Power and Pay in the C-Suite

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Introduction

The debate over executive pay has gripped corporate law scholars, regulators, and the national public for decades.[1] A C-Suite position provides uniquely lucrative financial benefits to executives, especially to Chief Executive Officers (CEOs). Over the past few decades, CEO pay has risen spectacularly,[2] as has debate regarding why this has occurred and whether policy should or can correct it.[3] The reasons why CEO pay has increased exponentially in the last 30 years are complex, and the solutions for reigning in executive compensation have been incomplete at best.

Yet one glaring fact about the C-Suite eludes much of the corporate governance literature and executive compensation policy reforms and proposals: the C-Suite, particularly the CEO role, has long been and continues to be dominated by men. Despite making up half the workforce, few women lead companies in corporate America. Less than 6% of CEOs of Fortune 500 companies are women, and women make up less than a quarter of C-level executives.[4] Furthermore, few of the executive positions that traditionally lead to CEO roles are occupied by women. As the *Wall Street Journal* reported in 2020, for women, "the barrier isn't only a glass ceiling at the very top, but also an invisible wall that sidelines them from the kinds of roles that have been traditional stepping stones to the CEO position."[5] Instead, women find

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1. CEO compensation became the focus of intense national scrutiny in the 1990s. *See* Kevin J. Murphy, *Politics, Economics, and Executive Compensation*, 63 U. CIN. L. REV. 713, 713–14 (1995). It remained a salient political issue in the 2000s, gaining particular prominence with the 2008 financial crisis. *See* Omari Scott Simmons, *Taking the Blue Pill: The Imponderable Impact of Executive Compensation Reform*, 62 SMU L. REV. 299, 304–05 (2009).

2. Simmons, *supra* note 1, at 305–06.

3. *Id.*

4. Vanessa Fuhrmans, *Where Are All the Women CEOs?*, WALL ST. J., (Feb. 6, 2020), https://www.wsj.com/articles/why-so-few-ceos-are-women-you-can-have-a-seat-at-the-table-and-not-be-a-player-11581003276 [https://perma.cc/5A24-4WVE].

5. *Id.*

themselves in "pink collar" C-Suite roles, such as head of human resources or legal.[6] Not only do such positions rarely lead to the top, but they rarely constitute the highest compensated positions within corporations.[7]

Ample evidence shows that when women come to dominate a profession, the salary of that profession drops.[8] This is particularly true in high-paid white-collar jobs.[9] With this Essay, we pose the question of whether the opposite proves equally true: as men dominate a profession, does the salary of that profession rise? As corporate scholars, we seek to understand how the pinnacle of the corporation—the CEO position—is both male and uniquely well-remunerated. Might masculinity be the culprit behind increasingly outrageous CEO compensation packages?

This Essay begins to explore the correlation between executive compensation and men's domination over senior executive roles, focusing on the CEO position. We delve into various theories that could help explain why men dominate the most lucrative role in corporate America. We argue that law and corporate governance need to account for these theories in designing solutions that address gender disparity in the CEO role.

Part I. Executive Pay and the Domination of Men in the C-Suite

A. *The Executive Pay Challenge*

Over the past few decades, CEO pay has grown exponentially. One study found that in 1993, a typical CEO pay package at the 1,000 largest companies averaged $1.3 million in total compensation.[10] Reports indicate that CEOs of the largest companies in the United States earned on average $21.3 million in realized compensation in 2019, with the pay ratio between CEOs

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6. *Id.*

7. *Id.*

8. Asaf Levanon, Paula England & Paul Allison, *Occupational Feminization and Pay: Assessing Causal Dynamics Using 1950–2000 U.S. Census Data*, 88 SOC. FORCES 865, 886 (2009).

9. *See* Francine Blau & Lawrence Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations* 9 (Nat'l Bureau of Econ. Research, Working Paper No. 21,913); Claire Cain Miller, *As Women Take Over a Male-Dominated Field, the Pay Drops*, N.Y. TIMES (Mar. 18, 2016), https://www.nytimes.com/2016/03/20/upshot/as-women-take-over-a-male-dominated-field-the-pay-drops.html [https://perma.cc/EF44-ZNU2].

10. *See* Murphy, *supra* note 1, at 718.

and typical workers reaching 320 to 1.[11] As reported by the Economic Policy Institute, CEOs of America's largest companies "earn far more today than they did in the mid-1990s and many times what they earned in the 1960s or late 1970s."[12] Because much of CEO compensation consists of performance based equity, such as stock awards and stock options, even the economic malaise caused by the COVID-19 pandemic may not make a dent in CEO pay given the continuing strong performance of the stock market.[13]

The growth in CEO pay has resulted in much consternation about how to address ballooning executive compensation.[14] In the early 1990s, the U.S. Securities and Exchange Commission (SEC) imposed sweeping disclosure rules intended to provide detailed information about the compensation received by senior executives.[15] Since then, lawmakers and regulators have continued to demand increased board process and additional corporate disclosure with respect to executive compensation. For example, since 2003, stock exchange rules have required corporate boards to form compensation committees composed of independent directors to review and evaluate CEO pay and performance.[16] Moreover, the SEC's 2006 rules require companies to disclose, as part of a mandatory Compensation Discussion & Analysis (CD&A) report contained in the proxy statement, detailed information on the amounts and types of compensation granted to senior executives as

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11. *See* LAWRENCE MISHEL & JORI KANDRA, ECON. POLICY INST., CEO COMPENSATION SURGED 14% IN 2019 TO $21.3 MILLION 2–3 (2020), https://www.epi.org/publication/ceo-compensation-surged-14-in-2019-to-21-3-million-ceos-now-earn-320-times-as-much-as-a-typical-worker/ [https://perma.cc/6C95-65BZ].

12. *Id.* at 1–2.

13. *See* Aubrey Bout & Brian Wilby, *S&P 500 CEO Compensation Increase Trends*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 1, 2021), https://corpgov.law.harvard.edu/2021/01/29/sp-500-ceo-compensation-increase-trends-4/ [https://perma.cc/4AD3-5EG9]; Jena McGregor, *Average CEO Earnings Soared to $21.3 Million Last Year and Could Rise Again in 2020 Despite the Coronavirus Recession*, WASH. POST (Aug. 18, 2020), https://www.washingtonpost.com/business/2020/08/18/corporate-executive-pay-increase/ [https://perma.cc/5KTW-576D].

14. *See generally* Kevin J. Murphy, *The Politics of Pay: A Legislative History of Executive Compensation*, *in* RESEARCH HANDBOOK ON EXECUTIVE PAY (Randall S. Thomas & Jennifer G. Hill eds., 2012) (providing a legislative history of executive compensation disclosure and regulation).

15. Executive Compensation Disclosure, 57 Fed. Reg. 48,126 (Oct. 21, 1992) (to be codified at 17 C.F.R. pts. 228, 229, 240, 249). For an overview of these rules, see Murphy, *supra* note 1, at 731–41.

16. *See, e.g.*, NYSE Listed Company Manual § 303A.05.

well as the "material factors underlying compensation policies and decisions."[17]

With politicians, the media, and the general public focused on the excesses of executive compensation, additional disclosure and a pressure to increase shareholder say over executive compensation have become mainstays of the regulatory environment.[18] For example, under section 951 of the Dodd-Frank Act of 2010, shareholders are provided a non-binding vote on the company's executive compensation practices at least every three years ("Say-on-Pay").[19] In addition, in the first year (and every six years thereafter), shareholders vote on whether their Say-on-Pay votes will occur every one, two, or three years.[20] Companies must also disclose, and shareholders are provided a non-binding vote on, any golden parachute payments in connection with merger and acquisition (M&A) deals, including mergers, tender offers, or going-private transactions ("Say-on-Golden Parachutes").[21] Moreover, Dodd-Frank and ensuing regulations require companies to also disclose the annual total compensation paid to the CEO, the annual total compensation paid to the median employee, and the pay ratio between the two.[22] Advocates for increased corporate transparency argued that this additional disclosure coupled with shareholder voice would place greater pressure on boards and companies to constrain executive compensation.[23]

The legislative efforts to both increase disclosure and to give shareholders a say have focused on curbing executive pay.[24] Whether any of these mechanisms has resulted in doing so is subject

17. *See* Executive Compensation and Related Person Disclosure, 71 Fed. Reg. 53,158, 53,160 (Sept. 8, 2006) (discussing the Instruction to Item 402(a)(3) of Regulation S-K).

18. *See*, *e.g.*, LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION (2004). Compensation disclosure and concerns about excessive executive compensation can be traced back for decades, although the concern and focus have amplified since the mid-2000s. *See* Steven M. Davidoff & Claire Hill, *Limits of Disclosure*, 36 SEATTLE U. L. REV. 599, 623 (2013).

19. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 951, 124 Stat. 1376, 1899–900 (2010) (to be codified at 15 U.S.C. § 78n-1).

20. *Id.*

21. *Id.*

22. For a detailed analysis of the CEO Pay Ratio rule, see Steven A. Bank & George S. Georgiev, *Securities Disclosure as Soundbite: The Case of CEO Pay Ratios*, 60 B.C. L. REV. 1123 (2019).

23. *See id.* at 1129; Davidoff & Hill, *supra* note 18, at 623–24.

24. *See* Lisa Fairfax, *Sue on Pay: Say on Pay's Impact on Directors' Fiduciary Duties*, 55 ARIZ. L. REV. 1, 4 (2013); Bank & Georgiev, *supra* note 22, at 1129.

to debate.[25] While they have added scrutiny to the process, compensation committees have proven largely ineffective in bargaining with CEOs over pay.[26] Furthermore, some scholars have argued that the increased disclosure may actually foster higher executive compensation.[27]

B. The C-Suite's Persistent Gender Gap

Executive compensation, and CEO compensation in particular, has received much attention. Yet, the various regulatory and policy measures designed to address executive compensation neglect to address the fact that the CEO role has been and continues to be dominated by men.

Few women serve as leaders in corporate America.[28] As of March 2021, only 6% of CEOs of Fortune 500 companies were women.[29] Of these, only a handful were women of color.[30] Data for a broader set of companies, the Russell 3000, similarly shows that few women occupy the CEO role.[31] Across the Russell 3000, men outnumbered women 17 to 1 in 2019.[32]

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25. *See, e.g.*, Jill Fisch, Darius Palia & Steven Davidoff Solomon, *Is Say on Pay All About Pay? The Impact of Firm Performance*, 8 HARV. BUS. L. REV. 101 (2018) (finding that Say-on-Pay is largely a vote by shareholders on firm performance rather than excessive executive compensation).

26. For an overview of critiques, see Li-Wen Lin, *Who Decides Executive Pay? A Comparative Analysis*, *in* COMPARATIVE CORPORATE GOVERNANCE (Afra Afsharipour & Martin Gelter, eds., 2021).

27. *See* Davidoff & Hill, *supra* note 18, at 624–26; Thomas A. DiPrete, Gregory M. Eirich & Matthew Pittinsky, *Compensation Benchmarking, Leapfrogs, and the Surge in Executive Pay*, 115 AM. J. SOC. 1671 (2010).

28. *See* DAVID F. LARCKER & BRIAN TAYAN, STANFORD UNIV., ROCK CENTER FOR CORP. GOVERNANCE, DIVERSITY IN THE C-SUITE: THE DISMAL STATE OF DIVERSITY AMONG FORTUNE 100 SENIOR EXECUTIVES 17–23 (2020).

29. *See* CATALYST, WOMEN CEOS OF THE S&P 500 (2021), https://www.catalyst.org/research/women-ceos-of-the-sp-500/ [https://perma.cc/X9SL-2A3H]; *see also* Alisha Ebrahimji, *Female Fortune 500 CEOs Reach an All-Time High, but It's Still a Small Percentage*, CNN BUS. (May 20, 2020), https://www.cnn.com/2020/05/20/us/fortune-500-women-ceos-trnd/index.html [https://perma.cc/B4UJ-8UKL]; Emma Hinchliffe, *The Number of Female CEOs in the Fortune 500 Hits an All-Time Record*, FORTUNE (May 18, 2020), https://fortune.com/2020/05/18/women-ceos-fortune-500-2020/ [https://perma.cc/TW9G-NNBW].

30. *See* Maggie McGrath, *Breaking the 'Concrete' Ceiling: Roz Brewer to Become the S&P 500's Only Black Female CEO*, FORBES (Jan. 28, 2021), https://www.forbes.com/sites/maggiemcgrath/2021/01/28/breaking-the-concrete-ceiling-roz-brewer-to-be-the-sps-only-black-female-ceo/?sh=2a9878bf667b [https://perma.cc/2JJV-CHFC].

31. *See* Jackie Cook, *The Gender Gap in the C-Suite*, MORNINGSTAR (Feb. 17, 2021), https://www.morningstar.com/lp/gender-pay-gap [https://perma.cc/NXZ8-AU7M].

32. *See id.*

Men vastly outnumber women beyond the CEO role as well. A 2020 McKinsey and Lean In study of 600 companies found that only 21% of C-Suite roles are held by women, and that only 3% of C-Suite roles are held by women of color.[33] Even when women are promoted to the C-Suite, men overwhelmingly get the management positions, such as those that include profit-and-loss (P&L) responsibilities, which set executives on the CEO track.[34] As a *Wall Street Journal* study revealed, for many women, "the barrier isn't only a glass ceiling at the very top, but also an invisible wall that sidelines them from the kinds of roles that have been traditional stepping stones to the CEO position."[35] These "glass walls" result in women predominantly holding "support roles like human resources and administration."[36]

C. The Gender Pay Gap in Executive Compensation

Sidelined for roles that lead to the CEO position, women make up few of the top earners in large companies.[37] A recent Morningstar study found that across the Russell 3000, women make up only 12.2% of Named Executive Officers (NEOs).[38] Other studies similarly find that across the S&P 500, women make up 12% of NEOs outside of the CEO and CFO role, where women's representation is even lower.[39] Across the Russell 3000, "[i]n 2019, less than half, or 47%, of companies counted at least 1 woman in the ranks of the highest paid executives and only 12% counted more than one woman."[40] A double gender gap exists for NEOs: fewer women hold such positions, and those that do earn less than men.[41]

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33. MCKINSEY & CO. & LEAN IN, WOMEN IN THE WORKPLACE 8 (2020).

34. Fuhrmans, *supra* note 4.

35. *Id.*

36. Cook, *supra* note 31.

37. Companies are required to disclose in their annual reports five to seven top earners, referred to as Named Executive Officers (NEOs). *See* 17 C.F.R. § 229.402 (2021); *see also* CATALYST, PYRAMID: WOMEN IN S&P 500 COMPANIES (2020), https://www.catalyst.org/research/women-in-sp-500-companies/ [https://perma.cc/Q3KR-L7MR] (finding that women make up 11% of the NEOs in S&P 500 companies).

38. *See* Cook, *supra* note 31.

39. *See* Steve Kline, Erik Nelson & Nancy Romanyshyn, *Why Limited Gender Diversity and Pay Equity Among Named Executive Officers Should Concern You*, WILLIS TOWERS WATSON (Jan. 17, 2019), https://www.willistowerswatson.com/en-US/Insights/2019/01/Why-limited-gender-diversity-pay-equity-among-NEOs-should-concern-you [https://perma.cc/Y92Y-YPKY].

40. *See* Cook, *supra* note 31.

41. Throughout the 1990s, the gender pay gap among high-level executives in US companies remained significant in part because women were less likely to hold the CEO or other high-level positions at large companies. *See* Marianne Bertrand &

When analyzing NEO pay across the Russell 3000, Morningstar's study found that in 2019, median pay for women NEOs was 84.6% of median pay for men NEOs.[42]

Interestingly, studies indicate that for the top position at a company—the CEO—there is little evidence of a continuing gender pay gap.[43] Some studies even suggest that the gender pay gap in CEO compensation now favors women CEOs.[44] In 2019, for example, for the few women that reached the coveted CEO role, Morningstar's study of the Russell 3000 companies showed "a small premium over their male counterparts" with women CEOs earning 103 cents for every dollar earned by men CEOs.[45] Other studies show that the few women CEOs at the very largest companies earn even more than the men occupying the same position.[46] Furthermore, in 2020, a woman was atop the list of the highest compensated public company CEOs.[47] These numbers are consistent with studies that suggest that there may be a "female premium" at the top of organizations given diversity goals adopted by large public companies and corresponding demands for "high potential" women.[48]

Kevin F. Hallock, *The Gender Gap in Top Corporate Jobs*, 55 INDUS. & LAB. REL. REV. 3 (2001).

42. *See* Cook, *supra* note 31. The pay inequity among NEOs mirrors the gender pay gap in the United States more generally. *See* Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547, 553–54 (2020).

43. *See* Vishal K. Gupta, Sandra C. Mortal & Xuaohu Guo, *Revisiting the Gender Gap in CEO Compensation: Replication and Extension of Hill, Upadhyay, and Beekun (2015)'s Work on CEO Gender Pay Gap*, 39 STRATEGIC MGMT. J. 2036 (2018); Layla Qureshi, *Dissecting C-Suite Gender Pay Disparity*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 1, 2018), https://corpgov.law.harvard.edu/2018/08/01/dissecting-c-suite-gender-pay-disparity/ [https://perma.cc/MKC7-T5GD].

44. *See* Aaron D. Hill, Arun D. Upadhyay & Rafik I. Beekun, *Do Female and Ethnically Diverse Executives Endure Inequity in the CEO Position or Do They Benefit from Their Minority Status? An Empirical Examination*, 36 STRATEGIC MGMT. J. 1115 (2015).

45. *See* Cook, *supra* note 31. *But see* Gupta, Mortal & Guo, *supra* note 43 (finding no reliable evidence for a difference in compensation based on CEO gender).

46. *See* Dan Marcec, *Do Women CEOs Earn More and Have More Diverse Boards?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 5, 2018), https://corpgov.law.harvard.edu/2018/05/05/do-women-ceos-earn-more-and-have-more-diverse-boards/ [https://perma.cc/DPK8-L4PN].

47. *See* Alexandra Kelley, *Woman Atop CEO Compensation List for First Time*, THE HILL (May 28, 2020), https://thehill.com/changing-america/respect/equality/499913-woman-atop-ceo-compensation-list-for-first-time [https://perma.cc/4V7B-4XSF].

48. *See* Lisa M. Leslie, Colleen Flaherty Manchester & Patricia C. Dahm, *Why and When Does the Gender Gap Reverse? Diversity Goals and the Pay Premium for High Potential Women*, 60 ACAD. MGMT. J. 402, 404–05 (2017).

Part II. How Do Men Monopolize the Most Lucrative Corporate Work?

This Part will suggest some explanations as to *how* the above-described process unfurls. While we cannot assert a direct correlation between men's near-monopoly of CEO positions and their extreme compensation, we suspect they are linked. Given the paucity of research, how this occurs requires theoretical intervention. First, we define how masculinities operate within the C-Suite. Then, we discuss how men compete, using tournament theory. This theory explains how men enter competitions at a level playing field with others but end up consistently winning: the competitions occur in ways that consistently and substantially diminish women's competitiveness.[49] These wins, over time, allow men to capture leadership positions and the processes for their continuity in power.

A. Masculinities in the C-Suite

A significant body of research on public company CEOs—the vast number of whom are men—suggests that hubris,[50] over-confidence,[51] narcissism,[52] a desire to build empires,[53] rivalry,[54] and envy (such as a desire to keep up with peer CEOs)[55] impact CEO

49. *See* Edward P. Lazear & Sherwin Rosen, *Rank-Order Tournaments as Optimum Labor Contracts*, 89 J. POL. ECON. 841, 841 (1981).

50. *See* Mathew L. A. Hayward & Donald C. Hambrick, *Explaining the Premiums Paid for Large Acquisitions: Evidence of CEO Hubris*, 42 ADMIN. SCI. Q. 103, 103 (1997); Richard Roll, *The Hubris Hypothesis of Corporate Takeovers*, 59 J. BUS. 197, 212 (1986).

51. *See* Ulrike Malmendier & Geoffrey Tate, *Who Makes Acquisitions? CEO Overconfidence and the Market's Reaction*, 89 J. FIN. 20, 20–21 (2008); Ulrike Malmendier & Geoffrey Tate, *CEO Overconfidence and Corporate Investment*, 60 J. FIN. 2661, 2661 (2005); 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, 288 (2004).

52. *See* Arijit Chatterjee & Donald C. Hambrick, *It's All About Me: Narcissistic Chief Executive Officers and Their Effects on Company Strategy and Performance*, 52 ADMIN. SCI. Q. 351, 351–52 (2007).

53. *See* Christopher Avery, Judith A. Chevalier & Scott Schaefer, *Why Do Managers Undertake Acquisitions? An Analysis of Internal and External Rewards for Acquisitiveness*, 14 J. L. ECON. & ORG. 24, 24–28 (1998); Bernard S. Black, *Bidder Overpayment in Takeovers*, 41 STAN. L. REV. 597, 627–28 (1989).

54. *See, e.g.*, Deepak Malhotra, Gillian Ku & J. Keith Murnighan, *When Winning Is Everything*, HARV. BUS. REV., May 2008, https://hbr.org/2008/05/when-winning-is-everything [https://perma.cc/VV6F-H4LG] (identifying "three principal drivers of competitive arousal in business settings: rivalry, time pressure, and audience scrutiny").

55. *See* Anand M. Goel & Anjan V. Thakor, *Do Envious CEOs Cause Merger Waves?*, 23 REV. FIN. STUD. 487, 510 (2010); Wei Shi, Yan Zhang & Robert E. Hoskisson, *Ripple Effects of CEO Awards: Investigating the Acquisition Activities of*

decision-making.[56] Gender theorists designate these traits as "toxic masculinity,"[57] that often masks as leadership skill.[58] Moreover, studies suggest that these traits are more prevalent in men[59] who face significant pressure to conform to masculine norms.[60] Indeed, some industries, such as the technology sector or the financial services industry, select for masculine leadership traits that favor men.[61] Studies have found that overconfident executives have "a higher likelihood than a rational manager of being deliberately promoted to CEO."[62] Nevertheless, evidence indicates that

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Superstar CEOs' Competitors, 38 STRATEGIC MGMT. J. 2080, 2081 (2017).

56. For an overview of this literature in the M&A context, see Afra Afsharipour, *Bias, Identity and M&A*, 2020 WIS. L. REV. 469, 475–80 (2020); Afra Afsharipour, *A Shareholders' Put Option: Counteracting the Acquirer Overpayment Problem*, 96 MINN. L. REV. 1018, 1034–41 (2012). For an overview of research in behavioral corporate finance on CEO biases, see Marius Guenzel & Ulrike Malmendier, *Behavioral Corporate Finance: The Life Cycle of a CEO Career* (Nat'l Bureau of Econ. Research, Working Paper No. 27,635, 2020).

57. Jennifer L. Berdahl, Marianne Cooper, Peter Glick, Robert W. Livingston & Joan C. Williams, *Work as a Masculinity Contest*, 74 J. SOC. ISSUES 422, 423 (2018).

58. *See* Tomas Chamorro-Premuzic, *Why Do So Many Incompetent Men Become Leaders?*, HARV. BUS. REV. (Aug. 22, 2013), https://hbr.org/2013/08/why-do-so-many-incompetent-men [https://perma.cc/82FS-4UYV].

59. *See, e.g.*, Jiekun Huang & Darren J. Kisgen, *Gender and Corporate Finance: Are Male Executives Overconfident Relative to Female Executives?*, 108 J. FIN. ECON. 822, 822–23 (2013).

60. *See* Berdahl et al., *supra* note 57, 424–25.

61. *See* Naomi Cahn, June Carbone & Nancy Levit, *Gender and the Tournament: Reinventing Antidiscrimination Law in an Age of Inequality*, 96 TEX. L. REV. 425, 465–67 (2018) [hereinafter Cahn, Carbone & Levit, *Gender and the Tournament*]. On banking, *see generally* CLAIRE A. HILL & RICHARD W. PAINTER, BETTER BANKERS, BETTER BANKS: PROMOTING GOOD BUSINESS THROUGH CONTRACTUAL COMMITMENT (2015) (describing typical banker traits and behaviors). *See also* Marleen O'Connor, *Women Executives in Gladiator Corporate Cultures: The Behavioral Dynamics of Gender, Ego, and Power*, 65 MD. L. REV. 465, 480 (2006) ("American firms are more masculine because they emphasize shareholder value and bottom-line norms to a greater degree.").

62. *See* Anand M. Goel & Anjan V. Thakor, *Overconfidence, CEO Selection, and Corporate Governance*, 63 J. FIN. 2737, 2737 (2008).

masculine leadership traits do not lead to leadership effectiveness[63] and foster "toxic" leadership environments.[64]

Feminist scholars have evaluated the extent to which masculinity norms[65] impact power structures and hierarchies at corporations, and how such norms undermine the potential success of women in the executive ranks, especially in rising to the CEO level.[66] Masculinities scholars assert that unconscious bias does not fully explain the lack of women in powerful positions such as the CEO role.[67] They argue that masculinity norms shape perceptions about the necessary attributes for leadership as well as the cultures adopted in corporations.[68] Gender theorists contend that workplace cultures at many firms resemble a masculinity contest: "[a] zero-sum competition played according to rules defined by masculine norms (e.g., displaying strength, showing no weakness or doubt)."[69] For example, Professors Naomi Cahn, June Carbone, and Nancy Levit analyze how many workplaces with the greatest income growth have been transformed into tournaments that exacerbate gender disparities.[70] They argue that performance pay further

63. *See* Tomas Chamorro-Premuzic & Cindy Gallop, *7 Leadership Lessons Men Can Learn from Women*, HARV. BUS. REV. (Apr. 1, 2020), https://hbr.org/2020/04/7-leadership-lessons-men-can-learn-from-women [https://perma.cc/YS7U-WAW8]; Jack Zenger & Joseph Folkman, *Research: Women Score Higher than Men in Most Leadership Skills*, HARV. BUS. REV. (June 25, 2019), https://hbr.org/2019/06/research-women-score-higher-than-men-in-most-leadership-skills [https://perma.cc/DV83-U3YT]. For an overview of the literature on leadership style and gender, see Alice H. Eagly, *Women as Leaders: Leadership Style vs. Leaders' Values and Attitudes*, *in* HARV. BUS. SCH. RES. SYMP., GENDER & WORK: CHALLENGING CONVENTIONAL WISDOM (2013), http://www.hbs.edu/faculty/conferences/2013-w50-research-symposium/Documents/eagly.pdf [https://perma.cc/T4XH-WRED].

64. *See* Robin J. Ely & Michael Kimmel, *Thoughts on the Workplace as a Masculinity Contest*, 74 J. SOC. ISSUES 628, 630 (2018).

65. For an overview of legal literature on masculinities, see Katharine T. Bartlett, *Gender Law: After Twenty-Five Years*, 27 DUKE J. GENDER L. & POL'Y 1, 16–19 (2020).

66. *See, e.g.*, Cahn, Carbone & Levit, *Gender and the Tournament*, *supra* note 61, at 445–59. Berdahl et al. define a workplace culture as a masculinity contest "when organizations focus not on mission but on masculinity, enacted in endless 'mine's bigger than yours' contests to display workloads and long schedules (as in law and medicine), cut corners to out-earn everyone else, or shoulder unreasonable risks (as in blue-collar jobs or finance)." *See* Berdahl et al., *supra* note 57, at 423–24.

67. *See* Berdahl et al., *supra* note 57, at 439–40.

68. *See* Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOL. REV. 573 (2002); S. Alexander Haslam & Michelle K. Ryan, *The Road to the Glass Cliff: Differences in the Perceived Suitability of Men and Women for Leadership Positions in Succeeding and Failing Organizations*, 19 LEADERSHIP Q. 530 (2008).

69. Berdahl et al., *supra* note 57, at 424.

70. *See* Cahn, Carbone & Levit, *Gender and the Tournament*, *supra* note 61, at

complicates masculinity contests, attracting those with hyper-competitive streaks that succeed in win-at-all-costs cultures.[71]

Not only do masculinity norms influence who rises up the corporate ladder to the CEO position, but research also indicates that women are punished whether they conform or refuse to adhere to such norms.[72] Role congruity theory, as coined by leading social psychologist Alice Eagly, supports this notion of how masculine norms define the corporate ladder.[73] Inconsistent stereotypes about the typical attributes of an effective leader plague women executives in their rise to leadership.[74] Traditionally masculine attributes, including dominance and assertiveness, are seen as necessary for leadership, but when women are assertive or decisive, they are viewed as unlikable.[75] In other words, "[w]omen who . . . seek leadership positions are subject to double standards and double binds."[76]

Carbone, Cahn, and Levit take this double bind literature to the next level, as they describe how masculinity contests in the workplace present women with a "triple bind."

> [W]omen lose if they do not play by the same terms as the men, lose if they do try to play on the same terms by being disproportionately punished for displaying the self-centered, rule-breaking behavior of the men, and over time become less likely to apply for such positions and thus more likely, individually and as a group, to be perceived as lacking what it takes to succeed in such environments.[77]

In other words, most women seeking to rise to corporate leadership face an almost impossible situation.

As people of different genders enter into corporate competition, the question remains—how will they, with their distinct, gendered traits, respond to the competition into which

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449–72.

71. *See id.*; June Carbone & William K. Black, *The Problem with Predators*, 43 SEATTLE U. L. REV. 441, 463–65 (2020).

72. *See* Andrea C. Vial, Jaime L. Napier & Victoria L. Brescoll, *A Bed of Thorns: Female Leaders and the Self-Reinforcing Cycle of Illegitimacy*, 27 LEADERSHIP Q. 400 (2016).

73. *See generally* Eagly & Karau, *supra* note 68 (describing how men are perceived better than women when demonstrating the same favorable leadership skills).

74. *Id.*

75. *See* CATALYST, THE DOUBLE-BIND DILEMMA FOR WOMEN IN LEADERSHIP (2018), https://www.catalyst.org/research/infographic-the-double-bind-dilemma-for-women-in-leadership/ [https://perma.cc/D9ZK-NJLJ].

76. DEBORAH L. RHODE, WOMEN AND LEADERSHIP 11 (2017).

77. June Carbone, Naomi Cahn & Nancy Levit, *Women, Rule-Breaking, and the Triple Bind*, 87 GEO. WASH. L. REV. 1105, 1126–27 (2019).

they're placed to attain corporate leadership positions? Tournament theory elucidates their situation.

B. Tournament Theory

Tournament theory describes a compensation scheme in which competitors obtain "prizes" depending on their relative position within an organization rather than their output level.[78] Various labor contests yield payment schemes set up as "prizes" awarded to winners and losers.[79] Some scholars assert that corporate executive positions incentivize workers to compete for higher compensation.[80] These positions prove easier to monitor than output-based schemes.[81] In implementing these roles, entities encourage workers to invest in skills and education to increase their productivity. Their likelihood of winning the prize also increases.[82] This decouples executive payment from productivity—executives do not earn compensation because of their current productivity, "but rather because it induces that individual and all other individuals to perform appropriately when they are in more junior positions."[83]

Here is where gender comes in—it turns out that the tournaments for these leadership positions involve substantial uncertainty and ambiguity.[84] Whereas in most tournaments men and women compete similarly, some scholars ran experiments that revealed that in contexts in which the outcomes are certain against those in which outcomes were "uncertain (i.e., unknown numbers of winners, but known probabilities) or ambiguous (unknown probabilities for different numbers of winners)," men outcompete women substantially.[85] When compared with a control experiment with a known number of winners, Loukas Balafoutas, Brent Davis, and Matthias Sutter argue that "ambiguity induces a significant increase in performance of men," but not of women.[86] Uncertain or ambiguous conditions do increase the participation of both men and

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78. *See* Lazear & Rosen, *supra* note 49, at 841.
79. *Id.* at 842.
80. *Id.*
81. *Id.*
82. *Id.* at 844.
83. *Id.* at 847.
84. LOUKAS BALAFOUTAS, BRENT J. DAVIS & MATTHIAS SUTTER, MAX PLANCK INST. FOR RES. ON COLLECTIVE GOODS, HOW UNCERTAINTY AND AMBIGUITY IN TOURNAMENTS AFFECT GENDER DIFFERENCES IN COMPETITIVE BEHAVIOR 1 (2017), http://dx.doi.org/10.2139/ssrn.3036428 [https://perma.cc/BPD8-CEHC].
85. *Id.*
86. *Id.*

women, but "men react slightly more than women."[87] Overall, men win the tournaments significantly more than women when there is ambiguity and uncertainty.[88]

When situations involve "competitive pressure," women participate less.[89] Based on the results of the same experiment, the authors concluded that the amount of information provided to the competitors determined the gendered outcome.[90] Winners have more gender balance when competitors receive more information.[91] Firms, they argue, can "influence male and female competitive behavior by changing the available information to competitors."[92] This proves consistent with the "Law of Inverse Certainty:" "[T]he more important the management decision, the less precise the tools to deal with it . . . and the longer it will take before anyone knows it was right."[93] Consequently, women get left out of the competitive positions and compensation packages.[94]

Understanding the competition for CEO positions through tournament theory clarifies how it could be that men outflank women in the race to the top of the corporate ladder. A parallel worth noting comes from the political context. In France, why did male legislators vote for a quota which required approximately equal numbers of men and women as party candidates?[95] The answer resides with voter preferences for male candidates: male legislators chose to mandate more female candidates to ensure men's continued incumbency.[96] Might a similar phenomenon be at play here, as male tournament winners seek to lock in their gains through capture?

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87. *Id.*
88. *Id.*
89. *Id.* at 2.
90. *Id.* at 16.
91. *Id.*
92. *Id.*
93. ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 53 (1977) (quoting CARL B. KAUFMAN, MAN INCORPORATE: THE INDIVIDUAL AND HIS WORK IN AN ORGANIZED SOCIETY 155, (1969)).
94. Additionally, Balafoutas et al. note that studies of "gender differences in competitive behavior [have] mainly investigated situations where subjects who may compete in a tournament are fully informed of the number of potential competitors and the number of winning positions in the tournament." BALAFOUTAS ET AL., *supra* note 84, at 2.
95. GUILLAUME R. FRECHETTE, FRANCOIS MANIQUET & MASSIMO MORELLI, INCUMBENTS' INTERESTS AND GENDER QUOTAS (2008), http://people.cess.fas.nyu.edu/frechette/print/Frechette_2008b.pdf [https://perma.cc/QQ9Q-V3Y7].
96. *Id.* (noting that research has shown that incumbency advantages for men increase with the introduction of gender quotas).

C. Capture Theory: Maintaining Control over Resources

Capture occurs when a special interest coopts a public good by manipulating the public process.[97] Disaggregated corporate leadership positions may not be a public good, but taken collectively, they reflect a political economic choice. We imagine corporate leadership constitutes a meritocracy that reflects effective competition among market actors, the rules of which follow corporate statutes and practices. Elite corporate leadership positions, like all specific labor markets, operate with highly specialized actors and rules.

Money drives the capture of this specific labor market. As Lucian Bebchuk, Jesse Fried, and David Walker have argued, managers—almost always men—use their positions to extract rents from their firms, through extremely large executive compensation schemes.[98] The managerial power of the CEO puts them in the position to extract rents from the firm—they structure their role as essential to the firm, and then capture resources from the firm.[99] Through this process, CEOs extract ever-higher salary packages out of the firms they "serve."[100] Over the past four decades, CEO-worker compensation ratios shifted radically—from 31 times worker compensation in 1978 to 320 times worker compensation in 2019.[101] Some argue that this ratio, along with the ratio of CEO compensation to stock market prices, reflects the tightness of the executive labor market.[102]

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97. *See, e.g.*, Will Kenton, *Regulatory Capture*, INVESTOPEDIA (Mar. 1, 2021), https://www.investopedia.com/terms/r/regulatory-capture.asp [https://perma.cc/8TPC-P6E2].

98. For a definition of rent based on managerial power, see Lucian Arye Bebchuk, Jesse M. Fried & David I. Walker, *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751, 754 (2002) ("According to the considered approach, compensation arrangements approved by boards often deviate from optimal contracting because directors are captured or subject to influence by management, sympathetic to management, or simply ineffectual in overseeing compensation. As a result of such deviations from optimal contracting, executives can receive pay in excess of the level that would be optimal for shareholders; this excess pay constitutes rents."). There are many examples of different rent strategies. *Id.* at n.5 (citing Jesse M. Fried, *Reducing the Profitability of Corporate Insider Trading Through Pretrading Disclosure*, 71 S. CAL. L. REV. 303 (1998); Lucian Arye Bebchuk & Christine Jolls, *Managerial Value Diversion and Shareholder Wealth*, 15 J.L. ECON. & ORG. 487 (1999)).

99. BEBCHUK & FRIED, *supra* note 18, at 62.

100. *See generally id.* (describing how CEO power is connected with higher compensation packages).

101. *See* Mishel & Kandra, *supra* note 11.

102. *See, e.g.*, Joseph E. Bachelder, *CEO Pay Ratios: What Do They Mean?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 13, 2017), https://corpgov.law.harvard.edu/2017/11/13/ceo-pay-ratios-what-do-they-mean/

The compensatory rewards for CEO spots incentivize men—primarily white men—to keep the labor market tight. Part of how they achieve this is by excluding those who are not white men. This phenomenon may also explain the paucity of women in NEO positions. At the same time, this phenomenon may explain why corporate leadership has been so slow to change. The combination of low accountability and the peculiarities of high deference in corporate governance certainly prevents rapid improvement in inclusion of outsiders, whether women or people of color.

Through this, male leaders have "captured" corporate leadership positions from objective notions of merit, under which women may more likely fit in the pool of potential candidates. Merit, as used by most, is understood to mean a combination of skill and fit,[103] both of which are highly gendered (and race-conscious) concepts.[104] Other character traits, affiliated with masculinity, demonstrate how the near monopoly that men have over CEO positions correlates with astronomical salaries.[105]

The picture we paint is both stark and blurry, almost like a J. M. W. Turner painting. It is stark how men have captured leadership positions *and* how these same positions yield exponential remunerative growth. Yet we do not know exactly how men engineer the competition to capture these posts. Linking an understanding of how masculinities work in the C-Suite with tournament theory and capture theory, we sketch an idea for *how* men have executed this power play.

Part III. What Role for the Law and Corporate Governance?

It may be that law, and in particular corporate governance law, can do little to tame such marked inequities. This Part provides an overview of two avenues for redress—antidiscrimination law and corporate governance reforms—that may rectify the power and pay disparities in the C-Suite.

[https://perma.cc/X99R-HHNB]; Alex Edmans, *Why We Need to Stop Obsessing over CEO Pay Ratios*, HARV. BUS. REV. (Feb. 23, 2017), https://hbr.org/2017/02/why-we-need-to-stop-obsessing-over-ceo-pay-ratios [https://perma.cc/39W7-7XYW].

103. *See* Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CALIF. L. REV. 1449, 1452 (1997).

104. *See generally* Emilio J. Castilla, *Gender, Race, and Meritocracy in Organizational Careers*, 113 AM. J. SOC. 1479 (2008) (examining gender and race in the context of reward systems based on merit).

105. *See* Cahn, Carbone & Levit, *Gender and the Tournament*, *supra* note 61, at 446–67.

A. Anti-Discrimination Law and Its Limits

The advent of the 1964 Civil Rights Act and subsequent engagements with its interpretation led activists and scholars to invest highly in the potentially curative power of such legislative and judicial endeavors.[106]

Subsequent work, in part by critical race and gender scholars, questioned the potential for antidiscrimination law to remedy inequality.[107] More recently, social science has revealed the power of unconscious bias in discriminatory practices.[108] At the same time, political economic theory has moved our thinking toward more collective and distributive understandings of inequality.[109]

Antidiscrimination law cannot help victims of discrimination in elite job markets.[110] Formally, the rules still apply, but plaintiffs justifiably fear backlash—perhaps even blacklisting—for raising claims of discrimination. Bringing a claim could mark the discrimination victim as unable to manage conflict, and few firms wish to incur the risk of hiring someone who may prove meddlesome.[111] Potential plaintiffs might also fear that claims of sexism would convey an inability to work as men do, severely impact their career options, or lead to retaliation and dismissal.[112] For example, when the former Chief Operating Officer of Pinterest raised claims of sexist treatment in the C-Suite, she was

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106. *See, e.g.*, Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 465–67 (2001).

107. *See, e.g.*, *id.*; Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1331 (1988).

108. *See* Cahn, Carbone & Levit, *Gender and the Tournament*, *supra* note 61, at 476–77; Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 5–8 (2006).

109. *See, e.g.*, Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1786–94 (2020); *see also* Jeanna Smialek & Jim Tankersley, *One Thing America Might Buy With All the Spending? Less Inequality*, N.Y. TIMES (Apr. 23, 2021), https://www.nytimes.com/2021/04/23/business/economy/biden-inequality-monetary-policy.html [https://perma.cc/9EA2-JVTA].

110. *See* Cahn, Carbone & Levit, *supra* note 61, at 473–74.

111. *See, e.g.*, *The Pao v. Kleiner Perkins Gender Discrimination Lawsuit*, EISENBERG & BAUM LLP: BLOG (Feb. 19, 2016), https://www.eandblaw.com/employment-discrimination-blog/2016/02/19/pao-v-kleiner-perkins/ [https://perma.cc/5WKS-BPY9]. For an analysis of Pao's case and how it illustrates the limits of antidiscrimination law, see Cahn, Carbone & Levit, *supra* note 61, at 473–76.

112. *See* Issie Lapowsky, *For Big Tech Whistleblowers, There's No Such Thing as 'Moving On'*, PROTOCOL (Apr. 15, 2021), https://www.protocol.com/big-tech-whistleblowers [https://perma.cc/EPW3-ZN7D].

marginalized as "not collaborative," punished, and eventually fired.[113] As she noted, "[g]ender discrimination at the C-level suite may be a little more subtle, but it's very insidious and real . . . .When women speak out, they get fired."[114]

Antidiscrimination law faces other limits. Often it allows "reverse-discrimination" claims more than claims of sexism, racism, or other subordinations.[115] Even when it succeeds in providing a remedy for victims of discrimination, most often such remedies benefit individual plaintiffs but fail to correct broader disparities.[116] Such successes give the impression that genuine remedies exist when structural discrimination continues to pervade the workplace, perhaps especially in elite contexts.

Unconscious bias theory has become more prominent over the past decade. Cognitive or unconscious biases play a large role in maintaining inequality at all levels of the workplace.[117] In particular, it impedes the rise of women to the CEO level.[118]

Unconscious bias may prevent the rise of women executives up the corporate ladder. Women tend to receive less credit for their successes and more blame for their missteps.[119] Both empirical research and anecdotal evidence indicate that women face harsher

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113. *See* Francoise Brougher, *The Pinterest Paradox: Cupcakes and Toxicity*, MEDIUM (Aug. 11, 2020), https://medium.com/digital-diplomacy/the-pinterest-paradox-cupcakes-and-toxicity-57ed6bd76960 [https://perma.cc/A7CT-QJRK].

114. Erin Griffith, *Pinterest Accused of Gender Bias in Suit by Former No. 2 Executive*, N.Y. TIMES (Aug. 11, 2020), https://www.nytimes.com/2020/08/11/technology/pinterest-francoise-brougher-gender-discrimination-lawsuit.html [https://perma.cc/6CXT-DFFW].

115. *See, e.g.*, Erin Mulvaney, *Diversity-Fueled 'Reverse' Bias Claims Put Employers in Quandary*, BLOOMBERG L. (Oct. 8, 2020), https://news.bloomberglaw.com/daily-labor-report/diversity-fueled-reverse-bias-claims-put-employers-in-quandary [https://perma.cc/9UL5-9HP2].

116. *See* Erin Griffith, *Pinterest Settles Gender Discrimination Suit for $22.5 Million*, N.Y. TIMES (Dec. 14, 2020), https://www.nytimes.com/2020/12/14/technology/pinterest-gender-discrimination-lawsuit.html [https://perma.cc/WX2G-3VFX]. While Pinterest's former COO received a large payout, she was not the first high-level employee to speak out about sexism at the company. Two other employees, both black women, had also alleged racism and sexism at the company but were denied any remedy. *Id.*

117. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001).

118. *See* Zenger & Folkman, *supra* note 63.

119. *See* GEORGES DESVAUX, SANDRINE DEVILLARD, ALIX DE ZELICOURT, CECILE KOSSOFF, ERIC LABAYE & SANDRA SANCIER-SULTAN, MCKINSEY & CO., WOMEN MATTER: TEN YEARS OF INSIGHTS INTO GENDER DIVERSITY (2017), https://www.mckinsey.com/featured-insights/gender-equality/women-matter-ten-years-of-insights-on-gender-diversity [https://perma.cc/V73M-AY4P] [hereinafter McKinsey, *Women Matter*].

judgment than men in similar leadership roles,[120] and managers suspect mothers lack sufficient commitment to their careers.[121] Of critical importance is the "performance evaluation bias" women face, by which organizations judge men on their future potential, and women on their past performance.[122] Recent research also suggests that unconscious biases that hinder women's promotion to the C-Suite may be long-ingrained in men CEOs due to their early exposure to family and communal gender inequities.[123]

Research by management and organization scholars shows that unconscious bias not only hinders the ability of women to reach the CEO position, but it also "undermine[s] the success of women in leadership roles."[124] Studies also indicate that women seeking the CEO role are likely to anticipate potentially biased treatment and negotiate for higher severance payments, reflecting their perception of greater termination risk.[125] Overall, while unconscious bias literature supports renewed interest in antidiscrimination law and class actions, the law's overall framework still invites doubt over what changes antidiscrimination law can generate.

Last, the prevalence of unconscious bias does not mean we have vanquished actual conscious bias. Managerial judgments—for example around parenting—still reflect substantial bias.[126] Above

120. For an overview of the studies showing that women CEOs are judged more harshly than men CEOs, see Felice B. Klein, Pierre Chaigneau & Cynthia E. Devers, *CEO Gender-Based Termination Concerns: Evidence from Initial Severance Agreements*, 47 J. MGMT. 567, 570–71 (2021).

121. *See* McKinsey, *Women Matter*, *supra* note 119, at 39.

122. *Id.*

123. *See* Ran Duchin, Mikhail Simutin & Denis Sosyura, *The Origins and Real Effects of the Gender Gap: Evidence from CEOs' Formative Years*, 34 REV. FIN. STUD. 700 (2021). This study finds that CEOs allocate less in funds to managers who are women when compared to managers who are men and appoint women to less profitable divisions. *Id.* at 701–02. Controlling for a wide variety of factors including education, age, and experience, the study finds that "the gender gap in capital allocations is related to the CEO's early-life exposure to gender inequity in the family, community, and school." *Id.* at 702. These inequitable family factors include being born into a family with the father as the sole income earner and with more education than the CEO's mother. *Id.* Community and school factors include attending an all-male high school and measures of gender inequity in the CEO's home county. *Id.*

124. Priyanka Dwivedi, Aparna Joshi & Vilmos F. Misangyi, *Gender-Inclusive Gatekeeping: How (Mostly Male) Predecessors Influence the Success of Female CEOs*, 61 ACAD. MGMT. J. 379, 379 (2018).

125. *See* Klein, Chaigneau & Devers, *supra* note 120, at 569.

126. *See* Marianne Cooper, *Mothers' Careers Are at Extraordinary Risk Right Now*, ATLANTIC (Oct. 1, 2020), https://www.theatlantic.com/family/archive/2020/10/pandemic-amplifying-bias-against-working-mothers/616565/ [https://perma.cc/8NRV-JSVU]; Katherine Goldstein, *The Open Secret of Anti-Mom Bias at Work*, N.Y. TIMES (May 16, 2018),

all, inequities in leadership promotion demand more holistic solutions to advance inclusion. Corporate rules hold firms to a plethora of rules against sex discrimination, but companies continue to exclude women from leadership and distribute power and resources to leaders who are men.

B. Corporate Governance and its Potential

Corporate governance rules and regulations incentivize certain behaviors as a system of market forces, and market actors stand ready to monitor and discipline firms.[127] Board diversity has driven the discussion over gender inclusion in the firm, but it is diversity beyond the board—arguably both more important and more difficult to achieve—that merits our attention.

Over the last decade, international action, corporate governance rules, and market pressure have increased gender diversity on U.S. firm boards.[128] Not only have reporting guidelines in corporate governance regulations focused on board gender diversity,[129] but institutional investors have vigorously pursued gender diversity on boards.[130] In some jurisdictions, mandatory board diversity quotas have been introduced, modeled after the initial quotas in leading countries such as Norway.[131] Less than two

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https://www.nytimes.com/2018/05/16/opinion/workplace-discrimination-mothers.html [https://perma.cc/6QBP-JX5T].

127. For an excellent analysis of contemporary corporate governance in the United States, see Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 122 COLUM. L. REV. (forthcoming 2021), https://ssrn.com/abstract=3775846 [https://perma.cc/75JY-NYYH].

128. For an overview, see Lisa M. Fairfax, Symposium, *All on Board? Board Diversity Trends Reflect Signs of Promise and Concern*, 87 GEO. WASH. L. REV. 1031 (2019). While there has been significant progress on women's representation on public company boards in the largest companies, small companies still lag far behind. *See, e.g.*, Kobi Kastiel & Yaron Nili, *The Corporate Governance Gap*, 131 YALE L.J. (forthcoming) (manuscript at 11), https://ssrn.com/abstract=3824857 [https://perma.cc/RK49-7JF6] (stating that "small-cap companies are approximately ten years behind large-cap companies in terms of board gender diversity"). For private companies, progress has been incredibly slow. For example, for private high-technology venture-backed companies, women represent less than 10% of board members. *See* Jennifer S. Fan, *Innovating Inclusion: The Impact of Women on Private Company Boards*, 46 FLA. ST. U. L. REV. 345, 374 (2019).

129. In some jurisdictions, mandatory disclosure requirements now call for companies to outline their diversity policies and goals, and also to describe the steps taken to achieve these goals. *See* EDWARD KAMONJOH, INSTITUTIONAL SHAREHOLDER SERVS., GENDER DIVERSITY ON BOARDS: A REVIEW OF GLOBAL TRENDS 3–4 (2014).

130. *Id.* at 4–5.

131. *See* Darren Rosenblum & Daria Roithmayr, *More than a Woman: Insights into Corporate Governance After the French Sex Quota*, 48 IND. L. REV. 889, 889–90 (2015). In 2003, Norway became the first country to impose a gender quota, mandating that corporate boards be composed of at least 40% of each gender,

decades after Norway's 2003 quota law, most of the top economies have some sort of quota for women on corporate boards.[132] Even the quota-averse United States has seen its largest and richest state, California, adopt not only a corporate board membership quota for women,[133] but also for people of color and LGBTQ+ people.[134] With data suggesting that the California statute has had considerable impact on the number of women on corporate boards, other states have either passed or are considering board diversity disclosure or quotas.[135] Furthermore, in August 2021, the SEC approved a rule proposed by Nasdaq, one of the leading stock exchanges, that requires that companies listed on Nasdaq appoint to their boards at least one woman and at least one person who identifies as part of a racial minority or as LGBTQ+, or explain why they have failed to do so.[136]

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effectively mandating the addition of a significant number of female directors. Øyvind Bøhren & Siv Staubo, *Does Mandatory Gender Balance Work? Changing Organizational Form to Avoid Board Upheaval*, 28 J. CORP. FIN. 152, 152 (2014).

132. *See* Darren Rosenblum, *Diversity and the Board of Directors: A Comparative Perspective*, *in* COMPARATIVE CORPORATE GOVERNANCE (Afra Afsharipour & Martin Gelter, eds., 2021).

133. *See generally* Darren Rosenblum, *California Dreaming?*, 99 B.U. L. REV. 1435 (2019) (analyzing the California gender quota).

134. *See, e.g.*, Darren Rosenblum, *California Pioneers New Quotas for People of Color & LGBT People*, FORBES (Oct. 5, 2020), https://www.forbes.com/sites/darrenrosenblum/2020/10/05/california-pioneers-new-quotas-for-people-of-color--lgbt-people/?sh=4bbec6f43cc3 [https://perma.cc/Q9JN-VUUJ].

135. *See* Julie Hembrock Daum, *Fresh Perspectives: Increasing the Diversity of Experience, Expertise, and Ideas in the Boardroom*, 2020 GOVERNANCE OUTLOOK: PROJECTIONS ON EMERGING BOARD MATTERS 62–63 (2019), https://www.spencerstuart.com/-/media/2019/december/2020_nacd_governance_outlook_report.pdf [https://perma.cc/6HGY-Z5LL]; Michael Hatcher & Weldon Latham, *States Are Leading the Charge to Corporate Boards: Diversify!*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 12, 2020), https://corpgov.law.harvard.edu/2020/05/12/states-are-leading-the-charge-to-corporate-boards-diversify/ [https://perma.cc/5K5H-8FAW]. For example, Washington requires public companies incorporated in Washington to have gender diverse boards or "deliver to its shareholders a board diversity discussion and analysis." S.B. 6037, 66th Leg., 2020 Reg. Sess. (Wash. 2020); *see also* Natalie Guevara, *What to Know About Washington's New Rules for Boardroom Diversity*, PUGET SOUND BUS. J. (Mar. 1, 2021), https://www.bizjournals.com/seattle/news/2021/02/28/washington-state-aims-to-make-boards-more-diverse.html [https://perma.cc/RY8A-3PQW]. Some also argue that California's efforts may prompt companies not directly impacted by the California law to increase gender diversity on their boards and further prompt federal action on diversity on boards. *See* Fairfax, *supra* note 128, at 1037–38.

136. *See* Allison Herren Lee & Caroline Crenshaw, *Statement by Commissioners Lee and Crenshaw on Nasdaq's Diversity Proposals*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 7, 2021), https://corpgov.law.harvard.edu/2021/08/07/statement-by-commissioners-lee-and-crenshaw-nasdaqs-diversity-proposals/ [https://perma.cc/EVH9-WLM5]; Ron S. Berenblat & Elizabeth Gonzalez-Sussman,

Board diversity is just one step toward inclusion in corporate leadership, and gender disparities remain stark in board leadership roles.[137] Board leaders are often deeply involved in CEO selection.[138] Moreover, research indicates that board diversity, particularly the presence of influential women directors, influences both the appointment and success of women CEOs.[139] Yet, data from 2018 shows that women held only 4.3% of the Fortune 500 board leadership positions, with only two women of color serving as board chair.[140]

With respect to CEO pay, the compensation committee plays a significant role.[141] Research indicates that on boards that include women board members, the women members are more likely to serve on the compensation committee than their colleagues who are men.[142] With respect to whether women board members influence executive compensation, the evidence is mixed.[143] While some studies suggest that women directors help curb excessive CEO pay, other studies show no relationship between women on boards and CEO pay.[144] Some research, however, suggests that excessive CEO compensation can be mitigated by having women board members on the compensation committee.[145]

Nasdaq Proposes New Listing Rules Related to Board Diversity, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 13, 2020), https://corpgov.law.harvard.edu/2020/12/13/nasdaq-proposes-new-listing-rules-related-to-board-diversity/ [https://perma.cc/TTF2-DGD9].

137. *See* Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L.J. 146, 152 (2019).

138. *See* Ram Charan, *The Secrets of Great CEO Selection*, HARV. BUS. REV. (Dec. 2016), https://hbr.org/2016/12/the-secrets-of-great-ceo-selection [https://perma.cc/7Q4X-7LK9].

139. *See* Anja Kirsch, *The Gender Composition of Corporate Boards: A Review and Research Agenda*, 29 LEADERSHIP Q. 346, 354 (2018); Alison Cook & Christy Glass, *Diversity Begets Diversity? The Effects of Board Composition on the Appointment and Success of Women CEOs*, 53 SOC. SCI. RES. 137, 137 (2015).

140. *See* DELOITTE & ALLIANCE FOR BOARD DIVERSITY, MISSING PIECES REPORT 26 (2019), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/center-for-board-effectiveness/us-cbe-missing-pieces-report-2018-board-diversity-census.pdf [https://perma.cc/ZJU5-U3FL].

141. *See* Nili, *supra* note 137, at 155 n.57.

142. *Id.* at 178.

143. Thi Hong Hanh Nguyen, Collins G. Ntim & John K. Malagila, *Women on Corporate Boards and Corporate Financial and Non-Financial Performance: A Systematic Literature Review and Future Research Agenda*, 71 INT'L REV. FIN. ANALYSIS 1 (2020).

144. *Id.*

145. *See, e.g.*, Martin Bugeja, Zoltan Matolcsy & Helen Spiropoulos, *The Association Between Gender-Diverse Compensation Committees and CEO Compensation*, 139 J. BUS. ETHICS 375 (2016).

Board diversity holds the promise of bringing women into the leadership team. A notable limit, however, is the relatively passive role boards play in corporate leadership. The C-Suite is where decisions happen.[146] But the pace of diversity in the C-Suite has been sluggish at best.[147] Moreover, as of this writing, only Germany has moved toward a diversity mandate for the C-Suite.[148]

With respect to the C-Suite, there has been some movement on increasing transparency and disclosure regarding diversity.[149] Several large institutional investors have pressured companies to disclose diversity metrics at the management level.[150] For example, in 2020, the New York City Comptroller asked Fortune 100 companies to disclose publicly their EEO-1 reports, which are filed with the Equal Employment Opportunity Commission.[151] He noted that "[p]ublicly disclosing the demographics of employees by race, gender, and ethnicity—including and most notably those in leadership and senior management positions—will provide critical information for shareowners to better understand workforce practices, identify areas for improvement, and benchmark diversity

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146. *See, e.g.*, Megan Wischmeier Shaner, *Officer Accountability*, 32 GA. ST. U. L. REV. 355, 367 (2016) (describing "an officer-dominated model of corporate governance, with officers exerting immense power and influence over the corporation"); Usha Rodrigues, *From Loyalty to Conflict: Addressing Fiduciary Duty at the Officer Level*, 61 FLA. L. REV. 1, 1 (2009) (describing officers as the "true corporate decision makers").

147. For an overview of diversity in the C-Suite, see Afra Afsharipour, *Women and M&A*, 12 U.C. IRVINE L. REV. (forthcoming 2022) (manuscript at 10–13), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3898551 [https://perma.cc/MVT6-QGWX].

148. *See* Kim Richters & Dieter Holger, *Germany Readies Quota for Women Board Members*, WALL ST. J. (Mar. 16, 2021), https://www.wsj.com/articles/germany-readies-quota-for-women-board-members-11615887001 [https://perma.cc/LHP8-UD99]. Currently, women account for only 11.5% of positions on management boards of the largest 100 listed companies in Germany. *See German Cabinet Agrees Quota for Women on Company Boards*, REUTERS (Jan. 6, 2021), https://www.reuters.com/business/sustainable-business/german-cabinet-agrees-quota-women-company-boards-2021-01-06/ [https://perma.cc/8KJQ-CNAB].

149. *See* Matteo Tonello, *2021 Proxy Season Preview and Shareholder Voting Trends (2017-2020)*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 11, 2021), https://corpgov.law.harvard.edu/2021/02/11/2021-proxy-season-preview-and-shareholder-voting-trends-2017-2020/ [https://perma.cc/4S4P-F7YJ].

150. *See, e.g.*, BLACKROCK, INVESTMENT STEWARDSHIP'S APPROACH TO ENGAGEMENT ON HUMAN CAPITAL MANAGEMENT (2020), https://www.blackrock.com/corporate/literature/publication/blk-commentary-engagement-on-human-capital.pdf [https://perma.cc/4XH8-7XTH].

151. *Comptroller Stringer, NYC Funds Escalate Campaign Calling on Major Companies to Publicly Disclose Workforce Demographics*, NYC COMPTROLLER (Dec. 10, 2020), https://comptroller.nyc.gov/newsroom/comptroller-stringer-nyc-funds-escalate-campaign-calling-on-major-companies-to-publicly-disclose-workforce-demographics/ [https://perma.cc/2YVT-Y5DN].

performance."[152] A few shareholder proposals have urged companies to include diversity targets into compensation packages of senior executives.[153] While important, little of this disclosure directly connects the composition and the pay of C-Suite members or those in line to be promoted to the C-Suite.[154]

Shareholders also have attempted to use litigation as a tool to hold companies that lack diversity accountable. For example, Oracle, a leading Silicon Valley technology company, faced a shareholder suit in 2020 alleging that the board "deceived stockholders and the market by repeatedly making false assertions about [Oracle's] commitment to diversity."[155] Facebook has faced similar shareholder suits.[156] This shareholder litigation has focused on representation broadly, but thus far is unlikely to change incentives for promotion at firms in any meaningful way.

Conclusion

Our modest goal with this Essay is to pose the obvious yet unasked question of how to explain a pair of C-Suite phenomena: high pay and male domination. The clear social science about how the feminization of professions reduces pay invites the question of whether it is because a profession is uniquely male-dominated that it is so well compensated.

The data on compensation in the C-Suite, combined with the data on the overwhelming domination of men in this corporate elite sets the background for several theories that we suggest may

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152. *Id.*

153. *See* Paresh Dave, *Google to Evaluate Executive Performance on Diversity, Inclusion*, REUTERS (Feb. 19, 2021), https://www.reuters.com/article/us-alphabet-google-diversity/google-to-evaluate-executive-performance-on-diversity-inclusion-idUSKBN2AJ2IG [https://perma.cc/GV27-LA4K].

154. For an argument on how and why institutional investors should urge companies to adopt "equality metrics," see Veronica Root Martinez & Gina-Gail Fletcher, *Equality Metrics*, 130 YALE L.J.F. 869 (2021). *See also* Cyrus Taraporevala, *Race & Ethnicity and the Role of Asset Stewardship*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 27, 2021), https://corpgov.law.harvard.edu/2021/03/27/race-ethnicity-and-the-role-of-asset-stewardship/#more-137282 [https://perma.cc/2DYV-HWK2].

155. *See* David Katz & Laura A. McIntosh, *Corporate Governance Update: Raising the Stakes for Board Diversity*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 25, 2020), https://corpgov.law.harvard.edu/2020/07/25/corporate-governance-update-raising-the-stakes-for-board-diversity/ [https://perma.cc/KJ9B-ECCK] (quoting Complaint at 4, Klein v. Ellison, No. 3:20-cv-04439 (N.D. Cal. July 2, 2020), ECF No. 1).

156. *See* Andrew Ramonas, *Facebook Wins Bid to Toss Shareholder's Lawsuit Over Diversity*, BLOOMBERG L. (Mar. 22, 2021), https://news.bloomberglaw.com/securities-law/facebook-wins-bid-to-toss-shareholders-lawsuit-over-diversity [https://perma.cc/UUF4-L8KE].

provide answers. Tournament theory, used to explain how people compete and win, describes gendered differentials in competitive spaces. Once a competition has been won, can the winners avoid further competition? Here's where capture theory comes in, to explain how specific groups take hold of public resources and keep them for themselves.

Empirical research might prove enlightening, but two realities limit its potential here. First, unlike in the context of feminized professions, the C-Suite has *always* been male-dominated. How, then, can we account for the rise in compensation if the ratio of men to women has remained relatively fixed? Women have logged substantial increases in middle management even as the C-Suite remains nearly all male. As other parts of the firm become more sex-integrated, the C-Suite's continued domination by men reflects a masculinization, relative to other areas of the firm.

Other empirical work may reflect with some precision whether tournament theory and capture theory indeed function to ensconce men in their secure, gilded citadel atop the corporate world. While data on candidates for CEO positions may prove hard to obtain, we can look for data on whether board gender diversity undermines men's tournament advantage and their resulting capture of the C-Suite.

These questions, both theoretical and empirical, will help enlighten debates over *how* to remedy this exclusion. While antidiscrimination law may prove a limited forum for rectifying inequality in corporate elites, improvements to corporate governance may prove more fruitful. Understanding a theoretical correlation between male domination of the C-Suite and the extraordinary compensation for such positions may itself reveal further potential improvements in law and governance to counter C-Suite sexism.