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The Corporate Governance of Iconic Executives

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ESSAY

THE CORPORATE GOVERNANCE OF
ICONIC EXECUTIVES

Tom C.W. Lin*

This Essay explores the special corporate governance challenges posed by iconic executives. Iconic executives are complex, bittersweet figures in corporate governance narratives. They are alluring, larger-than-life corporate figures who often govern freely. Iconic executives frequently rule like monarchs over their firms, offering lofty promises to shareholders, directors, and managers under their reign. But like many stories of powerful and influential figures, the narratives of iconic executives also contain adversity and danger. Part of the acquiescence and enchantment with such figures is rooted in the virtuous promises embodied by their presence, promises of unity, accountability, and effectiveness in corporate governance. Unfortunately, for many shareholders, these promises turn out to be illusory, empty, and full of peril. The threatening hollowness of such promises exists because the virtues of unity, accountability, and effectiveness pledged by iconic executives also contain the vices of excessive deference, overconfidence, and licentiousness. Given such dangerous duplicity, this Essay calls for greater governance of iconic executives.

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INTRODUCTION

The modern corporation is one of the greatest fictions and inventions of humankind.¹ It has made unparalleled wealth, unmatched progress, and unimaginable innovations a reality through the ingenuity and hard work of enterprising individuals. Nonetheless, the modern corporation is not without its flaws and challenges, imperfections and difficulties coded in its essential form. The modern corporation is owned by its shareholders, but governed by its directors and officers.² This inherent dissonance between ownership and management creates many advantages,³ but also presents many corporate governance challenges.⁴ Such challenges are exponentially magnified and further complicated when the manager of a corporation is of elevated stature and prominence, when the corporate manager is an

1 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, Colum. Univ., Address at the 143rd Annual Banquet of the Chamber of Commerce of the State of New York (Nov. 16, 1911))); JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE COMPANY, at xv (2003) (“[The corporation is] the basis of the prosperity of the West and the best hope for the future of the rest of the world.”).

2 See ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 6–7 (Transaction Publishers 1991) (1932).

3 See Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 301-02 (1983) (articulating the benefits of the corporate structure derived from specialization, monitoring, and ratification by different stakeholders); Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1698–1700 (2001) (espousing the virtues of centralized corporate management).

4 BERLE & MEANS, *supra* note 2, at 1164 (“The concentration of economic power separate from ownership has, in fact, created economic empires, and has delivered these empires into the hands of a new form of absolutism, relegating ‘owners’ to the position of those who supply the means whereby the new princes may exercise their power.”); Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 288–91 (1980) (highlighting agency costs created by the organization of the corporate firm).

“iconic executive.”⁵ This special set of challenges resides in corporate governance territory partially distinct from plots claimed by directorism,⁶ managerialism,⁷ and shareholderism.⁸ The aim of this Essay is to venture into this distinct territory and explore this special set of corporate governance issues: the corporate governance challenges posed by powerful and influential iconic executives.

This Essay does not intend to serve as a normative, wholesale indictment of the corporate governance of iconic executives, nor does it intend to serve as a descriptive, resigned apology of the status quo. Instead, this Essay inquires into the unique considerations presented by the corporate governance of iconic executives and cautions against blind assent to their governance.

This Essay proceeds with this inquiry in three parts. Part I begins with a character sketch of iconic executives.⁹ It describes their distinct attributes and functions in the modern corporation, and proffers an explanation for their seductive allure. Part II then explores the promise of iconic executives. Borrowing from constitutional law’s discourse on the unitary presidency,¹⁰ it illuminates the interrelated virtues of unity, accountability, and effectiveness in having a strong corporate unitary executive. Pivoting into the shadows, Part III examines the vices of such imperial governance and warns of the perils of iconic executives. Utilizing an instructive, albeit inelegant, penumbra cast by political despots, dictators, and strongmen, it warns against excessive deference, overconfidence, and licentiousness in boardrooms and executive suites. Finally, this Essay concludes with a cautionary coda on the bittersweet duplicity of iconic executives.

5 For a character sketch of an “iconic executive” for the purpose of this Essay, see *infra* Part I.A.

6 See generally Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003) (outlining the director-centric model of corporate governance).

7 See generally ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977) (describing the manager-dominant model of corporate governance).

8 See generally Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440–41 (2001) (articulating the shareholder-based model of corporate governance).

9 Iconic executives exist at both privately-held and publicly-traded business entities, but this Essay will focus primarily on those at large publicly-traded corporate firms because of their select prominence and influence.

10 See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE* 3–10 (2008) (providing an overview of the debate on the unitary presidency theory).

I. ICONIC EXECUTIVES

Iconic executives are precious and rare creatures in the corporate ecosystem. The contemporary iconic executive is an epiphenomenon of modern media and modern business, often appearing as an alluring chimera of businessman, statesman, and celebrity.¹¹ Iconic executives frequently serve as the chairman and chief executive of prominent publicly-traded corporations.¹² Many perceived the modern iconic executive as both a personification and a reincarnation of the mythical captain of industry from the Industrial Age, as described by Thorstein Veblen:

In the typical case he was business manager of the venture as well as foreman of the works, and not infrequently he was the designer and master-builder of the equipment of which he was the responsible owner [A] man of workmanlike force and creative insight into the community's needs, who stood out on a footing of self-help, took large chances for large ideals, and came in for his gains as due reward for work well done in the service of the common good, in designing and working out more effective organization and industrial forces and in creating and testing out new and better processes of production.¹³

The iconic executive is distinct from his or her ordinary boardroom brethren. Whereas ordinary executives are seen as mere temporary stewards of their firms, iconic executives are viewed as oracles, visionaries, and gurus.¹⁴ Whereas ordinary executives are perceived as important to the success of their firms, iconic executives are viewed as indispensable to the success of their firms. Whereas ordinary executives are considered as one of many factors for investors, iconic execu-

11 See, e.g., Tom C.W. Lin, *Undressing the CEO: Disclosing Private, Material Matters of Public Company Executives*, 11 U. PA. J. BUS. L. 383, 389–92 (2009) (discussing the impact of modern media and investor diversification in elevating corporate executives); Patricia Sanchez Abril, *The Evolution of Business Celebrity in American Law and Society*, 48 AM. BUS. L.J. 177, 178 (2011) (“Over the past half-century, digital communications, globalization, mass-market media and advertising, and a heightened public interest in business matters have conspired to shine a brighter spotlight on business leaders as stars.”).

12 See JONATHAN R. MACEY, *CORPORATE GOVERNANCE* 62 (2008) (noting that in the United States “board chairmen of 70 percent of public companies serve concurrently as CEO of the company”).

13 THORSTEIN VEBLEN, *ABSENTEE OWNERSHIP AND BUSINESS ENTERPRISE IN RECENT TIMES* 103–04 (Augustus M. Kelley 1964) (1923).

14 See 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) (discussing popular creation myths and perceptions of celebrity CEOs).

tives are considered *the* determinative factor for investors.¹⁵ Whereas ordinary executives are seen as faceless managers of their corporations, iconic executives are seen as doppelgangers of their firms.

Throughout her exceptional history, America has been fortunate to have had more than its fair share of iconic executives in the past and in the present.¹⁶ Iconic executives of time past like Andrew Carnegie, Henry Ford, John Pierpont Morgan, John D. Rockefeller, Cornelius Vanderbilt, and Sam Walton helped a nation rebuild after the Civil War, rise out of the Great Depression, and move towards the Great Society. Present day, iconic executives like Warren Buffett, Bill Gates, Steve Jobs, Jeff Bezos, Jamie Dimon, Sergey Brin, and Larry Page are helping to create wealth and economic progress to safeguard the present and shape the future.¹⁷ For many investors and individuals, these iconic executives become mythical figures with seductive allure.

Part of the profound enchantment with iconic executives can be explained by the immeasurable, amorphous, and complex nature of leadership and power. Effective leadership can manifest itself in a wide range of personalities from all backgrounds.¹⁸ More than one type of person can make for an effective executive. Often, an executive is effective because of soft values and soft skills that are difficult to measure and replicate.¹⁹ Thus, individuals, like iconic executives,

15 See, e.g., GIDEON HAIGH, *FAT CATS: THE STRANGE CULT OF THE CEO* 98 (2005) (“A survey found that 95 percent of respondents were influenced in stock selection by the CEO’s profile and reputation.”).

16 American executives arguably are more powerful and influential than many of their international counterparts given the importance of American corporations relative to those based in other countries. See Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 848 (2005) (highlighting American corporate law’s historic preference of managerial power over shareholder power); Jens Dammann, *How Embattled are U.S. CEOs?*, 88 TEX. L. REV. SEE ALSO 201, 210 (2010), <http://www.texasrev.com/sites/default/files/seealso/vol88/pdf/88TexasLRevSeeAlso201.pdf> (“Moreover, it is well worth remembering that, decline or not, U.S. CEOs remain very powerful by international standards.”).

17 It is important to note that iconic executives need not be corporate successes and saints. In fact, iconic executives can turn out to be corporate scoundrels and failures that lead their firms to spectacular demises.

18 See Peter F. Drucker, *What Makes an Effective Executive*, HARV. BUS. REV., June 2004, at 63 (“Effective executives differ widely in their personalities, strengths, weaknesses, values, and beliefs. All they have in common is that they get the right things done.”).

19 See Daniel Goleman, *What Makes a Leader?*, HARV. BUS. REV., Jan. 2004, at 82 (discussing the soft qualities of “emotional intelligence” inherent in successful leadership). In addition to soft, immeasurable qualities, chance and luck can play a critical role in the effectiveness and success of a leader. See, e.g., LEONARD MLODINOW, *THE*

who appear to possess such illusive traits and produce sustainable, successful results are exalted, and given great liberties to manage their firms.

Functionally, because of the exalted stature of iconic executives, they exert a great deal of influence internally within their organizations and externally with the wider public.²⁰ Internally, iconic executives often unilaterally set forth the strategic visions of their firms, and carefully manage the execution of those visions.²¹ Iconic executives do this more so than ordinary executives. Iconic executives often have an overwhelming influence in the composition of the firm's board of directors, the selection of high-level operational managers, and the operation of the corporation's key departments.²²

Externally, business peers, policymakers, regulators, journalists, and the public view iconic executives as social celebrities, thought leaders, economic mavens, and business gurus.²³ Among their business brethren, iconic executives, their behaviors, and their policies are often viewed as models and templates to adopt, mimic, and replicate. Therefore, the practices of iconic executives—good and bad—can significantly influence trends and norms in the business world. Outside of the business realm, iconic executives serve as counselors to presi-

DRUNKARD'S WALK 13, 205 (2009) (opining on the random, but important, role of luck on the perceived success and failure of a business executive); Marianne Bertrand & Sendhil Mullainathan, *Are CEOs Rewarded for Luck? The Ones Without Principals Are*, 116 Q.J. ECON. 901, 901–93 (2001) (testing the role of good fortune in an executive's performance-tied compensation).

20 Some commentators and scholars have suggested that there has been a shift towards reining in the imperial governance of corporate executives at the beginning of the twenty-first century. See, e.g., Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987, 989 (2010) (“The CEOs of publicly held corporations in the United States are losing power.”); 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. While that observation may have some merit, corporate executives still, nonetheless, wield a great deal of power, and this is especially the case with iconic executives. See Bebchuk, *supra* note 16, at 913–14 (stating that management often dominates the governance of corporations to the firm's detriment); Dammann, *supra* note 16, at 201 (“U.S. managers are in fact quite powerful, especially by international standards.”).

21 See RAKESH KHURANA, *SEARCHING FOR A CORPORATE SAVIOR* 179–85 (2002) (discussing superior bargaining leverage of CEO candidates and reliance on their corporate visions); MYLES L. MACE, *DIRECTORS* 78–85 (1971) (excerpting interviews with senior executives who attest to the supreme power of some CEOs within corporations).

22 See *infra* Part III.A.

23 See Lin, *supra* note 11, at 383–95 (discussing the rise in social prominence of corporate executives). See generally KHURANA, *supra* note 21 (discussing various attributes of charismatic and celebrity CEOs).

dents, legislators, and ministers—foreign and domestic—on a whole host of matters.²⁴ In short, they populate a superclass of merchant statesmen that influence policies and decisions beyond those of their own firms, industries, and nation-states.²⁵

Ultimately, because of their select prominence, influence, and power, iconic executives offer special promises and pose distinct dangers for their firms, their shareholders, and the larger public.

II. THE PROMISE OF UNITARY CORPORATE EXECUTIVES

Iconic executive power holds special promises for the modern corporation. Executive power in the governance structure of our federal body politic offers an instructive lens for examining the promises of executive power in the governance structure of our corporations. The President of the United States has frequently been compared to the chief executive of a large, complex corporation.²⁶ As President Calvin Coolidge famously observed, “The business of America is business.”²⁷

Fundamental governance principles, in the political and corporate realms, often find bases in the allocation of power among separate groups of stakeholders.²⁸ The governance powers of the American federal government are divided among three co-equal branches—the executive branch, the legislative branch, and the judicial branch.²⁹ This division in political power is in large part a reaction to the unchecked rule of the British crown over the colonies

24 See Sheryl Gay Stolberg & Anahad O’Connor, *Obama Alters Panel of Advisors*, N.Y. TIMES, Jan. 21, 2011, at B7 (reporting on the formation of a panel of business executives and other stakeholders to advise President Obama on jobs and economic competitiveness).

25 See C. WRIGHT MILLS, *THE POWER ELITE* 3–7 (2000) (discussing the role of corporate leaders in the elite circle of national power); DAVID ROTHKOPF, *SUPERCLASS* 33–37 (2009) (reporting on how some corporate executives populate a premium place in the global power structure).

26 See, e.g., Richard A. Epstein, *Executive Power in Political and Corporate Contexts*, 12 U. PA. J. CONST. L. 277, 282–83 (2010) (comparing executive power in the political and corporate contexts).

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

28 See Kahan & Rock, *supra* note 20, at 992–95 (grounding discussions of corporate executive power in political and social theory on the topic). See generally ROBERT A. DAHL, *WHO GOVERNS?* (2d ed. 2005) (examining corporate political governance principles through the prism of New Haven politics); STEVEN LUKES, *POWER* (2d ed. 2005) (examining sociological aspects of power and influence); MILLS, *supra* note 25, at 3–7 (discussing the nature of great individuals and their influence over others).

29 For a historical perspective, see THE FEDERALIST NOS. 47, 48 (James Madison) (professing the need for separate branches of government).

prior to American independence.³⁰ Similarly, the governance power of the modern corporation is also divided among three groups—the directors, the managers, and the shareholders.³¹

Justifications to aggrandize federal political power in the executive branch, known as the unitary executive theory,³² often find root in the interrelated promises of unity, accountability, and effectiveness.³³ Analogously, the promises of iconic executives find persuasive rationales in the same three interconnected promises.

A. *Unity*

A chief promise of iconic executives is that they offer a unity of vision, purpose, and power to the governance of a corporation. Such unity serves as a bulwark against different stakeholders with disparate, competing, and perhaps conflicting interests, much in the same fashion that a strong presidency guards against state and local pressures of contrasting constituencies in favor of national interests.³⁴

The iconic executive is a personification of the promise of unity: the unity of corporate personality and corporate purpose. Iconic executives often serve concurrently as the chairman and chief executive officer of a corporation.³⁵ They also are often the founders and chief architects of large publicly-traded corporations and, therefore, are presumed to be especially protective of their corporations' image, interests, and culture since the firm is often the by-product of their lives' most important work. For many iconic executives, their

30 See Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 225–28 (1989).

31 See John Pound, *The Promise of the Governed Corporation*, HARV. BUS. REV., Mar.–Apr. 1995, at 94 (stating that directors, managers, and shareholders are the key constituencies in corporate governance).

32 See CALABRESI & YOO, *supra* note 10, at 2–9 (providing an overview of the unitary executive theory in constitutional law discourse).

33 See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 36 (1995) (“The essential ingredient to combating the congressional collective action problem is the President’s national voice, because he, and he alone, speaks for the entire American people.”); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2332–39 (2001) (extolling the virtues of decisive executive action).

34 See Calabresi, *supra* note 33, at 42 (“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.” (emphasis omitted)).

35 See MACEY, *supra* note 12, at 98 (“[I]f the board is supposed to play a managerial role and provide strategic support for the company, as maintained by the managerial model of boards, then combining the CEO function and the function of board chair makes perfect sense.”).

blueprints for their firms are so viscerally a part of their corporations' genetic fabric that investors often view them synonymously with their firms. Warren Buffett is Berkshire Hathaway. Martha Stewart is Martha Stewart Omnimedia. Steve Jobs is Apple. Bill Gates is Microsoft. Sam Walton is Wal-Mart. Therefore, the interests of iconic executives presumably are perfectly aligned and attached with their shareholders' interests³⁶—to maximize shareholder wealth.³⁷

As a matter of governance, the iconic executive in theory personally manifests and efficiently executes a singular, purposeful vision of the corporation without dilutions from other parties.³⁸ The iconic executive designs the firm's strategic blueprint, hires its executors, manages its construction, and markets its final outputs. Some perceive this unitary paradigm of governance as superior to models that are based on divided power among many stakeholders because it enhances strategic cohesiveness and reduces agency costs.³⁹ Steve Jobs, the former CEO and co-founder of Apple, reportedly micromanaged almost all aspects of Apple, from product design to manufacturing to marketing to store construction to corporate strategy.⁴⁰ Mr. Jobs's prolific micromanagement is partially reflected in the fact that he is named as the inventor or co-inventor of 313 Apple patents relating to inventions ranging from the glass staircases in its stores to the power adapters on its computers.⁴¹ Many investors and analysts attribute Apple's incredible success in the first decade of the twenty-first century to Mr. Jobs's monolithic embodiment and detailed control of the firm.⁴²

36 See Renee Adams et al., *Understanding the Relationship between Founder-CEOs and Firm Performance*, 16 J. EMPIRICAL FIN. 136, 136–51 (2009) (showing a strong, positive correlation between higher valuations of firms with founder-CEOs relative to firms without founder-CEOs).

37 See Bainbridge, *supra* note 6, at 552 (stating that shareholder wealth maximization is the guiding impetus of corporations).

38 See Kahan & Rock, *supra* note 20, at 993 (assessing the wide scope of a corporate executive's power over multiple facets of a corporation).

39 For a definitive overview of agency cost in the corporate form, 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).

40 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 MAG., Nov. 23, 2009, at 89–96.

41 See Miguel Helft, *Attention to Detail, Noted in 313 Patents*, N.Y. TIMES, Aug. 25, 2011 at B6.

42 See *id.*

B. *Accountability*

A second promise of iconic executives, related to the pledge of unity, is the promise of enhanced accountability. Like the unitary president of constitutional legal theory, because vision, strategy, and execution all reside primarily within one corporate actor, it is distinctly and theoretically easier to hold that one actor accountable for the successes and failures of the corporation.⁴³ In corporations where power and influence are diffused among a plurality of managers, responsibility and accountability likewise are diffused. Such diffusion sometimes renders it more difficult for shareholders and other stakeholders to accurately cast blame or give credit to the responsible parties.

The corporation of the iconic executive does not suffer from such a problem of dispersed accountability. Just as the presidency's unitary structure and singular personhood renders it easier—rightly or wrongly—for the electorate to hold him accountable every four years,⁴⁴ the iconic executive's concentrated and all-encompassing influence on his corporation theoretically makes it easier for shareholders to hold him or her responsible (perhaps too much so) for triumphs and failures. When Berkshire Hathaway fails or succeeds, blame or credit is attributed to Warren Buffett. When Amazon fails or succeeds, criticism or praise is given to Jeff Bezos. While individual shareholders may lack the will and resources to hold an executive accountable, the rise of institutional shareholders like hedge funds, private equity groups, pension funds, and mutual funds have ample will and resources, in theory, to hold an underperforming executive accountable.⁴⁵

C. *Effectiveness*

A third promise of iconic executives is that of increased effectiveness in corporate governance. Because of the unitary nature of iconic executives, they are not beset with the indecisions and inefficiencies that often plague and characterize the actions of a plurality of actors.

43 See Calabresi, *supra* note 33, at 65 (“[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.”).

44 See Kagan, *supra* note 33, at 2332 (“The 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.”).

45 See Kahan & Rock, *supra* note 20, at 995–1000 (discussing the rise and activism of institutional shareholders). For a more skeptical alternative view of institutional shareholder activism, see *infra* Part III.A.1.

Similar logic has been used to justify a stronger executive branch in the political context.⁴⁶ Because vision, power, and execution are centralized in one actor, the iconic executive, theoretically, can act in a more expedient and effective manner than executives that do not wield similar managerial power and influence over their firms.⁴⁷

The promise of effectiveness is particularly seductive in modern times because a frequently cited ingredient of a successful modern business is swift decisions in the face of accelerated, shifting market trends.⁴⁸ Kenneth Arrow, in his seminal organizational theory tome, *The Limits of Organization*, espoused this sentiment: “Under conditions of widely dispersed information and the need for speed in decisions, authoritative control at the tactical level is essential for success.”⁴⁹ This is especially true of a large modern corporation in the age of globalization. A large modern corporation can consist of a myriad of divisions and departments that span industries, time zones, and nation-states. For example, the General Electric Company (GE) has as of 2011, in more than 100 countries, about 300,000 employees working in industries ranging from “aircraft engines and power generation to financial services, medical imaging, and television programming.”⁵⁰

Organizations governed by a plurality of actors often suffer from collective action constraints and information asymmetries that lead to indecisiveness, infighting, and inefficiency.⁵¹ Politically, legislative action through Congress generally requires more time than executive action from the President.⁵² The same holds true for analogous corporate decisions decided by committees, cooperatives, or multiple managers. The iconic executive can sidestep the problems of collective action that dispersed stakeholders and managers share and act in

46 See Kagan, *supra* note 33, at 2339 (“Because he is a unitary actor, he can act without the indecision and inefficiency that so often characterize the behavior of collective entities.”).

47 See KENNETH J. ARROW, *THE LIMITS OF ORGANIZATION* 68–70 (1974).

48 See CLAYTON M. CHRISTENSEN & MICHAEL E. RAYNOR, *THE INNOVATOR’S SOLUTION* 35–38 (2003) (studying the need for innovation and swift corporate action in the face of increasing competitive pressures).

49 ARROW, *supra* note 47, at 69.

50 See *Fact Sheet*, GEN. ELECTRIC CO., <http://www.ge.com/company/factsheets/corporate.html> (last visited Sept. 22, 2011).

51 See Bainbridge, *supra* note 6, at 555–56 (“Fiat can also lower costs associated with uncertainty, opportunism, and complexity.”); Kagan, *supra* note 33, at 2339 (discussing the benefits of a singular actor governance paradigm relative to a governance paradigm based on a plurality of actors).

52 See ARTHUR CHESTER MILLSPAUGH, *DEMOCRACY, EFFICIENCY, AND STABILITY* 278 (1942) (criticizing the slowness and fitfulness of congressional lawmaking).

a prudent, expeditious manner as required by the demands of fast-moving modern markets.⁵³ Just as proponents of unitary presidencies argue that modern circumstances demand a stronger executive branch in the political sphere,⁵⁴ the iconic executive promises to fulfill such demands of modernity in the corporate sphere.

III. THE PERILS OF IMPERIAL CORPORATE GOVERNANCE

Iconic executives can govern firms like corporate emperors and empresses, holding primacy over shareholders, directors, and managers during their reign.⁵⁵ This imperial model of corporate governance offers great promises to the governed, but those promises can be illusory, empty, and full of peril.⁵⁶ The linked virtues of unity, accountability, and effectiveness that iconic executives promise also contain the intertwined vices of excessive deference, overconfidence, and licentiousness.⁵⁷ These vices afflict executive scoundrels and saints, the well-intentioned as well as the ill-willed. Because of these vices, corporate boardrooms can become populated with naked iconic executives who are not exposed “until the tide goes out,”⁵⁸ and when that proverbial tide goes out, it often can be too late for shareholders and investors.

53 See John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301, 331 (2004) (suggesting that managerial power increases with dispersed ownership among shareholders).

54 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) (stating that “modern life [makes] unitary executive theory so deeply appealing” despite its unfilled promises); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 91–92 (1994) (suggesting that modern circumstances may make the unitary executive model more attractive relative to models with greater plurality).

55 See A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1366 (1932) (opining that corporate managers generally operate like “princes and ministers”).

56 See Leonhardt & Sorkin, *supra* note 20 (reporting on how imperial corporate governance led to superior compensation for executives and subpar returns for shareholders at some firms).

57 See *infra* Part III.A–C.

58 RICHARD POSNER, *A FAILURE OF CAPITALISM* 221 (2009) (quoting Warren Buffett).

A. *Excessive Deference*

1. Organizational Deference

Deference to directors and officers is inherent in the corporate form. Shareholders own the corporation, but directors and officers manage it.⁵⁹ Accordingly, shareholders lack meaningful supervisory powers over their firms and its managers, which can lead to steep agency costs.⁶⁰ As a matter of law and practice, the “original and undelegated” governance powers of the corporation reside with directors and authorized officers on most issues.⁶¹ Due to a number of factors, iconic executives exacerbate and capture much of this deference, given their exalted roles in their corporations.⁶²

First, iconic executives, especially those who are concurrently chief executive officers and chairmen of their corporations, often possess an incredible amount of influence over the selection and composition of their board of directors, senior managers, senior staff, outside advisors, and gatekeepers.⁶³ With regards to directors, executives often engage in “homosocial reproduction”⁶⁴ and select like-minded individuals to work with them and to execute their visions.⁶⁵ Thus, it should not be surprising that many current and former corporate executive officers serve on corporate boards, even interlocking firms in their service.⁶⁶ Therefore, many technically independent⁶⁷

59 See BERLE & MEANS, *supra* note 2, at 6–8.

60 See E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1147 (1932) (stating that corporate managers are “free from any substantial supervision by stockholders”).

61 See *Manson v. Curtis*, 119 N.E. 559, 562 (N.Y. 1918); see also Bainbridge, *supra* note 6, at 559 (“The statutory decisionmaking model thus is one in which the board acts and the shareholders, at most, react.”).

62 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.”).

63 See James D. Westphal & Edward J. Zajac, *Who Shall Govern? CEO/Board Power, Demographic Similarity, and New Director Selection*, 40 ADMIN. SCI. Q. 60, 61–65 (1995).

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

65 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.”).

66 See Eliezer M. Fich & Lawrence J. White, *CEO Compensation and Turnover: The Effects of Mutually Interlocked Boards*, 38 WAKE FOREST L. REV. 935, 947–51 (2003) (“[T]he number of mutual director interlocks is found to be significant.”).

67 The New York Stock Exchange and NASDAQ Stock Market requires the boards of most of its listed companies to consist of a majority of independent directors. See

and highly qualified boards are not objectively independent.⁶⁸ For instance, in 2011, News Corporation, the global media conglomerate headed by its founder and chief executive Rupert Murdoch, had legally independent directors that included a “godfather to one of Mr. Murdoch’s children and another who ran one of Mr. Murdoch’s Australian subsidiaries,” and other board members that “included many people with deep and longstanding ties to Mr. Murdoch, his company, and his family.”⁶⁹

With regards to senior managers and staff, executives can, wittingly or unwittingly, pack their lower-level personnel population with yes-people who have sycophantic tendencies to blindly execute their strategies without critique or concern.⁷⁰ While having likeminded individuals on a team can better facilitate a shared vision, this uniformity, in thought, can also lead to groupthink and extremism in the pursuit of a flawed, improperly vetted vision.⁷¹

With regards to outside advisors and gatekeepers such as attorneys, accountants, and bankers, executives often hire firms and individuals who subscribe wholesale to their views as opposed to objective parties who can check and refine their views.⁷² “For the outside observer, substitute judge, juror, or regulator, the importance of the gatekeeper’s cognitive role is clear: The gatekeeper’s task is to bring the outsider perspective to work *ex ante*, as a risk management device.”⁷³ As a result of the biased hiring practices of executives and the biased behavioral tendencies of gatekeepers, shareholders are

NASDAQ Stock Market Rules, NASDAQ INC., <http://nasdaq.cchwallstreet.com/> (last visited Sept. 22, 2011) (listing Rule 5605(b)(1)); *Listed Company Manual*, NYSE, INC. <http://nysemanual.nyse.com/lcm/> (last visited Sept. 22, 2011) (listing § 303A.01–.02).

68 See MACEY, *supra* note 12, at 84 (“The board of directors of Enron provides a vivid example of the following point: even boards that appear from the outside to be independent, professional, and highly qualified are susceptible to board capture.”).

69 Jeremy W. Peters, *For Murdoch, a Board Meeting with Friendly Faces*, N.Y. TIMES, Aug. 10, 2011, at BU1.

70 See Donald C. Langevoort, *Ego, Human Behavior, and Law*, 81 VA. L. REV. 853, 873–74 (1995); Canice Prendergast, *A Theory of “Yes Men”*, 83 AM. ECON. REV. 757, 769 (1993).

71 See CASS R. SUNSTEIN, *GOING TO EXTREMES* 85–93 (2009) (discussing how interactions among like-minded individuals can lead to extremism and group polarization).

72 See Andrew F. Tuch, *Multiple Gatekeepers*, 96 VA. L. REV. 1583, 1597–99 (2010) (explaining the importance of various, interdependent corporate gatekeepers).

73 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 CORNELL L. REV. 1209, 1214 (2011).

deprived of meaningful gatekeepers.⁷⁴ Enron failed, in part, because its outside law firm, Vinson & Elkins, and its independent auditor, Arthur Andersen—two of the most important gatekeepers for Enron shareholders—did not properly caution against the excesses and aggressiveness of the firm’s imperial executives.⁷⁵ The same can be said of many gatekeepers at a number of large financial institutions in the years prior to the recent financial crisis.⁷⁶

In sum, while personnel and gatekeeper selection of similar-minded individuals and institutions can enhance corporate cohesion, such self-selection, incest, and insularity can also breed excessive deference to iconic executives and unduly damage the stability and long-term success of firms when such individuals and institutions subscribe blindly to an executive’s will.⁷⁷

Second, iconic executives often can form and execute the fundamental strategies of their corporations with little or no organizational dissent, internally and externally. Internally, the self-selected boards and managers of many iconic executives likely will be reluctant to question or second-guess the decisions of their revered chief executive officer and chairman.⁷⁸ “[I]n the United States, where the board chairmen of 70 percent of public companies serve concurrently as CEO of the company, challenging senior management may be viewed

74 See BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM* 406–08 (2003); John C. Coffee, Jr., *Understanding Enron: “It’s About the Gatekeepers, Stupid”*, 57 *BUS. L.* 1403, 1403–07 (2002) (discussing how deficient gatekeeping led to the demise of Enron).

75 See Coffee, *supra* note 74, at 1403–07; Nancy B. Rapoport, *Enron, Titanic, and The Perfect Storm*, 71 *FORDHAM L. REV.* 1373, 1385–91 (2003).

76 See Langevoort, *supra* note 73, at 1212 (“By most accounts, the gatekeepers at many financial firms did a poor job in the events leading up to the crisis.”).

77 See 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) (espousing the view 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. FINANCE* 1829, 1852 (1999) (suggesting higher market capitalization for firms that select directors without CEO input).

78 See 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.”). As an example of a board reluctant to disagree and debate with its powerful CEO and chairman, see JAMES B. STEWART, *DISNEYWAR* 531 (2005) (discussing how Disney’s CEO, Michael Eisner, manipulated his passive board members to serve his ends).

as insubordinate.”⁷⁹ Externally, few outside parties are capable of meaningfully critiquing and checking executive decisions, given the economic and organizational advantages of corporate officers.⁸⁰ Only incumbent executives, for instance, are permitted to use corporate funds to solicit proxy votes, which can be a very expensive and labor-intensive process.⁸¹ 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.”⁸² Iconic executives can use their personal stature and corporate funds to lobby and influence legislative efforts that attempt to curtail their expansive powers and interests.⁸³ In the lead up to the passage of the landmark Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010,⁸⁴ many financial institutions and their executives expended great efforts and huge sums of corporate funds to lobby against the legislation.⁸⁵

Third, in addition to structural limitations, information asymmetry and investor apathy weaken shareholder activism as a possible institutional check on iconic executives. While public corporations make periodic material disclosures to the public through securities filings to inform investors and regulators, such disclosures may be incomprehensible, incomplete, or nonexistent.⁸⁶ For instance, when Apple’s former iconic CEO, Steve Jobs, took medical leaves in 2009,⁸⁷ and again in early 2011, under mysterious circumstances on both occasions,⁸⁸ the company made no meaningful disclosures about Mr.

79 MACEY, *supra* note 12, at 62.

80 See Ramirez, *supra* note 78, at 349 (“CEOs are simply better organized and have superior economic and political resources than the investing public.”).

81 See C.C. Marvel, Annotation, *Expenses Incurred by Competing Factions Within Corporation in Soliciting Proxies as Charge Against Corporations*, 51 A.L.R. FED. 873 (1957).

82 Ramirez, *supra* note 78, at 355.

83 See Edward J. McCaffery & Linda R. Cohen, *Shakedown at Gucci Gulch: The New Logic of Collective Action*, 84 N.C. L. REV. 1159, 1233 (2006) (discussing the pervasive influence of corporations on the political process).

84 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

85 See Helene Cooper, *Obama Signs Contentious Overhaul of the Financial System*, N.Y. TIMES, July 22, 2010, at B3 (reporting on the well-funded and well-organized corporate lobbying efforts against the legislation).

86 See Tom C.W. Lin, *A Behavioral Framework for Securities Risk*, 34 SEATTLE U. L. REV. 325, 349–56 (2011) (critiquing various shortcomings of the securities disclosure system).

87 See Yukari Iwatani Kane, *Apple’s Jobs Takes Medical Leave*, WALL ST. J., Jan. 15, 2009, at A1.

88 See Miguel Helft, *Jobs Takes Leave at Apple Again; Stirs Questions*, N.Y. TIMES, Jan. 18, 2011, at A1.

Jobs's condition, despite his incomparable importance to his firm. Apple shares gyrated in the absence of solid information and the presence of persistent false rumors, ranging from Mr. Jobs's suffering a heart attack⁸⁹ to Mr. Jobs's death.⁹⁰ When Mr. Jobs ultimately resigned as chief executive of Apple in late August 2011 with the release of a brief letter short on details,⁹¹ the stock dropped by 5 percent in after-hours trading following the announcement.⁹² Mr. Jobs would pass away several weeks later in early October 2011, at the age of 56.⁹³

Furthermore, the economic incentives do not properly encourage most individual investors to educate themselves by reading securities disclosures. "Given the length and complexity of corporate disclosure documents, the opportunity cost entailed in making informed decisions is both high and apparent. In contrast, the expected benefits of becoming informed are quite low . . ." ⁹⁴ And even when shareholders are properly informed, attempts at activism, such as through corporate elections, "are plagued by a variety of collective action and signaling" problems.⁹⁵ Similarly, many institutional shareholders lack proper economic incentives and organizing mechanisms to meaningfully engage in shareholder activism.⁹⁶ Many institutional investors, for instance, are transient investors focused on quarterly or annual returns for their portfolio of numerous investments. Therefore it makes little sense for them to engage in prolonged shareholder activism and monitoring, where they bear much

89 See Seth Liss, *Social Media Allows Public to Shape the News*, SUN-SENTINEL (Ft. Lauderdale), Aug. 16, 2009, at 1F (noting that Apple's stock price dropped upon false rumors that Steve Jobs had suffered a heart attack).

90 See Matthew Moore, *Steve Jobs's Obituary Published by Bloomberg*, TELEGRAPH (London), Aug. 28, 2010, <http://www.telegraph.co.uk/news/newsttopics/howaboutthat/2638481/Steve-Jobs-obituary-published-by-Bloomberg.html>.

91 David Streitfeld, *Jobs Steps Down at Apple, Saying He Cannot Meet Duties*, N.Y. TIMES, Aug. 25, 2011, at A1.

92 *Id.* It should be noted that the stock stabilized during the next trading day. See Matt Krantz, *Day after Jobs Resigns, Apple Stock Losses Minor*, USA TODAY, Aug. 26, 2011, at 1B.

93 See John Markoff, *Apple's Visionary Redefined Digital Age*, N.Y. TIMES, Oct. 6, 2011, at A1 (reporting on the death and life of Steve Jobs).

94 Bainbridge, *supra* note 6, at 558.

95 MACEY, *supra* note 12, at 211.

96 See Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1751-54 (2006) (describing the lack of incentives for financial firms to engage in shareholder activism); Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO. L.J. 445, 446, 473-74 (1991) (articulating economic disincentives for fund managers to engage in shareholder activism).

of the costs of the fight, and their competitors can free-ride the benefits of their efforts.

In sum, the economic factors simply do not incentivize many individual shareholders to try to actively engage in corporate governance.⁹⁷ Moreover, limited resources and other issues constrain many institutional shareholders from engaging in consistent, meaningful shareholder activism and monitoring.⁹⁸

The net result, from an organizational perspective, is an almost wholesale deference to the iconic executive. While such deference can lead to swift and effective action to the benefit of a corporation, it can also create opportunities for serious abuse. While such deference exists in many corporate boardrooms, and may be instinctual,⁹⁹ iconic executives present especially magnified iterations of these challenges because of their exalted status, the degree of deference afforded to them, and the lack of strong checks-and-balances against their power. Famed investor, John Bogle, and others have suggested that excessive deference can mutate “traditional owners’ capitalism to the new managers’ capitalism,”¹⁰⁰ kill any meaningful corporate governance, and destroy shareholder wealth creation.¹⁰¹ For instance, iconic executives could use their outsized influence and power to enrich themselves at the expense of investors in the absence of any meaningful organizational checks on their power.¹⁰² Empirical studies suggest that CEO influence and power is closely and positively correlated with

97 See ROBERT CHARLES CLARK, *CORPORATE LAW* 390–92 (1986) (discussing the rational apathy of shareholders); see also Bernard S. Black, *Shareholder Activism and Corporate Governance in the United States*, in 3 *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 459, 460 (1998) (discussing the limited effects of shareholder activism).

98 See Bainbridge, *supra* note 6, at 571–72 (“Even the most active institutional investors devote only limited resources to corporate governance . . .”); Rock, *supra* note 96, at 465–66 (describing the lack of rational incentives for some institutional investors to actively participate in corporate governance). *But see* Bebchuk, *supra* note 16, at 888–92 (suggesting that sophisticated institutional investors would be more inclined to engage in shareholder activism absent certain legal constraints).

99 See, e.g., Langevoort, *supra* note 73, at 1214 (arguing that corporate gatekeepers are sometimes cognitively lulled to “relax their guard” in the presence of successful and optimistic individuals).

100 JOHN C. BOGLE, *THE BATTLE FOR THE SOUL OF CAPITALISM* 28 (2005).

101 See Paul Gompers et al., *Corporate Governance and Equity Prices*, 118 *Q.J. ECON.* 107, 108–09 (2003) (hypothesizing that superior corporate governance can lead to superior results).

102 See Michael C. Jensen & Kevin J. Murphy, *CEO Incentives: It’s Not How Much You Pay, But How*, *HARV. BUS. REV.*, May–June 1990, at 138; Leonhardt & Sorkin, *supra* note 20.

CEO compensation.¹⁰³ The stock options backdating scandals that unfolded in 2006 and 2007 involved many firms with very powerful CEOs such as Apple, Barnes & Noble, Cablevision, and Research in Motion, who unjustly and unscrupulously enriched themselves at the shareholder's expense with the blessing of their boards.¹⁰⁴

2. Legal Deference

Courts historically have shown great procedural and substantive deference to the decisions and judgments of corporate executives.¹⁰⁵

Procedurally, many state corporate law statutes, especially Delaware, make it very cumbersome for shareholders to bring derivative suits on behalf of a corporation; and private federal securities actions offer no easier path for shareholders.¹⁰⁶ Preparing, submitting, and litigating a derivative lawsuit requires resources that are prohibitively high for most investors. For example, pursuant to Federal Rule of Civil Procedure 23.1, and similar state equivalents, a shareholder may not bring a lawsuit unless they make a demand of the board or unless such demand is excused.¹⁰⁷ "At a minimum, a demand must identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused to the corporation, and request remedial relief."¹⁰⁸ Moreover, once a demand is submitted, a corporation can terminate the action at its reasonable discretion, even if the allegations in the demand have merit, so long as it is exercising sound business judgment. As a result of the procedural hurdles that shareholders face, "[d]erivative suits in fact are relatively rare," and even when they commence, they usually settle prior to trial.¹⁰⁹ Thus, derivative litigation as a source of shareholder governance is thought

103 See, e.g., Lucian Arye Bebchuk et al., *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751, 754 (2002); Bertrand & Mullainathan, *supra* note 19, at 930; Richard M. Cyert et al., *Corporate Governance, Takeovers, and Top-Management Compensation: Theory and Evidence*, 48 MGMT. SCI. 453, 456 (2002).

104 See *Perfect Payday: Options Scorecard*, WALL ST. J. ONLINE, <http://online.wsj.com/public/resources/documents/info-optionsscore06-full.html> (last visited Sept. 22, 2011).

105 See *infra* notes 108–15 and accompanying text.

106 See LUCIAN BEBCHUK & JESSE FRIED, *PAY WITHOUT PERFORMANCE* 46–47 (2004) (outlining procedural obstacles faced by shareholders in connection with derivative suits).

107 See FED. R. CIV. P. 23.1.

108 *Allison v. Gen. Motors Corp.*, 604 F. Supp. 1106, 1117 n.17 (D. Del. 1985).

109 See STEPHEN M. BAINBRIDGE, *CORPORATION LAW AND ECONOMICS* 385 (2002).

to be an ineffective tool for corporate governance as the law frequently defers to postures favorable to corporations.¹¹⁰

Federal securities litigation offers no easier path for shareholders as Congress and courts have in recent history taken positions that favor corporate management over plaintiff-shareholders. For instance, Congress passed the Private Securities Litigation Reform Act of 1995, which made it procedurally more difficult for plaintiff-shareholders as it relates to, inter alia, pleadings and discovery.¹¹¹ Courts, including the U.S. Supreme Court, have similarly made it procedurally more difficult for plaintiff-shareholders by, among other matters, redefining standards for liable parties and proof of loss causation.¹¹² The collective result, as Justice Sandra Day O'Connor noted, is that: "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."¹¹³

Substantively, the law has also shown great deference to corporate executives under the common law doctrine known as the business judgment rule.¹¹⁴ The business judgment rule "establishes a presump-

110 See, e.g., Roberta Romano, *The Shareholder Suit: Litigation without Foundation?*, 7 J. L. ECON. & ORG. 55, 84 (1991).

111 See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737.

112 See, e.g., *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) (limiting liable parties in private securities litigation); *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005) (redefining standards for loss causation); *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, 487 F.3d 261, 270 (5th Cir. 2007) (refining the requirements for showing loss causation via stock price decline at the class certification phase of a suit).

113 *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009).

114 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."); *Shlensky v. Wrigley*, 237 N.E.2d 776, 779 (Ill. App. Ct. 1968) ("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." (alteration in original) (quoting *Toebelman v. Missouri-Kansas Pipe Line Co.*, 41 F. Supp. 334, 339 (D. Del. 1941))); *Leslie v. Lorillard*, 18 N.E. 363, 365 (N.Y. 1888) ("[T]he powers of those intrusted [sic] with corporate management are largely discretionary."); *Kamin v. Am. Express Co.*, 383 N.Y.S.2d 807, 810-11 (N.Y. Sup. Ct. 1976) ("The directors' room rather than the courtroom is the appropriate forum for thrashing out purely business questions"), *aff'd*, 387 N.Y.S. 993 (N.Y. 1976).

tion against judicial review” of substantive business decisions.¹¹⁵ As a result, courts rarely second-guess the decisions of corporate executives or substitute their judgments for the judgments of corporate executives,¹¹⁶ regardless of how catastrophic the outcomes may be, or how horrendous the decision-making process may look in hindsight.¹¹⁷ As the Delaware Supreme Court famously stated:

[T]he business judgment rule is the offspring of the fundamental principle, codified in [Delaware General Corporation Law] 141(a), that the business and affairs of a Delaware corporation are managed by or under its board of directors. . . . The business judgment rule exists to protect and promote the full and free exercise of the managerial power granted to Delaware directors.¹¹⁸

The underlying assumption is that businessmen, not judges, are better suited to make business decisions. While that assumption generally makes practical sense, this almost *carte blanche* judicial deference to executive corporate decisions is exceedingly rare in American jurisprudence. Courts generally do not extend such deference when adjudicating other specialized and complex subjects like medicine or engineering.¹¹⁹ Coincidentally, the other prominent area where courts have exhibited such deference is the executive decisions of presidents, particularly on matters relating to national security.¹²⁰

115 Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 90 (2004); *see also Shlensky*, 237 N.E.2d at 778 (“[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.”).

116 *See, e.g., Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“[J]udges are not business experts.”).

117 The business judgment rule, however, is not without its limits. *See Joy*, 692 F.2d at 886 (“[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 (holding that the business judgment rule does not protect decisions that involve illegality, fraud, or bad faith).

118 *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (internal citations omitted).

119 *See* FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 94 (1991) (questioning the rationale that permits generalist jurists to adjudicate over controversies involving engineering design but not business decisions); Bainbridge, *supra* note 115, at 120 (“[N]o ‘medical judgment’ or ‘design judgment’ rule precludes judicial review of malpractice or product liability cases.”).

120 This similarity lends additional credence to the comparison of unitary presidents to iconic executives in Part II.B, *supra*. *See, e.g., Haig v. Agee*, 453 U.S. 280, 309–10 (1981) (deferring to the Secretary of State on a national security matter);

While judicial deference to corporate executives encourages efficient business decisions by diminishing the fear and apprehension of hindsight judgment,¹²¹ such deference can become excessive and problematic when compounded with the absence of organizational mechanisms for checks-and-balances, as is the case with many iconic executives.¹²² Such excessive deference can lead to perilous outcomes for a firm, its shareholders, and the greater public.

Because corporations play such a vital role in the life of individuals and states, their governance can impact a whole host of prosaic and profound issues.¹²³ When Enron collapsed in 2001, billions of dollars in market value evaporated for investors and retirees, and 25,000 people around the world lost their jobs.¹²⁴ During its heyday, Enron's senior executives were viewed by business commentators as paragons of a new, elite corporate milieu.¹²⁵ In 2008, the failure of Lehman Brothers nearly pushed the global financial market to the brink of systemic failure.¹²⁶ Millions of jobs were lost in connection

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, 333 (1936) (submitting to executive judgment on an economic issue in the national security context); Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) (“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.”); *In re Terrorist Attack 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”).

121 Some studies strongly suggest that additional legal protections for investors may actually lead to enhanced returns as opposed to stifle economic growth. See, e.g., Rui Castro et al., *Investor Protection, Optimal Incentives, and Economic Growth*, 119 Q.J. ECON. 1131, 1131–35, 1166–67 (2004) (finding a “positive association between investor protection and profit growth”); Rafael La Porta et al., *Investor Protection and Corporate Valuation*, 57 J. FINANCE 1147, 1148–51 (2002) (suggesting that strong protections for investors of financial products can lead to higher rates of return).

122 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 significant increases in executive compensation).

123 See Ramirez, *supra* note 78, at 354 (“Corporations are the pivotal store of risk capital in the United States, and the key holder of society's wealth. The manner in which corporations are governed will affect a wide range of national issues—from economic inequality to globalization.”).

124 See A. C. FERNANDO, CORPORATE GOVERNANCE 296–300 (2009).

125 See, e.g., McLEAN & ELKIND, *supra* note 74, at 329 (discussing the business press's admiration of Enron's leadership at the time of its peak).

126 See, e.g., Tom C.W. Lin, *Too Big to Fail, Too Blind to See*, 80 MISS. L.J. 355, 355–67 (2010) (reviewing ANDREW ROSS SORKIN, TOO BIG TO FAIL (2009) and summarizing key episodes of the recent financial crisis). See generally FIN. CRISIS INQUIRY COMM'N,

with the financial crisis.¹²⁷ Iconic executives led both firms. Jeffrey Skilling, Ken Lay, and Andy Fastow ruled Enron like an imperial triumvirate during its spectacular ascent and equally spectacular crash.¹²⁸ Dick Fuld was the longtime powerful CEO of Lehman Brothers, one of Wall Street's largest investment banks, at the time of its collapse.¹²⁹ In both instances, these executives were afforded excessive deference over extended periods of time, which ultimately played a critical role in the demise of their respective firms and the disastrous consequences that followed their downfalls.

B. Overconfidence

Numerous studies have shown that individuals often have an abundance of confidence in their skills, intellect, and predictive powers.¹³⁰ A majority of Americans believe that their marriages will last until death does them part, even though fifty percent of all marriages end in divorce or separation.¹³¹ Lottery players believe that they have a reasonable chance of winning the jackpot in the face of astronomical odds to the contrary.¹³² Individuals who ascend to the executive suites of the corporate hierarchy generally do not suffer from a deficit of confidence.¹³³ Individuals revered as iconic executives usually have

THE FINANCIAL CRISIS INQUIRY REPORT, at xv–24 (2011) (studying the origins and causes of the financial crisis).

127 See, e.g., David Leonhardt, *In Wreckage of Lost Jobs, Lost Power*, N.Y. TIMES, Jan. 20, 2011 at B1 (reporting on the jobs lost in the United States following the financial crisis).

128 See McLEAN & ELKIND, *supra* note 74, at 405–11 (discussing Enron's executives and the board's deference to them).

129 See Lin, *supra* note 126, at 359–60 (summarizing key episodes involving Dick Fuld in the waning hours of Lehman Brothers).

130 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).

131 See ROSE M. KREIDER & JASON M. FIELDS, U.S. CENSUS BUREAU, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 1996, at 17–18 (2002) (indicating the large number of marriages that end in divorce or separation).

132 See generally Edward J. McCaffery, *Why People Play Lotteries and Why it Matters*, 1994 WIS. L. REV. 71, 121–22 (analyzing why individuals play the lottery despite the strong odds against winning).

133 See Antonio E. Bernardo & Ivo Welch, *On the Evolution of Overconfidence and Entrepreneurs*, 10 J. ECON. & MGMT. STRATEGY 301, 301–04 (2001); Troy A. Paredes, *Too Much Pay, Too Much Deference: Behavioral Corporate Finance, CEOs, and Corporate Governance*, 32 FLA. ST. U. L. REV. 673, 675 (2005) (suggesting that “business executives,

a surplus of confidence.¹³⁴ A healthy dose of confidence is a necessary ingredient for successful leadership;¹³⁵ however, excessive confidence can lead to disastrous and dangerous tendencies.

Iconic executives who operate with scarce dissent and bountiful deference are especially susceptible to the perils of overconfidence.¹³⁶ The scarcity of dissent combined with the abundance of deference can lead iconic executives to engage in excessively risky actions or investments. Overconfidence in one's investment and business strategies can lead one to invest in volatile and risky positions without properly considering the downside,¹³⁷ and once invested, become reluctant to withdraw from such bad investments.¹³⁸ Studies have suggested that executive overconfidence can lead to the overpayment of acquisitions or the adoption of unreasonably harmful defensive tactics to avoid a takeover.¹³⁹

particularly CEOs, suffer from overconfidence—often referred to more pejoratively as executive ‘ego,’ ‘hubris,’ or ‘arrogance’”).

134 See Dan Lovallo & Daniel Kahneman, *Delusions of Success: How Optimism Undermines Executives' Decisions*, HARV. BUS. REV., July 2003, at 56, 57–59; Richard Roll, *The Hubris Hypothesis of Corporate Takeovers*, 59 J. BUSINESS 197, 197–200 (1986) (discussing the hubris of executives in the context of corporate takeovers).

135 See ADAM BRYANT, *THE CORNER OFFICE* 24–40 (2011) (chronicling the importance of “battled-hardened confidence” for corporate executives). See generally ROSABETH MOSS KANTER, *Confidence* (2006) (examining the role of confidence in the success or failure of an enterprise).

136 See KANTER, *supra* note 135, at 63–84.

137 See 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 overvalue previous successes based on a perceived level of masterful skill); Susanna Kim Ripken, *Predictions, Projections, and Precautions: Conveying Cautionary Warnings in Corporate Forward-Looking Statements*, 2005 U. ILL. L. REV. 929, 961 (2005) (“The illusion of control causes investors to believe that positive investment outcomes are due to investors’ own skills and superior strategy, rather than good luck.”).

138 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, 167 (1997) (classifying this consequence of overconfidence as the “optimism-commitment whipsaw”).

139 See J.B. Heaton, *Managerial Optimism and Corporate Finance*, 31 FIN. MGMT. 33, 42–43 (2002) (studying the dangers of managerial overconfidence in defending against a takeover); Roll, *supra* note 134, at 197–200 (discussing the hubris of executives in the context of corporate takeovers); Richard H. Thaler, *Anomalies: The Winner's Curse*, J. ECON. PERSP., Winter 1998, at 191 (explaining how winners of auctions tend to overpay for their winning bid).

Overconfidence in their own abilities also can lead iconic executives to disengage from active management of critical issues or to fail to acknowledge personal shortcomings.¹⁴⁰ For example, Warren Buffett, believing in the superiority of a laissez-faire management style, does not actively manage Berkshire Hathaway's numerous businesses and its hundreds of thousands of employees.¹⁴¹ Berkshire Hathaway consists of more than seventy-five operating companies with over 250,000 employees¹⁴² that generate over \$136 billion annually in revenue.¹⁴³ These companies operate in diverse industries such as insurance, confectioneries, railroad systems, power generation, and furniture leasing.¹⁴⁴ Mr. Buffett manages these businesses with only twenty-one people at his headquarters.¹⁴⁵ Berkshire Hathaway's Vice Chairman, Charlie Munger, once described the firm's management style as, "delegation just short of abdication."¹⁴⁶ Mr. Buffett's management record generally has been lauded as exemplar, and he frequently has acknowledged his own limitations.¹⁴⁷ However, would the market tolerate such a hands-off approach from another CEO?¹⁴⁸ And more importantly, is such an approach really in the best interest of investors and public welfare for such a large and important corporation?

Overconfidence of iconic executives poses a real corporate governance threat, given the excessive deference granted to them by

140 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 14, at 645–47 (2004) (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) (theorizing on the causes of "blind spots" in the context of corporate actions).

141 See Andrew Ross Sorkin, *Delegator in Chief*, N.Y. TIMES, Apr. 24, 2011, at WK4.

142 See BERKSHIRE HATHAWAY INC., 2010 ANNUAL REPORT 106 (2011).

143 See Joe Nocera, Op-Ed., *The Party's Over for Buffett*, N.Y. TIMES, Apr. 30, 2011, at A21.

144 See BERKSHIRE HATHAWAY INC., *supra* note 142, at Inside Cover.

145 See Sorkin, *supra* note 141, at WK4.

146 David F. Larcker & Brian Tayan, *Berkshire Hathaway: The Role of Trust in Governance*, STAN. GRADUATE SCH. OF BUS., CORP. GOVERNANCE RES. PROGRAM, 2 (May 28, 2010), <http://www.gsb.stanford.edu/cgrp/documents/CGRP02-BerkshireHathaway.pdf>.

147 See ROBERT P. MILES, *THE WARREN BUFFETT CEO* 3–7 (2003).

148 In the Spring of 2011, Mr. Buffett received significant criticism for his hands-off corporate governance style following questionable securities transactions by one of his key lieutenants and senior executives, David Sokol. See Paul M. Barrett, *Sokol's Choice*, BLOOMBERG BUSINESSWEEK, May 2–May 8, 2011, at 50–55; Nocera, *supra* note 143, at A21.

their organization and by the law. The presence of excessive deference, coupled with the absence of adequate checks, can create a feedback loop that breeds more hubris at the senior executive levels and below, which ultimately can lead corporations down perilous paths.¹⁴⁹ “Confidence is not just the emotional state of an individual. It is a view of other people’s confidence, and of other people’s perceptions of other people’s confidence. . . . Just as diseases spread through contagion, so does confidence[.]”¹⁵⁰ The corporate scandals of Enron, WorldCom, Tyco, and Adelphia that caused billions in market capitalization to vanish, tens of thousands of people to lose their livelihoods, and countless others to lose their savings, can all be partially attributed to the overconfidence of, and excessive deference to, iconic executives.¹⁵¹ Overconfidence may also have played a significant role in the financial crisis of 2008 that cost millions of jobs and billions of dollars in bailouts.¹⁵² Many senior investment banking executives (and average homeowners) all operated under the Panglossian belief that housing prices could only rise; and, thus, they were not properly prepared when the housing bubble popped.¹⁵³

C. *Licentiousness*

The vices of excessive deference and overconfidence can lead to the vice of licentiousness among iconic executives when checks-and-balances are unduly sacrificed for efficiency and decisiveness.¹⁵⁴ Licentiousness can cloud executive judgment and lead to catastrophic consequences. History is rife with tragic tales of political leaders who embarked on paths of promise but ultimately journeyed to paths of peril because of overconfidence and excessive deference. In a peculiar way, the reigns of despots, dictators, and strongmen serve as powerful corporate governance parables for iconic executives. As such, the stories of men like Egypt’s Hosni Mubarak, Iraq’s Saddam Hussein, Libya’s Muammar el-Qaddafi, and Zimbabwe’s Robert Mugabe

149 See Paredes, *supra* note 133, at 702–22 (hypothesizing that executive confidence is a byproduct of corporate governance practices and corporate culture).

150 GEORGE A. AKERLOF & ROBERT J. SHILLER, *ANIMAL SPIRITS* 55–56 (2009).

151 See Paredes, *supra* note 133, at 679.

152 See Lin, *supra* note 126, at 371–73 (discussing the role of overconfidence in the financial crisis).

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

154 See Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 *VAND. L. REV.* 129, 130–35 (2009) (noting that the virtues of efficiency promoted by centralized management must be balanced with institutional oversight and checks).

offer instructive narratives for thinking about iconic executives, unbri-dled power, and licentiousness in corporate governance.

First, like their infamous political analogues, licentious iconic executives, with good or ill intentions, can successfully engage in legally compliant, but objectively conflicted dealings and dangerous practices, given the lack of meaningful restraints on their power.¹⁵⁵ Dictates and mandates replace discussions and deliberations. Warren Buffett, for example, generally conducts little to no due diligence prior to major acquisitions, which can reach billions of dollars.¹⁵⁶ Former longtime Disney CEO and Chairman, Michael Eisner, in the last few years of his long tenure, allegedly 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.¹⁵⁷ 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.¹⁵⁸ Although Disney’s directors would ultimately be exonerated for the severance package because they did not act with gross negligence and bad faith,¹⁵⁹ 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.¹⁶⁰

Second, like their infamous political counterparts, absent meaningful constraints on their power, licentious iconic executives can perpetuate their own reigns and enrich themselves to the detriment of their shareholders.¹⁶¹ Whereas despots can orchestrate sham elec-

155 See MACEY, *supra* note 12, 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.”); Paredes, *supra* note 133, at 727 (discussing conflicts of interests in corporate governance involving CEOs); WILLIAMS C. POWERS, JR., ET AL., REPORT OF INVESTIGATION BY THE SPECIAL INVESTIGATIVE COMMITTEE OF THE BOARD OF DIRECTORS OF ENRON CORP. 18–20, 2002 WL 198018 (discussing various conflicted dealings that played a key role in Enron’s demise).

156 See BERKSHIRE HATHAWAY INC., *supra* note 142, at 3.

157 *In re Walt Disney Co. Derivative Litigation*, 907 A.2d 693, 763 (Del. Ch. 2005).

158 See *id.* at 733–40.

159 See *id.* at 760.

160 *In re Walt Disney Co. Derivative Litigation*, 825 A.2d 275, 278 (Del. Ch. 2003).

161 See *Walt Disney*, 907 A.2d at 741 n.373 (“[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 areas.”).

tions¹⁶² and build monuments and mansions for themselves,¹⁶³ iconic executives can engage in pro forma self-serving policies,¹⁶⁴ accounting gimmickry, earnings manipulation, or outright fraud to generate wealth, produce glowing (but misleading) results, and keep themselves in power.¹⁶⁵ “In the 2001–2002 crisis that led up to the Sarbanes-Oxley Act, managers at literally hundreds of companies inflated earnings, typically by prematurely recognizing income, which behavior resulted in the number of annual financial statement restatements growing hyperbolically over the period from 1996 to 2002.”¹⁶⁶ Iconic executives can become susceptible to subscribing to that Nixonian adage of, “Well, when the president does it, that means that it is not illegal.”¹⁶⁷ Dennis Kozlowski, the former CEO and chairman of Tyco, used corporate funds to throw a \$2,000,000 birthday party for his wife in Sardinia with vodka-trickling ice sculptures, and to lavishly furnish a New York City apartment, which included a \$6,000 shower curtain.¹⁶⁸ These actions were minor relative to \$150 million that Mr. Kozlowski allegedly stole from Tyco shareholders.¹⁶⁹ Less nefarious and perhaps more common, in 2011, Wal-Mart changed its executive compensation metrics to allow its powerful CEO, Mike Duke, to hit certain bonus targets, which he would have otherwise missed under the old metrics.¹⁷⁰

As previously noted, the oversight powers of directors and shareholders are limited.¹⁷¹ The monitoring powers of directors are constrained, given the iconic executive’s influence over them and the executive’s ability to control the agenda of board meetings, which can

162 See Youssef M. Ibrahim, *Iraqis Go to Polls; Guess Who Will Win*, N.Y. TIMES, Oct. 15, 1995, at 10 (reporting on the sham election of Iraqi dictator Saddam Hussein, where he garnered over 99% of the votes).

163 See, e.g., Neil MacFarquhar, *Mubarak May Be Gone, But Many Egyptians Say They See Too Much of Him*, N.Y. TIMES, Mar. 26, 2011, at A7 (discussing the various monuments built by Egyptian strongman, Hosni Mubarak, during his thirty year reign).

164 See Clapham & Schwenk, *supra* note 140, at 227–28.

165 See Paredes, *supra* note 133, at 689.

166 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).

167 DAVID FROST, FROST/NIXON 89 (2007).

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

169 See *id.*

170 See Gretchen Morgenson, *Moving the Goal Posts On Pay*, N.Y. TIMES, May 8, 2011, at BU1.

171 See *supra* Part III.A.1.

lead to perfunctory processes without meaningful oversight.¹⁷² As corporate law scholar Jonathan Macey noted:

The concern is that board meetings, where corporate governance is actually done, have turned into festivals of process that are little more than kabuki-like rituals at which lawyers and investment bankers choreograph ersatz discussions designed to protect foregone conclusions from being attacked by judges as being the result of a defective process.¹⁷³

Similarly, shareholders have very little recourse to combat such executive aggrandizement and licentiousness. Much like citizens of states led by dictators that generally have little say in the governance of *their* states, shareholders of corporations led by iconic executives generally have little say in the governance of *their* corporations, other than selling their shares.¹⁷⁴

Third, the reigns of licentious iconic executives like the reigns of despots and dictators, can reach chaotic ends when they are forced out of power in the wake of scandal or revolt.¹⁷⁵ Such disruptive ousters often leave firms in shambles and shareholders in an abyss because firms did not have meaningful succession plans, which are critical to a

172 See Robert F. Felton, *What Directors and Investors Want from Governance Reform*, MCKINSEY Q., May 2004, No. 2, at 32–33.

173 MACEY, *supra* note 12, at 31 (noting the limited powers of shareholders in corporate governance).

174 See Bainbridge, *supra* note 6, at 573 (“Shareholders exercise virtually no control over either day-to-day operations or long-term policy.”); William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 662 (2010) (“Even though the shareholders elect the board, they have no right to tell it what to do.”). While this is generally true of many corporations given the inherent separation of ownership and management in the corporate form, this is particularly true for firms led by iconic executives because of the size of their corporations, their large number of disparate shareholders, and their wealth of institutional resources to combat shareholder activism. Large, prominent corporations led by iconic executives are usually better positioned to defend against well-coordinated shareholder attacks relative to smaller corporations led by anonymous executives. See, e.g., Stefano Gatti & Chiara Battistini, *Hedge Fun Activism*, in PRIVATE EQUITY, 167–77 (Douglas Cumming ed., 2010) (reviewing the high-profile proxy fight between Carl Icahn and Time Warner, Inc. in 2006).

175 See Roderick M. Kramer, *The Harder They Fall*, HARV. BUS. REV., Oct. 2003, at 58 (discussing how excessive deference and hubris can lead to an executive’s spectacular demise). While executive transitions may frequently be disruptive, and reflect the capitalistic process of creative destruction, those transitions need not be so disruptive as to be materially destructive to the firm. See JOSEPH ALOIS SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81–87 (Routledge 2006) (1942) (outlining the process of creative destruction in capitalism).

firm's long-term stability and success.¹⁷⁶ Contrast this with the peaceful and thoughtful succession plan for U.S. presidents as dictated by the Presidential Succession Act of 1947.¹⁷⁷ Despite the importance of CEO succession, "two-thirds of all corporate directors admit that they don't give succession planning sufficient energy and time."¹⁷⁸ Succession planning for iconic executives may be especially complicated because of their unique attributes. For instance, boards dominated by an iconic executive may find it difficult to plan for his seemingly irreplaceable absence; and strong internal candidates may decamp for more exciting opportunities rather than wait for a long-standing iconic executive to depart before they can lead. Because of such special considerations, succession plans are particularly important for complex organizations that have been led and dominated by one person for an extended period of time. In such circumstances, absent a thoughtful succession plan, the sudden departure of an iconic executive can lead to chaos and morass. In 2011, when longtime Egyptian President and strongman, Hosni Mubarak, was ousted by a people's revolution after a thirty year reign where he ruled "as Egypt's modern-day pharaoh,"¹⁷⁹ the country was at a loss for a successor and in disarray after his fall.¹⁸⁰ Similarly, when Hank Greenberg, the CEO and chairman of AIG, was ousted in 2005 after a thirty-seven year reign amid allegations of financial misconduct, the insurance giant struggled to find its bearings.¹⁸¹ A few years later, AIG would be at the center of the worst economic crisis since the Great Depression, a predicament attributed by some commentators to the leadership void left by Mr. Greenberg at the senior executive level.¹⁸² Contrast this with Apple; when Steve Jobs resigned in August 2011, Tim Cook, its then chief operating officer, was able to step in immediately and seamlessly

176 See WILLIAM J. ROTHWELL, *EFFECTIVE SUCCESSION PLANNING* 31–41, 131–36 (4th ed. 2010) (explicating on the importance of meaningful corporate succession planning).

177 Pub. L. No. 80-199, 61 Stat. 380 (codified as amended at 3 U.S.C. § 19 (2006)).

178 A.G. Lafley, *The Art and Science of Finding the Right CEO*, HARV. BUS. REV., Oct. 2011, at 74.

179 Michael Slackman, *A Brittle Leader, Appearing Strong*, N.Y. TIMES, Feb. 12, 2011, at A1.

180 See Kareem Fahim, *Military Offers Assurances to Egypt and Neighbors: Protests Reach Yemen and Algeria*, N.Y. TIMES, Feb. 13, 2011, at A1.

181 See Jonathan D. Glater, *A.I.G.'s Sunny Side: An Insurer has a Wide Array of Profitable Units to Sell to Bolster Finances*, N.Y. TIMES, Sept. 17, 2008, at C1.

182 See, e.g., Michael Lewis, *The Man Who Crashed the World*, VANITY FAIR, Aug. 2009, at 137–39 (suggesting that a leadership vacuum at AIG post-Greenberg made it possible for AIG's London affiliate, AIG Financial Products, to take on excessively risky positions that crippled the firm).

as chief executive officer because the board had conducted meaningful succession planning.¹⁸³

Ultimately, because of the licentious, dictatorial actions of some iconic executives, as one prominent corporate governance commentator lamented, “the core of the problem faced by investors today, as revealed by corporate scandals, is that investors must be better protected from CEOs.”¹⁸⁴

CONCLUSION

Iconic executives are both a blessing and a curse. Society is both fortunate and unfortunate to have so few iconic executives. Despite all their flaws, the corporate governance model of iconic corporate leaders, like Ford, Rockefeller, Carnegie, Vanderbilt, Buffett, Jobs, and Gates, helped fuel a nation’s unparalleled economic progress and expansion.¹⁸⁵ Yet at the same time, the imperial, unitary model of corporate governance that this elite caste practices presents serious challenges and perils for investors and society at large. While the accomplishments of iconic executives should be celebrated and rewarded, such accomplishments should not give them a license to govern freely nor should it encourage corporate stakeholders to turn a blind eye to their actions and give in to easy instincts of complacency.¹⁸⁶ While good iconic executives can fulfill the promises of their imperial, unitary governance and sidestep most perils,¹⁸⁷ bad

183 See Verne G. Kopytoff & David Streitfeld, *Big Shoes at Apple, but Maybe Not Unfilial*, N.Y. TIMES, Aug. 26, 2011, at B1. While the verdict on Tim Cook’s reign as CEO remains to be written and judged by history at the time of this writing in the Fall of 2011, the first draft of history strongly suggests that Steve Jobs’s reign as CEO of Apple ended in an orderly fashion.

184 D. QUINN MILLS, WHEEL, DEAL, AND STEAL 183 (2003).

185 See Bengt Holmstrom & Steven N. Kaplan, *The State of U.S. Corporate Governance: What’s Right and What’s Wrong?*, 15.3 J. APPLIED CORP. FIN. 8, 8–11 (2003) (“Despite the alleged flaws in its governance system, the U.S. economy has performed very well, both on an absolute basis and particularly relative to other countries. U.S. productivity gains in the past decade have been exceptional, and the U.S. stock market has consistently outperformed other world indices over the last two decades . . .”).

186 See Andrew W. Lo, *Hedge Funds, Systemic Risk, and the Financial Crisis of 2007–2008*, Written Testimony Prepared for the U.S. House of Representatives Committee on Oversight and Government Reform Hearing on Hedge Funds 12–13 (Nov. 13, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1301217 (“In fact, there is mounting evidence from cognitive neuroscientists that financial gain affects the same ‘pleasure centers’ of the brain that are activated by certain narcotics. This suggests that prolonged periods of economic growth and prosperity can induce a collective sense of euphoria and complacency . . .”).

187 See Kahan & Rock, *supra* note 20, at 1051 (“[I]t is worth keeping in mind that for every story about a domineering CEO who should have been replaced long ago,

iconic executives break those promises and lead directly into perilous paths. Because it is often difficult to timely discern a good executive from a bad one, and because good intentions sometimes can lead to ill results, corporate stakeholders must carefully examine and scrutinize iconic executives. The role of this cautious examiner can be played by a cast consisting of boards, independent directors,¹⁸⁸ shareholders,¹⁸⁹ gatekeepers,¹⁹⁰ journalists, market forces, organizational personnel,¹⁹¹ industry watchdogs, stock exchanges, state regulators,¹⁹² and federal agencies.¹⁹³ The ultimate identity of the ensemble matters less than faithful and thoughtful portrayals of their respective roles. In the end, because iconic executives govern so freely and so successfully, they must be governed so cautiously and so closely.

there is an Andrew Grove or a Jack Welch who used the power of the position to make billions of dollars for their shareholders.”).

188 See *id.* at 1022–33 (discussing the important role of independent directors in constraining CEO power).

189 See Bebhuk, *supra* note 16, at 835–36 (advocating for more shareholder activism in corporate governance).

190 See Tuch, *supra* note 72, at 1598–1600 (explaining the important role of multiple corporate gatekeepers).

191 See Paredes, *supra* note 133, at 742–43 (recommending the appointment of a corporate devil’s advocate to enhance corporate decision making dominated by CEOs).

192 See ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 12–20 (1993) (stating the important role of state corporate law in corporate governance); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 276 (1977) (noting that “competition between states for charters” is a key factor in good corporate governance).

193 See Ramirez, *supra* note 78, at 317 (proposing “an administrative agency with a depoliticized structure (akin to the Federal Reserve Board or the “Fed”) with control over a federal incorporation regime that shareholders may select”).