the executive branch and the legislative branch, in whole or in part.¹²⁷ For instance, in 2013, Democratic Senate Majority leader Harry Reid altered longstanding Senate rules to help the

Powers, 112 COLUM. L. REV. 459, 466-67 (2012) (discussing the rise of the administrative state post-New Deal as central to expansions in presidential power). See generally Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1241-46 (1994) (discussing the President's constitutional powers).

¹²⁰ Marshall, *supra* note 110, at 514.

¹²¹ Peter L. Strauss, *Overseer, or "The Decider"?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 752 (2007).

¹²² See Daniel P. Gitterman, *The American Presidency and the Power of the Purchaser*, 43 PRESIDENTIAL STUD. Q. 225, 225-29 (2013).

¹²³ *Ruberoid Co.*, 343 U.S. at 487.

¹²⁴ See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2312-15 (2006).

¹²⁵ THE FEDERALIST NO. 51, at 319 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

¹²⁶ MCCARTY ET AL., *supra* note 113, at 15-16.

¹²⁷ See Jide Nzelibe, *Partisan Conflicts over Presidential Authority*, 53 WM. & MARY L. REV. 389, 392-94 (2011) (discussing how partisanship can enhance presidential power); see also Ethan J. Leib & Christopher S. Elmendorf, WHY PARTY DEMOCRATS NEED POPULAR DEMOCRACY AND POPULAR DEMOCRATS NEED PARTIES, 100 CALIF. L. REV. 69, 71 (2012) (arguing that "there is an important potential for complementarity between popular and party democracy").

appointees of President Barack Obama, a fellow Democrat, gain confirmation.¹²⁸

Third, just as CEOs can surround themselves with sycophants and agreeable advisors, presidents can do the same with Cabinet appointments and senior advisors. Rather than surround themselves with a “team of rivals,”¹²⁹ presidents can form a group of devotees that do not provide objective counsel or any meaningful counsel at all.¹³⁰ While Congress has confirmation powers over Cabinet appointments,¹³¹ most Cabinet appointees are confirmed.¹³² And if Congress refuses to confirm a presidential appointee, presidents can make such appointments during a congressional recess.¹³³ Moreover, highly influential senior advisors, staffers, and agency political appointees, such as the Chief of Staff, require no Senate consultation or confirmation.¹³⁴

¹²⁸ Jeremy W. Peters, *Senate Vote Curbs Filibuster Power to Stall Nominees*, N.Y. TIMES, Nov. 22, 2013, at A1.

¹²⁹ See, e.g., DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN*, at xvi (2005) (chronicling how Abraham Lincoln “made the unprecedented decision to incorporate eminent rivals into his political family, the cabinet”).

¹³⁰ See Gia B. Lee, *The President’s Secrets*, 76 GEO. WASH. L. REV. 197, 237 (2008); Marshall, *supra* note 110, at 511-14; cf. ROBERT B. REICH, *LOCKED IN THE CABINET* 109 (1998) (“From the view of the White House staff, cabinet officials are provincial governors presiding over alien, primitive territories. Anything of any importance occurs in the imperial palace, within the capital city.”).

¹³¹ See U.S. CONST. art. II, § 2, cl. 2 (granting the President the power to appoint officials “by and with the Advice and Consent of the Senate”).

¹³² See Nolan McCarty & Rose Razaghian, *Advice and Consent: Senate Responses to Executive Branch Nominations 1885–1996*, 43 AM. J. POL. SCI. 1122, 1125-26 (1999) (finding that between 1885 to 1996 only 4.4% of presidential nominations were rejected, withdrawn, or expired due to Senate inaction).

¹³³ See U.S. CONST. art. II, § 2, cl. 3; *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 2012 WL 168645, at *19 (O.L.C. Jan. 6, 2012); see also *Canning v. NLRB*, 705 F.3d 490, 504-07 (D.C. Cir. 2013) (interpreting “recess” and limiting the scope of presidential recess appointment powers).

¹³⁴ See, e.g., JONATHAN ALTER, *THE PROMISE: PRESIDENT OBAMA, YEAR ONE* 330 (2010) (observing that the Obama administration “centralized decision making in the White House to the point where many cabinet secretaries had their chiefs of staff appointed by [White House chief of staff] Rahm Emmanuel[.]”); see also BRADLEY H. PATTERSON, JR., *THE WHITE HOUSE STAFF: INSIDE THE WEST WING AND BEYOND* 2 (2000) (“The Constitution includes not a word about the White House staff, and they are barely mentioned in statute. Staff members have zero legal authority in their own right, yet 100 percent of presidential authority passes through their hands.”); David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1122-25 (2008) (noting that modern presidents appoint thousands of individuals to government posts without Senate

Fourth, internal presidential gatekeepers are flawed sentinels against executive overreach on the most important and sensitive matters facing the presidency.¹³⁵ The Department of Justice and its Office of Legal Counsel (“OLC”) in particular, are charged with the duty of opining on the legal veracity of executive actions,¹³⁶ including critical matters like drone strikes, enhanced interrogations, and targeted killings of American citizens.¹³⁷ The Attorney General and the head of the OLC are both presidential appointees who are usually strong supporters of the President and his worldview.¹³⁸ Accordingly, they frequently facilitate executive action and executive power rather than check them.¹³⁹

Fifth, because of the nature of presidential elections, a president can win or retain office while only appealing to a very thin slice of the electorate in a few states. In fact, because of the Electoral College, presidents can secure re-election by winning only the eleven most populated states.¹⁴⁰ Therefore, presidents (particularly those in their second terms) can sometimes act in contravention of popular opinion with little fear of political retribution. As a result, elections represent, at best, an imperfect mechanism for constraining presidential power.

In sum, from an organizational perspective, there exists the distinct likelihood of substantial capture by powerful presidents and CEOs. While such capture exists in many institutions, and may be instinctual,¹⁴¹ presidents and CEOs present exponentially magnified

confirmation).

¹³⁵ See *Presidential Authority*, *supra* note 70, at 2092-94.

¹³⁶ See Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1305-08 (2000).

¹³⁷ See JACK GOLDSMITH, *THE TERROR PRESIDENCY* 141-53 (2007) (writing about OLC memos relating to enhanced interrogation techniques); DAVID E. SANGER, *CONFRONT AND CONCEAL: OBAMA'S SECRET WARS AND THE SURPRISING USE OF AMERICAN POWER* 255-59 (2012) (discussing OLC review of using drones in warfare); Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. Times, May 29, 2012, at A1 (reporting on the OLC justifying plans to kill American citizens engaging in terrorist activities).

¹³⁸ Cf. *Presidential Authority*, *supra* note 70, at 2109-12 (discussing OLC's attempts to increase its independence from White House influence). *But see* Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 514-16 (1993) (articulating institutional practices that safeguard the independence of the OLC).

¹³⁹ *Presidential Authority*, *supra* note 70, at 2093-94.

¹⁴⁰ See Nzelibe, *Fable*, *supra* note 65, at 1221. See generally KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 1-3 (2d ed. 1963) (discussing problems of majoritarian voting as a mechanism for expressing collective, social choice).

¹⁴¹ See, e.g., Donald C. Langevoort, *Chasing the Greased Pig Down Wall Street: A Gatekeeper's Guide to the Psychology, Culture, and Ethics of Financial Risk Taking*, 96

mutations of these challenges because of their prominence, their power, and the lack of strong checks and balances against their positions. While such capture can lead to swift, effective, and beneficial action, it can also create opportunities for serious abuse.¹⁴² In the corporate context, CEO capture can destroy shareholder wealth-creation and lead to disastrous consequences.¹⁴³ Likewise, in the political context, presidential capture can send a nation down perilous paths with no easy exits.

2. Deference

The law has exhibited significant legal deference to the decisions of CEOs and presidents. Part of the rationale underlying such legal deference is the belief that business decisions are better made by business executives and certain decisions, particularly those related to national security, foreign affairs, and executive privilege, are better made by presidents without the second-guessing of courts. This deference is more unique than rare in American law as courts generally do not defer on other specialized subjects, like medicine or engineering.¹⁴⁴ The deference extended by the law to their decisions serves as another point of convergence between CEOs and presidents.

With regards to CEOs, the law has exhibited great deference to corporate executives¹⁴⁵ under the business judgment rule doctrine.¹⁴⁶

CORNELL L. REV. 1209, 1214 (2011) (arguing that corporate gatekeepers are sometimes cognitively lulled to “relax their guard” in the presence of successful and optimistic individuals).

¹⁴² Studies suggest that CEO influence and power is closely and positively correlated with CEO compensation. See, e.g., Bebchuk et al., *supra* note 5, at 754 (studying executive compensation); Marianne Bertrand & Sendhil Mullainathan, *Are CEOs Rewarded for Luck? The Ones Without Principals Are*, 116 Q.J. ECON. 901, 901-03, 929 (2001) (discussing the correlation between executive power and compensation). See generally Richard M. Cyert et al., *Corporate Governance, Takeovers, and Top-Management Compensation: Theory and Evidence*, 48 MGMT. SCI. 453, 456 (2002) (citing studies examining CEO influence and compensation levels).

¹⁴³ See JOHN C. BOGLE, *THE BATTLE FOR THE SOUL OF CAPITALISM* 22-28 (2005).

¹⁴⁴ See FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 94 (1991) (inquiring as to why judges are permitted to judge controversies involving engineering design but not business decisions); Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 120 (2004) [hereinafter *Business Judgment Rule*] (“[N]o ‘medical judgment’ or ‘design judgment’ rule precludes judicial review of malpractice or product liability cases.”).

¹⁴⁵ The term “corporate executives” is meant to capture both directors and senior officers of corporations. While there exists no judicial uniformity that extends the business judgment to both officers and directors, a significant number of commentators and courts have held accordingly. Moreover, given that many CEOs

The doctrine “establishes a presumption against judicial review” of substantive business decisions.¹⁴⁷ Courts, therefore, rarely second-guess the decisions of CEOs or substitute their judgments for the judgments of CEOs,¹⁴⁸ regardless of how catastrophic the result or how imprudent the process.¹⁴⁹ As the highly influential Delaware

also serve as a corporation’s chairman, such an extension appears sensible. *See* Galef v. Alexander, 615 F.2d 51, 57 n.13 (2d Cir. 1980) (noting that the business judgment rule “generally applies to decisions of executive officers as well as those of directors”); *FDIC v. Stahl*, 854 F. Supp. 1565, 1570 n.8 (S.D. Fla. 1994) (noting business judgment rule extends to both officers and directors); *Selcke v. Bove*, 629 N.E.2d 747, 750 (Ill. App. 1994) (rejecting contention that business judgment rule does not apply to officers); PRINCIPLES OF CORPORATE GOVERNANCE § 4.01 (1994) (extending the doctrine to cover the decisions of officers as well as directors). *But see* *FDIC v. Hawker*, CV F 12-0127 LJO DLB, 2012 U.S. Dist. LEXIS 79320, at *24-25 (E.D. Cal. June 7, 2012) (withholding application of the business judgment rule to officers at early stages of a legal proceeding); *Platt v. Richardson*, CIV No. 88-0144, 1989 WL 159584, at *2 (M.D. Pa. June 6, 1989) (“The business judgment rule applies only to directors of a corporation and not to officers.”).

¹⁴⁶ *See, e.g.,* *Joy v. North*, 692 F.2d 880, 885 (2d Cir. 1982) (“Whatever the terminology, the fact is that liability is rarely imposed upon corporate directors or officers simply for bad judgment and this reluctance to impose liability for unsuccessful business decisions has been doctrinally labeled the business judgment rule.”); *see also* *Kamin v. Am. Express Co.*, 383 N.Y.S.2d 807, 810-11 (Sup. Ct. 1976) (“The directors’ room rather than the courtroom is the appropriate forum for thrashing out purely business questions . . .”).

¹⁴⁷ *Bainbridge, Business Judgment Rule*, *supra* note 144, at 90; *see also* *Shlensky v. Wrigley*, 237 N.E.2d 776, 778 (Ill. App. Ct. 1968) (“[C]ourts of equity will not undertake to control the policy or business methods of a corporation, although it may be seen that a wiser policy might be adopted and the business more successful if other methods were pursued.”).

¹⁴⁸ *See* *Shlensky*, 237 N.E.2d at 779 (“In a purely business corporation . . . the authority of the directors in the conduct of the business of the corporation must be regarded as absolute when they act within the law, and the court is without authority to substitute its judgment for that of the directors.” (quoting *Toebelman v. Missouri-Kansas Pipe Line Co.*, 41 F. Supp. 334, 339 (D. Del. 1941))); *cf.* *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (refusing to interfere with business decisions because “judges are not business experts”).

¹⁴⁹ The business judgment rule, however, is not an omnipotent shield. *See* *Joy*, 692 F.2d at 886 (noting that the business judgment rule “does not apply in cases, e.g., in which the corporate decision lacks a business purpose, is tainted by a conflict of interest, is so egregious as to amount to a no-win decision, or results from an obvious and prolonged failure to exercise oversight or supervision” (internal citations omitted)); *Shlensky*, 237 N.E.2d at 779-80 (holding that the doctrine does not protect decisions that involve illegality, fraud, or bad faith). There also exists the “responsible corporate officer” doctrine, which permits courts to hold executives criminally and strictly liable for violations caused by business organizations under certain circumstances. *See* *United States v. Dotterweich*, 320 U.S. 277, 284-85 (1943); *see also* *United States v. Park*, 421 U.S. 658, 670-71 (1975).

Supreme Court stated, “The business judgment rule exists to protect and promote the full and free exercise of the managerial power. . . .”¹⁵⁰

With regards to presidents, courts have exhibited great deference to them, particularly in matters relating to national security, foreign affairs, and executive privilege.¹⁵¹ In terms of national security and foreign affairs, the Supreme Court has long held that, “The conduct of the foreign relations of our government is committed by the Constitution to the executive [It] is not subject to judicial inquiry or decision.”¹⁵² And with executive privilege, presidents and other members of the executive branch are afforded the deference to withhold information from the other branches,¹⁵³ and the general public.¹⁵⁴ Presidents have defended executive privilege as a necessity for confidential, candid deliberations in connection with executing their constitutional duties.¹⁵⁵ Historically, courts have generally

¹⁵⁰ *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (citing *Zapata Corp. v. Maldonado*, 430 A.2d 779, 782 (Del. 1981)).

¹⁵¹ See *In re Terrorist Attacks on Sept. 11, 2001*, No. 03 MDL 1570, 03 Civ. 6978 (RCC), 2004 WL 1348996, at *2 (S.D.N.Y. June 14, 2004) (“This Court defers to the judgment of the executive branch with respect to issues of national security”); Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1109-11 (2013) (summarizing the limits of judicial review on presidential power); see, e.g., *Haig v. Agee*, 453 U.S. 280, 309-10 (1981) (deferring to the Secretary of State on a national security matter); *United States v. Reynolds*, 345 U.S. 1, 10 (1953) (permitting the concealment of evidence by the executive branch for national security purpose); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 330-31 (1936) (submitting to executive judgment on an economic issue in the national security context). *But see*, e.g., *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (rejecting the political question deference in a foreign affairs context); *Medellin v. Texas*, 552 U.S. 491 (2008) (restraining presidential powers to enforce international treaties without congressional consent); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (limiting the presidential authority to set up military commissions). See generally Barron & Lederman, *supra* note 6, at 693 (challenging “the traditional assumption that Congress has ceded the field to the President when it comes to war”); Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2355 (2006) (discussing presidential deference in national security matters).

¹⁵² *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918).

¹⁵³ See Mark J. Rozell, *Executive Privilege in the Clinton Scandal*, in *THE CLINTON SCANDAL* 81, 81 (Mark J. Rozell & Clyde Wilcox eds., 2000) (“[E]xecutive privilege is an implied power that enables presidents and high-level executive branch officers to withhold information from Congress, the courts, and ultimately the public.”).

¹⁵⁴ Mark J. Rozell, *Executive Privilege in an Era of Polarized Politics*, in *EXECUTING THE CONSTITUTION* 91, 91 (Christopher S. Kelley ed., 2006).

¹⁵⁵ See THEODORE H. WHITE, *BREACH OF FAITH: THE FALL OF RICHARD NIXON* 203 (1975) (“Executive privilege is a matter of vital importance to the conduct of the American Presidency. Unless the President can talk frankly, and listen to frank advice, he cannot think clearly enough to act effectively.”); Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1386 (1974) (“The Executive Branch, on the other hand, has an undeniably

accepted this view¹⁵⁶ and deferred to the desires of presidents for secrecy.¹⁵⁷

Moreover, outside of matters relating to national security, foreign affairs, and executive privilege, the law has also shown deference to presidents.¹⁵⁸ “Most notably, the Supreme Court in *Chevron* assigned to the executive branch the authority to determine the meaning of ambiguously worded statutes, suggesting it was desirable for agencies to pursue the President’s regulatory agenda in interpreting such statutes.”¹⁵⁹ Because of such great deference, scholars like Bruce Ackerman lament that courts and the law have created a “runaway presidency.”¹⁶⁰ This generous deference is fortunately checked by “politics and public opinion,”¹⁶¹ as presidents can (hopefully) only act within the bounds of their public stature.¹⁶²

In sum, presidents and CEOs are afforded significant deference under the law in many key contexts. While such deference encourages

legitimate interest, at least under some circumstances, in preserving the confidentiality of internal communications in order to perform its duties under article II.”)

¹⁵⁶ While courts have given presidents great deference on executive privilege, such deference is not absolute and must be balanced against other interests. *See In re Sealed Case*, 121 F.3d 729, 742 (D.C. Cir. 1997) (“Executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case.” (quoting *Nixon v. Sirica*, 487 F.2d 700, 716 (D.C. Cir. 1973))); MARK J. ROZELL, EXECUTIVE PRIVILEGE 43 (2002) (“Congress’s and the public’s ‘right to know’ must be balanced with the requirements of national security.”).

¹⁵⁷ *See, e.g.*, Mark J. Rozell, *Restoring Balance to the Debate over Executive Privilege*, 8 WM. & MARY BILL RTS. J. 541, 561 (2000) (“The Court has determined that secrecy is a necessary condition for the President to carry out many of his constitutional duties”); *see also* *United States v. Nixon*, 418 U.S. 683, 708 (1974) (“The privilege is fundamental to the operation of Government.”); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (“The President, both as Commander-in-Chief and as the Nation’s organ for foreign affairs, has available intelligence services whose reports neither are not and ought not to be published to the world.”); *cf.* *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (“Congress — in giving the Executive authority over matters of foreign affairs — must of necessity paint with a brush broader than that it customarily wields in domestic areas.”).

¹⁵⁸ POSNER & VERMEULE, *supra* note 72, at 15.

¹⁵⁹ Bulman-Pozen, *supra* note 119, at 467.

¹⁶⁰ BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 6 (2010).

¹⁶¹ POSNER & VERMEULE, *supra* note 72, at 12.

¹⁶² *See* NEUSTADT, *supra* note 112, at 185; Richard H. Pildes, *Book Review*, 125 HARV. L. REV. 1381, 1387 (2012) (“[T]he actual, effective powers of a President (as opposed to the formal powers of the office) are directly rooted in, and limited by, his or her ongoing credibility.” (reviewing POSNER & VERMEULE, *supra* note 72)); *Presidential Authority*, *supra* note 70, at 2067 (“[T]he *people* retain substantial power to define the proper scope of the presidential authority.” (emphasis added)).

efficient decision-making, such deference can also become dangerously excessive when compounded with the absence of endogenous and exogenous organizational checks, as is frequently the case with presidents and CEOs. Excessive deference can lead to abuses of power and paths of peril for corporations, shareholders, and society.¹⁶³

3. Overconfidence

Individuals generally possess an overabundance of confidence in their skills, intellect, and foresight.¹⁶⁴ This is particularly true for individuals who ascend to the position of the CEO of a large corporation or the President of the United States.¹⁶⁵ It is likely difficult not to feel confident when one is a modern captain of industry or the leader of the free world.¹⁶⁶

Presidents and CEOs are particularly susceptible to the perils of overconfidence because of their proclivity for organizational capture and the deference of law.¹⁶⁷ The presence of organizational capture coupled with the deference of law can create feedback loops where confidence breeds more confidence.¹⁶⁸ While confidence is necessary for successful leadership in business and government,¹⁶⁹ excessive

¹⁶³ See, e.g., Joel Seligman, *Rethinking Private Securities Litigation*, 73 U. CIN. L. REV. 95, 114 (2004) (discussing how state corporate law's deference to management contributed to increases in executive compensation).

¹⁶⁴ See David A. Armor & Shelley E. Taylor, *When Predictions Fail: The Dilemma of Unrealistic Optimism*, in *HEURISTICS AND BIASES* 334, 334 (Thomas Gilovich et al. eds., 2002) ("One of the most robust findings in the psychology of prediction is that people's predictions tend to be optimistically biased."); Daniel Kahneman & Dan Lovallo, *Timid Choices and Bold Forecasts: A Cognitive Perspective on Risk Taking*, 39 MGMT. SCI. 17, 27 (1993).

¹⁶⁵ See ROSABETH MOSS KANTER, *CONFIDENCE* 325-349 (2006) [hereinafter *CONFIDENCE*]; Dan Lovallo & Daniel Kahneman, *Delusions of Success: How Optimism Undermines Executives' Decisions*, HARV. BUS. REV., July 2003, at 56, 57-59. See generally Richard Roll, *The Hubris Hypothesis of Corporate Takeovers*, 59 J. BUS. 197, 197-200 (1986) (discussing hubris in connection with corporate takeovers).

¹⁶⁶ See Tom C.W. Lin, *The Corporate Governance of Iconic Executives*, 87 NOTRE DAME L. REV. 351, 354 (2011); see also Mathew L.A. Hayward et al., *Believing One's Own Press: The Causes and Consequences of CEO Celebrity*, 25 STRATEGIC MGMT. J. 637, 638-43 (2004). But cf. Stanley Lieberman & James F. O'Connor, *Leadership and Organizational Performance: A Study of Large Corporations*, 37 AM. SOC. REV. 117 (1972) (questioning the estimation of leadership's impact on corporate performance).

¹⁶⁷ See *supra* Parts II.B.1 and II.B.2.

¹⁶⁸ GEORGE A. AKERLOF & ROBERT J. SHILLER, *ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM* 55-56 (2009).

¹⁶⁹ See ADAM BRYANT, *THE CORNER OFFICE* 24-40 (2011) (chronicling the

confidence can lead to dangerous tendencies and disastrous outcomes. Overconfident presidents and CEOs are more inclined to engage in excessively risky behavior.

In the corporate context, CEO overconfidence can lead executives to invest in suspect positions without properly considering the risks,¹⁷⁰ and once invested, become reluctant to change course.¹⁷¹ Studies have suggested that CEO overconfidence can lead to the overpayment of acquisitions or the adoption of unreasonably harmful defensive tactics to avoid takeovers.¹⁷² Overconfidence can also lead CEOs to disengage from meaningful management of critical issues.¹⁷³ Overconfidence may have played a significant role in the lead up to the financial crisis of 2008 that cost millions of jobs and billions of dollars in bailouts.¹⁷⁴ At the time, CEOs of many investment banks confidently (and

importance of “battled-hardened confidence” for corporate executives); see also KANTER, CONFIDENCE, *supra* note 165, at 30-31 (examining the role of confidence in the success or failure of an enterprise).

¹⁷⁰ Cf. David A. Hoffman, *The “Duty” to Be a Rational Shareholder*, 90 MINN. L. REV. 537, 555 (2006) (“[M]ost investors mistakenly believe they can beat the market.”); Donald C. Langevoort, *Selling Hope, Selling Risk: Some Lessons for Law from Behavioral Economics About Stockbrokers and Sophisticated Customers*, 84 CALIF. L. REV. 627, 663-65 (1996) (explaining that investors erroneously attribute past success to masterful skill).

¹⁷¹ See Stephen J. Choi & A.C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1, 13 (2003); Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 147, 167 (1997) (classifying this consequence of overconfidence as the “optimism-commitment whipsaw”); cf. Jason Zweig, *Polishing the Dimon Principle*, WALL ST. J., May 12, 2012, at B1 (“Experiments at racetracks and elsewhere have shown that people who bet on an outcome become up to three times more confident that it will occur than people who didn’t put up any money.”).

¹⁷² See J.B. Heaton, *Managerial Optimism and Corporate Finance*, 31 FIN. MGMT. 33, 42-43 (2002) (studying the dangers of managerial overconfidence in takeover defenses); Roll, *supra* note 165, at 197-200. See generally Richard H. Thaler, *Anomalies: The Winner’s Curse*, 2 J. ECON. PERSPECTIVES 191 (1998) (explaining how winners of auctions tend to overpay).

¹⁷³ See Stephen E. Clapham & Charles R. Schwenk, *Self-Serving Attributions, Managerial Cognition, and Company Performance*, 12 STRATEGIC MGMT. J. 219, 227-28 (1991); Hayward et al., *supra* note 166, at 645-47 (discussing how executive overconfidence can lead to strategic inertia); Edward J. Zajac & Max H. Bazerman, *Blind Spots in Industry and Competitor Analysis: Implications of Interfirm (Mis)Perceptions for Strategic Decisions*, 16 ACAD. MGMT. REV. 37, 37-41 (1991) (commenting on the causes of “blind spots” in corporate decision-making).

¹⁷⁴ See Tom C.W. Lin, *Too Big to Fail, Too Blind to See*, 80 MISS. L.J. 355, 371-73 (2010) (reviewing ANDREW ROSS SORKIN, *TOO BIG TO FAIL* (2009)) (discussing the role of overconfidence in the financial crisis).

erroneously) believed that housing prices could only rise; and, thus, they were not properly prepared when the housing bubble burst.¹⁷⁵

Similarly, in the political context, overconfident presidents can place too much faith in their individual capacities and judgments disregarding the fact that the executive branch is more than one individual.¹⁷⁶ As a result, overconfident presidents can steadfastly cling to bad policies in domestic and foreign affairs unmindful of unknown information and uncertain outcomes.¹⁷⁷ For instance, some attribute the disastrous policies related to the Vietnam War that caused thousands of American casualties over the course of a decade to presidential hubris under the Kennedy and Johnson administrations.¹⁷⁸ More recently, controversies related to the lead-up and fallout of the war in Iraq under President George W. Bush have also been attributed to presidential hubris and overconfidence.¹⁷⁹

In sum, a healthy level of confidence is often a key ingredient for successful corporate and presidential leadership as it imbues leaders with optimism and inspiration. However, overconfidence can blind leaders to their flaws and bind them and their constituents to their failings.

4. Aggrandizement

The perils of capture, deference, and overconfidence in presidents and CEOs can form a cocktail of executive liberty that transforms into dangerous executive aggrandizement, as checks and balances are

¹⁷⁵ See MICHAEL LEWIS, *THE BIG SHORT* 88-90 (2010) (noting the prevalent view on Wall Street of an ever-rising housing market).

¹⁷⁶ See Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1840 (2013) (“[W]hile the President is ultimately in charge, the White House itself is a ‘they,’ not an ‘it.’”); see also Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 49 (2006) (“Presidential control is a ‘they’ not an ‘it.’”).

¹⁷⁷ See NEUSTADT, *supra* note 112, at 209 (“What Presidents do every day is to make decisions that are mostly thrust upon them, the deadlines all too often outside their control, on options mostly framed by others, about issues crammed with technical complexities and uncertain outcomes.”); Jeffery J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 601 (2002) (“The President is the most overworked and underinformed decisionmaker in the American policymaking system.”).

¹⁷⁸ See, e.g., DAVID HALBERSTAM, *THE BEST AND THE BRIGHTEST* 41-59 (1993).

¹⁷⁹ See generally MICHAEL ISIKOFF & DAVID CORN, *HUBRIS: THE INSIDE STORY OF SPIN, SCANDAL, AND THE SELLING OF THE IRAQ WAR* (2007); BOB WOODWARD, *STATE OF DENIAL: BUSH AT WAR, PART III* (2006).

unduly sacrificed in the name of efficiency and effectiveness.¹⁸⁰ Such executive aggrandizement can lead to catastrophic consequences when callous dictates and mandates replace meaningful discussions and deliberations.¹⁸¹ Moreover, recent studies have also suggested that high-statured individuals, like CEOs and presidents, are more inclined to engage in unethical and risky behavior.¹⁸²

The corporate law canon is littered with stories of aggrandizing executive behavior. CEOs, with good or ill intentions, can successfully engage in legally compliant, but conflicted dealings and dangerous practices, given the lack of meaningful restraints on their power.¹⁸³ Former longtime Disney CEO and Chairman, Michael Eisner, in the last few years of his long tenure, as one court described, “enthroned himself as the omnipotent and infallible monarch of his personal Magical Kingdom” to install his then good friend Michael Ovitz as President of Disney.¹⁸⁴ Mr. Eisner would later fire Ovitz and grant him a severance package in excess of \$100 million for about a year’s worth of work after several clashes.¹⁸⁵ Mr. Eisner’s cavalier hiring and firing of Michael Ovitz as President of Disney led one Delaware court to declare that Disney’s directors “failed to exercise *any* business judgment and failed to make *any* good faith attempt to fulfill their fiduciary duties to Disney and its stockholders” because of their almost wholesale deference to Mr. Eisner.¹⁸⁶ More recently, in the

¹⁸⁰ Cf. Prakash, *supra* note 82, at 1433 (“[W]ith the passage of time, our nation’s highest office has evolved from a somewhat imbecilic executive to a muscular one that enjoys extensive and undetermined crisis authority.”); Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129, 144-49 (2009) (noting that the efficiencies promoted by centralized management must be balanced with oversight).

¹⁸¹ See Lee, *supra* note 130, at 237 (“When deliberants espouse diverse perspectives, deliberating groups are less likely to experience extreme polarization.”).

¹⁸² See, e.g., Paul K. Piff et al., *Higher Social Class Predicts Increased Unethical Behavior*, 109 PROCEEDINGS NAT’L ACAD. SCI. 4086, 4086 (2012); William J. Wales et al., *In Pursuit of Greatness: CEO Narcissism, Entrepreneurial Orientation, and Firm Performance Variance*, 50 J. MGMT. STUD. 1041, 1041-42 (2013).

¹⁸³ See MACEY, *supra* note 58, at 98 (“To the extent that boards of directors monitor management, it is indeed perverse to have the monitors led by the leader of the executive groups they ostensibly are monitoring.”); WILLIAMS C. POWERS, JR. ET AL., REPORT OF INVESTIGATION BY THE SPECIAL INVESTIGATIVE COMMITTEE OF THE BOARD OF DIRECTORS OF ENRON CORP., at 18-25 (2002) (discussing various conflicted dealings that played a key role in Enron’s demise); Troy A. Paredes, *Too Much Pay, Too Much Deference: Behavioral Corporate Finance, CEOs, and Corporate Governance*, 32 FLA. ST. U. L. REV. 673, 727 (2005) (discussing conflicts of interests in corporate governance involving CEOs).

¹⁸⁴ *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 763 (Del. 2005).

¹⁸⁵ *In re Walt Disney Co. Derivative Litig.*, 825 A.2d 275, 279 (Del. 2003).

¹⁸⁶ *Id.* at 278.

aftermath of the financial crisis, John Mack, the then CEO of Morgan Stanley, simply admitted that the boards and CEOs of the investment banks “can’t control ourselves.”¹⁸⁷

Furthermore, absent meaningful oversight, aggrandizing CEOs can boost their power, wealth, and influence to the detriment of their constituencies.¹⁸⁸ Such CEOs can engage in self-serving policies,¹⁸⁹ accounting gimmickry,¹⁹⁰ or outright fraud to enrich themselves and perpetuate their reigns.¹⁹¹ Dennis Kozlowski, the former CEO and chairman of Tyco, used corporate funds to throw a \$2 million birthday party for his wife in Sardinia and embezzled approximately \$150 million from the company.¹⁹²

In the political context, aggrandizing presidents can be just as troubling. Such presidents can subscribe to that Nixonian adage of, “[W]hen the president does it, that means that it is not illegal.”¹⁹³ Such reckless subscription with centralized power can lead to dangerous presidential behavior and perilous national consequences. President Lincoln suspended the writ of habeas corpus during the Civil War,¹⁹⁴ and ignored a Supreme Court order to overturn the suspension.¹⁹⁵

¹⁸⁷ *Morgan Stanley’s Mack: “We Cannot Control Ourselves,”* N.Y. TIMES DEALBOOK (Nov. 19, 2009), <http://dealbook.blogs.nytimes.com/2009/11/19/morgan-stanleys-mack-we-cannot-control-ourselves/> (quoting John J. Mack as stating “[w]e cannot control ourselves”).

¹⁸⁸ See Xueming Luo et al., *Long CEO Tenure Can Hurt Performance*, HARV. BUS. REV., Mar. 2013, at 26, 26; see also Whitehead, *supra* note 5, at 1277 (“CEOs typically possess significant discretion in performing their jobs. That discretion can be used to enhance their authority, potentially at shareholder expense.”).

¹⁸⁹ See Clapham & Schwenk, *supra* note 173, at 227-28.

¹⁹⁰ See generally Joseph Fuller & Michael C. Jensen, *Just Say No to Wall Street: Putting a Stop to the Earnings Game*, 22 J. APPLIED CORP. FIN. 59 (2010).

¹⁹¹ See *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 741 n.373 (Del. 2005) (“[O]rnamental, passive directors contribute to sycophantic tendencies among directors and how imperial CEOs can exploit this condition for their own benefit, especially in the executive compensation and severance area.”); John C. Coffee, Jr., *What Went Wrong?: An Initial Inquiry into the Causes of the 2008 Financial Crisis*, 9 J. CORP. L. STUD. 1, 2 (2009).

¹⁹² See Andrew Ross Sorkin, *Ex-Chief and Aide Guilty of Looting Millions at Tyco*, N.Y. TIMES, June 18, 2005, at A1.

¹⁹³ DAVID FROST, *FROST/NIXON* 89 (2007).

¹⁹⁴ Abraham Lincoln, Executive Order to the Commanding General of the Army of the United States (Apr. 27, 1861), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=69748>; see Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att’y Gen. 74, 74 (1861); see also David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — A Constitutional History*, 121 HARV. L. REV. 941, 998-99 (2008) (reviewing Lincoln’s suspension of the writ of habeas corpus).

¹⁹⁵ JAMES F. SIMON, *LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE*

President Franklin Roosevelt attempted to pack the Supreme Court in order to achieve his desired results.¹⁹⁶ President Reagan's administration secretly provided millions of dollars in cash and weapons to contras in Nicaragua and Iran.¹⁹⁷ President Obama ordered military strikes against Libya without congressional approval and in opposition to the opinions of his most senior attorneys in the OLC and the Pentagon.¹⁹⁸ President Obama also personally ordered the killing of an American citizen in the name of national security without traditional due process.¹⁹⁹ Given such executive actions, all of which were surely done with the best of intentions for the nation, it is little wonder that some scholars view the executive branch headed by the President as the "most dangerous branch" of government.²⁰⁰

In sum, executive liberty is a blessing and a curse. When properly exercised and tempered, it allows presidents and CEOs to swiftly and effectively fulfill their promises to the governed. However, when improperly utilized and checked, executive liberty can turn into executive aggrandizement and lead to grave perils for the nation and its corporations. Because it is often difficult to timely discern good executives and good policies from bad ones, and because good intentions sometimes can lead to terrible consequences, corporate and political stakeholders must carefully guard against excessive executive liberty that borders on dangerous executive aggrandizement.

III. DISTINCT DIVERGENCES

Despite their shared promises and perils, presidents and CEOs possess critical divergences that render these principals of power distinctively unique. Constitutional law and corporate law demarcate three of the most critical divergences between presidents and CEOs along the shared axes of elections, objectives, and constituents.

PRESIDENT'S WAR POWERS 197 (2007).

¹⁹⁶ NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 103-14 (2010).

¹⁹⁷ See generally THEODORE DRAPER, A VERY THIN LINE: THE IRAN-CONTRA AFFAIRS (1992).

¹⁹⁸ Charlie Savage, 2 *Top Lawyers Lose Argument on War Power*, N.Y. TIMES, June 18, 2011, at A1.

¹⁹⁹ See Becker & Shane, *supra* note 137, at A1.

²⁰⁰ See, e.g., Flaherty, *supra* note 6, at 1727 (arguing that the Court has safeguarded presidential power); Greene, *supra* note 6, at 125 (advocating for increased congressional regulation of presidential action).

A. Elections

Presidents and CEOs are both elected to their offices. Their elections, however, differ in a number of significant ways.

First, presidential and CEO elections are governed by very different rules. Presidential elections are governed in concert by state and federal law. Article II of the Constitution, amended by the Twelfth Amendment, governs presidential elections.²⁰¹ Under the Constitution, each state and the District of Columbia must appoint a number of electors “equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”²⁰² Collectively, the 538 electors form the Electoral College.²⁰³ Each state has plenary power to determine the method of appointing electors.²⁰⁴ Thus, it is electors who ultimately elect presidents, not the voters who only elect the electors.²⁰⁵ To win a presidential election, a candidate must win a majority of electoral votes, or 270 votes.²⁰⁶

CEO elections, by contrast, are governed by a combination of private law and state law.²⁰⁷ CEOs are “elected” or rather selected by a corporation’s board of directors,²⁰⁸ who are, in turn, elected by shareholders.²⁰⁹ CEOs frequently serve as chairman of the board, and so are also frequently subject to shareholder elections. Under the highly influential Delaware corporate law: “Officers shall be chosen in

²⁰¹ U.S. CONST. art. II, § 1, cl. 2, *amended by* U.S. CONST. amend. XII.

²⁰² *Id.*

²⁰³ *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890) (referring to the body of electors as “college of electors”); KEVIN J. COLEMAN ET AL., *PRESIDENTIAL ELECTIONS IN THE UNITED STATES: A PRIMER* 12 (Susan Boriotti et al. eds., 2001).

²⁰⁴ See U.S. CONST. art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof [of the state] may direct, a Number of Electors . . .”).

²⁰⁵ COLEMAN ET AL., *supra* note 203, at 12.

²⁰⁶ See U.S. CONST. amend. XII; HARVEY L. SCHANTZ, *AMERICAN PRESIDENTIAL ELECTIONS: PROCESS, POLICY, AND POLITICAL CHANGE* 23 (1996).

²⁰⁷ The elections of public company directors and CEOs are governed by a combination of a company’s charter documents, exchange rules, and state law. See WALTER A. EFFROSS, *CORPORATE GOVERNANCE* 299 (Vicki Been et al. eds., 2010); *Listed Company Manual*, *supra* note 93, §§ 303A.00, 303A.04, 310, 313; DEL. GEN. CORP. LAW § 211(b) (2010).

²⁰⁸ Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797, 801 (2001).

²⁰⁹ See DEL. GEN. CORP. LAW § 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.”); MODEL BUS. CORP. ACT § 8.03(c) (2007); William K. Sjostrom, Jr. & Young Sang Kim, *Majority Voting for the Election of Directors*, 40 CONN. L. REV. 459, 464 (2007).

such manner and shall hold their offices for such terms as are prescribed by the bylaws or determined by the board of directors or other governing body.”²¹⁰ As such, CEO elections are more aptly described as CEO *selections*.

Second, voting for presidents and voting for CEOs stand in stark contrast to one another. Political voting is viewed as a critically important political exercise essential to democratic governance.²¹¹ Voting in presidential elections is a right available to all eligible citizens that cannot be denied without compelling justification.²¹² As a result, throughout our history, constitutional conventions, Congress, and others have established various safeguards to protect voting.²¹³ For instance, courts have long held the doctrine of “one person, one vote” to protect the voting power of citizens in elections and to prevent voter dilution.²¹⁴

Unlike political voting, corporate voting is not a fundamental civil right that should be available to all eligible citizens; instead, corporate voting is a privilege of corporate ownership limited to shareholders of the corporation. Unlike the political vote, which is sacred and inalienable in a democracy,²¹⁵ the corporate vote can be commoditized,

²¹⁰ DEL. GEN. CORP. LAW § 142(b) (2010).

²¹¹ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 83-88 (1980) (expounding on voting and representation as critical processes in enhancing democratic politics).

²¹² See Voting Rights Act of 1965, 42 U.S.C. §§ 1973 1973aa-6 (2012); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“It is beyond cavil that voting is of the most fundamental significance under our constitutional structure.” (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979))); *Mathews v. Diaz*, 426 U.S. 67, 78 n.12 (1976) (noting that the right to vote belongs to citizens); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (“By denying some citizens the right to vote, such laws deprive them of ‘a fundamental political right, . . . preservative of all rights.’” (quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964))).

²¹³ See, e.g., U.S. CONST. amends. XV, XIX, XXIV, and XXVI (prohibiting voting discrimination based on race, guaranteeing women’s suffrage, banning poll taxes, and setting a minimum voting age); 42 U.S.C. §§ 1973 to 1973aa-6; Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86.

²¹⁴ *Bd. of Estimate of N.Y.C. v. Morris*, 489 U.S. 688, 692 (1989); *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964) (“To say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas of democratic government.”); *Gray v. Sanders*, 372 U.S. 368, 381 (1963) (“The conception of political equality . . . can mean only one thing — one person, one vote.”); cf. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (holding that apportionment of state legislatures needs to reflect a one person, one vote policy); *Baker v. Carr*, 369 U.S. 186, 207-08 (1962) (holding that a citizen’s right to vote should be free from voter dilution).

²¹⁵ See *Brown v. Hartlage*, 456 U.S. 45, 54 (1982) (“No body politic worthy of being called a democracy entrusts the selection of leaders to a process of auction or

bartered, and sold through shareholder agreements.²¹⁶ And some corporations even have multiple classes of stocks with different voting powers.²¹⁷ Because most shareholders of public companies are diverse and dispersed in geography and expectations, they frequently vote by proxy, if they vote at all.²¹⁸ Whereas political elections adhere to the “one person, one vote” doctrine that strives to treat all voters equally, no analogous “one shareholder, one vote” doctrine exists in corporate elections.²¹⁹ Instead, corporate voting explicitly discriminates among voting shareholders to the benefit of large shareholders over small shareholders by subscribing to a “one share, one vote” principle.²²⁰ Whereas political elections are supposed to offer protections for minority voters in terms of race and gender,²²¹ no analogous suspect class protections exist in corporate law.²²² Instead, corporate law focuses its minority protections on minority shareholders.²²³

Additionally, corporate votes can be tallied in a variety of ways beyond the straightforward “majority wins” method of the political setting. Four main types of voting systems exist for corporate elections: majority voting, plurality voting, dual-class stock voting, and cumulative voting.²²⁴ A majority of states, including Delaware, and those that adopt the Model Business Code, have plurality voting as

barter.”); see also Steven G. Calabresi & James Lindgren, *The President: Lightning Rod or King?*, 115 YALE L.J. 2611, 2613 (2006) (“Electing the President is the democratic decision that really counts.”).

²¹⁶ See Karlan, *supra* note 7, at 1709 (highlighting how the political vote is the “antithesis of the market”).

²¹⁷ See generally Stephen M. Bainbridge, *Revisiting the One Share/One Vote Controversy: The Exchanges’ Uniform Voting Rights Policy*, 22 SEC. REG. L.J. 175 (1994).

²¹⁸ See William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 705-10 (2010) (discussing the “heterogeneous expectations” of shareholders); Lisa M. Fairfax, *Making the Corporation Safe for Shareholder Democracy*, 69 OHIO ST. L.J. 53, 60 (2008) [hereinafter *Making the Corporation Safe*] (“The widely dispersed nature of public shareholders means that shareholders cast their vote by proxy rather than in person.”).

²¹⁹ Cohen & Schleyer, *supra* note 13, at 138. It should be noted that at its infancy, American corporations allocated votes according to shareholders and not shares. See Colleen A. Dunlavy, *Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights*, 63 WASH. & LEE L. REV. 1347, 1354-63 (2006).

²²⁰ Rodrigues, *supra* note 7, at 1391.

²²¹ U.S. CONST. amends. XV and XIX.

²²² Cf. Chander, *supra* note 7, at 120 (explaining that minority status is explicitly taken into account in the corporate context).

²²³ *Id.*

²²⁴ For a more detailed description of each type of voting, see DAVID LARCKER & BRIAN TAYAN, *THE DUTIES AND LIABILITIES OF THE BOARD OF DIRECTORS* 15 (2011), and EFFROSS, *supra* note 207, at 309.

their default.²²⁵ Under a plurality regime, directors win elections by receiving the most affirmative votes, regardless of how many negative votes or withheld votes are cast. As such, directors can be elected based on a single affirmative vote if the number of nominees equals the number of candidates.²²⁶ Thus, some corporate law scholars believe that shareholders do not elect corporate boards; instead “boards elect themselves.”²²⁷

Third, presidential and CEO elections differ in the candidate qualifications necessary to stand for election. In presidential elections, as constitutionally-mandated, a presidential candidate must be 35 years old, a natural born citizen of the United States, and must have lived in the United States for at least 14 years.²²⁸ In corporate elections, there are no legally mandated minimum qualifications to serve as a CEO or corporate executive. As such, CEOs and directors can, and do, vary widely in age and background.

Lastly, presidential and CEO elections undergo very different campaigns. In presidential campaigns, candidates undergo very public campaigns that can last more than a year and cost more than \$1 billion.²²⁹ In presidential campaigns, candidates run quadrennial electoral gauntlets across the country that include numerous debates, town halls, fundraisers, and rallies all under the watchful eyes of the press, competitors, and other interested parties. Because of such a rigorous and public vetting process, David Axelrod, the chief strategist of President Obama’s campaigns, compared a presidential campaign to an “MRI for the soul.”²³⁰

CEO election campaigns, by contrast, are very private affairs. Moreover, unlike presidents who are subject to term limits²³¹ and competitive quadrennial elections, CEOs face no such constraints and

²²⁵ See DEL. GEN. CORP. LAW § 216(3) (2010); MODEL BUS. CORP. ACT § 7.28(a) (2007).

²²⁶ In recent years, however, “most large public companies have adopted majority voting provisions, whereby an affirmative majority of votes cast in favor of a director, rather than a mere plurality of votes, is necessary for the election of that director in an uncontested election.” See Cohen & Schleyer, *supra* note 13, at 105.

²²⁷ Blair & Stout, *supra* note 5, at 311.

²²⁸ U.S. CONST. art. II, § 1, cl. 5.

²²⁹ See Nicholas Confessore, *Romney, Again, Outdoes Obama in Fund-Raising*, N.Y. TIMES, June 10, 2012, at A1 (projecting over \$1 billion raised in the 2012 presidential election cycle); Nicholas Confessore & Jo Craven McGinty, *Obama, Romney and Their Parties on Track to Raise \$2 Billion*, N.Y. TIMES, Oct. 26, 2012, at A18. See generally RICHARD BEN CRAMER, WHAT IT TAKES: THE WAY TO THE WHITEHOUSE (1993).

²³⁰ Richard A. Oppel, Jr., *Snag for Perry: Offensive Name at Texas Camp*, N.Y. TIMES, Oct. 3, 2011, at A1 (“Campaigns are like an MRI for the soul — whoever you are, eventually people find out.” (quoting David Axelrod)).

²³¹ U.S. CONST. amend. XXII.

are rarely fired.²³² CEOs do not have legally-mandated term limits or retirement ages.²³³ In fact, studies suggest that CEOs of large public companies have relatively secure and long tenures.²³⁴ However, when a new CEO is needed, the selection process occurs in private board meetings with the aid of advisors.²³⁵ Further introverting the CEO selection process is the fact that most CEOs are promoted from within the corporation.²³⁶ Collectively, these factors usually make CEO elections very private.²³⁷

B. Objectives

Presidents and CEOs diverge not only in their elections, but also in the chief objectives of their respective high offices. Presidential objectives are defined, yet indeterminate. According to Article II of the Constitution, the President possesses “the executive Power,”²³⁸ must “take care that the laws be faithfully executed,”²³⁹ and “shall be Commander in Chief.”²⁴⁰ In addition to his powers, Article II broadly delineates a president’s chief objectives in the form of an oath:

“I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best

²³² See M. Todd Henderson, *The Nanny Corporation*, 76 U. CHI. L. REV. 1517, 1556-57 (2009) (comparing the fixed terms of politicians to the open-ended terms of business executives); Lucian A. Taylor, *Why Are CEOs Rarely Fired? Evidence from Structural Estimation*, 65 J. FIN. 2051, 2051 (2010).

²³³ See Whitehead, *supra* note 5, at 1268.

²³⁴ See *id.* at 1267 (“[O]nly about 2 to 2.25 percent of CEOs at large U.S. corporations are forced out each year . . .”). See generally Taylor, *supra* note 232, at 2078-80 (using evidence of structural estimation to show that CEOs are rarely fired); Jerold B. Warner et al., *Stock Prices and Top Management Changes*, 20 J. FIN. ECON. 461, 462-82 (1988) (opining that top management changes are low).

²³⁵ Jay W. Lorsch & Rakesh Khurana, *Changing Leaders: The Board’s Role in CEO Succession*, HARV. BUS. REV., May 1999, at 96, 104.

²³⁶ See DAVID LARCKER & BRIAN TAYAN, CORPORATE GOVERNANCE MATTERS: A CLOSER LOOK AT ORGANIZATIONAL CHOICES AND THEIR CONSEQUENCES 211 (Jeanne Glasser et al. eds., 2011) (“[A]pproximately 80 percent of successions involve an internal replacement.”).

²³⁷ While there are interests in CEO selections, particularly with large prominent public companies, the level of scrutiny involved pales in comparison to the level of scrutiny given to presidential candidates.

²³⁸ U.S. CONST. art. II, § 1, cl. 1.

²³⁹ *Id.* § 3, cl. 5.

²⁴⁰ *Id.* § 2, cl. 1.

of my Ability, preserve, protect and defend the Constitution of the United States.”²⁴¹

And the multivariate purpose of the Constitution, as declared in its Preamble, is to: “form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity[.]”²⁴²

Despite these words written in parchment more than two centuries ago, presidential objectives are not static, but dynamic.²⁴³ Time and circumstance, more than preordination and dictate, determine presidential objectives.²⁴⁴ Presidential objectives can span all matters, foreign and domestic: from winning the peace abroad to defending the nation at home, from rebuilding Europe to revitalizing our economy, from creating new world orders to ensuring civil rights here at home. Presidents Washington, Lincoln, FDR, Truman, Kennedy, Reagan, and Bush all viewed the chief objectives of their presidencies differently even though they were honor-bound by the same oath to the same Constitution. It can be argued that Franklin Delano Roosevelt viewed the chief objectives of his presidency differently at different periods of his twelve years in office. George W. Bush’s presidency certainly changed after September 11, 2001.²⁴⁵ Thus, presidential objectives remain subject to many reasonable, competing understandings.

In contrast to the kaleidoscopic nature of presidential objectives, a CEO’s chief objective is clear and well-defined: maximize shareholder value.²⁴⁶ As observed in the canonical, corporate law case, *Dodge v. Ford Motor Co.*²⁴⁷:

²⁴¹ *Id.* § 1, cl. 8.

²⁴² U.S. CONST. pmb.

²⁴³ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653-54 (1952) (Jackson, J., concurring) (“[I]t is relevant to note the gap that exists between the President’s paper powers and his real powers. The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office.”); Marshall, *supra* note 110, at 509 (noting the “constitutional indeterminacy of the Presidency”).

²⁴⁴ See Marshall, *supra* note 110, at 510 (“This fluidity in definition, in turn, allows presidential power to readily expand when factors such as national crisis, military action, or other matters of expedience call for its exercise.”).

²⁴⁵ GEORGE W. BUSH, *DECISION POINTS* 129 (2010) (“In a single morning, the purpose of my presidency had grown clear: to protect our people and defend our freedom that had come under attack.”).

²⁴⁶ Cf. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 35 (Del. 2010) (stating that directors of a for-profit Delaware corporation cannot “defend a business strategy that openly eschews stockholder wealth maximization”); Stephen M. Bainbridge, *In Defense of Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1423-24 (1993) (“Shareholder wealth

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of the directors is to be exercised in the choice of means to attain that end[.]²⁴⁸

While CEOs may encounter different obstacles during their tenures, their North Star is constant: maximize shareholder value. While the chief objective of a CEO is clear, it is nonetheless subject to legitimate debate.²⁴⁹ Maximizing shareholder value can hold a different meaning to different stakeholders using divergent timelines and varying metrics. For some, shareholder maximization means shareholder maximization *now*.²⁵⁰ For others, it means long-term shareholder maximization. For some, shareholder value is entirely measured by stock price and profits.²⁵¹ For others, shareholder value means more than financial results. Nonetheless, on balance, many observers largely measure the success and failure for contemporary CEOs in meeting their chief objective through a combination of stock price, financial results, and market sentiments.

C. Constituents

Beyond distinct divergences in elections and objectives, presidents and CEOs also serve very different constituencies. A president's constituency is first and foremost the people of the United States. While presidential campaigns tend to focus on large donors,²⁵²

maximization long has been the fundamental norm which guides U.S. corporate decisionmakers.”); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) (noting the recent dominance of a shareholder-centered ideology of corporate law); Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2065 (2001) (“Shareholder wealth maximization is usually accepted as the appropriate goal of American business circles.”).

²⁴⁷ 170 N.W. 668 (Mich. 1919).

²⁴⁸ *Id.* at 684. *But see* Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 165-66 (2008).

²⁴⁹ The term “shareholder value,” however, is subject to legitimate definitional disagreements as shareholders are not monolithic and can value a variety of variables. *See* LYNN STOUT, *THE SHAREHOLDER VALUE MYTH* 6-7 (2012) (challenging the shareholder primacy model that dominates American business).

²⁵⁰ *See* Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 579-83 (2006); Strine, *True Corporate Republic*, *supra* note 7, at 1771.

²⁵¹ *See, e.g.,* Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 33.

²⁵² *See* LESSIG, *supra* note 29, at 119-24 (discussing the elevation of fundraising

battleground states,²⁵³ and swing voters,²⁵⁴ presidential administrations must govern all states and all demographic groups. Presidents are presidents of the United States, not just presidents of those whom voted for them. Moreover, every four years, a president's constituents can vote him or her out of office for any reason. Appealing to such a large, varied, and powerful constituency requires great political skill, some good fortune, and a high tolerance for disappointment.²⁵⁵

By comparison, a CEO's chief constituency, the firm's shareholders, is relatively narrow and weak.²⁵⁶ Theoretically, CEOs must appeal to the firm's shareholders. Practically, CEOs must appeal to the firm's largest shareholders because they wield most of the power and influence.²⁵⁷ Also, unlike voters and citizens, who are relatively static and politically powerful, a corporation's shareholders frequently have very little voting power and change in composition over time through the trading of shares.²⁵⁸ Thus, appealing to such a narrow constituency requires little political skill, less good fortune, and a lower tolerance for disappointment.

Ultimately, because of the distinct divergences between presidents and CEOs, it would be misguided to assume that success in one role would guarantee success in the other. The truth of the matter is that

above other tasks in American politics); Ashley Parker & Helene Cooper, *2 Campaigns Chasing Funds at Frantic Pace*, N.Y. TIMES, June 13, 2012, at A1.

²⁵³ See LILLIAN KILLIAN, *THE SWING VOTE 5-25* (2012) (discussing the critical role of swing states and their voters in election outcomes); Jeremy W. Peters, *Campaigns Blitz 9 Swing States in a Battle of Ads*, N.Y. TIMES, June 8, 2012, at A1.

²⁵⁴ See, e.g., KILLIAN, *supra* note 253, at 19-25 (dividing swing voters into four distinct demographic groups); Jonathan Weisman, *Wooing Swing Voters, Both Parties Wary of Overemphasizing Health Care*, N.Y. TIMES, July 4, 2012, at A14.

²⁵⁵ See DEREK BOK, *THE TROUBLE WITH GOVERNMENT* 383 (2001) ("Convinced that presidents can often accomplish more than is humanly possible . . . that politicians should refrain from pandering to the voters yet still reflect the views of their constituents, the public seems fated to endure repeated disappointment over the government and those who run it.").

²⁵⁶ For a discussion on how shareholders and boards can be ineffective in restraining CEOs, see *supra* Part I.A. See generally Lee Harris, *The Politics of Shareholder Voting*, 86 N.Y.U. L. REV. 1761 (2011).

²⁵⁷ See Jens Dammann, *Corporate Ostracism: Freezing out Controlling Shareholders*, 33 J. CORP. L. 681, 682-89 (2008) (noting the influence of controlling shareholders on management).

²⁵⁸ See Rodrigues, *supra* note 7, at 1398 (concluding that "the shareholder vote, with the important exception of takeovers, is generally an empty exercise"); Strine, *True Corporate Republic*, *supra* note 7, at 1762-64.

the American presidency is a unique position with no training school.²⁵⁹ After two years in office, President Kennedy confessed, “There is no experience you can get that can possibly prepare you adequately for the Presidency.”²⁶⁰ Admittedly, some good CEOs may make good presidents; and some good presidents may make good CEOs. But success in one role does not guarantee success in the other given the distinct differences between these two positions.²⁶¹ Winning a presidential election is very different from winning a corporate election. Managing a corporation and appealing to large shareholders and a board of directors holds little resemblance to governing a country and appealing to a large electorate and the leaders of the other parties and branches of government. Achieving the singular dictate to maximize shareholder value is very different from achieving the multivariate dictates of the presidency. Managing a corporate budget of tens of billions of dollars is very different from managing a federal budget of tens of trillions of dollars and countless political considerations. These are differences not only in degree, but kind.

In sum, presidents and CEOs may share many similarities and may lend themselves to easy comparisons, but critical divergences relating to elections, objectives, and constituencies render them distinctly unique — and they should therefore be judged and understood distinctly.

IV. THE DANGERS OF CONFLATION

The President as CEO is a good metaphor of power. And good metaphors, when properly mastered, can reveal new insight to otherwise stale ideas.²⁶² Yet, good metaphors can also “constrain our imaginations, remove potential objectives, and obscure the perception

²⁵⁹ See John Balz, *Ready to Lead on Day One: Predicting Presidential Greatness from Political Experience*, 43 PS: POL. SCI. & POL. 487, 487 (2010) (“Overall, there is no evidence that political experience improves the likelihood of strong presidential performance . . .”).

²⁶⁰ GIBBS & DUFFY, *supra* note 65, at 8 (quoting John F. Kennedy).

²⁶¹ See Brownstein, *supra* note 11, at A1 (“[B]usiness executives have had mixed success as politicians. Some . . . have proved incapable of adapting the autocratic style of the boardroom to the give-and-take of the political cloakroom.”); see also Susan Estrich, *The Value of Experience*, BUFF. NEWS, June 16, 2010, at A7 (suggesting that business success and skills do not necessarily translate into political success and skills); Roger Simon, *Businessmen Make Lousy Presidents*, POLITICO (May 24, 2012), <http://www.politico.com/news/stories/0512/76693.html>.

²⁶² See STEVEN PINKER, *THE STUFF OF THOUGHT: LANGUAGE AS A WINDOW INTO HUMAN NATURE* 241 (2007) (explaining that a good metaphor or analogy “would be the mechanism that the mind uses to understand otherwise inaccessible ideas”).

of political contingencies.”²⁶³ Easy comparisons of presidents and CEOs have created an environment where there is no shortage of businessmen with high political ambitions.²⁶⁴ These easy comparisons have also led to dangerous conflation of presidents and CEOs. Conflating corporate leadership and political leadership is dangerous not only because of potential mismatches in personnel and skill, but also because such conflation can lead to conceptual borrowings and misuses that cause serious harm to American corporations and American democracy.

A. *The Harms of Democratizing American Corporations*

Corporations are not democratic nation-states. Democratic governing principles cannot be crudely imposed on firms as a cure for all corporate ills. Thoughtless, wholesale attempts to “democratize” corporations can cause serious harms to corporations, shareholders, and society.

Corporations are one of the great inventions of law and humanity — an engine for the ingenuity and energy of enterprising individuals.²⁶⁵ Yet for all the good that they have created, they are not perfect. Corporations contain imperfections rooted in their inherent forms, which require separation of ownership and management.²⁶⁶ Shareholders own corporations, but boards of directors manage them. As a result of this separation and its discontents, some scholars and policymakers have advocated for policies aimed at creating a democratic paradigm of corporations centered on shareholder primacy also known as shareholder democracy.²⁶⁷ Shareholder democracy is

²⁶³ Eben Moglen, *The Invisible Barbecue*, 97 COLUM. L. REV. 945, 948 (1997).

²⁶⁴ See ADOLF A. BERLE, JR., *POWER WITHOUT PROPERTY: A NEW DEVELOPMENT IN AMERICAN POLITICAL ECONOMY* 3 (1959) (“The businessman will find that he is a politician and a commissar — perhaps even a revolutionary one.”); Brownstein, *supra* note 11, at A1; Romano & Hirsch, *supra* note 11.

²⁶⁵ See 1 WILLIAM MEADE FLETCHER ET AL., *FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* 43 (1917) (“[T]he limited liability corporation is the greatest single discovery of modern times.” (quoting Nicholas Murray Butler, President, Columbia University, Address at the 143rd Annual Banquet of the Chamber of Commerce of the State of New York (Nov. 16, 1911))); MICKLETHWAIT & WOOLDRIDGE, *supra* note 4, at xv (“[The company is] the basis of the prosperity of the West and the best hope for the future of the rest of the world.”).

²⁶⁶ See Rodrigues, *supra* note 7, at 1390 (arguing that “corporate and civic polities, while intellectually tempting, ultimately falter because participation in a corporation fundamentally differs from participation in a nation”).

²⁶⁷ E.g., Bebchuk, *supra* note 56, at 836 (describing the virtues of shareholder empowerment); see Cohen & Schleyer, *supra* note 13, at 105, 133 (discussing various

rooted in the principle that shareholders should have a greater voice in corporate governance.²⁶⁸ The underlying presumption of this principle is that more shareholder participation will engender more executive accountability to the ultimate benefit of shareholders and the corporation.²⁶⁹

This straightforward shareholder-centric model of governance rooted in democratic theory, however appealing, is an inelegant analogue that expresses little fidelity to bedrock concepts of American corporate law and American democratic ideals in a number of ways. First, corporate democracy assumes that many or most shareholders share a largely homogenous set of interests and powers. While this may be true for small, private corporations, this is not the case for most large, public corporations that are owned by a large number of diverse and dispersed shareholders with varying interests.²⁷⁰ Because corporate law adheres to a “one share, one vote” principle rather than a “one person, one vote” principle, larger shareholders have a greater voice at the corporate ballot box.²⁷¹ As a result of divergent interests, large shareholders with short-term agendas would likely be most active and influential, which may not always be consistent with the best interests of the corporation or the other shareholders.²⁷²

Second, the shareholder democracy paradigm departs from the core concept of republicanism in American democracy. America does not

strands of “shareholder democracy”); Lisa M. Fairfax, *The Future of Shareholder Democracy*, 84 IND. L.J. 1259, 1260-62 (2009); Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 PENN. L. REV. 1907, 1910 (2013) (“[S]ince the early 1980s, the U.S. system has shifted from a manager-centric system to a shareholder-centric system.”). *But see* Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 624 (2006) [hereinafter *Limited Shareholder Voting Rights*] (espousing the virtues of a board-centric corporate model); Bratton & Wachter, *supra* note 218, at 658-59.

²⁶⁸ See Bebchuk, *supra* note 56, at 842-43 (advocating shareholder democracy as a means to enhance shareholder value).

²⁶⁹ Fairfax, *Making the Corporation Safe*, *supra* note 218, at 55.

²⁷⁰ Anabtawi, *supra* note 250, at 575-79.

²⁷¹ See Black, *supra* note 105, at 822 (“A shareholder who owns 1,000 shares is 1,000 times more likely to cast a decisive vote than a shareholder who owns a single share”); Rodrigues, *supra* note 7, at 1391 (“By virtue of the one-vote-per-share principle, larger shareholders inevitably have a greater say in corporate governance than do smaller shareholders [I]n striking contrast to the operation of our modern political system, which is built on the principle of ‘one person, one vote.’”).

²⁷² See Anabtawi, *supra* note 250, at 577-83; *see also* Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795, 803 (1993); Lynn A. Stout, *Takeovers in the Ivory Tower: How Academics Are Learning Martin Lipton May Be Right*, 60 BUS. LAW. 1435, 1447-49 (2005); Strine, *True Corporate Republic*, *supra* note 7, at 1771.

have a direct democracy; instead it has a democratic republic.²⁷³ Citizens elect others to represent them in governance. Citizens do not decide all critical national matters via referendums. Likewise, corporations are governed less as direct democracies, and more as democratic republics.²⁷⁴ Shareholders elect board members to govern the corporation just as citizens elect representatives to govern the nation. And a price of the republic structure, whether in the context of constitutional law or corporate law, is agency costs.²⁷⁵

Third, the shareholder democracy paradigm departs from the bedrock concept of a separation of ownership and control in American corporate law.²⁷⁶ Shareholders own the corporation, but the board manages the corporation with their best efforts.²⁷⁷ This separation is critical to leveraging the expertise and efficiencies of corporate directors and officers for the benefit of shareholders.²⁷⁸ This separation is particularly pronounced with large, publicly traded corporations owned by a large number of diverse and dispersed shareholders. Shareholders generally have very little input in the management of a corporation.²⁷⁹ When shareholders disagree with management, rather than trying to vote management out, because of their limited influence, they frequently “vote” by selling their shares.²⁸⁰

Shareholders who are fundamentally dissatisfied with this bedrock corporate agency relationship can invest in other business organizations like sole proprietorships, partnerships, and limited liability companies, all of which can give investors greater managerial

²⁷³ See Cohen & Schleyer, *supra* note 13, at 136 (“[T]he U.S. federal system was structured as a representative democracy rather than a direct democracy.”); see also THE FEDERALIST NO. 10, at 57-63 (James Madison) (Jacob E. Cooke ed., 1961) (espousing the virtues of representative democracy at our nation’s infancy).

²⁷⁴ See, e.g., Epstein, *supra* note 9, at 282 (analogizing the corporate structure to the United States’ political structure); cf. Strine, *True Corporate Republic*, *supra* note 7, at 1760-67 (theorizing the same transposition).

²⁷⁵ Cf. Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1316 (2012) (“Constitutional and corporate law share the goal of reducing the agency costs of representative government.”).

²⁷⁶ See BERLE, JR. & MEANS, *supra* note 7, at 6-7.

²⁷⁷ See *Paramount Commc’ns Inc. v. Time Inc.*, 1989 WL 79880, at *30 (Del. Ch. 1989) (“[C]orporation law does not operate on the theory that directors, in exercising their powers to manage the firm, are obligated to follow the wishes of a majority of shares. In fact, directors, not shareholders, are charged with the duty to manage the firm.”), *aff’d*, 571 A.2d 1140 (Del. 1990).

²⁷⁸ See Bainbridge, *Limited Shareholder Voting Rights*, *supra* note 267, at 624-36.

²⁷⁹ See, e.g., DEL. CODE ANN. tit. 8, §§ 251(c), 275(c) (2010).

²⁸⁰ See Thomas W. Joo, *The Modern Corporation and Campaign Finance*, 79 WASH. U. L.Q. 1, 57-58 (2001).

influence.²⁸¹ The redress for shareholder dissatisfaction should not be to make corporations run like democratic states. Permitting shareholders of large corporations to vote on all material, corporate matters as if it were a direct democracy is impracticable, inefficient, and likely unprofitable.²⁸² Informational asymmetries, coordination challenges, and divergent interests of shareholders all seriously limit a true shareholder democracy and undermine the substantial benefits and efficiencies of centralized corporate management.²⁸³

The siren songs of shareholder democracy have lured many to embark on regulatory odysseys in search of fulfilling frequently admirable, but misplaced expectations. Such siren songs have led policymakers to create mechanisms for more direct shareholder participation, such as recent iterations of proxy access²⁸⁴ and say-on-pay.²⁸⁵ These well-intentioned but flawed attempts at better corporate governance through more shareholder participation have arguably created few meaningful improvements in governance, few attributable appreciations in shareholder value, more costs for firms, and more disillusionment for shareholders.²⁸⁶ Additionally, some of these attempts have diverted limited corporate resources from productivity and creativity to compliance and bureaucracy, depriving shareholders and society of more growth and innovation.²⁸⁷

²⁸¹ See Rodrigues, *supra* note 7, at 1398.

²⁸² See Bainbridge, *Shareholder Disempowerment*, *supra* note 106, at 1746. See generally Henry G. Manne, *The 'Corporate Democracy' Oxymoron*, WALL ST. J., Jan. 2, 2007, at A23.

²⁸³ See Bainbridge, *Limited Shareholder Voting Rights*, *supra* note 267, at 624-36. See generally Coase, *supra* note 78 (discussing the definition of a firm and why firms exist).

²⁸⁴ See Jill E. Fisch, *The Destructive Ambiguity of Federal Proxy Access*, 61 EMORY L.J. 435, 435, 490-93 (2012) (criticizing federal efforts at proxy access); Kahan & Rock, *Insignificance of Proxy Access*, *supra* note 103, at 1353-62 (reviewing the history of proxy access).

²⁸⁵ See Wall Street Reform and Consumer Protection (Dodd-Frank) Act § 951, 15 U.S.C. § 78n-1 (2012); Shareholder Approval of Executive Compensation and Golden Parachute Compensation, 76 Fed. Reg. 6,010 (Feb. 2, 2011); see also Diane Brady, *Say on Pay Depends on How They Play*, BUS. WK., June 11-17, 2012, at 58-59 (discussing the impact of say-on-pay on corporate compensation practices).

²⁸⁶ See Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779, 1779-83 (2011) [hereinafter *Dodd-Frank*]; Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1523-29 (2005). But see Lucian A. Bebchuck et al., *The Long Term Effects of Hedge Fund Activism 1-4* (Columbia Bus. Sch. Research Paper No. 13-66, 2013), available at <http://ssrn.com/abstract=2291577>.

²⁸⁷ See U.S. CHAMBER OF COMMERCE, CAPITAL MARKETS, CORPORATE GOVERNANCE, AND THE FUTURE OF THE U.S. ECONOMY 14 (2006); Bainbridge, *Dodd-Frank*, *supra* note

This commentary is not asserting that corporate governance needs no improvement or that it has always served the best interests of all shareholders, because many corporations can certainly do better for shareholders and other stakeholders. At the same time, this commentary is not suggesting that all financial regulation that empowers shareholders is fundamentally flawed or misguided. Rather, it contends that policymakers must act more judiciously when they attempt to “democratize” corporations as a means to improving it because of the many inherent harms that can arise from such efforts.

B. *The Harms of Corporatizing American Democracy*

Just as democratizing corporations can cause grave harms, corporatizing American democracy is similarly ill-advised. The American republic is not a corporate entity, and thoughtless attempts to “corporatize” or “privatize” government can cause serious harms to American democracy.²⁸⁸ Lincoln stated that: “The legitimate object of government is to do for a community of people whatever they need to have done, but cannot do at all, or cannot so well do, for themselves in their separate and individual capacities.”²⁸⁹ Whereas corporations exist for the primary pursuit of profit, government exists for higher and more varied pursuits that are not always motivated by profit.²⁹⁰ While many corporations in recent years have become more cognizant of

286, at 1788-89 (arguing that the Sarbanes-Oxley Act created “significant new costs that have had a deleterious effect on the economy and the capital markets”); Ellen Engel et al., *The Sarbanes-Oxley Act and Firms’ Going-Private Decisions*, 44 J. ACCT. & ECON. 116, 117, 142 (2007); Eric Dash, *Feasting on Paperwork*, N.Y. TIMES, Sept. 9, 2011, at B1 (reporting on the billions of dollars spent by corporations related to the Dodd-Frank Act). *But cf.* Bebchuck, *supra* note 286, at 1-4, 27-31 (challenging the claim that shareholder interventions have adverse effects on the long-term interests of companies and their shareholders); John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1026 (2012).

²⁸⁸ See, e.g., STOUT, *supra* note 249, at 3-11 (critiquing the consequences of the popular corporate edict to maximize shareholder value); Paul Krugman, Op-Ed, *Off and Out With Mitt Romney*, N.Y. TIMES, July 6, 2012, at A23 (“A country is not a company (despite globalization, America still sells 86 percent of what it makes to itself), and the tools of macroeconomic policy — interest rates, tax rates, spending programs — have no counterparts on a corporate organization chart.”).

²⁸⁹ ABRAHAM LINCOLN: COMPLETE WORKS: COMPRISING HIS SPEECHES, LETTERS, STATE PAPERS, AND MISCELLANEOUS WRITINGS 180 (John G. Nicolay & John Hay eds., 1902) (quoting an excerpt from *The Nature and Object of Government, with Special Reference to Slavery*).

²⁹⁰ See Blair & Stout, *supra* note 5, at 304-05 (describing the potential social harms of a stubborn, singular focus on profit maximization).

their social responsibilities, corporations and the laws that govern them nonetheless have largely continued their core focus on profits for shareholders.²⁹¹ As such, corporate ideals frequently remain mismatches for public aims.²⁹²

In the last few decades, many traditional government functions have become privatized and outsourced to corporations.²⁹³ Corporations play larger roles in traditional governmental functions like utilities, infrastructure, schools, prisons, and warfare.²⁹⁴ Many of these efforts that instituted corporate values on government functions have led to more efficient governance in many instances, but at what cost?

While government can learn and benefit from corporate practices,²⁹⁵ a substantial subscription of corporate ideals into political governance can cause serious harms. While privatization can lead to more efficient governance in many instances, if imprudently applied, it can also lead to breaches of the social contract between the government and the people, as corporate profit supersedes common purpose.²⁹⁶ Corporate motivations of efficiency and profit may contradict and corrupt American democratic values, such as justice and equal protection, to the detriment of many stakeholders.²⁹⁷ Corporatizing democracy can

²⁹¹ See LAWRENCE MITCHELL, *CORPORATE IRRESPONSIBILITY, AMERICA'S NEWEST EXPORT* 1-10 (2003); Kent Greenfield & D. Gordon Smith, *Debate: Saving the World with Corporate Law?*, 57 *EMORY L.J.* 947, 948-49 (2008).

²⁹² See generally Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 *N.Y.U. L. REV.* 733, 740 (2005) (discussing the difficulties of using corporations to promote social welfare); Mickey Edwards, *The Difference Between Business and Government*, *ATLANTIC* (June 13, 2010), available at <http://www.theatlantic.com/politics/archive/2010/06/the-difference-between-business-and-government/58085/>.

²⁹³ See, e.g., SANDEL, *supra* note 4, at 5 (discussing the rise of market values over the past three decades); Stanger, *supra* note 26 (“The United States has become addicted to contractors[.]”).

²⁹⁴ See, e.g., DONAHUE & ZECKHAUSER, *supra* note 4, at 3-4 (noting the rise of the private sector in “undertakings traditionally considered the province of the government”); JEREMY SCAHILL, *BLACKWATER: THE RISE OF THE WORLD'S MOST POWERFUL MERCENARY ARMY*, at xiv-xx (2008); Stanger, *supra* note 26 (noting the outsourcing of military operations to private actors).

²⁹⁵ See ROTHKOPF, *supra* note 25, at 322 (noting “some governments recognizing that to better compete in the modern global economic environment, they would benefit by embracing practices that are more commonly found in corporate suites”).

²⁹⁶ See *id.* at 16.

²⁹⁷ See SANDEL, *supra* note 4, at 110-13 (suggesting that imposing market values on all human interactions will lead to corruption and unfairness); Greenfield & Smith, *supra* note 291, at 951 (“[Corporations] produce costly externalities; they are amoral; they fail to sustain implicit or explicit commitments to communities; they privilege some stakeholders (shareholders) at the expense of others (for example, employees).”).

lead to corruptions of civility and virtue in society.²⁹⁸ For instance, while a democratic government governed by our morals and values may be incredibly reticent to do business with genocidal fascists or tyrants, a government dictated solely by corporate norms may not be as reticent.²⁹⁹ Additionally, government social programs, such as Social Security and Medicaid, cannot automatically be eliminated because they are not profitable. Similarly, government organizations like the National Institutes of Health, the Centers for Disease Control, and the Federal Emergency Management Agency should not be motivated solely by financial profit.

Furthermore, corporatizing American democracy is problematic because just as the nation is not a corporation, citizens are not shareholders. Unlike owning shares, citizenship is often not voluntary and has no easy exit strategies.³⁰⁰ Shareholders who disagree with corporate policies can readily sell their shares. Citizens in actual civic democracies, unlike shareholders in theoretical corporate democracies, who disagree with national policies, cannot readily exit the country without incurring significant costs.³⁰¹ As such, attempts at corporatizing government endeavors must be more restrained and more thoughtful, and must be driven by more than just profits.³⁰²

²⁹⁸ See SANDEL, *supra* note 4, at 202-03 (discussing the degrading effect of wholesale impositions of market values on society); see also J. W. SCHULTE NORDHOLT, WOODROW WILSON 87 (1991) (“The government which was designed for the people has got into the hands of the bosses and their employers, the special interests. An invisible empire has been set up above the forms of democracy.” (quoting Woodrow Wilson)); Elhauge, *supra* note 292, at 738-56 (discussing the negative externalities created by a singular pursuit of shareholder wealth maximization).

²⁹⁹ See JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER 88 (2005) (observing that “[c]orporations have no capacity to value political systems, fascist or democratic, for reasons of principle or ideology”); EDWIN BLACK, IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA’S MOST POWERFUL CORPORATION 7-16 (2002) (investigating the close alliance between IBM, an American corporation, and Nazi Germany).

³⁰⁰ Cf. Rodrigues, *supra* note 7, at 1390 (“Shareholders are not citizens; their investments are voluntary and relatively liquid”); Thompson & Edelman, *supra* note 180, at 160 (“While persons generally enter a corporation upon making a relatively free choice, persons generally enter nation-states without making a choice.”).

³⁰¹ Cf. Strine, *True Corporate Republic*, *supra* note 7, at 1762-64 (highlighting the divergent ease of exits between shareholders and citizens).

³⁰² See Chander, *supra* note 7, at 160-61 (“The weaker voluntariness of entry in political society should lead us to heightened concern for members of politics than for members of corporations — either because of the moral valence of choice itself or because of the inability of some to protect themselves by refusing to enter unattractive situations.”); see also Hillary A. Sale, *The New “Public” Corporation*, 74 LAW & CONTEMP. PROBS. 137, 138 (2011) (suggesting that public corporations should better

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Corporate principles and democratic principles should not be crudely adopted across the government/corporation divide but must carefully balance competing and crosscutting considerations.³⁰³ Crude and thoughtless conflation of CEOs and presidents, of American corporations and American democracy, can cause serious harms for shareholders and citizens alike. Similarly, crude and thoughtless adoptions across the government/corporation divide can beset shareholders and citizens alike with bilateral anxieties about their government and their corporations, and the chief executives that run these institutions.³⁰⁴

Government and corporations are not actual or conceptual substitutes for one another, but are complements of one another. We need not go from “*having* a market economy to *being* a market society.”³⁰⁵ Similarly, we can have an economy dictated by corporate values without having a government being dictated by those same values. In other words, we can have a *corporate economy* without having a *corporate government*. The non-profitable pursuits of

account for public interests).

³⁰³ See Dwight D. Eisenhower, Farewell Radio and Television Address to the American People (Jan. 17, 1961), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: DWIGHT D. EISENHOWER, 1960–61, at 1037 (1961):

[E]ach proposal must be weighed in the light of a broader consideration: the need to maintain balance in and among national programs — balance between the private and the public economy, balance between cost and hoped for advantage — balance between the clearly necessary and the comfortably desirable; balance between our essential requirements as a nation and the duties imposed by the nation upon the individual; balance between actions of the moment and the national welfare of the future. Good judgment seeks balance and progress; lack of it eventually finds imbalance and frustration.

³⁰⁴ One can arguably attribute such bilateral anxiety as root causes of the recent Occupy Wall Street and Tea Party movements. See generally TODD GITLIN, OCCUPY NATION (2012); THEDA SKOCPOL & VANESSA WILLIAMSON, THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM (2012). While Americans have expressed anxiety about the merger of corporations and government, other countries like Russia and China have openly embraced the union of corporations and government under the model of state capitalism. See IAN BREMMER, THE END OF THE FREE MARKET 4-8 (2010).

³⁰⁵ SANDEL, *supra* note 4, at 10. Nonetheless, many scholars, most notably those in the field of economics, believe that market values can be used to understand all human interactions. See, e.g., GARY BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 3-4 (1976).

government can facilitate the profitable pursuits of corporations.³⁰⁶ Citizens schooled at public universities provide an educated workforce for our corporations. Roads and bridges built by the government reduce transportation costs for businesses. Public police forces reduce crime and make neighborhoods safer for corporations and consumers. Likewise, the for-profit pursuits of corporations can facilitate the non-profit pursuits of government. Tax revenue from corporate and individual incomes help strengthen our military, build our infrastructure, and care for our sick. Corporate initiatives at creating smarter, fairer, and more inclusive workplaces can help government efforts aimed at promoting and protecting civil rights. And certain innovations and practices from corporations can surely lead to more efficient government, as prominently theorized by many public choice theory scholars.³⁰⁷

Undoubtedly, disagreements will arise between government and corporations, but such disagreements should not be dismissed; instead, they should be deliberated as part of a healthy political process in a vibrant democracy. Ultimately, American democracy and American corporations are at their best when they collaborate with one another, mindful of their distinct roles, rather than trying to replace one another. And our laws and lawmakers should do more to respect their differences while facilitating appropriate collaborations.³⁰⁸

V. MUTUAL LESSONS

The symmetries and asymmetries between presidents and CEOs braid not only dangerous connotations but also a comity of mutual

³⁰⁶ ROTHKOPF, *supra* note 25, at 340.

³⁰⁷ See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991); DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* (1994); JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* (1997); DENNIS C. MUELLER, *PUBLIC CHOICE III* (2003); RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW (Daniel A. Farber & Anne Joseph O'Connell eds., 2010); James M. Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, in *THE THEORY OF PUBLIC CHOICE—II* (James M. Buchanan & Robert D. Tollison eds., 1984).

³⁰⁸ See DONAHUE & ZECKHAUSER, *supra* note 4, at 3-10 (espousing the benefits of more integrative public-private collaborations); Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 *WAKE FOREST L. REV.* 135, 136 (2012) (“In the end, policymakers should not delude themselves about the corporation’s ability to police itself; government still has a critical role in setting the rules of the game.”).

lessons. Presidents and CEOs are paramount personalities of power with distinct realms of governance. Yet for all their divergences, presidents and CEOs also coexist in a web of mutuality spun by law and society. And this mutual web presents an instructive space where these two powerful figures can learn from one another. To illustrate by example the richness of this common ground, this Part offers two lessons: the first is a lesson in collaboration that presidents can learn from CEOs, and the second is a lesson in legacy that CEOs can learn from presidents.

A. *A Lesson in Collaboration*

CEOs offer a valuable lesson in collaboration for modern presidents. CEOs manage businesses with the goal of maximizing shareholder wealth. With that goal in mind, CEOs are willing to work with any party that they believe can help them achieve that goal. This means that CEOs and their corporations will frequently work with competitors — fierce competitors at that. IBM collaborated with Microsoft at the height of their competition.³⁰⁹ Apple continued to partner with Samsung even though they were engaged in critical lawsuits in the court of law, and fierce competition in the court of consumer sentiments.³¹⁰ Major investment banks work with one another to underwrite offerings, syndicate loans, and advise clients even as they compete for the same business and the same clients. CEOs do this because they recognize that their competitors are not enemies, and that mutual benefit can be gained by working with competitors despite strong disagreements and fierce competition.

Modern presidents and politicians can learn from corporate collaboration. Too often in contemporary politics, competitors are viewed as enemies.³¹¹ And endless campaigning rather than governing has become the default mode of elected officials.³¹² Differences in ideology have polarized the political parties like never before.³¹³

³⁰⁹ See WILLIAM H. PAGE & JOHN LOPATKA, *THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AND CONSUMER WELFARE* 77-79, 227-30 (2009).

³¹⁰ See Steve Lohr, *Apple-Samsung Patent Battle Shifts to Trial*, N.Y. TIMES, July 30, 2012, at B1.

³¹¹ See Moss, *supra* note 113, at 136 (“The real problem with American politics is the growing tendency among politicians to pursue victory above all else — to treat politics as war . . .”).

³¹² See GUTMANN & THOMPSON, *supra* note 113, at 2 (“The means of winning an office are subverting the ends of governing once in office.”); ORNSTEIN & MANN, *supra* note 113, at 17.

³¹³ See NOLAN McCARTY ET AL., *supra* note 113, at 6-8 (charting the growing party

Differences during the debt ceiling debates in recent years caused America to partially shut down the federal government and nearly default on its obligations.³¹⁴ Rather than seek common ground for the common good, presidents and opposition leaders stubbornly stand their ground and create roadblocks for progress on the big issues that face the nation.³¹⁵ Rather than recognize that achievements in a democracy are frequently incomplete victories and works-in-progress, presidents and opposition leaders can obstinately seek complete victories and permanent solutions. More and more, divided government has meant dysfunctional government. The end result of this dysfunction is a lack of progress for the country and a loss of faith by the people in their government.³¹⁶ Presidents and other politicians can and should continue to disagree with one another where there are principled differences; that kind of disagreement is at the heart of a vibrant democracy. But such disagreement and difference should not lead to dysfunction, and principles should serve as guideposts, not roadblocks, on the road to progress.

In sum, if fierce business competitors with billions of dollars at stake can simultaneously collaborate and compete for their constituents, then presidents and the opposing party should be able to learn to do the same for their constituents. America, after all, was founded and built on difficult compromises and grand collaborations among parties with strident, principled differences.³¹⁷

polarization from 1880).

³¹⁴ See MANN & ORNSTEIN, *supra* note 113, at 3-8 (chronicling the contentious fight over raising the debt ceiling); Hulse & Cooper, *supra* note 113, at A1; Weisman & Parker, *supra* note 113, at A1.

³¹⁵ Partisan gridlock was not always the case in our history. Franklin Roosevelt passed the National Industrial Recovery Act and established the Securities and Exchange Commission by working with Republicans; Lyndon Johnson passed the Civil Rights Act of 1964 by working with Republicans; and Ronald Reagan worked with a Democratic House to pass comprehensive tax reform. See, e.g., GUTMANN & THOMPSON, *supra* note 113, at 5-7, 105 (detailing the political compromises behind the Tax Reform Act of 1986 and the Civil Rights Act of 1964); MATTHEWS, *supra* note 113, at xiv-xv (chronicling the compromises between a Republican President and a Democratic Speaker of the House); Scher, *supra* note 113, at SR8 (discussing how Roosevelt collaborated with the opposition to achieve some of his signature accomplishments).

³¹⁶ See MANN & ORNSTEIN, *supra* note 113, at x-xv (diagnosing the political dysfunction in Washington); Moss, *supra* note 113, at 136 (observing that political gridlock “runs counter to basic democratic values and may be crippling Washington’s ability to reach solutions that capture the smartest thinking of both camps”).

³¹⁷ See, e.g., RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 200-02 (2009) (chronicling the Connecticut Compromise between large and small states at the constitutional convention in Philadelphia); ROBERT PIERCE

B. *A Lesson in Legacy*

Presidents offer an important lesson in legacy for CEOs. Presidents, by the historic nature of their office, naturally think about their legacies. As such, many presidential actions and initiatives are focused on the distant future, on making a long-term impact.³¹⁸ This was true of Lincoln's construction of the intercontinental railroad, FDR's creation of Social Security, Kennedy's pursuit of the moon, and Reagan's conferences with the Soviets. In addition to official actions as the head of the executive branch, presidents also make political actions with an eye towards legacy as the head of their political parties. Since the moment of their nominations, every president has had to confront their mortality and the issue of succession in choosing a running mate. Nine vice-presidents have had to assume the presidency due to the death or resignation of the President. Thus, selecting a running mate is one of the most important decisions of presidential nominees and presidents; it can speak not only to their political viability, but also to national stability and their place in history. In America's great history, every presidential succession has been peaceful, though not every one of them has been smooth.³¹⁹ There has never been an appeal from the ballot to the bullet in our history where the electorate used violence to overthrow a president. Such peaceful transitions are due in part to law, but also due in part to presidential planning with an eye towards legacy.³²⁰

Modern CEOs can learn instructive lessons from this presidential focus on legacies.³²¹ While CEOs are mortal individuals, corporations can be immortal entities.³²² Too often, many modern CEOs are too myopic — too focused on next week and next quarter, rather than

FORBES, *THE MISSOURI COMPROMISE AND ITS AFTERMATH: SLAVERY AND THE MEANING OF AMERICA* 1-13 (2009) (examining the grand compromise on slavery that warded the civil war for a generation of Americans).

³¹⁸ See, e.g., GIBBS & DUFFY, *supra* note 65, at 13, 229, 233, 338, 380 (discussing various episodes of presidents acting to secure their legacies and places in history). This, however, is not to suggest that presidents do not make calculated decisions for short-term motivations because they undoubtedly and frequently do so.

³¹⁹ See, e.g., JEFFREY TOOBIN, *TOO CLOSE TO CALL: THE THIRTY-SIX-DAY BATTLE TO DECIDE THE 2000 ELECTION* (2001) (examining the Bush-Gore presidential recount).

³²⁰ See generally Pre-Election Presidential Transition Act of 2010, Pub. L. No. 111-283, 124 Stat. 3045; Presidential Transition Act of 1963, Pub. L. No. 88-277, 75 Stat. 153 (1964).

³²¹ See Gil Troy & Karl Moore, *Leading from the Centre: What CEOs Can Learn from U.S. Presidents*, IVEY BUS. J., Sept.–Oct. 2010, at 7, 7.

³²² Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764, 766 (2012).

next year and the long-term horizon.³²³ This emphasis on narrow, short-term interests can lead to bad business and bad governance.³²⁴ Rather than invest in innovation and long-term growth, many CEOs will act solely to meet quarterly expectations to the long-term detriment of shareholders.³²⁵ Rather than plan for succession as part of governance, CEOs and boards will ignore succession planning at the expense of future stability and prosperity. Despite the importance of CEO succession, most corporate directors freely concede that not enough time and resources are dedicated to succession planning.³²⁶ Corporate myopia in this area can cause significant harms to shareholder wealth and corporate stability in the event of a sudden CEO ouster or incapacitation.³²⁷ Imagine how the market would react if Warren Buffett was suddenly incapacitated and Berkshire Hathaway did not have a succession plan in place.³²⁸ CEOs and their boards, therefore, should take a page from the presidential playbook, and focus more on the distant future, including one where they are no longer leading the firm.³²⁹

In sum, if presidents can govern with an eye towards the distant future in the modern political maelstrom, then CEOs should learn that lesson of legacy and plan for a time beyond the next quarter or the next year in the long-term interests of their shareholders.

³²³ See ROGER MARTIN, *FIXING THE GAME* 29 (2011) (“In the face of expectations that can run wild, CEOs have increasingly focused on what they can control: managing share price over the short run.”).

³²⁴ See *id.* at 28-37 (opining on the negative consequences of myopia in corporate management).

³²⁵ See CLAYTON M. CHRISTIANSEN, *INNOVATOR’S DILEMMA*, at xv-xx (2011) (studying how good businesses fail because of not adapting to changing and disruptive trends).

³²⁶ See A.G. Lafley, *The Art and Science of Finding the Right CEO*, *HARV. BUS. REV.*, Oct. 2011, at 66, 74 (“[T]wo-thirds of all corporate directors admit that they don’t give succession planning sufficient energy and time.”).

³²⁷ See Randolph P. Beatty & Edward J. Zajac, *CEO Change and Firm Performance in Large Corporations: Succession Effects and Manager Effects*, 8 *STRATEGIC MGMT. J.* 305, 313-16 (1987) (examining the negative effects of unanticipated CEO transitions on stock values).

³²⁸ Fortunately, Warren Buffett and his board have a succession plan in place. See WARREN BUFFETT, 2011 *BERKSHIRE HATHAWAY INC. ANNUAL SHAREHOLDERS LETTER* 3 (2012).

³²⁹ See Thomas J. Friel & Robert S. Duboff, *The Last Act of a Great CEO*, *HARV. BUS. REV.*, Jan. 2009, at 82, 85-89 (arguing that companies need to give CEO transitions more advanced and meaningful consideration).

CONCLUSION

This Article has been a comparative study of CEOs and presidents: the constructs that bind them in the popular imagination of law and society, the truths that sever their bonds in reality, and the wide-ranging effects of this double helix of executive power on law and society. Through a concurrent exploration of the critical convergences and distinct divergences between CEOs and presidents, this Article argues that viewing CEOs and presidents through the same light illuminates each figure, but also obscures and distorts them. Rather than conflate these figures of power through a common prism, many lessons can be gained by examining these chief executives and the laws that govern them in a concurrent but distinct manner. In the end, this Article suggests, with hope, that in learning better the ways and laws of the chief executives who lead and govern our nation and our corporations, we can learn better ways to be led and governed, as citizens and shareholders alike.

APPENDIX

Figure 1: True Contest Elections

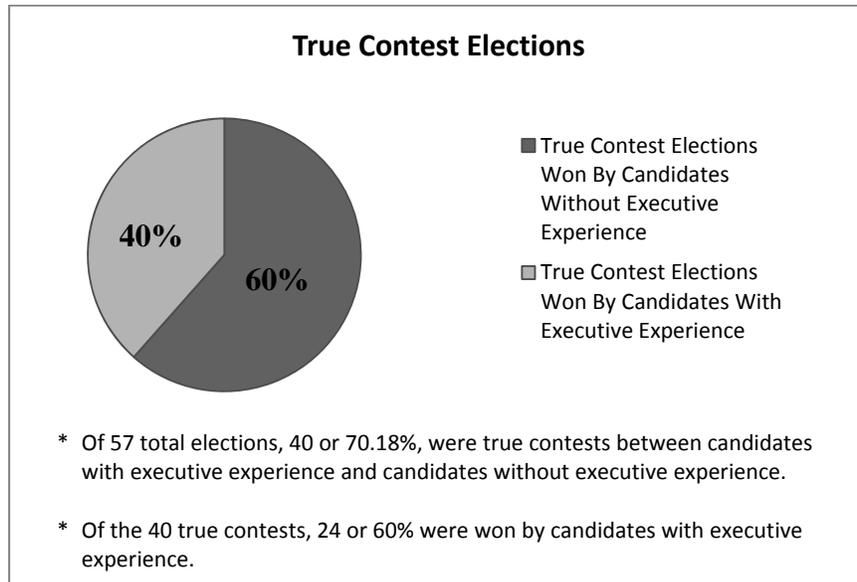


Table 1: Summary of True Contest Elections

Year	Name	Party	Relevant Experience	Electoral Votes
2012	Barack Obama	Democrat	President; U.S. Senator	332
	Willard "Mitt" Romney	Republican	Gov. of MA; CEO of Bain	206
2004	George W. Bush	Republican	Gov. of TX	286
	John Kerry	Democrat	Senator; Lt. Gov. MA	251
2000	Al Gore	Democrat	Vice-Pres.; Congressman	266
	George W. Bush	Republican	Gov. of TX	271
1996	William Clinton	Democrat	Gov. of AK	379
	Bob Dole	Republican	Congress	159
	Ross Perot	Reform	CEO of EDS & Perot Systems	0
1992	William Clinton	Democrat	Gov. of AK	370

	George H.W. Bush	Republican	Pres.; Vice-Pres.; CIA Dir.	168
	Ross Perot	Independent	CEO of EDS & Perot Systems	0
1984	Ronald Reagan	Republican	Gov. of CA	525
	Walter Mondale	Democrat	Congressman	13
1980	Ronald Reagan	Republican	Gov. of CA	489
	James Carter	Democrat	President; Gov. of GA	49
	John Anderson	Independent	Congressman	0
1976	James Carter	Democrat	Gov. of GA	297
	Gerald Ford	Republican	Congressman	240
1940	Franklin Roosevelt	Democrat	Gov. of NY	449
	Wendell Willkie	Republican	Corporate Attorney	99
1932	Franklin Roosevelt	Democrat	Gov. of NY	472
	Hebert Hoover	Republican	Sec. of Commerce	59
1924	Calvin Coolidge	Republican	Gov. of MA	382
	John Davis	Democrat	Congressman; Solicitor General	136
	Robert LaFollette Sr.	Progressive	Congressman; Gov of Wisconsin	13
1912	Woodrow Wilson	Democrat	Gov. of NJ	435
	Theodore Roosevelt	Progressive	Pres.; Vice-Pres.; Gov. of NY	88
	William Taft	Republican	Sec. of War	8
1904	Theodore Roosevelt	Republican	Vice-Pres.; Gov. of NY	336
	Alton Parker	Democrat	Chief Judge, NY Ct. of Appeals	140
1900	William McKinley	Republican	Gov. of OH	292
	William Bryan	Democrat	Congressman	155
1896	William McKinley	Republican	Gov. of OH	271
	William Bryan	Democrat	Congressman	176
1894	Grover Cleveland	Democratic	Gov. of NY	277

	Benjamin Harrison	Republican	President; Senator	145
	James Weaver	Populist	Congressman	22
1884	Grover Cleveland	Democrat	Gov. of NY	219
	James Blaine	Republican	Sec. of State	182
1844	James K. Polk	Democrat	Gov. of TN	170
	Henry Clay	Whig	Sec. of State	105
1836	Martin Van Buren	Democrat	Gov. NY; Sec. of State	170
	William Harrison	Whig	Sec. Northwest Territory	73
	Hugh White	Whig	Congress	26
1832	Andrew Jackson	Democrat	Gov. FL Territory	219
	Henry Clay	National Republican	Sec. of State	49
	John Floyd	Nullifier	Congressman	11
1828	Andrew Jackson	Democrat	Gov. FL Territory	178
	John Quincy Adams	National Republican	Sec. of State	83
1820	James Monroe	Democratic-Republican	Gov. of VA; Sec. of State/War	231
	John Quincy Adams	Democratic-Republican	Sec. of State	1
1816	James Monroe	Democratic-Republican	Gov. of VA; Sec. of State/War	183
	Rufus King	Federalist	Senator	34
1804	Thomas Jefferson	Democratic-Republican	Gov. of VA	162
	Charles (CC) Pinckney	Federalist	SC State Legislature	14
1800	Thomas Jefferson	Democratic-Republican	Gov. of VA	73
	Aaron Burr	Democratic-Republican	Senate	0
	John Adams	Federalist	Vice-Pres.; Minister to England	65

Figure 2: Former Governors As Presidents

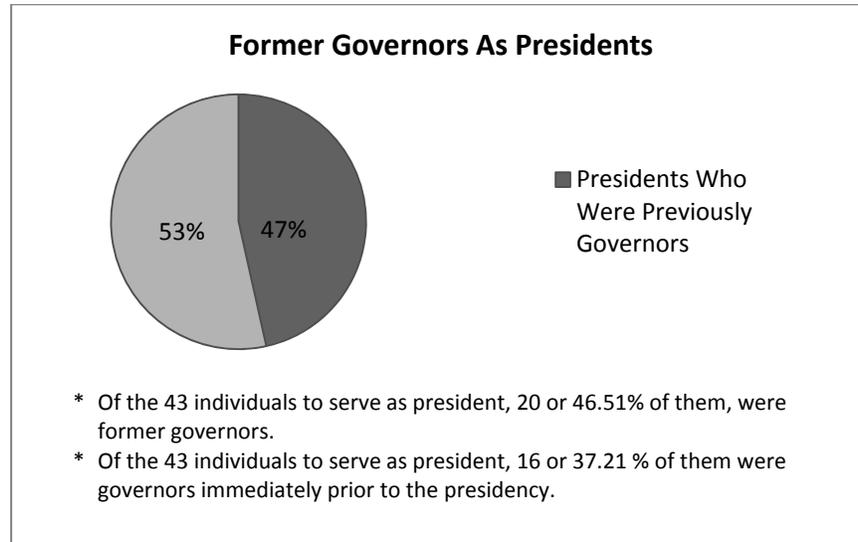


Table 2: Former Governors Who Became President

Number	Name	Dates as Governor	State	Dates President
3	Thomas Jefferson	1779-1781	VA	1801-1809
5	James Monroe	1799-1802	VA	1817-1825
7	Andrew Jackson	1821	FL Territory	1829-1837
8	Martin Van Buren	1829	NY	1837-1841
9	William Henry Harrison	1801-1813	IN*	1841
10	John Tyler	1825-1826	VA	1841-1845
11	James Polk	1839-1841	TN	1845-1849
17	Andrew Johnson	1853-1857	TN	1865-1869
19	Rutherford Hayes	1868-72, 1876-77	OH	1877-1881
22/24	Grover Cleveland	1883-1885	NY	1885-89, 1893-97
25	William McKinley	1892-1896	OH	1897-1901
26	Theodore Roosevelt	1898-1900	NY	1901-1909

27	William Taft	1901-1904	Philippines	1909-1913
28	Woodrow Wilson	1911-1913	NJ	1913-1921
30	Calvin Coolidge	1919-1920	MA	1923-1929
33	F.D. Roosevelt	1929-1933	NY	1933-1945
39	Jimmy Carter	1971-1975	GA	1977-1981
40	Ronald Reagan	1967-1975	CA	1981-1989
42	William Jefferson Clinton	1978-80, 1982-92	AK	1993-2001
43	George W. Bush	1995-2000	TX	2001-2009