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The Inclusion Imperative For Repairing Corporate Governance

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Abstract

This is a moment of rapid, unpredictable technological, economic and political change. Careful decision-making proves especially critical, yet many firms are abandoning decades of organizational research showing how inclusive practices strengthen governance capacity. The retreat from diversity, equity, and inclusion ("DEI") signals a broader problem: leaders increasingly normalize inconsistent, even impulsive leadership that can harm firms, shareholders and stakeholders alike. This essay argues that inclusive leadership is essential to strong governance and challenges the narrative that firms have universally abandoned their inclusive practices. This essay first recounts the dramatic rise and recent retreat of DEI practices in corporate governance over the past two decades. This essay proceeds to show how the tech sector's rise to dominance has normalized governance pathologies, drawing on epic failures in governance such as WeWork to illustrate how homogenous leadership teams make critical mistakes. Our research is the first to draw on 2025 proxy evidence, showing that many firms, with overwhelming support of shareholders, have maintained inclusive governance. These firms understand what their retreating counterparts have forgotten: that robust governance requires diverse voices, careful deliberation, and the institutional wisdom to resist impulsive reactions to shifting political winds. Long-term success depends on inclusive governance.

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Abstract

This is a moment of rapid, unpredictable technological, economic and political change. Careful decision-making proves especially critical, yet many firms are abandoning decades of organizational research showing how inclusive practices strengthen governance capacity. The retreat from diversity, equity, and inclusion ("DEI") signals a broader problem: leaders increasingly normalize inconsistent, even impulsive leadership that can harm firms, shareholders and stakeholders alike. This essay argues that inclusive leadership is essential to strong governance and challenges the narrative that firms have universally abandoned their inclusive practices. This essay first recounts the dramatic rise and recent retreat of DEI practices in corporate governance over the past two decades. This essay proceeds to show how the tech sector's rise to dominance has normalized governance pathologies, drawing on epic failures in governance such as WeWork to illustrate how homogenous leadership teams make critical mistakes. Our research is the first to draw on 2025 proxy evidence, showing that many firms, with overwhelming support of shareholders, have maintained inclusive governance. These firms understand what their retreating counterparts have forgotten: that robust governance requires diverse voices, careful deliberation, and the institutional wisdom to resist impulsive reactions to shifting political winds. Long-term success depends on inclusive governance.

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Introduction

Corporate governance faces an unprecedented test. Rapid technological and economic change poses previously unimagined challenges for firms. In this tumultuous moment, when effective decision-making proves most critical, some firms are abandoning decades of organizational research on inclusive practices that strengthen their governance capacity. This retreat signals a broader crisis beyond diversity, equity, and inclusion ("DEI"): leaders increasingly normalize inconsistent, even impulsive leadership that creates governance blind spots and can devastate firms and stakeholders alike. Fortunately, many firms have resisted this tide. As our research demonstrates, firms that have maintained their commitment to inclusive governance understand what their retreating counterparts have forgotten: that robust governance requires diverse voices, careful deliberation, and the institutional wisdom to resist impulsive reactions to shifting political winds. As the 2025 proxy evidence we have gathered underscores, many influential firms have resisted pulling back on inclusion, with the full support of their shareholders, because inclusive practices improve governance outcomes.

We are witnessing a perfect storm that makes effective corporate governance more essential than ever. Rapid technological disruption has fundamentally altered competitive landscapes and business models, while economic volatility creates unprecedented uncertainty for strategic planning. Simultaneously, the political environment, both in the United States and globally, has become increasingly unstable. Corporate diversity efforts, which have developed over nearly two decades of stakeholders and regulators pressure, have been hit hard by this storm. History shows that periods of upheaval separate firms with resilient governance from those without. The companies that weathered past crises, such as Goldman Sachs and General Motors, succeeded not because they avoided risk, but because their governance structures enabled them to understand, evaluate, and manage risk with deliberation and balance.[1] By contrast, firms like Lehman Brothers and, more recently, WeWork and FTX illustrate how governance failures rooted in homogeneous leadership, unchecked power, and the systematic exclusion of dissenting voices can produce catastrophic blind spots. In the current storm, the escalating retreat from inclusive governance threatens to entrench these pathologies. As the analysis in this essay illustrates, inclusive practices are the foundation of resilient governance, bringing in diverse perspectives and enabling the deliberate, thoughtful decision-making most critical in times of crisis.

Experience over the last twenty years makes this clear: inclusive practices are not mere cultural add-ons but are central to good governance itself. Boards and C-Suites are pivotal decision-making *groups,* and to truly appreciate the value of inclusion, we need to explore when

[1] *See generally* Brian R. Cheffins, *Did Corporate Governance 'Fail' During the 2008 Stock Market Meltdown? The Case of the S&P 500*, 65 BUS. LAW. 1, 2 (2009) (arguing that corporate governance functioned "tolerably well" among companies that suffered during the 2008 financial crisis). This is not to say that these companies were models of diversity. For example, for many years the board of Goldman Sachs had two women as part of its eleven members. *See* Bradley Keoun, *The Goldman Sachs Board Remainbs Old Boys' Club Even as Rivals Promoto Women*, THE STREET (May 1, 2018), https://www.thestreet.com/investing/as-companies-add-more-women-to-boards-goldman-sachs-keeps-a-pair-14574319. General Motors, on the other hand, is now one of the few Fortune 500 companies with a majority-women board, and was the first Fortune 500 company to seat an African-American director. *See* Dale Buss, *How Barra Built GM's Majority-Women Board*, CHIEF EXECUTIVE (Aug. 27, 2024), https://chiefexecutive.net/how-barra-built-gms-majority-women-board/.

and how inclusion integrates with and enhances group processes.[2] By reviewing literature from finance, management, sociology, and psychology, we delineate the principal elements of effective group decision-making and elucidate how each is intrinsically linked to inclusive practices. This research underscores the importance of both identity-based diversity and broader diversity dimensions in enriching the decision-making capabilities of groups. Furthermore, academic research supporting the value of inclusion in corporate governance bolsters actions of certain corporate boards and shareholders who have resoundingly rejected anti-DEI efforts, demonstrating that inclusion remains imperative for the long-term success of their firms.[3]

This recognition stems from nearly two decades of sustained pressure to embed DEI into corporate governance. Shareholders, employees, and customers alike, have consistently demanded that companies not only commit to DEI ideals but also embed them deeply into their boardrooms and C-Suites.[4] For years, prominent investors, including powerful institutional investors,[5] scrutinized diversity metrics, transparency, and accountability, while socially conscious consumers began to align their spending with companies that championed inclusivity.[6] Employees, too, voiced their expectations for inclusive workplaces that prioritized a commitment to diversity.[7] And legislative efforts aimed at enhancing diversity in corporate governance leadership soon followed.[8]

Yet, these advances also invited additional scrutiny from conservative quarters. After many years of significant stakeholder advocacy to promote corporate DEI initiatives, companies began to face major anti-DEI threats ranging from shareholder proposals and lawsuits initiated by anti-DEI advocacy groups to public shaming campaigns by conservative activists.[9] Since early 2025,

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[2] *See generally* Anja Kirsch, *The Gender Composition of Corporate Boards: A Review and Research Agenda*, 29 LEADERSHIP Q. 346 (2018).
[3] *See* Andrew Behar, *The Anti-DEI Movement Has Made Corporate Diversity Stronger*, FORTUNE (July 1, 2025), https://fortune.com/2025/07/01/anti-dei-movement-makes-corporate-diversity-stronger/.
[4] *See generally* Lisa M. Fairfax, *Fall 2018 Symposium: All on Board? Board Diversity Trends Reflect Signs of Promise and Concern*, 87 GEO. WASH. L. REV. 1031 (2019).
[5] *See, e.g.,* BLACKROCK, PROXY VOTING GUIDELINES FOR U.S. SECURITIES (2019), https://www.blackrock.com/corporate/literature/publication/blackrock-investment-stewardship-benchmark-guidelines-us.pdf; Cydney Posner, *BlackRock Advocates That at Least Two Women Be on Each Company Board*, COOLEY PUBCO (Feb. 6, 2018), https://cooleypubco.com/2018/02/06/blackrock-advocates-that-at-least-two-women-be-on-each-company-board/. In response to anti-DEI pressures, some institutional investors have now softened their stance on diversity metrics and transparency. *See* Matteo Tonello, *2025 Proxy Season Preview*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 10, 2025), https://corpgov.law.harvard.edu/2025/03/10/2025-proxy-season-preview/; *see also* Jack Pitcher, *BlackRock, a Diversity Pioneer, Distances Itself From DEI*, WALL ST. J. (Feb. 25, 2025), https://www.wsj.com/finance/investing/blackrock-a-diversity-pioneer-distances-itself-from-dei-24839d6c?reflink=desktopwebshare_permalink
[6] *See generally* Michael Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance,* 93 S. CAL. L. REV. 1243 (2020).
[7] Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, 130 YALE L.J. 869, 885 (2021).
[8] *See, e.g.,* A.B. 979, 2019–2020 Leg., Reg. Sess. (Cal. 2020); Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Approving Proposed Rule Changes, as Modified by Amendments No. 1, to Adopt Listing Rules Related to Board Diversity and to Offer Certain Listed Companies Access to a Complimentary Board Recruiting Service, Exchange Act Release No. 34-92590, 86 Fed. Reg. 44424 (Aug. 6, 2021), https://www.sec.gov/rules/sro/nasdaq/2021/34-92590.pdf [hereinafter SEC Nasdaq Rule Approval].
[9] Lila Maclellan, *Major Players in the Anti-DEI Movement: Here's Who's Pressuring Goldman Sachs, Pfizer, IBM, and Other Fortune 500 Companies to Drop Their Policies*, FORTUNE (Feb. 1, 2025), https://fortune.com/2025/02/01/anti-dei-guide-groups-people-attackin-goldman-ibm-pfizer-jpmorgan-salesforce/; Max Ufberg, *Robby Starbuck's Anti-DEI Activism Uses a Very Familiar Playbook*, FAST COMPANY (Oct. 23, 2024),

the Trump administration's wide-reaching anti-DEI efforts have accelerated various orders and investigations by U.S. federal and state government actors.[10] In short, the rapid swings around diversity have shaken the entire U.S. private sector, leaving corporations in a tight corner. Having suffered the whiplash of expanding diversity demands followed by a witch hunt against such efforts, firms find themselves in a uniquely precarious position regarding diversity.

The challenges surrounding diversity in corporate governance arise at a time when long-standing corporate governance practices—from defining a corporation's purpose to determining its incorporation jurisdiction and managing conflicts of interest—are under intense, and at times polarizing, debate.[11] CEOs and boards cite "uncertainty across the economic, geopolitical, and political landscape" as a key challenge.[12] Few expect this uncertainty and volatility to diminish anytime soon. After investing significant resources and time to address environmental, social and governance issues ("ESG"), U.S. companies now face pressure to rapidly abandon these efforts.[13] Even Delaware's longstanding dominance in corporate law and governance has come under immense attack.[14] Long considered the leader for corporate law in the United States,[15] and even globally,[16] Delaware is experiencing looming competition from states like Texas and Nevada, as well as from international jurisdictions.[17] For decades, corporate boardrooms seldom debated incorporation choices, but such discussions have become a staple of boardroom agendas.[18] These pressures and debates have resulted in a major overhaul of the state's corporate law that experts describe as "the most significant rewriting of Delaware corporate law in over half a century,

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https://www.fastcompany.com/91214494/robby-starbucks-anti-dei-activism-uses-a-very-familiar-playbook. *See also* POLLACK, GLASGOW, VAN BOMMEL, JOSEPH & YOSHINO, RISKS OF RETREAT: THE ENDURING INCLUSION IMPERATIVE 12-14 (2025), https://www.catalyst.org/insights/2025/risks-of-retreat-report [hereinafter RISKS OF RETREAT].

[10] *See* RISKS OF RETREAT, *supra* note 9, at 4; Exec. Order No. 14,151, Ending Radical and Wasteful Government DEI Programs and Preferencing, 90 Fed. Reg. 8,339 (Jan. 29, 2025), https://www.govinfo.gov/app/details/FR-2025-01-29/2025-01953; Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, 90 Fed. Reg. 8,615 (Jan. 30, 2025).

[11] *See* RUSSELL REYNOLDS, CORPORATE GOVERNANCE TRENDS IN THE UNITED STATES (2025), https://www.russellreynolds.com/en/insights/reports-surveys/global-corporate-governance-trends/2025/united-states.

[12] Benjamin Finzi, Brett Weinberg & Elizabeth Molacek, *CEO Survey*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 3, 2025), https://corpgov.law.harvard.edu/2025/07/03/ceo-survey-2/.

[13] *See* Danielle Fugere, *ESG Proposals at Mid-Season 2025: Trends, Turbulence & Triumphs*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 18, 2025), https://corpgov.law.harvard.edu/2025/06/18/esg-proposals-at-mid-season-2025-trends-turbulence-triumphs/.

[14] *See* Kenneth Khoo & Roberto Tallarita, *The Price of Delaware Corporate Law Reform* 15-16 (June 24, 2025), https://ssrn.com/abstract=5318203. For more on Delaware's importance in US corporate law, *see* Afra Afsharipour & Matthew Jennejohn, *Gender and the Social Structure of Exclusion in U.S. Corporate Law,* 90 U. CHI. L. REV. 1819 (2023).

[15] *See* Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 590 (2003).

[16] *See* William J. Moon, *Delaware's Global Competitiveness*, 106 IOWA L. REV. 1683, 1688 (2021).

[17] *See* Courtney Tygesson, Kealan Santistevan & Lisa Cossi, *Reincorporation Considerations for Late-Stage Private and Pre-IPO Companies*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 3, 2025), https://corpgov.law.harvard.edu/2025/07/03/reincorporation-considerations-for-late-stage-private-and-pre-ipo-companies/; Emily Glazer, Berber Jin & Meghan Bobrowsky, *Meta in Talks to Reincorporate in Texas or Another State, Exit Delaware*, WALL ST. J. (Jan. 31, 2025), https://www.wsj.com/tech/metaincorporation-texas-delware-f06e8bab.

[18] *See, e.g.*, Priya Cherian Huskins, *Weighing the Move from Delaware: Key Considerations for Company Reincorporation*, FORBES (Oct. 9, 2024), https://www.forbes.com/sites/priyacherianhuskins/2024/10/09/weighing-the-move-fromdelaware-key-considerations-for-company-reincorporation/.

changing the system in a more controller-friendly direction."[19]

As of this writing, it may seem as if DEI's days are numbered. However, this essay makes it clear that this is not diversity's death knell. Far from serving as the "end of the story," the pushback on DEI only highlights the extent to which large firms have already integrated ideas about the importance of inclusion. While full integration remains a distant reality for gender, race, sexual orientation and other differences, many firms realize its centrality to good governance. The firms that see that now and articulate it will serve as leaders for the corporate sector in the years to follow. As other changes in society show, progress typically comes in waves, including some backlash. The arguments for inclusion mostly were sound ones that, as we underscore here, serve better governance. They will carry the day, perhaps not immediately, but eventually. Good governance depends on integrating radically different points of view to balance opportunity and risk in the context of ever-more-complicated markets. While some question whether good governance improves firm economic value, we hold to the belief that it can serve to enhance leadership practices, avoid major risk and improve decisionmaking.[20]

This essay offers a fresh analysis with novel data demonstrating that inclusive practices remain essential to effective corporate governance. Our research from 2025 proxy reports and corporate governance practices over the past two decades interweaves macro shifts, especially the rise of the tech sector, with evolving approaches to inclusion in corporate leadership. It explores the tension between these two developments and argues that today's broader governance challenges demand more inclusive leadership, not less. What follows is a three-part analysis. Part I traces the rise and fall of DEI in corporate governance, presenting an overview of the significant pendulum swings driven by political pressure over the last two decades. Part II examines how technology sector governance failures exemplify the larger crisis of homogeneous leadership pathologies, using the rise and fall of WeWork as a recurring case study of how unvaried and exclusionary cultures enable governance breakdowns. Part III pulls from 2025 proxy statements to demonstrate how some leading firms have adhered to their inclusion commitments. Drawing on interdisciplinary research, Part III argues that inclusive practices improve decision-making and clarifies how corporate boards should approach DEI-related questions and challenges. Together, these sections make clear that the choice facing corporate leaders is not between inclusion and success, but between governance that is robust enough to withstand turbulent times or governance that puts firms, their shareholders and stakeholders at far greater risk.

Part I. The DEI Pendulum in Corporate Governance

This Part traces the rise—and more recent retreat—of inclusion efforts in corporate governance. In the corporate governance realm, inclusion efforts primarily focused on greater

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[19] *See* Khoo & Tallarita, *supra* note 14, at 16.

[20] We recognize that there is a vast scholarly debate on the precise relationship between corporate governance practices and firm economic value. Within this literature, there is also significant debate on whether diverse boards increase firm economic value. For an overview of this debate, *see* Jill Fisch, *Promoting Corporate Diversity: The Uncertain Role of Institutional Investors*, 46 SEATTLE U. L. REV. 367, 375-379 (2023). For a thorough assessment of the "myth that board diversity harms firm performance," *see* Michal Barzuza & Gideon Parchomovsky, *Economic Analysis of Board Diversity*, 49 J. CORP. L. 1043, 1070-1076 (2024).

demographic diversity in the boardroom, although over time, such efforts expanded to also address greater diversity among senior executives.

Starting with Norway's 2003 board mandate to include women,[21] the past few decades have seen governments and firms view inclusion as an increasingly central proposition for firms. State institutional actors, investors and firms actively promoted inclusionary initiatives through legislation and policy changes. While many on the left asserted – and even believed – that this would prove a secular trend, the political right viewed it as a politicized power-grab by the "less-qualified." The swing of the pendulum since 2024 and most notably since President Trump's second inauguration has shifted the ground considerably. We view it as essential work to detail, as objectively as we can, this wide swing to-and-fro over the past decade as a descriptive matter to analyze where we find ourselves now.

A. Boards and C-Suites Pre-Inclusion

At the dawn of the 21st century, women comprised nearly half of the workforce in the United States and represented over half of all college graduates and nearly half of all doctoral and professional school graduates.[22] Despite calls for greater inclusion, women's leadership in corporate governance—whether in the boardrooms or C-Suites of U.S. corporations—lagged significantly.[23] For example, in 2000, women occupied less than 10% of all board seats in the S&P 1500.[24] Although the subsequent decade saw some progress, the increase in women's representation on boards remained relatively slow.[25] By 2010, women held approximately 15.7% of board seats in Fortune 500 companies, a figure that had barely shifted by 2015.[26] In 2014, a comprehensive government report highlighted the limited number of women in traditional

[21] Norway was the first country to impose a gender quota, mandating that corporate boards be composed of at least forty percent of each gender, 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). The penalty of noncompliance was liquidation. *Id*

[22] *See* NAT'L CTR. FOR EDUC. STAT., TABLE 318.10: DEGREES CONFERRED BY POSTSECONDARY INSTITUTIONS, BY LEVEL OF DEGREE AND SEX OF STUDENt, NCES (2015), https://nces.ed.gov/programs/digest/d15/tables/dt15_318.10.asp; Claudia Buchman, Rachel E. Dwyer & Man Yao, *The Deepening Gender Divide in Credentials, 2000–2020: Continuity, Change, and Implications*, 11 RSF: RUSSELL SAGE FOUND. J. SOC. SCI., 154 (Jan. 2025). For example, since the mid-1990s, women have accounted for almost half of all law students graduating from law schools. *See generally* Legal Education & Admissions to the Bar, Statistics, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_education/resources/statistics/. *See also* Jonathan D. Glater, *Women Are Close to Being Majority of Law Students*, N.Y. TIMES (Mar. 26, 2001), https://www.nytimes.com/2001/03/26/business/women-are-close-to-being-majority-of-law-students.html. By 2002, women constituted forty-nine percent of U.S. law students. FIRST YEAR AND TOTAL J.D. ENROLLMENT BY GENDER 1947–2011, AM. BAR ASS'N, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_gender.authcheckdam.pdf [http://web.archive.org/web/20220103113720/https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_gender.authcheckdam.pdf].

[23] *See generally* Sarah C. Haan, *Corporate Governance and the Feminization of Capital*, 74 STAN. L. REV. 515 (2022).

[24] U.S. GOV'T ACCOUNTABILITY OFFICE, *CORPORATE BOARDS: STRATEGIES TO ADDRESS REPRESENTATION OF WOMEN INCLUDE FEDERAL DISCLOSURE REQUIREMENTS* (2015), http://www.gao.gov/assets/680/674008.pdf [hereinafter GAO REPORT].

[25] Jayne W. Barnard, *More Women on Corporate Boards? Not So Fast*, 13 WM. & MARY J. WOMEN & L. 703 (2007), https://scholarship.law.wm.edu/wmjowl/vol13/iss3/2.

[26] GAO REPORT, *supra* note 24.

pathways to board service, including the scarcity of women with CEO and other senior C-Suite experience.[27] In 2000, women made up less than 0.5% of CEOs of Fortune 500 companies, a number that rose to 4.8% by 2014.[28] Beyond the CEO role, women held only about 8% of executive officer positions in Fortune 500 companies as of 2002—a small fraction of the overall C-suite. Long after the death of gentlemen's clubs, corporate governance remained an old-boys club, the "nearly exclusive province of white males," with little prospect of change on the horizon.[29]

Limiting the pool of board candidates to C-Suite members left firms unable to access the full spectrum of talent available. Selection processes still relied on "the traditional old-boy network of friends, college classmates, and country club buddies."[30] Corporate governance remained an insiders' game for the advancement of individuals (primarily elite white men) based on their connections instead of merit.[31] In such a labor market, personal relationships and shared backgrounds perpetuated existing power structures. Rather than seeking desired expertise, nominating committees displayed a tendency for homophily—a preference for associating with others demographically like oneself. This self-reinforcing cycle favored and advanced certain groups at the expense of different, highly qualified candidates.[32]

Board recruitment began to evolve after the enactment of the Sarbanes-Oxley Act of 2002, which introduced significant corporate governance reforms. Massive corporate scandals, like the failure of Enron, raised questions about whether the traditional qualifications of director candidates were sufficient to make such directors effective monitors.[33] The reforms introduced by Sarbanes-Oxley encouraged boards to explore a "wider and deeper talent pool" when selecting directors.[34] The regular involvement of professional search firms in board searches further expanded the range

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[27] *Id. See also* Barnard, *supra* note 25, at 706 n. 24 (noting that "[i]n 2005, forty-one percent of male directors were active CEOs, and twenty-two percent were retired CEOs.").
[28] *See* Katherine Schaeffer, *The Data on Women Leaders*, PEW RSCH. CTR. (Sept. 27, 2023).
[29] Steven A. Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America's Boardrooms and What To Do About It*, 61 WASH. & LEE L. REV. 1583, 1583 (2004). A 2013 report found that for Fortune 100 companies, white men comprised nearly 68% of boards seats in 2012. ALLIANCE FOR BOARD DIVERSITY, MISSING PIECES REPORT: WOMEN AND MINORITIES ON *FORTUNE* 500 BOARDS (2013).
[30] Barnard, *supra* note 25, at 708.
[31] *See* Andrew Howard, *Groupthink and Corporate Governance Reform: Changing the Formal and Informal Decisionmaking Processes of Corporate Boards*, 20 S. CAL. INTERDISC. L. J. 425 (2011); Kimberly A. Houser & Jamillah Bowman Williams, *Board Gender Diversity: A Path to Achieving Substantive Equality in the United States*, 63 WM. & MARY L. REV. 497, 518 (2021).
[32] Houser & Williams, *supra* note 31, at 517–18. For more discussion on homophily, see Gueorgi Kossinets & Duncan J. Watts, *Origins of Homophily in an Evolving Social Network*, 115 AM. J. SOCIO. 405 (2009); Miller McPherson, Lynn Smith-Lovin & James M. Cook, *Birds of a Feather: Homophily in Social Networks*, 27 ANN. REV. SOCIO. 415, 416 (2001).
[33] *See* Jeffrey N. Gordon, *Governance Failures of the Enron Board and the New Information Order of Sarbanes-Oxley*, 35 Conn. L. Rev. 1125, 1127 (2003). For more on the failures of the Enron board, see PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON GOVERNMENTAL AFFAIRS, 107TH CONG., REPORT ON THE ROLE OF THE BOARD OF DIRECTORS IN ENRON'S COLLAPSE (Comm. Print 2002).
[34] Cynthia A. Glassman, Remarks Before the 2005 Colloquium for Women Directors, *Board Diversity: The 21st Century Challenge, The New Regulatory Climate and Impact on Board Composition*, SEC (Nov. 11, 2005), https://www.sec.gov/news/speech/spch111105cag.htm.

of candidates considered for these influential roles.[35] As we discuss below, in the middle of the 2010s, public attention, institutional activism, and even legislative efforts began to reshape the makeup of corporate boards.

B. The Pinnacle of Inclusion Efforts

1. Board Diversity Mandates Take Hold

By the mid-2010s, U.S. companies began to face significant pressure from a variety of stakeholders to diversify their corporate governance institutions. An obvious story was the one involving the initial public offering (IPO) of Twitter, which originally had an all-male board. Various news outlets decried this choice, and the company quickly added a woman director.[36] This moment made it clear that the corporate sector had to step up gender inclusion efforts. Companies began to regularly receive shareholder proposals advocating board diversity.[37] The largest asset managers, including BlackRock, State Street, and Vanguard, all engaged public companies in board diversity efforts.[38] In early 2017, State Street commissioned its famous Fearless Girl statute to emphasize its board diversity efforts.[39] State Street amplified its efforts by sending letters emphasizing board diversity to 3,500 public companies and by using its voting power against boards that failed to enhance their diversity.[40] BlackRock, the world's largest asset manager with trillions under management, stated that the companies in which it invests should have at least two women directors. BlackRock also asked about 300 companies in the Russell 1000 with fewer than two women directors to disclose their approaches to diversity and to establish a timeframe for improvement.[41] Institutional investors primarily advanced the "business case" for diversity, while other advocates argued that diversity on boards must be a priority for moral and social reasons as well as for instrumental reasons.[42]

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[35] *See* Sheryl Nance-Nash, *Boardroom Pressures Open Doors for Women*, WOMEN'S ENEWS (May 31, 2005), https://womensenews.org/2005/05/boardroom-pressures-open-doors-women/ (stating that now search firms conduct more than half of all board searches).

[36] *See, e.g.,* Matthew Yglesias, *It Would Be Really Easy for Twitter to Put a Woman on Its Board*, SLATE (Oct. 7, 2013), https://slate.com/business/2013/10/twitter-s-all-male-board-so-easy-to-fix.html. Twitter's addition of an initial token woman director was seen by governance experts as just a "start" for a company that had "become a poster child for the sexism and arrogance that pervades Silicon Valley." Vivek Wadhwa, *Twitter's Addition of Marjorie Scardino is a Great Move, but More Needs to be Done*, WASH. POST (Dec. 6, 2013), https://www.washingtonpost.com/news/innovations/wp/2013/12/06/twitters-addition-of-marjorie-scardino-is-a-great-move-but-more-needs-done/.

[37] *See* Anzhela Knyazeva, Diana Knyazeva & Lalitha Naveen, *Diversity on Corporate Boards*, 13 ANN. REV. FIN. ECON. 301, 302 (2021).

[38] *See* BLACKROCK, PROXY VOTING GUIDELINES, *supra* note 5; Posner, *supra* note 5. For an analysis of the efforts of institutional investors to promote board diversity, *see generally* Fisch, *Promoting Corporate Diversity, supra* note 20.

[39] *See* Jeff Green, *The Fearless Girl is Worth $7.4 Million in Free Publicity for State Street*, BLOOMBERG (Apr. 28, 2017), https://www.bloomberg.com/news/articles/2017-04-28/fearless-girl-earns-7-4-million-in-free-media-for-state-street; Annalyn Kurtz, *State Street Takes On Wall Street's Gender Gap*, FORTUNE (May 23, 2017), https://fortune.com/2017/05/23/state-street-women-gender-diversity-finance/.

[40] *See* Fisch, *Promoting Corporate Diversity, supra* note 20, at 371. *See also* Todd A. Gormley, Vishal K. Gupta, David A. Matsa, Sandra C. Mortal & Lukai Yang, *The Big Three and Board Gender Diversity: The Effectiveness of Shareholder Voice*, 149 J. FIN. ECON. 323 (2023) (finding that the campaigns of the "big three" institutional investors led to a significant increase in board gender diversity.

[41] *See* Posner, *supra* note 5.

[42] As we discuss in Part III below, the business case for board diversity is a complex one that goes beyond considerations of financial performance to include its impacts on decision-making, effective risk management, and

At the governmental level, by 2018, nearly all of the world's top ten economies had adopted some form of gender diversity mandate—most of them hard quotas—while the United States continued to lag behind.[43] Board mandates seeped into U.S. conversations, both among investors and legislators. Perhaps because of the lack of governmental intervention on diversity, the private sector in the U.S. took an assertive and innovative posture on inclusion efforts. Firms, investment fund managers, and private sector leaders leaned into the effort to increase inclusion. Certain companies went so far as requiring diverse teams within the outsourced banks and law firms they hired.[44]

Eventually, California took the lead and mandated board diversity in 2018 to become the first jurisdiction in the United States to adopt a mandate for corporate board inclusion based on gender, with the passage of Senate Bill 826 ("SB 826").[45] SB 826 required publicly-traded companies headquartered in or based in California to have at least one female director by 2019, and more expansively mandating at least 30% female representation – depending on board size – by 2021.[46] Other states considered legislation on board diversity.[47]

SB 826 became the first foothold in the United States, and as such aroused substantial opposition. Stanford Professor Joseph Grundfest presented the most pointed argument against the legislation.[48] He recognized that "corporate boards are insufficiently diverse" with "too few women and ethnic minorities. . . at the table," but insisted that "affirmative action is a divisive issue."[49] He noted the litigation challenging Harvard University's admission policies.[50] The

the establishment of egalitarian corporate cultures. *See* Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1, 26–48 (2022); *see also* Naomi Cahn, June Carbone & Nancy Levit, *The Instrumental Case for Corporate Diversity*, 40 MINN. J.L. & INEQ. 117, 119 (2022) (suggesting that "diversity may also be useful in countering illegal or unethical practices that require a carefully selected crony network to stay hidden") [hereinafter Cahn, Carbone & Levit, *Instrumental Case*].

[43] *See* Darren Rosenblum, *Diversity and the Board of Directors: A Comparative Perspective*, *in* RESEARCH HANDBOOK ON COMPARATIVE CORPORATE GOVERNANCE 179, 179 (Afra Afsharipour & Martin Gelter eds., 2021) [hereinafter Rosenblum, *Comparative Perspective*].

[44] *See* Afra Afsharipour, *Women and M&A*, 12 U.C. IRVINE L. REV. 359, 417-18 (2022).

[45] *See* Darren Rosenblum, *California Dreaming?* 99 B.U. L. REV. 1435, 1437 (2019) [hereinafter Rosenblum, *California Dreaming?*]; Rosenblum, *Comparative Perspective*, *supra* note 43, at 189–90. For more on the scope and structure of SB 826, as well as whether it addresses corporate internal affairs, *see generally* Jill E. Fisch & Steven Davidoff Solomon, *Centros, California's "Women on Boards" Statute and the Scope of Regulatory Competition*, 20 EUR. BUS. ORG. L. REV. 493 (2019).

[46] S.B. 826, § (1)(a), 2017–2018 Leg., Reg. Sess. (Cal. 2018); *see also* Christopher J. Riley, *An Equal Protection Defense of SB 826*, CAL. L. REV. ONLINE (July 2020), https://www.californialawreview.org/online/an-equal-protection-defense-of-sb-826. For an analysis of the California legislation, see generally Rosenblum, *California Dreaming?*, *supra* note 45, at 1435. Data suggests that the California statute significantly increased the number of women on corporate boards. *See* Julie Hembrock Daum & Spencer Stuart, *Fresh Perspectives: Increasing the Diversity of Experience, Expertise and Ideas in the Boardroom*, *in* 2020 GOVERNANCE OUTLOOK: PROJECTIONS ON EMERGING BOARD MATTERS 62, 62–63 (Nat'l Ass'n of Corp. Dirs. ed., 2019), https://www.spencerstuart.com/-/media/2019/december/2020_nacd_governance_outlook_report.pdf.

[47] *See* Afsharipour, *Women and M&A*, *supra* note 44, at 374–75; 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/.

[48] Joseph A. Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826* (Rock Ctr. for Corp. Governance at Stan. Univ., Working Paper No. 232, Stan. Pub. L. Working Paper, 2018), https://ssrn.com/abstract=3248791.

[49] *Id.* at 7.

[50] *Id.*

slippery slope risk served as his main warning: "if SB 826 is allowed to stand, then the federal government, states, and local authorities will be able to mandate racial and gender quotas across a broad range of private sector activities."[51] Grundfest also warned that SB 826-like legislation would create a "parade of horribles" that would undermine affirmative action generally.[52] Grundfest's warning proved prescient regarding the rise in anti-affirmative action resentment.[53]

However, the diversity juggernaut had not finished its advance. On the corporate side, efforts to advance inclusion continued apace. While early efforts to increase diversity in corporate governance focused on gender diversity, eventually, board diversity efforts expanded to include racial and ethnic diversity, as well as diversity with respect to sexual orientation and gender identity.[54] 2020 saw the murder of George Floyd, which unleashed a sharp rise in anti-racism protests as the Black Lives Matter ("BLM") movement spread. BLM's muscular show in street protests led to a broader trend of firms making clear and assertive commitments on the inclusion of Black people in corporate governance. Some have argued that this movement translated into larger representation of Black people on corporate boards.[55]

The same year, two new legislative remedies furthered this push for inclusive representation in corporate governance. In 2020, California, often at the forefront of State legislative efforts, followed up its board gender diversity legislation with new legislation. California's Assembly Bill 979 (*AB 979*), mandated that public companies headquartered in the state appoint board members from underrepresented communities.[56] The term "underrepresented communities" initially included only African American, Hispanic, and Native American individuals, but the state later expanded this to include those who self-identified as members of the LGBTQ+ community.[57] AB 979 required companies to have at least one director who self-identified with those groups by the end of 2021, with the requirement scaling up in the next year, depending on board size.[58] As with SB 826, AB 979 required the California Secretary of State to track and report compliance, as well as impose fines for noncompliance.[59] AB 979 became law in September 2020. By the first quarter of 2021, there was a substantial increase in some racial diversity on corporate boards [60]

Meanwhile, Nasdaq, the world's second largest stock exchange, began the process to obtain

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[51] *Id.*
[52] *Id.*
[53] Professor Grundfest did recognize that although he believed SB826 to be unconstitutional, "it works like a charm" and has been "very effective in increasing the number of women on corporate boards in CA and elsewhere." *See* Joseph A. Grundfest, *California's Gender and Race Boardroom Quotas: The Most Effective Unconstitutional Legislation in History?* (Oct. 29, 2020), https://millstein.law.columbia.edu/sites/millstein.law.columbia.edu/files/content/docs/Grundfest%20Slides%20-%20Conference%20on%20Racial%20Equity%20in%20CorpGov%20(10.27.20).pdf.
[54] *See* Brummer & Strine, *supra* note 42, at 53–54; *see also* Chaz Brooks, *Gen Y More Black Corporate Directors*, 59 U. RICH. L. REV. (2025).
[55] *See* Lisa M. Fairfax, *Racial Rhetoric or Reality? Cautious Optimism on the Link Between Corporate #BLM Speech and Behavior,* 2022 COLUM. BUS. L. REV. 118 (2022).
[56] A.B. 979, § (1), 2019-2020 Leg., Reg. Sess. (Cal. 2020).
[57] *Id.*
[58] *Id.*
[59] Fines amount to $100,000 for the first violation and $300,000 for each subsequent violation. *Id.*
[60] LATINO CORPORATE DIRECTORS ASSOCIATION, CALIFORNIA BOARDROOM EQUITY REPORT (2022), https://www.latinocorporatedirectors.org/docs/LCDA_California_Boardroom_Equity_Report_May_2022.pdf.

SEC approval[61] for a "comply-or-explain" rule that imposed two principal requirements.[62] First, the rule required listed firms to aggregate and disclose directors' voluntarily self-identified identity related to gender, race, and LGBTQ+ status (the "Board Diversity Disclosure Rule").[63] Second, the rule required firms' boards to include a certain number of "diverse" directors, or publicly disclose why their board did not include them (the "Board Diversity Objective" rule).[64] This rule obligated firms to disclose board diversity data to shareholders but did not impose financial or legal penalties for noncompliance.[65] Rather than mandating change, it left enforcement to shareholders, who could decide whether the firm's explanation was sufficient. If they were dissatisfied, they could either vote to change the board or sell their shares, just as with any other corporate decision. The SEC approved the Nasdaq listing rule in August 2021.[66]

While both the Nasdaq rule[67] and the CA legislation[68] quickly faced challenges in court, their passage indicated the pressure corporations faced on board diversity. In fact, despite legal challenges facing legislative and regulatory efforts to advance board diversity, stakeholders, including investors, continued to push companies to diversify their boards.

In response to these various efforts, the composition of public company boards shifted in dramatic ways, with more women and minority directors added to boards each year.[69] To illustrate,

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[61] SEC Nasdaq Rule Approval, *supra* note 8.
[62] *See* Ron S. Berenblat & Elizabeth Gonzalez-Sussman, *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/.
[63] *See* Press Release, Elad L. Roisman, Comm'r., Statement on the Commission's Order Approving Exchange Rules Relating to Board Diversity (Aug. 6, 2021), https://www.sec.gov/news/public-statement/roisman-board-diversity [https://perma.cc/EK5N-2QT4]. *See* Nasdaq Listing Rule 5605(f) (diverse board representation) and 5606 (board diversity disclosure). In addition, the rule makes special provisions for smaller companies and those companies with five or fewer directors. Nasdaq Rule 5605(f)(2)(D). Companies with five or fewer directors can satisfy the diversity requirement by having one director who self-identifies as female or an underrepresented minority or LGBTQ+. *Id.* Smaller Reporting Companies (as defined by SEC regulations) can meet the diversity requirement if they have two female directors or one female director and one director who is an underrepresented minority or LGBTQ+. Nasdaq Rule 5605(f)(2)(C). Foreign Issuers can comply with the rule with two female directors or with one female director and one director who is an underrepresented individual based on national, racial, ethnic, indigenous, cultural, religious, or linguistic identity in the country in which the company's executive offices are located, or LGBTQ+. Nasdaq Rule 5605(f)(2)(B); *see also Nasdaq's Board Diversity Rule: What New Companies Listing on Nasdaq Should Know*, NASDAQ, at 2 (Feb. 18, 2022), https://listingcenter.nasdaq.com/assets/New%20Companies%20Listing%20on%20Nasdaq.pdf [https://perma.cc/4Q8V-9SVC] [hereinafter *What New Companies Should Know*].
[64] *What New Companies Should Know*, *supra* note 63, at 1.
[65] John Livingstone et al., *The Attack on Nasdaq's Board Diversity Rule*, OXFORD BUS. L. BLOG (Sep. 23, 2022), https://blogs.law.ox.ac.uk/oblb/blog-post/2022/09/attack-nasdaqs-board-diversity-rule; SEC Nasdaq Rule Approval, *supra* note 8, at 64.
[66] *See* Cydney Posner, *SEC Approves Nasdaq "Comply-or-Explain" Proposal for Board Diversity*, COOLEY PUBCO (Aug. 9, 2021), https://cooleypubco.com/2021/08/09/sec-approves-nasdaq-diversity-proposal/.
[67] In December 2024, the United States Court of Appeals for the Fifth Circuit vacated the Nasdaq board diversity rule, finding that in approving the Nasdaq rule the SEC had exceeded its authority under the Securities Exchange Act of 1934. *See* Skadden, *Nasdaq Board Diversity Rules Vacated by the Fifth Circuit* (Dec. 16, 2024), https://www.skadden.com/insights/publications/2024/12/nasdaq-board-diversity-rules-vacated-by-the-fifth-circuit.
[68] AB 979 in CA was held to constitute an unconstitutional racial quota in violation of the Equal Protection Clause. *See* All. for Fair Bd. Recruitment v. Weber, No. 2:21-cv-01951, 2023 U.S. Dist. LEXIS 85662 (E.D. Cal. May 17. 2023). The case was appealed in June 2023, and the appeal is pending.
[69] *See generally* SPENCER STUART, 2024 U.S. SPENCER STUART BOARD INDEX (2024), *available at* https://www.spencerstuart.com/-/media/2024/09/ssbi2024/2024_us_spencer_stuart_board_index.pdf. In 2025, "for

board gender diversity has increased substantially across corporate America.[70] While in 2008, women held only 16% of S&P 500 board seats, by 2024 that number had increased to 34%.[71] Similarly, by 2024 the percentage of minority directors had increased to 24%. In comparison, in 2012, "around 55% of U.S. public companies had no racial minorities represented on their boards of directors, and fewer than 20% had more than one minority director."[72] Importantly, several studies find that diverse newly appointed directors proved as, if not more, qualified than candidates appointed in the past.[73]

Nevertheless, the significant changes in diversity in corporate leadership may prove fleeting. As we discuss below, several key mandates promoting or requiring board diversity – California's SB826 and AB979 as well as the Nasdaq diversity disclosure rule – have subsequently been invalidated by the courts, though companies largely continued their diversity efforts in response to investor and stakeholder pressure. The real threat to these gains emerged in late 2024 and 2025, when political and regulatory pressures dramatically shifted following President Trump's January 2025 executive orders targeting DEI programs.[74] In response, major institutional investors, including the "Big Three" reversed their diversity policies, and experts warn of "a broader slowdown in diversity efforts as investor and regulatory pressures ease amid rising legal and political scrutiny of corporate DEI practices."[75]

2. Inclusion in the C-Suite

Following on the heels of efforts to increase board diversity, corporations also began to face greater demands for diversity in the C-suite. However, achieving gender parity at the executive level proved significantly more complex than on boards.[76] While both Germany and

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the first time, women and non-White men hold just over half, or 50.2%, of the more than 5,500 board seats at S&P 500 companies, according to data compiled for Bloomberg by ISS-Corporate. That compares with five years ago when White men accounted for almost 60% of the directorships." Jeff Green, *White Men in the Minority as US Boardrooms Enter New Era*, BLOOMBERG (May 8, 2025), https://www.bloomberg.com/news/articles/2025-05-08/s-p-500-board-seats-see-demographic-shift-as-white-men-lose-majority.

[70] Outside of the largest companies, board diversity has been more elusive. *See* Kobi Kastiel & Yaron Nili, *The Corporate Governance Gap*, 131 YALE L.J. 782, 837 (2022); Fairfax, *supra* note 4*, at* 1055–56. In addition to lagging diversity at small publicly traded companies, board diversity at private companies—even the largest ones—continues to lag. *See* Jennifer S. Fan, *Innovating Inclusion: The Impact of Women on Private Company Boards*, 46 FLA. ST. U. L. REV. 345, 374 (2019).

[71] David F. Larcker & Brian Tayan, *Diversity in the C-Suite: The Dismal State of Diversity Among Fortune 100 Senior Executives*, ROCK CTR. FOR CORP. GOVERNANCE AT STAN. UNIV. CLOSER LOOK SERIES, No. CGRP-82 (Apr. 1, 2020), at 5, https://ssrn.com/abstract=3587498 [https://perma.cc/TW5g-TM8H]. SPENCER STUART, *supra* note 69, at 26. Women's leadership in board committees is rising. *See id.* at 29.

[72] Vicki L. Bogan, Ekaterina Potemkina & Scott E. Yonker, *What Drives Racial Diversity on U.S. Corporate Boards? Mandates or Movements* (Oct. 29, 2021), https://ssrn.com/abstract=3952897.

[73] *See* Anete Pajuste, Maksims Dzabarovs & Romans Madesovs, *Boardroom Racial Diversity: Evidence from the Black Lives Matter Protests,* 32 CORP. GOVERNANCE: INT'L REV. 170, 176 (2024). For a summary of other studies, see Barzuza & Parchomovsky, *supra* note 20, at 1069-70.

[74] LEAN IN AND MCKINSEY & COMPANY, WOMEN IN THE WORKPLACE (2024), https://cdn-static.leanin.org/women-in-the-workplace/2024-pdf.

[75] Andrew Jones, *Women in the Boardroom: Recent Progress and the Road Ahead*, THE CONFERENCE BOARD (Mar. 5, 2025), https://www.conference-board.org/publications/women-in-the-boardroom-recent-progress-and-the-road-ahead.

[76] *See* Afsharipour, *Women and M&A*, *supra* note 44, at 411–13; *see also* 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/.

France passed mandates for gender inclusion in the C-Suite in 2021,[77] legislative efforts were not seriously considered in the United States. Instead, diversity in the C-suite was primarily in the realm of shareholder advocacy. For example, in 2020, the New York City Comptroller, on behalf of several public employee pension funds, asked S&P 100 companies to disclose publicly their EEO-1 reports, which are filed with the Equal Employment Opportunity Commission.[78] In the private sector, BlackRock encouraged companies in 2022 to include leadership, director, and staff diversity in their sustainability reports.[79] Other shareholders submitted diversity-oriented proposals that targeted corporate leadership. Some proposals focused on disclosure and transparency, such as a report on workforce diversity or a report on the company's strategic plan to increase the diversity of its leadership and workforce.[80] Others sought action from the company, with proposals to include diversity targets into senior executives' compensation packages.[81]

Stakeholder pressure on corporations to increase the diversity of their leadership has led to change, especially at the largest companies. While the C-suite's long-standing gender disparities are well-documented, the past ten years have produced notable change in the C-suite.[82] By late 2020, the number of women CEOs of Fortune 500 companies hit an unprecedented high of forty-one CEOs, about 8%.[83] By 2025, that number rose to a record of 58 CEOs, constituting about 11.6% of CEOs in the Fortune 500.[84] Beyond the CEO role, women make up approximately 29% of C-level executives, compared with just 17% in 2015.[85] Numbers for other groups continued to lag.

Yet even as companies reached new heights in diversifying their leadership, the very visibility of these diversity efforts – from California's groundbreaking legislation to Nasdaq's disclosure rules – made them prominent targets for those opposed to affirmative action in any

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[77] Rixain Act (2021); Führungspositionengesetz II (2021).

[78] Press Release, Scott M. Stringer, N.Y.C. Comptroller, NYC Funds Escalate Campaign Calling on Major Companies to Publicly Disclose Workforce Demographics (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/EKV3-49LY].

[79] *See* BLACKROCK, INVESTMENT STEWARDSHIP: OUR APPROACH TO ENGAGEMENT ON HUMAN CAPITAL MANAGEMENT 2 (2022), https://perma.cc/2KDU-DS2B; Martinez & Fletcher, *supra* note 7, at 893.

[80] *See* Angelo Martinez, *Shedding Light on Diversity-Based Shareholder Proposals*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 16, 2018), https://corpgov.law.harvard.edu/2018/10/16/shedding-light-on-diversity-based-shareholder-proposals/.

[81] *See, e.g.*, *Alphabet, Inc.—Senior Executive Diversity (2019)*, TRILLIUM ASSET MGMT. (Dec. 19, 2018), https://archive.trilliuminvest.com/shareholder-proposal/alphabet-inc-senior-executive-diversity-2019/ [https://perma.cc/D5YS-JMMB].

[82] *See* LEAN IN & MCKINSEY, WOMEN IN THE WORKPLACE, *supra* note 74.

[83] Vanessa Fuhrmans, *There Are More Female CEOs than Ever, and Many of Them Are in Retail*, WALL ST. J. (Nov. 25, 2020), https://www.wsj.com/articles/there-are-more-female-ceos-than-ever-and-many-of-them-are-in-retail-11606328235 [https://perma.cc/89HX-T6SX].

[84] *See* Emma Hinchliff & Nina Ajemian, *The Fortune 500 Has Two New Female CEOs—Finally Pushing That Milestone Above 11%,* FORTUNE (Jan. 8, 2025), https://fortune.com/2025/01/08/the-fortune-500-has-two-new-female-ceos-finally-pushing-that-milestone-above-11/.

[85] LEAN IN & MCKINSEY, WOMEN IN THE WORKPLACE, *supra* note 74. Overall, women have made progress, but the absence of women of color in the C-Suite is notable. Women of color account for about 20% of the U.S. population and make up about 17% of entry level workers at firms. *Women of Color in the United States (Quick Take)*, CATALYST (Jan. 31, 2022), https://www.catalyst.org/research/women-of-color-in-the-united-states/ [https://perma.cc/23LD-N2W2]. Yet in 2024, few women of color held leadership positions at large corporations, making up only 7% of leaders in the C-Suite. LEAN IN & MCKINSEY, WOMEN IN THE WORKPLACE, *supra* note 74

form. What followed was a coordinated litigation assault on these two U.S. attempts to harmonize corporate inclusion.

C. Reversal of Fortune

Assertive moves to diversify corporate leadership invited scrutiny from conservative quarters. Edward Blum, an activist focused on dismantling affirmative action since 2012, had already begun identifying cases for litigation.[86] He founded both Students for Fair Admissions and Alliance for Fair Board Recruitment, the organizations that led the litigation against affirmative action and board diversity remedies, respectively.[87]

The major shift in diversification efforts began with the Supreme Court's *Students for Fair Admissions* (*SFFA)* decision,[88] which voided affirmative action policies at public and private universities, overturning decades of precedent. That ruling capped a long battle over affirmative action, with a lengthy articulation of the ways in which the consideration of racial identity in college admission processes violated U.S. constitutional norms. Many of the core arguments that appeared in SFFA applied to efforts to legislate board diversity.

The prior year, courts found both California mandates – SB826 and AB979 – unconstitutional.[89] Courts invalidated both on grounds that they violated the Equal Protection provision of the constitution and that they did not withstand strict scrutiny.[90]

The Fifth Circuit then overturned the Nasdaq rule after two hearings, despite the rule imposing no mandate on firms other than disclosure.[91] The first ruling by the Circuit in October 2023 sided with Nasdaq, focusing on how Nasdaq itself is not a government entity and that its board diversity rules proposed could not be attributable to the government[92] finding that the SEC had complied with its statutory obligations.[93] The petitioners appealed and the court reheard the

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[86] Lulu Garcia-Navarro, *He Worked for Years to Overturn Affirmative Action and Finally Won. He's Not Done,* N.Y. TIMES (July 8, 2023); Martin Bell, Alicia Washington & Leah Malone, *Fifth Circuit Declines to Review SEC's Approval of Nasdaq's Board Diversity Rule*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 15, 2023), https://corpgov.law.harvard.edu/2023/11/15/fifth-circuit-declines-to-review-secs-approval-of-nasdaqs-board-diversity-rule/.

[87] These efforts elicited significant intra-community debate in the Asian American Community. Some organizations, such as the Asian American Coalition for Education, supported the efforts of Student's for Fair Admissions (SFFA), including its efforts in Students for Fair Admissions Inc. v. President & Fellows of Harvard College, 600 U.S. 181 (2023), while others such as the Asian American Legal Defense and Education Fund filed amicus briefs opposing SFFA. *See* Christina Pazzanese, *Harvard Gets Broad Support in Admissions Case*, THE HARV. GAZETTE (Aug. 3, 2022), https://news.harvard.edu/gazette/story/2022/08/harvard-gets-broad-support-in-admissions-case/.

[88] Students for Fair Admissions Inc. v. President & Fellows of Harvard College, 600 U.S. 181, 22 (2023).

[89] All. for Fair Bd. Recruitment v. Weber, 2023 U.S. Dist. LEXIS 85662 § 3(e)(1) (E.D. Cal. May 15, 2023).

[90] Christopher Auguste et al., *Diversity in the Boardroom: Nasdaq's Diversity Disclosure Rules Struck Down by En Banc Fifth Circuit Court of Appeals*, HERBERT SMITH FREEHILLS KRAMER (Jan. 6, 2025), https://www.jdsupra.com/legalnews/diversity-in-the-boardroom-nasdaq-s-7672812/ [hereinafter *Diversity in the Boardroom*].

[91] All. for Fair Bd. Recruitment v. SEC, 2023 U.S. App. LEXIS 27705, at 6 (5th Cir. Oct. 18, 2023). Edward Blum, the conservative legal activist who overturned U.S. affirmative action policies in *Students for Fair Admission v. Harvard*, initiated the suit. See Jody Godoy, *Conservatives Challenging Nasdaq Board Diversity Rule Appeal to Full 5th Circuit*, REUTERS (Oct. 25, 2023), https://www.reuters.com/legal/conservatives-challenging-nasdaq-board-diversity-rule-appeal-full-5th-circuit-2023-10-25/.

[92] *All. for Fair Board Recruitment,* 2023 U.S. App. LEXIS 27705*,* at 7.

[93] *Id.* at 2.

case *en banc.* In December 2024, the Fifth Circuit issued a sharply divided 9-8 *en banc* ruling reversing the panel's decision.[94] The court stated that the scope of SEC's statutory authority was "limiting speculation, manipulation, and fraud, and removing barriers to exchange competition."[95] It found that the SEC failed to demonstrate how the proposed rules aligned with the statutory purposes of the Securities Exchange Act, namely in preventing fraud, manipulation, or speculation. The court did not reject the value of board diversity itself, but held that such diversity fell outside the SEC's enumerated mandate under the Exchange Act, even though it was a Nasdaq rule.[96] Shortly thereafter, Nasdaq proposed to remove the rule, and the SEC approved it.[97] Nonetheless, while regulations no longer require disclosure, for a period of time. proxy advisory firms like Institutional Shareholder Services and Glass Lewis continued to request board diversity data.[98] However, given the growing political pressure faced by these firms in 2025, ISS, as well as major institutional investors, appears to be softening their positions on board diversity.[99]

From the day he took office in January 2025, President Trump immediately began to target DEI. Trump's January 20, 2025, Executive Order entitled "Ending Radical And Wasteful Government DEI Programs And Preferencing"[100] barred any and all governmental efforts regarding DEI. The next day, his order "Ending Illegal Discrimination and Restoring Merit-Based Opportunity"[101] sought to "encourage the private sector to end illegal discrimination and preferences, including DEI."[102] This federal effort sparked a similar push by the attorneys general of ten states, who published a letter targeting the six largest financial institutions to pressure them to eliminate their DEI and ESG programs, warning that they would face reprisals if they do not stop advancing "discriminatory employment quotas."[103]

The Trump administration has relentlessly continued to pressure industries, firms, and

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[94] All. for Fair Bd. Recruitment v. SEC, 2024 U.S. App. LEXIS 31475 (5th Cir. Dec. 11, 2024).
[95] *Id*. at 11.
[96] *Id*. By applying struct scrutiny to whether board diversity disclosure was 'related to' the Exchange Act's core purposes, the majority arguably subjected a private market actor's rule to a more stringent test than Congress intended.
[97] John J. Spidi, *Nasdaq Diversity Rules Struck Down*, NAT'L L. REV. (Jan. 30, 2025), https://natlawreview.com/article/nasdaq-diversity-rules-struck-down [https://perma.cc/H4SM-8RYK].
[98] *Diversity in the Boardroom*, *supra* note 90.
[99] *See* David A. Katz, Elina Tetelbaum & Loren Braswell, Trump Issues Executive Order Targeting Proxy Advisors and Shareholder Proposals, HARV. L. SCH. F. ON CORP. GOVERNANCE (DEC. 17, 2025), HTTPS://CORPGOV.LAW.HARVARD.EDU/2025/12/17/TRUMP-ISSUES-EXECUTIVE-ORDER-TARGETING-PROXY-ADVISORS-AND-SHAREHOLDER-PROPOSALS/; *see also* Beth Sasfai, Michael Mencher & Vince Flynn, *Board Diversity: Policy Updates and Considerations for Proxy Season*, HARV. L. SCH. F. ON CORP. GOVERNANCE (MARCH 6, 2025), https://corpgov.law.harvard.edu/2025/03/06/board-diversity-policy-updates-and-considerations-for-proxy-season/; Raquel Fox, Marc S. Gerber & Elizabeth R. Gonalzez-Sussman, *Glass Lewis To End Benchmark Proxy Voting Policy: What Companies Should Know*, HARV. L. SCH. F. ON CORP. GOVERNANCE (OCT. 29, 2025), https://corpgov.law.harvard.edu/2025/10/29/glass-lewis-to-end-benchmark-proxy-voting-policy-what-companies-should-know/.
[100] Exec. Order No. 14,151, 90 Fed. Reg. 8339 (Jan. 20, 2025), https://www.govinfo.gov/app/details/FR-2025-01-29/2025-01953
[101] Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 31, 2025), https://www.govinfo.gov/app/details/FR-2025-01-31/2025-02097.
[102] *Id.*
[103] Letter from Ken Paxton, Tex. Att'y Gen to JPMorgan Chase, Bank of America, Morgan Stanley, Goldman Sachs, Citigroup, and BlackRock Regarding Alleged Legal and Contractual Violations at 2 (Jan. 23, 2025), https://www.texasattorneygeneral.gov/sites/default/files/images/press/Paxton%20Financial%20Institutions%20Letter%20Final.pdf.

universities to eliminate DEI efforts.[104] As a result of this severe series of governmental actions, firms that had previously led the push for inclusion and DEI efforts after 2020, such as BlackRock, made a direct about-face on many of their policies.[105] Dozens of major employers identified DEI as a *risk factor*.[106] Firms such as John Deer, Harley Davidson, Jack Daniels rolled back their DEI commitments.[107] Some firms also eliminated DEI roles—such as the chief diversity officer role—and programs.[108]

The backlash represents part of a broader anti-DEI movement driven by politicians, activists, and segments of the general public who challenge the effectiveness, legitimacy, and legality of these programs. A central argument against DEI holds that its emphasis on demographic identity undermines meritocracy and functions as a vehicle for identity-based preferences, often framed as "reverse discrimination."[109] Conservative activists that once revered the public-private divide, and favored allowing firms complete bandwidth to manage their affairs, have utilized similar arguments to pressure firms to eliminate DEI departments and objectives due to perceived "business and financial risks."[110] These activists, like Robby Starbuck, have used social media to drive pressure on firms to shelve their inclusivity initiatives. Posts on platforms like X (formerly Twitter), expose companies as overly "woke." [111] These pressure campaigns can carry significant consequences. After Bud Light partnered with Dylan Mulvaney, a transgender advocate, they faced a loss of $1.4 billion in sales. They retreated from their prior inclusive stance in a rapid fashion that underscored how the inclusive commitment held little staying power.[112]

Meanwhile, some academics have also questioned the effectiveness of existing DEI programs.[113] Some studies highlight limited effectiveness,[114] while others demonstrate decreasing

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[104] James Frater & Olesya Dmitracova*, US Embassies to Contractors Worldwide: Cancel Any Diversity Programs or Risk Going Unpaid*, CNN (Apr. 1, 2025) https://www.cnn.com/2025/04/01/business/us-embassies-european-suppliers-dei-intl.

[105] Silla Brush, *BlackRock Ends Diversity Goals, Merges DEI Staff Into New Team*, BLOOMBERG (Feb. 28, 2025) https://fortune.com/2025/02/28/blackrock-diversity-dei-new-team/.

[106] *Id*.

[107] Nathaniel Meyersohn, *The Right-Wing Activist Riding a Wave of Opposition to DEI in Corporate America*, CNN (Aug. 28, 2024), https://www.cnn.com/2024/08/28/business/dei-john-deere-harley-davidson-robby-starbuck/index.html. Robby Starbuck, who spearheaded these campaigns, explicitly stated that his strategy was to first target companies "that depend on the right-wing consumer" as these were the brand most unlikely to be diversity leaders. *Why America's Biggest Companies Are Going Anti-'Woke'*, THE WALL ST. J. (Jan. 7, 2025), https://www.youtube.com/watch?v=BuUUQBH_VlY.

[108] Lisa Talbot et al., *The Backlash Against DEI in the U.S. and What It Means for Canadian and Cross-Border Companies*, TORYS LLP (Feb. 7, 2025), https://www.torys.com/our-latest-thinking/publications/2025/02/the-backlash-against-dei-in-the-us.

[109] Sidley Austin LLP, *Sidley Discusses the Evolving Corporate Diversity, Equity, and Inclusion Landscape* (Feb. 21, 2025), ma-litigation.sidley.com/2025/02/sidley-discusses-the-evolving-corporate-diversity-equity-and-inclusion-landscape; Denise Robb & Sarah Rana, *Cutting the Cord: Good Riddance to Ineffective DEI Programs*, 17 INDUS. & ORG. PSYCHOL. 507, 508 (2024), https://doi.org/10.1017/iop.2024.38 [hereinafter *Cutting the Cord*]

[110] Sidley Austin LLP *supra* note 109.

[111] Robby Starbuck, "It's time to expose Tractor Supply..." (June 6, 2024), https://x.com/robbystarbuck/status/1798773494127411262. This tweet serves as an example of an exposing tweet, where an individual or conservative activist publicly critiques a corporation's DEI policies or initiatives.

[112] *Id.* This kind of numbers-driven about-face reflects the inadequacy of the business case for inclusion.

[113] *Cutting the Cord*, *supra* note 109 at 508.

[114] William T.L. Cox & Patricia G. Devine, *The Prejudice Habit-Breaking Intervention: An Empowerment-Based Confrontation Approach in* CONFRONTING PREJUDICE AND DISCRIMINATION 249 (Elsevier, 2019); Patricia G.

support for these initiatives.[115] Despite the increase in criticism, scholars emphasize that further research is needed to assess whether board diversity initiatives actually improve financial performance, as existing studies show mixed results and often fail to establish clear causal relationships between diverse board composition and firm profitability.[116]

At the same time that efforts against DEI have advanced in the political sphere, some corporate leaders and stakeholders have shown caution against jettisoning the advancements on inclusion in corporate governance.[117] As we discuss in Part III below, other prominent firms engaged in public statements and actions, specifically with disclosure.[118] While some firms, such as Meta (Facebook's parent company), have quickly fallen in line with demands to eliminate their diversity efforts, other firms have continued to evolve their inclusion efforts.[119] Experts indicate that some firms have changed their policies (or the naming of their programs) not out of ideological shifts but rather to navigate political pressures without sparking controversy.[120] Even under pressure, some firms have remained outwardly committed to inclusive practices. For example, the CEO of Cisco, one of the largest technology companies in the U.S., defended the company's DEI initiatives, stating that "a diverse workforce is better" and "there's too much business value" that stems from these policies.[121] Similarly, in response to an anti-DEI shareholder proposal by the National Center for Public Policy Research that requested a "Report on the Risks of Maintaining DEI Efforts,"[122] Costco's board defended the company's inclusive practices as crucial to helping Costco's business succeed by enhancing employment satisfaction, providing diverse insights into consumers, and fostering creativity and innovation.[123] Accordingly, the Costco board unanimously asked shareholders to reject the proposal. Shareholders followed the board's recommendation, with over 98% of Costco shareholders voting against the proposal.[124] As we discuss in Part III below, like Costco, board of directors from a variety of companies have met the flurry of anti-DEI shareholder proposals with a variety of rationales defending their DEI policies—rationales that

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Devine & Tory L. Ash, *Diversity Training Goals, Limitations, and Promise: A Review of the Multidisciplinary Literature*, 73 ANN. REV. PSYCH. 403 (2022), 10.1146/annurev-psych-060221-122215.

[115] Edward H Chang et al., *The Mixed Effects of Online Diversity Training*, 116 PROC. NAT'L ACAD. SCI. 7778 (2019), https://doi.org/10.1073/pnas.1816076116.

[116] *Cutting the Cord, supra* note 109 at 508.

[117] *See* LITTLER, 2025 INCLUSION, EQUITY, AND DIVERSITY C-SUITE SURVEY REPORT (Feb. 2025), https://www.littler.com/sites/default/files/2025_littler_csuite_survey_report.pdf.

[118] Mike Scarcella, *Trump's Orders Targeting Law Firms Raise Constitutional Concerns, Experts Say,* REUTERS (Mar. 10, 2025), https://www.reuters.com/world/us/trumps-orders-targeting-law-firms-raise-constitutional-concerns-experts-say-2025-03-08/; *see also* Part III *infra*.

[119] *See* Jessica Guynn, *Trump Says He Killed DEI. So Why Isn't It Dead Yet? Cracks Emerge in War on 'Woke'*, USA TODAY (May 18, 2025), https://www.usatoday.com/story/money/2025/05/18/why-trump-is-trying-to-kill-dei/83647800007/.

[120] *See* LITTLER, 2025 C-SUITE SURVEY REPORT*, supra* note 117.

[121] Dan Primack, *Cisco CEO Chuck Robbins Defends DEI at His Company*, AXIOS (Jan. 22, 2025), https://www.axios.com/2025/01/22/cisco-chuck-robbins-defends-dei.

[122] Costco Wholesale, Proxy Statement for Annual Meeting of Shareholders to Be Held January 23, 2025 at 31–32 (2025), https://s201.q4cdn.com/287523651/files/doc_financials/2024/ar/FY24-Proxy-Statement.pdf [hereinafter Costco Proxy Statement]; Anne D'Innoncenzio, *Costco Successfully Defends its Diversity Policies as Other US Companies Scale Theirs Back*, AP NEWS (Jan. 23, 2025), https://apnews.com/article/costco-shareholder-proposal-diversity-dei-0330f448741b35f2f788a36948ff3f95.

[123] Costco Proxy Statement*, supra* note 122, at 32.

[124] Kelly Tyko, *Costco Shareholders Overwhelmingly Reject Anti-DEI Measure,* AXIOS, (Jan. 23, 2025) https://www.axios.com/2025/01/23/costco-dei-shareholders-reject-anti-diversity-proposal.

align with findings from decades of research on effective group decision-making.

These defenses of DEI initiatives reveal that experienced directors understand that inclusive practices constitute fundamental components of effective governance. Despite this insight, many firms have hastily retreated from their diversity commitments. This retreat surely embodies more than just political capitulation; it may also represent internal firm resistance to inclusion efforts, and frustration with failed attempts at inclusion.[125] Above all, it is a symptom of a deeper governance failure: governance, especially regarding policies such as these, should be deliberate and careful, not impulsive.[126] To understand why firms are abandoning practices, we must examine the broader transformation of corporate governance driven by the technology sector's rise to dominance and its normalization of concentrated power, excessive risk-taking, and short-term thinking.

Part II. Bad Governance: The Corporate Governance Risks of Abandoning Diversity

This Part argues that the current retreat from DEI initiatives represents a dangerous abandonment of sound corporate governance principles. While U.S. firms have experienced unprecedented growth in recent decades, corporate governance has simultaneously experienced a troubling decline in quality, which sporadic DEI efforts have failed to counteract. Good governance depends on effective teamwork on boards and in C-suites, and diverse perspectives play a central role in enabling such teams to achieve the most careful, deliberate, and effective processes. The retreat from DEI is both a symptom of and a contributor to bad governance.[127] Bad, or weak, governance consists of ill-considered, knee-jerk and myopic decisions of a firm that ultimately result in poor performance. While several other factors undermine good governance, the spectacular expansion of the tech sector stands out as the most prominent. Tech famously suffers from multiple governance weaknesses, including significant gaps in workforce and board diversity, concentrated ownership through dual class stock structures and founder control that limits board independence and accountability.[128] Capital and labor markets favor tech firms with

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[125] Although distinct, these observations may also be seen in the rapid retreat of DEI efforts in universities. *See* Erin Gretzinger, Maggie Hicks, Christa Dutton, Jasper Smith, Sonel Cutler & Aisha Baiocchi, *Tracking Higher Ed's Dismantling of DEI*, Chronicle of Higher Ed. (Dec. 16, 2025), https://www.chronicle.com/article/tracking-higher-eds-dismantling-of-dei.

[126] Some may argue that the rush toward DEI in the early 2020s reflected social pressure more than deliberate governance.

[127] *See* Carol Liao, *Power and the Gender Imperative in Corporate Law*, *in* CREATING CORPORATE SUSTAINABILITY: GENDER AS AN AGENT FOR CHANGE 282 (Sjåfjell & Fannon eds., 2018) (arguing that the long-standing lack of gender diversity in corporate governance has perpetuated entrenched ideologies—including shareholder wealth maximization at all cpsts—in corporate law).

[128] *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, HIGH TECH, LOW INCLUSION (2024), https://www.eeoc.gov/sites/default/files/2024-09/20240910_Diversity%20in%20the%20High%20Tech%20Workforce%20and%20Sector%202014-2022.pdf; Daniel Wiessner, *EEOC Says High Tech Workforce Continues to Lack Diversity*, REUTERS (Sept. 11, 2024), https://www.reuters.com/legal/government/eeoc-says-high-tech-workforce-continues-lack-diversity-2024-09-11/; Rebekah Bastion, *A Rise In Biased Job Language Is Not Helping Tech's Lack Of Diversity A Rise In Biased Job Language Is Not Helping Tech's Lack Of Diversity*, FORBES (May 1, 2023), https://www.forbes.com/sites/rebekahbastian/2023/05/01/a-rise-in-biased-job-language-is-not-helping-techs-lack-of-diversity/. Some scholars argue that concentrated ownership and dual class structures are especially vulnerable to governance risks. *See, e.g.,* Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class*

high growth potential over old-line firms. Tech firms draw the favor of large and small investors, public and private, domestic and international. Elite staff as well as other corporate professionals – analysts, accountants, and lawyers – follow suit. The richest players' weak governance sets the standard for the rest of the market, pressuring other firms to ditch traditional governance in order to "keep up" on the perceived path to financial success. While these tech firms move rapidly to advance their market position, the firms and their leadership often lack the capacity to see the downsides of risk. This leaves these firms and especially their shareholders vulnerable to financial disasters. Although the dynamics described here are observable across industries, we use the technology sector as an especially salient case study because founder-centric structures and high-growth incentives can intensify common governance failure modes.

This Part examines three interconnected developments demonstrating this weakening governance. First, the increasing prevalence of imperial CEOs and the use of "founder governance" lead to excessive risk-taking and, at times, the downfall of firms. Second, firms with weak corporate governance demonstrate impulsive decision-making. This issue extends to all levels of financial and managerial decisions. The ill-designed diversity programs intended to address tech's diversity challenges, followed by the subsequent whiplash of nearly instantaneous and politically motivated abandonment of DEI efforts by many leading technology firms exposed these governance flaws.[129] Third, leaders emphasize radical short-termism at the expense of long-term financial success. This short-termism characterizes not only firms but also how leaders view their own role in the firms, as quick, transactional experiences, in which enormous pay and parachutes will cushion failures, as CEO turnover accelerates.[130] This Part examines how corporations have normalized weak governance across industries, using WeWork as a recurring case study. This Part further argues that the proper remedy for bad governance is the continued diversification of leadership teams, which plays a central role in restoring sound corporate governance.

A. Tech's Homogeneous Leadership Dominance Failed Corporate Governance

Technology firms have fundamentally altered corporate governance by demonstrating that massive returns can flow to companies that concentrate power in the hands of charismatic founders while sidelining traditional governance safeguards. Between 2010 and 2022, technology firms more than doubled their share as a percentage of overall capital markets' valuation. In that same period, tech firms went from composing 23% of the S&P 500 to 37.5%, becoming central players

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Stock, 103 VA. L. REV. 585, 591 (2017); Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L. J. 1453, 1499 (2019). For an overview of policy debates over the desirability of dual-class stock, *see* Jill E. Fisch & Steven Davidoff Solomon, *Dual Class Stock*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE, SECOND EDITION (2025).

[129] *See* Allyson Kapin, *How Big Tech Failed DEI*, FORBES (Jan. 20, 2025), https://www.forbes.com/sites/allysonkapin/2025/01/20/how-big-tech-failed-dei/.

[130] *See* Peer C. Fiss, Mark T. Kennedy & Gerald F. Davis, *How Golden Parachutes Unfolded: Diffusion and Variation of a Controversial Practice*, 23 ORG. SCI. 1077, 1078 (2011). *See also* Naomi Cahn, June Carbone & Nancy Levit, *Gender and the Tournament: Reinventing Antidiscrimination Law in an Age of Inequality*, 96 Tex. L. Rev. 425, 449-453 (2018).

in capital markets.[131] Indeed, tech companies dominate the largest stocks in the S&P 500[132] — Apple, Microsoft, Google, Amazon, and Meta collectively account for 22% of the value of the S&P 500,[133] and all have seen growth since 2016.[134] For private tech companies, the number of "unicorn" status designations has also been steadily increasing since 2013.[135] This market dominance, notably as a result of the financial performance of these firms, has created a new corporate archetype: the "imperial CEO" operating in "founder mode," where traditional checks and balances give way to cultish deference to individual genius.

In the era preceding the dominance of tech firms, investors saw firms like General Electric as corporate superstars because they reliably delivered reasonably high earnings quarter after quarter. That ideal lost its luster after the exposure of GE's earnings management techniques, which methodically reported earnings to maximize stock price improvements.[136] What really buried the memory of that corporate world was the seemingly exponential growth of tech titans like Alphabet. An entirely new world of investments driven by private equity, venture capital, and a plethora of unicorn successes followed.[137] The advent of this world created a staunch divide between tech firms, relying on often spectacular growth, and the cleaved "antiquated" firms with average or strong earnings.

The change in the corporate market directly altered governance regimes, starting with statutory influence. Overwhelmed by the massive infusion of capital, from tech and finance alike, the regulatory cat found itself chasing the corporate mouse, as companies began setting the rules and regulators scrambled to follow.[138] Governments started crafting corporate statutes to attract capital, even going so far as to allow those corporate actors to suggest and draft corporate law provisions.[139] The corporate code itself, some have argued, has become the product of those it regulates.[140] The transnational nature of capital created a transnational market for governance, in

[131] Paul Kenney, *Know What You Own: Revisiting S&P 500 Tech Exposure,* SYNTAX (Dec. 8, 2022), https://www.syntaxdata.com/research/know-what-you-own-revisiting-s-p-500-tech-exposure.
[132] Mike Minter, *Tech Sector Underperformance and Concentration Risk*, FINANCIAL SYNERGIES: WEALTH ADVISORS (Feb. 19, 2025), https://www.finsyn.com/tech-sector-underperformance-and-concentration-risk/#:~:text=The%20composition%20of%20major%20market,Alphabet%2C%20Meta%2C%20and%20Tesla.
[133] THE FIDUCIARY GROUP: INVESTMENT MANAGERS, *The Impact of the S&P Tech Industry Concentration* (July 5, 2023), https://www.tfginvest.com/insights/the-impact-of-the-sp-tech-industry-concentration .
[134] DATA TREK RESEARCH, *Big Tech Sales Growth: Past, Present and Future* (Oct. 13, 2021), https://datatrekresearch.com/big-tech-sales-growth-past-present-and-future/?v=eb65bcceaa5f.
[135] Begum Erdogan et al., *Grow Fast or Die Slow: Why Unicorns are Staying Private*, MCKINSEY & COMPANY (May 11, 2016), https://www.mckinsey.com/~/media/McKinsey/Industries/Technology%20Media%20and%20Telecommunications/High%20Tech/Our%20Insights/Grow%20fast%20or%20die%20slow%20Why%20unicorns%20are%20staying%20private/Grow-fast-or-die-slow-Why-unicorns-are-staying-private.pdf.
[136] For more on GE's earnings management scandal, *see* JAMES J. PARK, THE VALUATION TREADMILL HOW SECURITIES FRAUD THREATENS THE INTEGRITY OF PUBLIC COMPANIES 114-128 (2022).
[137] *See* Alexander I. Platt, *(More) Legal Guardrails for a Unicorn Crackdown*, 98 N.Y.U. L. REV. ONLINE 359, 462-64 (2023); Renee M. Jones, *The Unicorn Governance Trap*, 166 U. PA. L. REV. ONLINE 165, 173 (2017).
[138] Uber and Airbnb are prominent examples. *See* Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 SO. CAL. L. REV. 383, 385, 389 (2017).
[139] *See* William J. Moon, *Delaware's New Competition*, 114 NW. U. L. REV. 1403, 1432-37 (2020).
[140] KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (Princeton Univ. Press 2019).

which small nations competed with Delaware for corporate registration.[141] Then, more recently, states such as Nevada and Texas have joined the fray.[142] Thus, while Delaware had stood for traditional standards, holding Elon Musk to his contractual commitments[143] and to basic norms of compensation,[144] it subsequently made a competitive move by changing its regulations to accommodate controlling stockholders and large corporate firms.[145]

The WeWork saga[146] proves emblematic of many of these phenomena. WeWork serves as a case study for understanding the central role of the "imperial CEO" in the larger scope. The reference to "imperial" reflects the central, unchecked power of the head of such an entity. Scholars describe the term "imperial CEO" as leaders who run firms through a highly centralized form of governance in which these leaders define the firm's strategy and its future.[147] For large firms with over a hundred thousand employees, some concentration of executive decision-making authority in senior leadership proved essential to coordinating complex operations and maintaining strategic coherence. The rise of the 'superstar CEO' became a defining feature of corporate governance, particularly in tech; it makes perfect sense that some high level of centralization would prove essential to leadership. The cult of personality of these CEOs may foster growth, but also may obscure real risks.[148]

But WeWork took this concept to another level. In 2019, WeWork's IPO filing revealed a company helmed by an all-male board and executive team that had enabled CEO Adam Neumann's turbulent leadership, self-dealing, and discriminatory workplace culture.[149] The company sold its "making-the-world-a-better-place" rhetoric, but it masked a culture in which the company marginalized, harassed, and demeaned women and people of color, a phenomenon common in pre-IPO Uber as well.[150] A handful of years later, the company collapsed from its $47

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[141] *See* Martin W. Sybblis, *Corporate Law as Decolonization*, 71 UCLA L. Rev/ 798 (2024); Moon, *Delaware's New Competition*, *supra* note 139, at 1441.
[142] *See generally* William J. Moon, *Havens for Corporate Lawbreaking*, 103 WASH. U. L. REV. (forthcoming 2026), https://ssrn.com/abstract=5148347.
[143] *See* Kalley Huang, *What Is Delaware's Court of Chancery and Its Role in Elon Musk's Twitter Deal?*, N.Y. TIMES (July 12, 2022), https://www.nytimes.com/article/musk-twitter-delaware-court-chancery.html.
[144] Tornetta v. Musk, C.A. No. 2018-0408-KSJM, 2024 Del. Ch. LEXIS 372, at *2 (Del. Ch. Dec. 2, 2024).
[145] *See* Khoo & Tallarita, *supra* note 14, at 16.
[146] For a thorough recounting of the WeWork saga, see generally Donald C. Langevoort & Hillary A. Sale, *Corporate Adolescence: Why Did "We" Not Work?*, 99 TEX. L. REV. 1347 (2021); Amy Deen Westbrook, *We('re) Working on Corporate Governance: Stakeholder Vulnerability in Unicorn Companies*, 23 U. PA. J. BUS. L. 505 (2021).
[147] Brian R Cheffins, *The Corporate Governance Movement, Banks, and the Financial Crisis*, 16 THEORETICAL INQUIRIES L. 1 (2015).
[148] *See* Ulrike Malmendier & Geoffrey Tate, *Superstar CEOs*, 124 Q. J. ECON. 1593 (2009); Jeffrey B. Lovelace et al., *The Shackles of CEO Celebrity: Sociocognitive and Behavioral Role Constraints on "Star" Leaders*, 43 ACAD. MGMT. REV. 419 (2018).
[149] *See* Afra Afsharipour, *Investment Bankers and Inclusive Corporate Leadership*, 46 SEATTLE U. L. REV. 221, 248-51 (2023).
[150] *See* ELIOT BROWN & MAUREEN FARRELL, THE CULT OF WE: WEWORK, ADAM NEUMANN, AND THE GREAT STARTUP DELUSIONS 255-58 (2021); Chelsia Rose Marcius, *WeWork Ex-Employee Says She Was Demoted and Her Pay Cut Because She's a Black Woman: Suit*, N.Y. DAILY NEWS (Feb. 28, 2020), https://www.nydailynews.com/new-york/ny-wework-employee-sues-over-racial-and-gender-discrimination-20200229-r5lmwoef6fhunkjqjxceddefs4-story.html [https://perma.cc/3WTG-YDSW]. *See also,* Susan J. Fowler, *Reflecting on One Very Strange Year at Uber* (Feb. 19, 2017), https://www.susanjfowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber.

billion valuation to bankruptcy, exemplifying how homogeneous leadership creates governance blind spots that shatter firms and stakeholders alike. WeWork's failure illustrates a broader crisis: as technology firms have reshaped corporate governance norms around imperial CEOs and founder worship, there has been a systematic exclusion of diverse perspectives and an undermining of traditional forms of checks and balances.

Overconfidence by investors in Neumann, the founder, reflects a cult of masculinity that permeates much of the technology industry.[151] Members of WeWork's board of directors – composed exclusively of men[152] – and executive team – almost all men[153] – created a culture that prized performances of masculinity and focused on protecting Neumann's ego. Neumann encouraged "bravado" and "executives seemed to be constantly 'peacocking'" to impress him.[154] Executives consistently proposed male-bonding activities such as surfing and sitting in a sauna or an ice bath with Neumann, leaving little room for women to access valuable less-formal time with Neumann outside of the office.[155] WeWork's governance structure rewarded conformity and discouraged dissent, creating an echo chamber that validated Neumann's erratic behavior while systematically marginalizing women and people of color who might have provided essential reality checks.[156] Ultimately, WeWork's founder-mode centered on Neumann's masculine vision impeded effective corporate governance, with WeWork's rapid crash.[157] It skyrocketed from an idea to a multibillion dollar company, and then rapidly descended into bankruptcy largely in part due to these governance failures as the board was unable or unwilling to challenge the founder's vision.[158]

Corporate governance practitioners, experts and scholars have long argued that the imperial CEO—or the modern day version, "superstar CEOs"—poses extreme risks for effective corporate governance.[159] Unchecked power allows CEOs to engage in heightened risk-taking and disregard the checks and balances customary to companies with good corporate governance. They engage little with the lower and middle echelons of the firm and often resist diversification. In their high tower, such CEOs develop strategy without much input from others. They overlook broader firm challenges, and some scholars blame the plethora of misguided acquisitions and mergers on

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151 *See generally* Benjamin P. Edwards & Ann C. McGinley, *Venture Bearding*, 52 U.C. DAVIS L. REV. 1873, 1891–96 (2019) (discussing how "masculinity contest cultures" drive out women in Silicon Valley).
152 *See* Westbrook, *supra* note 146, at 533–34.
153 BROWN & FARRELL, *supra* note 150, at 258.
154 *Id.* at 254–55.
155 *Id.*
156 Shirin Ghaffary, *A Former WeWork Employee Is Suing the Company over Alleged Sexual Assaults Fueled by 'Frat-boy Culture'*, VOX (Oct. 12, 2018), https://www.vox.com/2018/10/12/17968668/wework-employee-sexual-assaults-lawsuit; *see also* Elana Lyn Gross, *A Former WeWork Executive's Complaint Alleges a Pattern of Gender Discrimination*, FORBES (Nov. 7, 2019) https://www.forbes.com/sites/elanagross/2019/11/07/a-former-wework-executives-complaint-alleges-a-pattern-of-gender-discrimination/?sh=41785b75110a [https://perma.cc/U8QV-XM59].
157 See BROWN & FARRELL, *supra* note 150, at 86–89, 291–92, 315.
158 Dan Byrne, *What Exactly Happened to WeWork?,* CORP. GOVERNANCE INST. (2024) https://www.thecorporategovernanceinstitute.com/insights/case-studies/what-exactly-happened-to-wework/?srsltid=AfmBOorwP7IgvJIr12lQpOEmkSaqLVUM7BRTaVjfFAbu_xto81ums3j6.
159 *See* Marek B. Nadler, *Navigating A New Management-Board Relationship*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 19, 2016), https://corpgov.law.harvard.edu/2016/10/19/navigating-a-new-management-board-relationship/; Assaf Hamdani & Kobi Kastiel, *Superstar CEOs and Corporate Law*, 100 WASH U. L. REV. 1353 (2023).

imperial CEO grandiosity.[160] Empire-building draws favor over rigorous governance that would benefit shareholders, stakeholders, as well as the long-term success of the firm.

The past few decades have heightened long-standing concern around the imperial CEO and the risks such power creates. Independent director requirements reflected an awareness that boards need to be independent from overly powerful CEOs. Say-on-pay rules, intended to add some shareholder oversight into the compensation process, also seek to counterbalance the power of the imperial CEO.[161] Nonetheless, the advent of the tech sector's centrality in the corporate world has led to a new, supercharged version of the imperial CEO - founder mode, where the CEO is *also* the principal shareholder.

As founder-centric firms became standout unicorns, the model became more common. But startups do not map well onto the principal-agent theory of corporate governance which divides power and responsibilities.[162] Founders who play multiple roles such as CEO and director often receive superpowered shares.[163] These include Alphabet's founder shares that hold important voting rights or those of WeWork that provide a 20:1 ratio between founder shares and common stock. Founders also consistently command highly favorable terms, exemplifying a failure to check their power.[164]

This dominance translates into a highly skewed corporate governance dubbed "Founder Mode." "Founder mode" represents a kind of corporate leadership in which a company thrives when the founder defines how the firm functions – its structure, its focus, its quality, and its care. This model has proved particularly hostile to diverse perspectives, as founder-directors believe they possess a "deeper understanding of the company."[165] They often run board meetings, despite their lack of governance experience.[166] In this version of the imperial CEO, the founder embeds themselves in all decision-making at *all levels* by working with leaders on the ground, rather than separate themselves in a higher tower. Nonetheless, as Airbnb founder Chesky opines, those on the ground should never be deferred to – even if they have more qualified governance expertise – as he believes founders are some of the only company actors that can consolidate opinions and view decisions at a macro-level.[167] Diving into details, for such founders, is the path to excellence.[168]

This concentration of power naturally excludes voices that don't fit the founder's demographic and cultural profile. Thus, founder mode has a darker side: myopia and an egocentric

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160 *See* Afra Afsharipour & J. Travis Laster, *Enhanced Scrutiny on the Buy-Side*, 53 GA. L. REV. 443, 453-55 (2019).
161 Afra Afsharipour & Darren Rosenblum, *Power and Pay in the C-Suite*, INEQUALITY INQUIRY 1, 2 (2021); Andrew Lund, *Say on Pay's Bundling Problems*, KY. L.J. (Aug. 2, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1598384.
162 Jennifer S. Fan & Xuan-Thao Nguyen, *Founder Worship, Effective Altruism, and Corporate Governance*, 113 K.Y. L. J. 1, 22-23 (2024-2025).
163 Jennifer S. Fan, *The Landscape of Startup Corporate Governance in the Founder-Friendly Era*, 18 N.Y.U. J. BUS. L. 317, 323-24 (Spring 2022).
164 *Id.* at 327, 348.
165*Id.* at 351.
166 *Id.* at 351, 353.
167 Scott Galloway, *Scaling Airbnb, Founder Mode, and What's Next for Travel,* THE PROF G POD (Oct. 19, 2024), https://www.youtube.com/watch?v=IodbsQV8dFE.
168 *Id.*

vision that may lead to colossal blind spots.[169] Founders build their firms on a clear idea for a new business that gains investor confidence. The investors' interest snowballs into a belief in the founder's exceptionalism – that their genius will deliver the rapid growth typical of the most successful Silicon Valley firms. This same exceptionalism may lead them (and others) to presume that broader market challenges and forces may not affect their firm. This lack of awareness of the market, including competitors and risks, leaves such firms exposed.[170] Focusing on the trees may deprive them of the forest level perspective, leaving the firm inept at conforming to corporate norms and regulatory regimes.[171] Such ineptitude could endanger the firm if the founder ignores non-founder-management directors' viewpoints.[172] "Vision and passion" can guide a firm to fulfill the founder's genius,[173] but cultish respect can trample governance and cast aside legal guardrails.[174] This aura of respectability therefore leads investors to accept concentrated founder control as a substitute for traditional governance structures.[175] While Goshen and Hamdani argue that such control enables founders to pursue an "idiosyncratic vision" that makes their companies valuable because such founders can focus on long-term goals, founder success may also be tied to market conditions and an exogenous change in fortune, such as a bear market, may expose the risks tied to the absence of board independence, oversight of self-dealing, and minority protections particularly as firms age.[176]

B. Careless CEOs, Impulsiveness & Excessive Short-Termism

As market incentives increasingly reward rapid scaling and high-risk strategies, some firms exhibit governance patterns associated with impulsive decision-making and insufficient risk oversight. Firms engage in utopic estimations of growth but avoid the necessary work of vigilance

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[169] Early research on firms where founders serve as a director illustrated that CEOs of such firms have "higher pay-for-performance sensitivity," and are more likely replaced for poor performance. Matthew R. Lyon, *Safeguarding Shareholders When the Superstar CEO Becomes a Liability*, 53 STETSON L. REV. 467, 469 (Spring 2024). Lyon reports that this is due in part by founders extending to more "effective board level monitoring." *Id.* at 470. In recent years and in particular since the Great Recession, scholars have noted both a trend towards a founder-centric model of corporate governance in startups and a distancing from some of these early findings regarding monitoring. Fan, *supra* note 163, at 319-20, 348.; Jennifer Fan, *Understanding Startup Corporate Governance*, THE FINREG BLOG (July 11, 2022), https://sites.duke.edu/thefinregblog/2022/07/11/understanding-startup-corporate-governance/. Under this model, a "best practices framework is used to implement corporate governance structure within startups," with founders directing the pace of this implementation and given deference during economic upturns. *Id.*

[170] Fan, *supra* note 163, at 324, 352.

[171] *Id.* at 347, 351.

[172] *Id.* at 324.

[173] *Id.* at 352-53.

[174] Fan & Nguyen, *supra* note 162, at 6.

[175] *Id.* at 54-55. A similar phenomenon has been noted in the case of "superstar" or "celebrity" founders, such as Elon Musk, who present characteristics of overconfidence and charisma to cultivate a particular image that becomes synonymous or interchangeable with the firm itself. Lyon, *supra* note 169. These founders also eschew corporate governance rules, with internal checks and balances clouded by their celebrity and ability to grow the startup quickly. *Id.* at 488-89 Venture capitalists themselves have begun "to see founders not as a problem that needed to be solved but as a valuable asset that needed to be retained." *Id.* These companies stay private longer, meaning they are not subject to disclosure requirements and remain highly deferential to founders. *Id.*

[176] *See* Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 571–75 (2016).

against too much risk.[177] Self-interest stemming from the concentration of power and the failure to consider diverse perspectives leads to reckless decisions. Leaders ignore calls for diversity in governance as expensive tactics that slow down the desire for a speedy profit—profit that can come at the expense of society.[178] This same profit could come at the expense of the long-term firm viability that comes from effective corporate governance.[179]

1. Impulsive & Risky Decision-Making

The academic literature offers examples that show impulsive and risky decision-making has spiked.[180] Corporate executives may not be the innately rational actors the market presumes. Some research shows that corporate executives are "prone to reckless risk taking" that engenders investment mistakes.[181] Scholars have identified patterns where management, and in particular men in management, may cut corners in their decision-making. This may arise from masculine leadership practices or even self-interest.[182] For example, unbridled self-interest corresponds with risk-taking tendencies in a way that some scholars believe resulted in the 2008 financial crisis.[183] The appeal of "self-interest" propels these risk-taking tendencies to the top and drive cautious individuals out.[184] Even in old-line firms, boards may find the lure of risky business too tempting to ignore, leading them to favor leaders who may bring these benefits.

The failure to prioritize risk is a clear consequence of the centralization of power and the spread of founder mode. The WeWork saga and its aftermath exemplify that risk appetite remains so high that even those who have destroyed businesses can *still* raise capital. Despite common knowledge of Neumann's debacles at WeWork, venture capital investors appeared unfazed by the many reports of Neumann's conduct. For example, in August 2022, well after the collapse of WeWork, Andreessen Horowitz, a prominent Silicon Valley venture capital firm, reportedly

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[177] *See generally* Hilary J. Allen, *Fintech and Techno-Solutionism*, 98 S. CAL. L. REV. 761 (2025) (arguing that faith in technology as a solution to complex social problems often leads to regulatory blind spots and weakened oversight).

[178] *See, e.g.* Tim Wu, *Big Tech's Predatory Platform Model Doesn't Have to Be Our Future*, N.Y. TIMES (Oct. 25, 2025), https://www.nytimes.com/2025/10/25/opinion/big-tech-platforms-reform.html; Eli Tan, *Their Water Taps Ran Dry When Meta Built Next Door*, N.Y. TIMES (July 14, 2025), https://www.nytimes.com/2025/07/14/technology/meta-data-center-water.html; Betsy Morris, *Ethics and Profits: The Case of Meta and Teens*, McCoy Family Center for Ethics in Society, Stanford University (2024), https://ethicsinsociety.stanford.edu/sites/ethicsinsociety/files/media/file/case_study_meta_and_teens.pdf.

[179] Barzuza & Parchomovsky, *supra* note 20, at 1079.

[180] Pria Kartik, *The Mindful Executive: Overcome Impulsivity and Boost Decision-Making*, FORBES (July 26, 2023), https://www.forbes.com/councils/forbescoachescouncil/2023/07/26/the-mindful-executive-overcome-impulsivity-and-boost-decision-making/.

[181] Renee M. Jones, *The Irrational Actor in the CEO Suite: Implications for Corporate Governance*, 41 DEL. J. CORP. L. 713, 738, 740 (2017).

[182] David Knights & Maria Tullberg, *Managing Masculinity/Mismanaging the Corporation*, 19 ORG. 385, 389-90 (2012); *see also* June Carbone, Naomi Cahn & Nancy Levit, *Women, Rule-Breaking, and The Triple Bind*, 87 GEO. WASH. L. REV. 1105 (2019).

[183] Mark Maier, *The Imperative for Servant-Leadership: Reflections on the (Enduring) Dysfunctions of Corporate Masculinity, in* GENDER IN ORGANIZATIONS 93, 105 (Ronald J. Burke & Debra A. Major eds., 2014).

[184] Jones, *supra* note 181, at 750. Considering gender, this risk-taking leads corporate executives to sense they are entitled to higher renumeration since they have successfully and visibly "conquered" the masculinity contest of the corporation. *See* Knights & Tullberg, *supra* note 182, at 400.

invested $350 million in Neuman's newest business venture.[185] While this WeWork story of funding the riskiest actors may not describe the entire corporate sector, it does put pressure on *all* corporate leaders to engage in more frequent risk to realize ever-greater returns.[186]

Homogenous leadership also enables deeper governance pathologies with regard to impulsivity in decision-making. Indeed, the quick adoption of sometimes superficial diversity measures in the early 2020s, followed by the rapid abandonment of such policies after the Trump Administration intensified political pressure on DEI initiatives, illustrates this impulsivity.[187] BlackRock, for example, centered firms they targeted for investment which chose to "run their businesses 'with a purpose.'"[188] Their CEO even asserted that the company "must embed DEI into everything we do."[189] Nonetheless, in response to Trump's executive orders, they quickly rolled back their DEI policy and disclosure of DEI information in their annual report, joining the likes of tech firms such as Google and Meta.[190]

2. Short-Termism and Regulatory Entrepreneurship

Risk-driven engagement also favors "short-termism," particularly since the global financial crisis and COVID-19.[191] The increasing dominance of shareholder primacy favors short-term interests over the institutions' long-term interests.[192] This focus "feeds competition, undermines cooperation, and promotes winner-take-all business practices," all representative of weak governance.[193] Short-termism can also take the form of corporate activism on political issues: short-term, hasty strategies chosen "without consideration of long-term consequences."[194] This

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[185] *See* Andrew Ross Sorkin, *Adam Neumann's New Company Gets a Big Check from Andreessen Horowitz*, N.Y. TIMES: DEALBOOK (Aug. 15, 2022), https://www.nytimes.com/2022/08/15/business/dealbook/adam-neumann-wework-startup.html.

[186] *See* Karen Weise & Eli Tan, *How Tech's Biggest Companies Are Offloading the Risks of the A.I. Boom*, N.Y. TIMES (Dec. 15, 2025), https://www.nytimes.com/2025/12/15/technology/ai-risks-debt.html. At least one example suggests that to some extent these governance failures may transcend gender: Elizabeth Holmes at Theranos engaged in similar patterns of deception, board capture, and resistance to oversight. The Theranos case reveals that dysfunction stems not necessarily from male leadership, but from organizational cultures that reward masculine-coded behaviors – aggressive risk-taking, dominance displays, hostility to scrutiny, and structural power concentration that creates conditions for malfeasance.

[187] Lauren Aratani, *What We Know So Far About Trump's Orders on Diversity, Equity and Inclusion,* THE GUARDIAN (Jan. 26, 2025), https://www.theguardian.com/us-news/2025/jan/26/trump-executive-orders-dei; Conor Murray & Molly Bohannon, *IBM Reportedly Walks Back Diversity Policies, Citing 'Inherent Tensions': Here Are All The Companies Rolling Back DEI Programs*, FORBES (Apr. 11, 2025), https://www.forbes.com/sites/conormurray/2025/04/11/ibm-reportedly-walks-back-diversity-policies-citing-inherent-tensions-here-are-all-the-companies-rolling-back-dei-programs/; Rebecca Schneid, *The Major U.S. Companies Scaling Back DEI Efforts as Trump Targets Initiatives,* TIME (Feb. 22, 2025), https://time.com/7260689/us-companies-scaling-back-dei-efforts-trump-targets-initiatives/.

[188] Akshaya Kamalnath, *Social Movements, Diversity, and Corporate Short-Termism*, 23 GEO J. GENDER & L. 449, 462 (2022).

[189] Murray & Bohannon, *supra* note 187. Whether BlackRock actually embedded diversity into its own corporate governance and leadership is subject to debate. *See* Rebecca Ungarino, *BlackRock's Boys' Club*, BUSINESS INSIDER (Jan. 5, 2024), https://www.businessinsider.com/blackrock-larry-fink-succession-boys-club-weidman-goldstein-2024-1.

[190] Schneid, *supra* note 187.

[191] Naomi Cahn, June Carbone & Nancy Levit, *Gender and the Tournament: Reinventing Antidiscrimination Law in an Age of Inequality*, 96 TEX. L. REV. 425, 449 (2018).

[192] *Id.* at 449

[193] *Id.* at 450.

[194] Kamalnath, *supra* note 188, at 469, 471-72.

specific form of short-termism could also help explain the rapid promotion and consequent rollback of DEI initiatives, as stakeholder concerns regarding diversity are cast as hindrances to swift financial growth. Extensive studies demonstrate how cognitive diversity slows down decisionmaking. Differences within groups prevent individuals from making assumptions. It forces groups to engage in more methodical examination of key issues, which may surface previously-overlooked longer-term consequences.[195]

Another example of short-termism is regulatory entrepreneurship. While it may not hold true for all tech firms, for many of them, their business success has involved some form of regulatory entrepreneurship. In their article, Pollman and Berry describe "regulatory entrepreneurship" as the phenomenon in which firms view altering the law as "a material part of [their] business plan."[196] These companies have "a legal issue at its core."[197] Businesses that prove well-suited for regulatory entrepreneurs are those that can be "easy to scale up quickly…foster interaction between the company and its stakeholders, and…appeal to an economically diverse audience."[198]

Rather than engage in corporate lobbying,[199] these regulatory entrepreneurs have instead used three new strategies: first, they break the law,[200] then they aim to become "too big to ban" before regulators take action,[201] while they rally large-scale public support to leverage their influence over regulatory officials.[202] The most significant example of these entrepreneurs who engaged all of these strategies is Uber, whose success was heavily determined by and built around the maneuvering through the heavily-regulated taxicab industry.[203] Like taxis, hotels face substantial municipal regulation, and proved vulnerable to regulatory entrepreneurship. Thus, Airbnb followed suit with its own sequence of acting first, then asking permission. Tesla similarly incorporated legal battles with car manufacturers into their business plan to achieve success.[204]

Regulatory entrepreneurship thus seeks out inefficient legal rules to circumvent. While greater efficiency may result, such as waiting less for transportation, it also undermines public goods, such as having drivers who are fairly paid, knowledgeable about transportation rules and practices, or know their misbehavior will lead to consequences.[205] Breaking the law becomes the core of the business model, and then with market power, the firm uses the community (sellers and customers) to lobby the state to alter the rules themselves. Arguably, nearly all major tech firms have engaged in regulatory entrepreneurship. Alphabet, founded as Google which initially had a

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[195] *See* SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES, 23-51 (2008); Katherine Phillips, *What Is the Real Value of Diversity in Organizations? Questioning Our Assumptions, in* THE DIVERSITY BONUS: HOW GREAT TEAMS PAY OFF IN THE KNOWLEDGE ECONOMY 229, 229 (Earl Lewis & Nancy Cantor eds., 2017);
[196] Pollman & Barry, *supra* note 138, at 385.
[197] *Id.* at 392.
[198] *Id.* at 390, 410-30.
[199] *Id.* at 406-10.
[200] *Id.* at 390, 398-400.
[201] *Id.* at 390, 400-03.
[202] *Id.* at 387, 390, 403-06.
[203] *Id.* at 385-86.
[204] *Id.* at 387.
[205] *Id.* at 398-408; *see also* Veena Dubal, *On Algorithmic Wage Discrimination*, 123 COLUM. L. REV. 1929, 1944-1952 (2023); Emily Steel, *Flagged for Sexual Misconduct, Many Uber Drivers Stay on the Road*, N.Y. TIMES (Dec. 29, 2025), https://www.nytimes.com/2025/12/29/business/uber-sexual-assault-drivers-complaints.html

nonprofit model, exploded as a firm once they began to engage in what Shoshana Zuboff has called "surveillance capitalism."[206] Google monetized all the interstices of our lives – creating deep and rich data about consumers that gave it a near-monopoly. Its search service was "free" to consumers because the company made so much money from selling the data of the users.[207] Likewise, Meta's products also monetized our relationships – taking our personal details without the full awareness or consent of the consumer – to monetize its deep pool of information about the billions of users.[208] Meta's practices have enabled so many unfortunate effects that one author has labeled Meta's leaders "Careless People" in a damning tell-all book.[209]

As the market rewarded rule-subversion and breaking, regulatory entrepreneur firms altered the entire economy, setting the standard for potential growth and profitability. Older mainstream firms with traditional forms of governance found themselves with comparatively weak earnings and growth. Some tried to mimic the profitability of hyper-successful technology firms. Think of car manufacturers selling details of their customers' car use and travel patterns, for example. This shift in the economy echoed in boardrooms across the world, as firms felt increased pressure to perform strikingly well. This regulatory entrepreneurship reflects a short-termism that has become increasingly normalized in the corporate world. WeWork famously utilized short-term growth hinged on rapid global expansion and aggressive leasing practices that prioritized scale over sustainability, a model that inflated growth metrics and created enormous financial liability. WeWork fueled its valuation by branding itself as a tech disruptor, rather than a real estate company[210] – an intentional mischaracterization that helped it evade regulatory scrutiny and draw in tech-focused investors. This strategy, coupled with Neumann's self-dealing described above[211], exemplifies how the firm prioritized short-term valuation gains and subverted both market and governance norms.

3. Compensation Cushions and Risk-Taking

Confidence in pay packages and golden parachutes should a firm fail has exacerbated the carelessness of boards and executives, including indifference to socio-political costs. Firms in the tech sector illustrate several of these shortcomings. It makes sense that corporate founders would feel cushioned by the unimaginable sums they receive when selling shares in their unicorn firms. But even for employee-leaders, the everyday CEOs who run most firms, multi-million dollar pay packages and parachutes cushion them from any potential falls.

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[206] SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (PublicAffairs 2019).
[207] *See* Dina Srinivasan, *Why Google Dominates Advertising Markets: Competition Policy Should Lean on the Principles of Financial Market Regulation*, 24 STAN. TECH. L. REV.. 55 (2020); Bennett Cyphers, *Google Says It Doesn't 'Sell' Your Data. Here's How the Company Shares, Monetizes, and Exploits It*, ELECTRONIC FRONTIER FOUND. (Mar. 19, 2020), https://www.eff.org/deeplinks/2020/03/google-says-it-doesnt-sell-your-data-heres-how-company-shares-monetizes-and.
[208] *See* Lena Cohen, *Mad at Meta? Don't Let Them Collect and Monetize Your Personal Data*, ELECTRONIC FRONTIER FOUND., (Jan. 17, 2025), https://www.eff.org/deeplinks/2025/01/mad-meta-dont-let-them-collect-and-monetize-your-personal-data.
[209] SARAH WYNN-WILLIAMS, CARELESS PEOPLE: A CAUTIONARY TALE OF POWER, GREED, AND LOST IDEALISM (Flatiron Books 2025).
[210] *See* BROWN & FARRELL, *supra* note 150, at 119–25.
[211] Eliot Brown, *How Adam Neumann's Over-the-Top Style Built WeWork. 'This is Not the Way Everybody Behaves.'*, WALL ST. J. (Sept. 18, 2019), https://www.wsj.com/articles/this-is-not-the-way-everybody-behaves-how-adam-neumanns-over-the-top-style-built-wework-11568823827.

Executive compensation has been spiking for decades,[212] exponentially outpacing the compensation of the general American workforce.[213] Data also reveals that executive salaries and bonuses continue to increase even when there are decreases in company profits.[214] Likewise, compensation of U.S. directors on public boards has spiked since the early 2000s, from $134K in 2000 to $327K in 2024, beyond inflation and CEO salary increases.[215] Not only has compensation gone into overdrive, but companies established golden parachutes as an "expected element of senior executive compensation,"[216] and became increasingly lucrative as compensation ballooned.[217]

Executives' confidence in their pay packages also engenders a reckless disregard for the socio-political costs of their actions. In the case of Facebook and Instagram, for example, Mark Zuckerberg not only claimed that "social media isn't harmful to mental health"[218]— but went so far as to reject company proposals to "improve teen mental health."[219] They seek short-term spikes in value to please shareholders, and have little fear of failure because their packages insulate them

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[212] Afsharipour & Rosenblum, *supra* note 161, at 2. The average CEO pay increased 997% between 1978 and 2014. *See* Biagio Marino, *Show Me the Money: The CEO Pay Ratio Disclosure Rule and the Quest for Effective Executive Compensation Reform*, 85 FORDHAM L. REV. 1355, 1361 (2016). Since 2016, the average pay of CEOs of companies on the S&P 500 still increased $4.2 million, with the 2019 average CEO pay of the largest companies in the U.S. sitting at $21.3 million. *See Executive Paywatch*, AFL-CIO, https://aflcio.org/paywatch.
[213] Robert J. Rhee, *Intrafirm Monitoring of Executive Compensation*, 69 VAND. L. REV. 695, 697 (2016); *Executive Paywatch*, AFL-CIO, *supra* note 212.
[214] Rhee, *supra* note 213, at 698.
[215] SPENCERSTUART, 2024 S&P 500 COMPENSATION SNAPSHOT, https://www.spencerstuart.com/-/media/2024/08/ssbi-comp-snapshot/2024-sp-500-compensation-snapshot.pdf?rev=ec56235f68c242d683daff49e4e30fef#:~:text=The%20average%20total%20compensation%20for,third%20year%20in%20a%20row.; Matthew Friestedt, Marc Trevino & Melissa Sawyer, *Trends in U.S. Director Compensation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 16, 2020), https://corpgov.law.harvard.edu/2020/08/16/trends-in-u-s-director-compensation/; Lily Fang & Sterling Huang, *The Governance of Director Compensation,* 155 J. FIN. ECON. 103813 (2024).
[216] Peer C. Fiss, Mark T. Kennedy & Gerald F. Davis, *How Golden Parachutes Unfolded: Diffusion and Variation of a Controversial Practice*, 23 ORG. SCI. 1077, 1078 (2011).
[217] Jeffrey N. Gordon, *Too Many Mergers? The Golden Parachute as a Driver of M&A Activity in the 21st Century*, (Colum. L. & Econ. Working Paper, No. 512065, 2025) 3, 20, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5125065. This increase continued even after the 1984 golden parachute tax penalties, with firms amending their parachute provisions "to provide recipients with additional compensation to cover the 20 percent excise tax…[and] to cover the taxes owing on additional subsidy." The ratio of golden parachutes to CEO salary increased from 13 in 2006 to 17 in 2017, revealing an increase in risk orientation. Albert H. Choi, Andrew C.W. Lund & Robert Schonlau, *Golden Parachutes and the Limits of Shareholder Voting*, 73 VAND. L.R. 223, 247 (2020). While this increase may have plateaued, proponents argue that such packages prevent an exodus of top talent. ISS CORPORATE SOLUTIONS, GOLDEN PARACHUTES FACE INVESTOR SCRUTINY: SHAREHOLDERS INCREASINGLY ASKING FOR A VOTE ON EXIT PACKAGES (2023), https://s3.us-east-1.amazonaws.com/iss-corporate.com/prod/wp-content/uploads/ics-golden-parachutes-face-investor-scrutiny.pdf?utm_medium=email&_hsenc=p2ANqtz-9a7yy1ZT84fgPyX7iSR-uAnZLRvf1t5hhm_ep8jbd2mmBmpJ8l9aBNjzmrT53kX30FXeiZIcofxwTv0azGCiTCgVMqVaiIektuDmvVk3V9kGyKQXI&_hsmi=277507602&utm_content=277507602&utm_source=hs_automation.
[218] Mitchell J. Prinstein, *Zuckerberg Claims Social Media Isn't Harmful to Mental Health—Here's What the Science Says,* AMERICAN PSYCH. ASSOC. (Feb. 9, 2024), https://www.apa.org/news/press/op-eds/zuckerberg-social-media-harmful.
[219] Brian Fung, *Mark Zuckerberg Personally Rejected Meta's Proposals to Improve Teen Mental Health, Court Documents Allege*, CNN (Nov. 10, 2023), https://www.cnn.com/2023/11/08/tech/meta-facebook-instagram-teen-safety/index.html. Dismissed initiatives by Meta's leadership include the building of "well-being tools to respond to addiction, social comparison, and loneliness" (*Id.*).

from losing their personal wealth. In this sense, short-termism and high compensation foster a reckless disregard of socio-political costs, as sky-high compensation fosters risky business. Moreover, diversity takes a seat on the backburner as an unnecessary socio-political mission and its benefits overlooked.

The normalization of excessive risk-taking has created refractory incentives throughout corporate America. Multi-million-dollar compensation packages and golden parachutes — which grow bigger year after year, even as company performance becomes more volatile – insulate executives from the consequences of their risky business. This dynamic encourages short-term thinking that prioritizes immediate returns over institutional stability, with diverse stakeholder concerns dismissed as obstacles to rapid growth. The result is this: a corporate culture that systematically undervalues the long-term perspective and stakeholder awareness that diverse leadership brings.

C. Institutionalizing Weak Governance?

Ultimately, risk-driven behavior prevents the development of the carefully minded and diverse corporate governance structures that investors, regulators, and societies rely on. But it is not just a question of behavior. It is also a question of core corporate governance. While courts have interpreted the duty of care to impose a relatively light burden on corporate actors, the language around this duty implicates a commitment of a higher order. Rather than moving towards more inclusive and accountable oversight, tech's founder-worship culture has doubled down on the historical pattern of concentrated control by predominantly white male leaders.

More recently, the weak governance exemplified by the tech sector has begun to alter the very nature of corporate governance itself. Over the past couple of decades, across the full spectrum of businesses – both public and private – a variety of firms have manipulated jurisdictions into adopting more flexible governance regimes to foster greater investment.[220] More recently, this competition to attract firms seeking more flexible regimes has moved to the U.S., as jurisdictions like Nevada and Texas have adopted flexible rules aimed at reducing shareholder rights. Most recently, Delaware has followed suit.[221] Delaware's recent corporate law developments reflect broader political tensions rather than tech firm influence. Diversity initiatives launched by the Delaware judiciary have faced criticism amid the broader anti-DEI backlash, while controversies over high-profile corporate governance decisions have prompted political attacks on the Delaware judiciary.

This institutionalization of weak governance reflects a broader trend rather than the just a single industry. For example, the rise of dual-class founder-dominated companies has played a significant role in changing corporate governance rules.[222] Founder mode not only affects the behavior of other CEOs but also shapes the regulation of corporate governance itself. These new corporate governance revisions themselves reflect a kind of urgency – desperation even – on the

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[220] PISTOR, CODE OF CAPITAL, *supra* note 140; Moon, *supra* note 16, at 1686, 1688.
[221] *See* Khoo & Tallarita, *supra* note 14.
[222] *See* Kosmas Papadopoulos, *Dual-Class Shares: Governance Risks and Company Performance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 28, 2019), https://corpgov.law.harvard.edu/2019/06/28/dual-class-shares-governance-risks-and-company-performance/.

part of actors in the most conservative corridors of corporate America, including even Delaware.[223] Their goal is to attract tech dollars, even if it means jettisoning the good governance protections that have established these jurisdictions as reliable sources of stable corporate law.

These changes will affect all companies registered in these jurisdictions, most of which are neither as successful nor as powerful as firms such as Meta. The potential abuse of minority shareholders and other stakeholders is significant. This risk extends beyond high-profile cases involving the likes of Elon Musk or Mark Zuckerberg to include more common scenarios where concentrated ownership creates governance vulnerabilities.[224] A powerful controlling stockholder can game the governance practices of the firm in detrimental ways, as illustrated in the WeWork scandal. These abuses undermine the confidence of minority investors that they can still get a fair share within firm governance,[225] particularly when leadership lacks diverse perspectives that help identify and prevent such abuses. Meanwhile, executives remain insulated through enormous spikes in pay and golden parachutes. The critical question is whether this insulation enables long-term value creation and stakeholder protection or merely shields management from accountability. Controlling structures can protect companies from destructive short-termism,[226] but the cases examined in this work suggest that insultation often enables extraction rather than value-creation.

The institutionalization of weak corporate governance can create full-blown collapses such as Enron, Lehman Brothers, Theranos, or FTX. In each of those cases – and many more – an effective board could have prevented harms from blowing up, though diversity alone is no panacea.[227] The question is not whether diverse boards prevent all disasters, but whether homogeneous boards are particularly vulnerable to specific failures. When founders and leaders facilitate internal cultures of sexism and discriminatory misconduct or partake in unethical decision-making, as in the case of Uber[228] or Facebook, we see the societal costs of bad governance.[229] WeWork, for example, reveals the fallout of weak governance. Disguising itself as a tech company rather than a property business amidst self-dealing, WeWork filed for bankruptcy

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[223] *See* Lucian A. Bebchuk, *Delaware: The Empire Strikes Back*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 4, 2025), https://corpgov.law.harvard.edu/2025/03/04/delaware-the-empire-strikes-back/; Lucian A. Bebchuk, Kobi Kastiel & Edward Rock, *Delaware and the Perils of Small Minority Controllers*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 5, 2025), https://corpgov.law.harvard.edu/2025/03/05/delaware-and-the-perils-of-small-minority-controllers/.

[224] *See* Lucian A. Bebchuk, Reinier Kraakman & George Triantis, *Stock Pyramids, Cross-Ownership, and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash Flow Rights*, *in* Concentrated Corporate Ownership 295 (Randall K. Morck ed., 2000); Bebchuk & Kastiel, *The Perils of Small-inority Controllers*, *supra* note 128, at 1468-74.

[225] *See* Lucian A. Bebchuk & Assaf Hamdani, *The Elusive Quest for Global Governance Standards*, 157 U. PA. L. REV. 1263, 1281–84 (2009).

[226] *See* Fisch & Davidoff Solomon, *Dual Class Stock, supra* note 128, at 7.

[227] Young Ah Kim, *The Agency Problem of Lehman Brothers 'Board of Directors*, ILL. BUS. L J. *(*Apr. 28, 2016), https://publish.illinois.edu/illinoisblj/2016/04/28/the-agency-problem-of-lehman-brothers-board-of-directors/; Marleen A. O'Connor, *The Enron Board: The Perils of Group Think*, 71 U. CIN. L. REV. 1233, 1308 (2003).

[228] Julia Carrie Wong, *Uber Board Member Resigns After Sexist Remark at Meeting Addressing Sexism*, THE GUARDIAN (June 13, 2017), https://www.theguardian.com/technology/2017/jun/13/david-bonderman-resigns-uber-board-sexist-remark.

[229] *See, e.g.,* WYNN-WILLIAMS, CARELESS PEOPLE, *supra* note 209.

in 2023.[230] This occurred only four years after it reached its peak valuation of $47 billion.[231] Outside observers knew well about its governance flaws, and yet we find them repeated in a variety of firms.[232] As jurisdictions weaken the minimal protections surrounding DEI, the risk of similar failures multiplies. Companies with homogeneous leadership operating under relaxed governance standards create conditions ripe for the kind of blind spots and conflicts of interest that devastated WeWork.

While one of tech's greatest strengths is the ability to get funding for risk-taking and to profitably commercialize some of those prospects, the sector's success does not inevitably lead to the conclusion that strong governance is less necessary. The relationship between corporate governance structures and firm performance remains empirically contested, though some research suggests that weaker governance yields poorer performance.[233] Weak governance reflects itself in, among other things, board meetings in which so-called independent directors rarely seriously question founder-CEOs.[234] Such meetings often prove only minimally participatory, and members rarely disagree with the CEO leading/chairing the meeting discussion.[235] Inefficiencies also arise as independent directors may remain silent or allow questioning to be merely perfunctory.[236] Effective board meetings, when they occur, can yield actual collaboration and creative decision-making.[237]

While much weak governance surfaces after failures come to light, such as with Enron, FTX and other examples, sometimes hindsight seems to provide the only crucial information about specific governance failures. However, anecdotally, we are not aware of examples of diverse or even somewhat-diverse boards that have led to major governance failures.

Nevertheless, the valuation spike of tech firms has generated an undeniable dominance of their model of governance across the private sector.[238] Embracing bad governance, in which unwarranted deference to leaders sits alongside excessive compensation, reveals an investment in individual genius over clear and effective governance. The enormous costs that weigh on the private sector prove undeniable, and one of them is that such leaders tend to be cut from the same cloth. Decision-making then excludes distinct opinions.

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[230] Edward Helmore, *The Dizzying Rise, and Even More Vertiginous Fall, of WeWork*, THE GUARDIAN (Nov. 7, 2023), https://www.theguardian.com/business/2023/nov/06/wework-bankruptcy-rise-fall; Britney Nguyen, *WeWork's Rise To $47 Billion—And Fall To Bankruptcy: A Timeline*, FORBES (Nov. 7, 2023), https://www.forbes.com/sites/britneynguyen/2023/11/07/weworks-rise-to-47-billion-and-fall-to-bankruptcy-a-timeline/.
[231] Nguyen, *supra* note 230.
[232] Byrne, *supra* note 158.
[233] LAWRENCE D. BROWN & MARCUS L. TAYLOR, THE CORRELATION BETWEEN CORPORATE GOVERNANCE AND COMPANY PERFORMANCE, https://www.boardoptions.com/issscoresandshareholdervalue.pdf.
[234] *See generally* Yaron Nili, *Board Gatekeepers*, 72 EMORY L. J. 91 (2022).
[235] Miriam Schwartz-Ziv & Michael S. Weisbach, *What do Boards Really Do? Evidence from Minutes of Board Meetings*, 108 J. FIN. ECON. 349 (2012).
[236] Helen R. Pernelet & Niamh M. Brennan, *Challenge in the Boardroom: Director-Manager Question-and-Answer Interactions at Board Meetings*, 31 CORP. GOVERNANCE: INT'L REV. 544 (2022).
[237] Leslie A. Perlow, Constance Noonan Hadley & Eunice Eun, *Stop the Meeting Madness*, HARV. BUS. REV. (July-Aug. 2017), https://hbr.org/2017/07/stop-the-meeting-madness.
[238] *See* Lucian A. Bebchuk & Kobi Kastiel, *How to Control Controller Conflicts*, 50 J. CORP. L. 1001, 1003-04 (2025).

While this same period has seen a real increase in board diversity, executive leadership has remained largely white and male. The board diversity we have seen over the past few decades alone could not have stopped this upsurge in bad governance. But to presume that abandoning diversity will be cost-free is a huge mistake. Diverse boards are the ones that question cultish deference to CEOs. Even if their voices are ultimately ignored, diverse boards raise outside considerations that disrupt group think and thus they will help impede recklessness by *not* fitting in.

The governance pathologies identified in this section all share a common characteristic: they thrive in environments where dissenting voices are absent or marginalized. WeWork's failure demonstrates how homogeneous leadership creates echo chambers that validate poor decision-making while silencing perspectives that could provide valuable insight and prevent catastrophe. The company's pre-IPO board consisted almost entirely of white men with finance and venture capital backgrounds. The board added its first female director, Frances Frei, in 2018, years after the company's founding.[239] Rather than providing independent oversight, board members largely deferred to Neumann, with some directors explicitly reasoning that challenging Neumann would be futile given his voting control. The homogenous board failed to question Neumann's self-dealing, erratic behavior, unsustainable business model, or corporate governance violations until public market scrutiny forced their hand.[240] The current retreat from diversity initiatives therefore represents not just a step backward for social progress, but an abandonment of the governance principles necessary for corporate and economic stability. To answer why inclusive practices actually improve governance outcomes, we must examine the fundamental mechanisms through which boards function as decision-makers. The following part draws on research from various fields to demonstrate that inclusion is not just compatible with good governance, but essential to achieving it.

Part III. Inclusion and Elements of Effective Group Decision-Making

Having examined in Part I the historical trajectory of diversity efforts, and in Part II the governance crisis they might help address, we now turn to the empirical foundation for our argument. The research we examine below does more than support diversity as a social good—it demonstrates that inclusive practices directly help to prevent the specific governance failures we have identified.[241]

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[239] *See* Cherella Cox, *WeWork Adds a Woman — Harvard Prof. Frances Frei — to the Board Ahead of IPO*, THESTREET (Sep. 4, 2019), https://www.thestreet.com/markets/wework-agrees-to-add-a-woman-to-its-board-ahead-of-ipo-15077063

[240] *See* Westbrook, *supra* note 146, at 533-34 (2021); BROWN & FARRELL, *supra* note 150, at 86-89, 291-92.

[241] *See* Barzuza & Parchomovsky, *supra* note 20, at 1079-1080. Many scholars have persuasively argued that firm value measured may be an overly narrow metric for advancing diverse corporate leadership, and that other rationales beyond the traditional business case better reflect the values of board diversity to achieve a variety of societal goals. *See, e.g.* Fisch, *Promoting Corporate Diversity, supra* note 20, at 379-382. We do not disagree, and do not contend that we are relying on the traditional business case in this essay. Instead of making normative claims about optimal governance structures to achieve economic vlaue, we point point to diversity as serving three independent goals: equity, legitimacy, and risk aversion. Diverse boards demonstrate superior deliberation processes through more comprehensive information sharing, risk assessment, and reduced groupthink. Whether these processes translate to measurable financial gains is uncertain, but they represent good governance generally. The goal of diversity in the board room is not to maximize quarterly earnings, but, in part, to prevent large-scale firm collapses.

Corporate boards of directors operate as collective decision-making bodies charged with overseeing and directing the company's strategic direction and governance. Comprised of many individuals with diverse expertise and perspectives, the board collaborates to set broad company policies, establish performance goals, and evaluate the executive management's effectiveness. The board's ability to effectively function as a group is a crucial component of a company's success and performance.

Research from the fields of finance, management, sociology, and psychology set forth three key elements of effective group decision-making. These elements include (i) deliberative decision-making processes that grapple with complex issues comprehensively; (ii) accurate, timely, and comprehensive information gathering and sharing; and (iii) awareness, consideration, and management of risks and opportunities. Research shows that these elements of effective group decision-making positively correlate with inclusive practices and diversity (including identity diversity as well as diversity beyond identity).[242] Studies show that heterogeneous teams share information more comprehensively and consider a wider range of alternatives than homogenous teams.

Beyond academic research, boards of leading corporations also have affirmed the connection between inclusion and effective decision making, particularly in response to a recent litany of anti-DEI shareholder proposals.[243] Shareholders have resoundingly rejected anti-DEI proposals, backing the rationales of experienced corporate boards for maintaining inclusive practices.[244] For example, in opposing anti-DEI proposals, Walmart's board emphasized that fostering a culture where associates feel "welcome and valued" helps the company "attract and retain the talent that drives our business."[245] This overwhelming shareholder rejection of anti-DEI proposals lines up with surveys of employees at medium and large companies that show high support for inclusive business practices.[246]

A. Deliberative Process

Diversity in terms of gender identity, sexual orientation, ethnicity, professional experience, and age can enhance management's ability to address complex issues comprehensively. Diversity proves especially valuable to address complex decisions that require problem-solving and prediction—precisely the type of decision-making undertaken by corporate boards and

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[242] Jessica R. Mesmer-Magnus & Leslie A. DeChurch, *Information Sharing and Team Performance: A Meta-Analysis*, 94 J. APPLIED PSYC. 535, 535–36 (2009), https://www.apa.org/pubs/journals/releases/apl942535.pdf.

[243] Shareholder proposals opposing corporate DEI efforts have grown significantly since 2023 but have achieved very limited success. Studies show that such proposals receive limited shareholder support (typically less than 2% approval). *See* Matteo Tonello, *The Evolving Landscape of DEI Shareholder Proposals*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 25, 2025), https://corpgov.law.harvard.edu/2025/04/25/the-evolving-landscape-of-dei-shareholder-proposals/.

[244] *See* Chloe Williment, *Walmart & Netflix Shareholders Reject Anti-DEI Proposals*, SUSTAINABILITY MAGAZINE (June 12, 2025), https://sustainabilitymag.com/articles/walmart-netflix-shareholders-reject-anti-dei-proposals; IMPACTIVIZE, 2025 ANTI-DEI PROPOSALS AND SHAREHOLDER VOTING RESULTS (2025), https://www.impactivize.org/2025-shareholder-proposals/ [hereinafter IMPACTIVIZE REPORT].

[245] Walmart Inc., Notice of 2025 Annual Shareholders' Meeting, at 120–21 (2025), https://stock.walmart.com/_assets/_ce43125c287746b5bb9dd177aebe127f/walmart/db/950/9949/proxy_statement/2025+Proxy+Statement.pdf [hereinafter Walmart Proxy Statement] (Walmart further notes the Board's oversight of its people strategy and an "approach to continuous improvement based on stakeholder feedback and results.").

[246] RISKS OF RETREAT, *supra* note 9, at 6-8.

executives.[247] Research in management and social psychology recognizes that diversity can lead to more robust discussions[248] and innovative solutions[249], as it allows groups to consider different viewpoints and avoid groupthink.[250] More diverse groups benefit from a healthy level of "cognitive conflict" when making decisions and are more likely to hold different opinions about how to characterize and address issues that arise.[251] The presence of these differing opinions leads to more critical discussion and expands the range of alternatives considered, thus positively contributing to the overall decision-making process. Importantly, traditional studies focused on measuring diversity's impact on firm performance do not always capture these benefits, because standard financial metrics measures often fail to consider catastrophic issues, including climate, or long-term resilience.[252] These studies cannot measure disasters that did not happen – the counterfactual governance failures that diverse boards prevented. The benefits of inclusive governance may appear primarily in tail-risk reduction and stakeholder legitimacy rather than average quarterly earnings.

Inclusion can slow decision-making processes in productive ways, helping groups avoid reflexive, knee-jerk reactions.[253] Homogenous groups tend to exhibit high levels of cohesiveness,

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[247] *See* SCOTT E. PAGE, THE DIVERSITY BONUS: HOW GREAT TEAMS PAY OFF IN THE KNOWLEDGE ECONOMY, 24 (2017) ("Many of our complex challenges involve understanding the actions, preferences, and capabilities of diverse people. Thus, identity diversity also contributes relevant cognitive diversity.").

[248] *See generally* PAGE, DIVERSITY BONUS, *supra* note 247; Lu Hong & Scott Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers,* 101 PROC. NAT'L ACAD. SCI. U.S. 16385, 16385 (2004); Jared Landaw, *Maximizing the Benefits of Board Diversity: Lessons Learned from Activist Investing,* HARV. L. SCH. F. ON CORP. GOVERNANCE (July 14, 2020), https://corpgov.law.harvard.edu/2020/07/14/ [https://perma.cc/3SQS-L38N]; Amy J. Hillman, *Board Diversity: Beginning to Unpeel the Onion*, 23 CORP. GOVERNANCE: INT'L REV 104, 104 (2015); Barbara Shecter, *Diverse Boards Tied to Fewer Financial 'Irregularities,' Canadian Study Finds*, FIN. POST (Feb. 5, 2020), https://financialpost.com/news/fp-street/diverse-boards-tied-to-fewer-financial-irregularities-canadian-study-finds [https://perma.cc/LR29-VC7S].

[249] PAGE, DIVERSITY BONUS, *supra* note 247, at 85-88; PAGE, THE DIFFERENCE, *supra* note 195, at 131-74, 323; Phillips, *Value of Diversity, supra* note 195, at 229–33; Dale Griffin, Kai Li & Ting Xu, *Board Gender Diversity and Corporate Innovation: International Evidence,* 56 CAMBRIDGE J. FIN. & QUANTITATIVE ANALYSIS 123, 127 (2021).

[250] *See* Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1391 (2002) (explaining that diversity generates "conflicting opinions, knowledge, and perspectives that result in a more thorough consideration of interpretations, alternatives, and consequences"); PAGE, THE DIFFERENCE, *supra* note 195, at 324–35; Frank Dobbin & Jiwook Jung, *Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias*, 89 N.C. L. REV. 809, 814–15 (2011).

[251] "Cognitive conflict refers to task-oriented differences in judgment among group members" and "is concerned with the presence of issue-related disagreement among members." Daniel P. Forbes & Frances J. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24 ACAD. MGMT. REV. 489, 494 (1999); *see also* Janet Sniezek & Rebecca A. Henry, *Accuracy and Confidence in Group Judgment*, 43 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 1, 20 (1989) ("The more disagreements that group members reported, the more accurate were their group judgments."); David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, HARV. BUS. REV. (Nov. 4, 2016), https://hbr.org/2016/11/why-diverse-teams-are-smarter.

[252] *See* Barzuza & Parchomovsky, *supra* note 20, at 1071-73.

[253] *Cf.* The Coca-Cola Co., 2025 Proxy Statement, at 98 (2025), https://investors.coca-colacompany.com/_assets/_ffaa6cd1a9303cbb26ac8aee9af9dcfb/cocacolacompany/db/1008/10475/document/2025_Proxy_%28Final_Bookmarked%29_3.17.pdf (board opposing proposal on DEI goals in executive pay; describing the compensation committee's "ongoing review" and "yearly evaluation" of financial and non-financial measures, undertaken with support from an independent compensation consultant and other advisors).

which can frustrate the process of meaningful and critical discussion.[254] In contrast, more diverse groups are more likely to encourage critical thinking and challenge entrenched assumptions.[255] For example, several studies focusing on board decision-making in M&A transactions find that increased gender diversity on boards correlates with less overpayment in acquisitions and fewer value-destroying transactions.[256] Studies find that board members with diverse perspectives help slow down the decision-making process and are less likely to acquiesce to assumptions of overconfident C-Suite executives.[257]

Closely tied to deliberation is the role of clear and open communication, which is an essential element in group decision-making processes. It ensures that all members understand the issues at hand, the objectives of the decision-making, and the role each participant plays in the process. Effective communication involves active listening, constructive feedback, and the facilitation of dialogue that encourages the sharing of ideas without fear of judgment.[258] This openness allows boards to consider a broad range of viewpoints, evaluate challenges from multiple angles, and generate more thoughtful solutions.[259] For example, studies demonstrate that gender diversity in corporate leadership shapes the dynamics of communication among board members, enhancing both the effectiveness and efficiency of board discussions and decision-making processes.[260]

Corporate boards themselves have recognized the importance of bringing different perspectives to the table when making business decisions. For example, in response to anti-DEI

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[254] *See* Forbes & Milliken, *supra* note 251, at 492–96. "Cohesiveness" is defined as "the degree to which board members are attracted to each other and are motivated to stay on the board." *Id.* at 493. Some studies have found, however, that diversity may reduce group cohesion, resulting in more difficult decision-making and greater dissatisfaction. For a discussion, see Dobbin & Jung, *supra* note 250, at 815–17.

[255] Given that many of the regulatory and shareholder advocacy efforts on diversity have focused on gender diversity, much of the literature studying the consequences of diversity on corporate governance similarly focus on gender diversity. *See generally* Knyazeva et al., *supra* note 37 (providing an overview of the board diversity literature).

[256] *See* Maurice Levi, Kai Li & Feng Zhang, *Director Gender and Mergers and Acquisitions*, 28 J. CORP. FIN. 185, 185–86 (2014); *see also* Guoli Chen, Craig Crossland & Sterling Huang, *Female Board Representation and Corporate Acquisition Intensity*, 37 STRATEGIC MGMT. J. 303, 303–05 (2016).

[257] *See* Jie Chen, Woon Sau Leung, Wei Song & Marc Goergen, *Why Female Board Representation Matters: The Role of Female Directors in Reducing Male CEO Overconfidence*, 53 J. EMPIRICAL FIN. 70, 71 (2019).

[258] *See* Cahn, Carbone & Levit, *Instrumental Case, supra* note 42, at 119.

[259] Stephen Bear, Noushi Rahman & Corinne Post, *The Impact of Board Diversity and Gender Composition on Corporate Social Responsibility and Firm Reputation* 97 J. BUS. ETHICS 207, 210 (2010); Phillips, *Value of Diversity, supra* note 195, at 229-30.

[260] *See* Margarethe Wiersema & Marie Louise Mors, *Research: How Women Improve Decision-Making on Boards,* HARV. BUS. REV. (Nov. 17, 2023), https://hbr.org/2023/11/research-how-women-improve-decision-making-on-boards. While diversity on a board may slow down deliberation, it renders discussions more methodical. *See* Darren Rosenblum & Daria Roithmayr, *More than a Woman: Insights into Corporate Governance after the French Sex Quota*, 48 Ind. L. Rev. 889 (2015).

shareholder proposals, companies such as Mastercard,[261] Goldman Sachs[262], Levi Strauss[263], and Costco[264] successfully defended their commitment to inclusive practices by emphasizing the importance of diverse perspectives to their commercial success and enhancement of shareholder value. Mastercard's board, for example, stated that the company's "commitment to an inclusive culture and a business strategy incorporating financial inclusion is good for our business and drives long-term value for our stockholders."[265]

Consumer-facing companies, such as Costco, Levi Strauss, and Lululemon, stressed the importance of their inclusion efforts in fostering innovation. Levi Strauss, for example, responded to a challenge by arguing that the company's inclusion efforts were "critical in ensuring that [Levi] products reflect and are relevant to [the company's] diverse global consumer base" and help inform the company to "design innovative products and anticipate and respond to consumer preferences and trends, ultimately promoting our success."[266] The Levi Strauss board stressed its belief in a "strong business case for a diverse and inclusive workforce."[267] Likewise, Costco's board defended DEI as crucial to helping Costco's business succeed by providing diverse insights into consumer preferences and fostering creativity and innovation.[268]

A deliberative decision-making process is particularly important today, given the increasing complexity of the board's advisory and monitoring role, coupled with their critical role in curbing managerial overreach.[269] As Claire Hill and Yaron Nili argue, the value of the modern board dominated by independent directors comes not just from preventing "managerial slack or value extraction," but increasingly with "curbing managerial overzealousness" so as to "preventing managerial overreach and misconduct even when such overreach or misconduct is compatible with promoting shareholder value."[270] Yet, numerous studies show that instead of counteracting managerial exuberance, boards often tend to be "passive and subject to CEOs and executives' dominance."[271] Even in bet-the-company transactions, such as large M&A deals, where the law

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[261] Mastercard Inc., Definitive Proxy Statement, at 122 (Apr. 28, 2025), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001141391/a77076fb-eb27-471e-8c06-a9827ce58a67.pdf [hereinafter Mastercard Proxy Statement]
[262] The Goldman Sachs Group, Inc., Proxy Statement 2025 Annual Meeting of Shareholders, at 87 (2025), https://www.goldmansachs.com/investor-relations/financials/proxy-statements/2025/proxy-statement.pdf; Lamar Johnson, *More Anti-DEI Shareholder Proposals Fail at Goldman Sachs, Levi's,* ESG DIVE (Apr. 28, 2025), https://www.esgdive.com/news/more-anti-dei-shareholder-proposals-fail-at-goldman-sachs-levis/746460/.
[263] Levi Strauss & Co., Notice of Annual Meeting of Shareholders and Proxy Statement, at 69 (2025), https://d18rn0p25nwr6d.cloudfront.net/CIK-0000094845/078b2b15-75a7-458e-b402-059b62587fba.pdf#page=69 [hereinafter Levi Strauss Proxy Statement]; James Darley, *99% of Levi's Shareholders Vote to Stand Resolute on DEI*, SUSTAINABILITY MAG., (Apr. 24, 2025), https://sustainabilitymag.com/articles/99-of-levis-shareholders-vote-to-stand-resolute-on-dei.
[264] Costco Proxy Statement*, supra* note 122, at 31-32; D'Innoncenzio, *supra* note 122.
[265] Mastercard Proxy Statement, *supra* note 261, at 122.
[266] Levi Strauss Proxy Statement, *supra* note 263, at 70.
[267] Levi Strauss Proxy Statement, *supra* note 263, at 70.
[268] Costco Proxy Statement*, supra* note 122, at 32.
[269] *See* Claire Hill & Yaron Nili, *Independence Reconceived*, 2023 COLUM. BUS. L. REV. 589, 604 (2023).
[270] *Id.* at 589-90.
[271] Julio David Castellanos & Babu George, *Boardroom Leadership: The Board of Directors as a Source of Strategic Leadership*, 6 ECON. & BUS. REV. 103, 114 (2020).

specifically demands a role for the board, directors tend to yield to C-suite executives at the expense of shareholders and stakeholders.[272]

B. Addressing Information Gaps

While diverse perspectives enhance the quality of deliberation, effective decision-making requires that board members have access to comprehensive and accurate information. Research emphasizes the importance of group members being well-informed about the company's present situation and engaging honestly with its strengths and weaknesses.[273] Given the complexity of the board's role, boards must base their decisions on accurate, timely, and comprehensive information. Boards, especially those dominated by independent directors, require access to key data and analyses, including financial reports, market trends, and risk assessments, as well as information flow from a wide array of sources, including employees and other stakeholders.

To this end, diversity in the sourcing of information can help board members develop a more comprehensive understanding of issues and opportunities facing the company, enabling them to make informed decisions that align with the company's strategic objectives.[274] Diverse boards may bring heightened awareness of, and attention to, stakeholder perspectives—whether they are customers, employees, or community groups.[275] This focus can drive boards to seek out information that reflects these stakeholders' needs and expectations, leading to more informed and balanced decisions that consider the wider impact on the organization's ecosystem.[276] Proxy disclosures likewise reflect boards' emphasis on structured information flows about workforce experience–such as retention monitoring, employee surveys, and other stakeholder-feedback channels –to inform ongoing people-strategy decisions.[277]

Tellingly, corporate boards also recognize the importance of gathering information from a variety of stakeholders in making business decisions. In its response to an anti-DEI shareholder proposal, Boeing underscored the importance of an inclusive work environment in fostering

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[272] *See generally* Afra Afsharipour & J. Travis Laster, *Enhanced Scrutiny on the Buy-Side*, 53 GA. L. REV. 443 (2019).
[273] Magnus & DeChurch, *supra* note 242, at 535–36.
[274] PAGE, DIVERSITY BONUS, *supra* note 247, at 81; CREDIT SUISSE RESEARCH INSTITUTE, GENDER DIVERSITY AND CORPORATE PERFORMANCE, at 17 (2012), https://internationalwim.org/iwim-reports/gender-diversity-and-corporate-performance/; Akshaya Kamalnath, *Gender Diversity as the Antidote to 'Groupthink' on Corporate Boards*, 22 DEAKIN L. REV. 85, 103-05 (2018).
[275] *See* Maretno Harjoto, Indrarini Laksmana & Robert Lee, *Board Diversity and Corporate Social Responsibility*, 132 J BUS. ETHICS 641 (2015); Whitney Douglas Fernandez & Yannick Thams, *Board Diversity and Stakeholder Management: the Moderating Impact of Boards' Learning Environment,* 26 LEARNING ORG. 160 (2019); PAGE, DIVERSITY BONUS, *supra* note 247, at 191-92; CREDIT SUISSE, GENDER DIVERSITY*, supra* note 274*,* at 18; Hillman, *Board Diversity, supra* note 248, at 105.
[276] INTERNATIONAL LABOUR ORGANIZATION, WOMEN IN BUSINESS AND MANAGEMENT: THE BUSINESS CASE FOR CHANGE at 21 (2019).
[277] Walmart Proxy Statement, *supra* note 245, at 120-21 (describing multiple feedback channels including AES and customer polling; stating it "listen[s] to and gather[s] feedback" from associates and stakeholders to continuously improve practices); Best Buy Co., Inc., 2025 Proxy Statement, at 103 (2025), https://d18rn0p25nwr6d.cloudfront.net/CIK-0000764478/e4db100f-47bb-4b3b-b94b-0e6ba0031460.pdf [hereinafter Best Buy Proxy Statement] (noting monitoring of retention rates and employee feedback/survey results; inclusion action and non-discrimination identified as top strengths); Visa Inc., Notice of 2025 Annual Meeting and Proxy Statement. at 105 (2025), https://s29.q4cdn.com/385744025/files/doc_downloads/2024/Visa-2025-Proxy-Statement.pdf [hereinafter Visa Proxy Statement] (stating it structures total rewards to attract/retain talent and "continue[s] to evolve [its] programs to meet employee needs.").

employee voice and diverse perspectives, stating: "[W]e continue to focus on creating a culture where all employees feel empowered to speak up. Teammates across the Company invite different perspectives, share ideas and concerns, and act on what they hear."[278] Similarly, pharmaceutical giant Bristol Myers Squibb stated in response to an anti-DEI shareholder proposal that its culture of inclusion facilitated open communication and information sharing by employees. In its 2025 proxy statement, Bristol Myers Squibb maintained that "Employees are encouraged to speak up—to ask questions, raise concerns, and make suggestions about business practices, which enables our workforce to achieve their full potential and thereby better serve our patients."[279]

C. Awareness, Consideration, and Management of Risk and Opportunities

Across jurisdictions, "[t] here is broad agreement . . . about the basic obligation of corporate boards to monitor corporate legal compliance, to oversee risk management policies and procedures and internal financial controls, and to set corporate strategy."[280] Board responses to DEI-related proposals commonly emphasize that compliance risk assessment and mitigation are already embedded in ongoing governance processes, rather than requiring ad hoc reaction.[281] Directors bear responsibility for establishing the company's risk appetite and strategy.[282] Effective risk management is critical to a company's success and its absence can be catastrophic. Moreover, failures in risk management have contributed to some of the most significant scandals and losses suffered by companies, including: environmental disasters (e.g. BP Deepwater Horizon, Bhopal), financial fraud (e.g. Enron, WorldCom, Satyam), foreign bribery (e.g. Siemens), massive trading losses (e.g. JPMorgan), and sexual harassment scandals (e.g. Uber, Oxfam).[283] These risk management failures are often "facilitated by corporate governance failures, where boards did not fully appreciate the risks that the companies were taking (if they were not engaging in reckless risk-taking themselves), and/or deficient risk management systems."[284]

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[278] The Boeing Co., 2025 Proxy Statement, at 93 (Feb. 24, 2025), https://materials.proxyvote.com/Approved/097023/20250224/NOMNP_596862/images/The_Boeing_Company-Proxy2025.pdf.

[279] Bristol-Myers Squibb Co., 2025 Proxy Statement, at 111-12 (2025), https://annual-report.bms.com/assets/bms-ar/documents/2024/bms-2025-definitive-proxy-statement.pdf [hereinafter BMS Proxy Statement].

[280] Virginia Harper Ho, *Board Duties: Monitoring, Risk Management, and Compliance*, *in* RESEARCH HANDBOOK ON COMPARATIVE CORPORATE GOVERNANCE 242, 245 (Afra Afsharipour & Martin Gelter eds., Edward Elgar 2021).

[281] See Netflix, Inc., Proxy Statement and Notice of 2025 Annual Meeting of Stockholders, at 82-83 (2025), https://s22.q4cdn.com/959853165/files/doc_financials/2024/ar/Netflix-Inc-2025-Proxy-Statement.pdf (opposing "Affirmative Action Risks" proposal; stating Netflix has a "well-established compliance program," "assess[es] and evolve[s]" its policies and programs "to address compliance risks," reviews employment laws "in multiple jurisdictions," and that "risk analysis and mitigation" are "a fundamental aspect of business operations").

[282] OECD, *Risk Management and Corporate Governance* (Report No. 6, 2014) [hereinafter RMCG]; Best Buy Proxy Statement, *supra* note 277, at 102-03 (explaining that the Board "plays an active role" in overseeing management's efforts to sustain an inclusive culture, including by reviewing "internal and external risks," and that the Compensation & Human Resources Committee "receives regular updates from management" related to these initiatives).

[283] COMMITTEE OF SPONSORING ORGANIZATIONS OF THE TREADWAY COMMISSION, ENTERPRISE RISK MANAGEMENT: APPLYING ENTERPRISE RISK MANAGEMENT TO ENVIRONMENTAL, SOCIAL AND GOVERNANCE-RELATED RISKS (Oct. 2018), https://www.wbcsd.org/resources/applying-enterprise-risk-management-to-environmental-social-and-governance-related-risks/.

[284] RMCG, *supra* note 282, at 10.

Research shows that inclusion supports risk management capabilities and that risk oversight benefits from people of varied cultural and professional backgrounds.[285] Data further establishes that directors from diverse backgrounds often ask more questions and engage in more rigorous discussions that enhance critical analysis and risk assessment.[286] For example, a qualitative study of directors at publicly listed companies in the US and Europe found that "women behave in ways contrary to existing board norms. By coming to board meetings highly prepared, being willing to acknowledge that they do not know something, asking questions, and getting things on the table, women impact the dialogue and interactions in the boardroom."[287] Additional studies have found that the greater presence of women on boards correlates with greater monitoring, stronger internal controls over financial reporting, better reporting results, and increased transparency.[288]

Critics of identity-based diversity initiatives question whether boards should prioritize cognitive and professional diversity rather than demographic characteristics, contending that race or gender does not guarantee diverse thinking. However, this framing ignores how identity shapes cognition through lived experience. Research suggests that demographically diverse boards produce cognitive diversity because cultural background, gender socialization, experiences of discrimination, and navigation of majority-minority dynamics fundamentally shape how people perceive problems.

Moreover, surveys of employees show that retreating from long-standing DEI programs could undermine risk management by increasing "talent risk," "financial risk," "legal risk" and "reputational risk."[289] Instead of knee-jerk reactions to the attack on DEI, experts caution that organizations undertake careful risk assessments of their various DEI programs on a program-by-program basis.[290]

Companies managing complex risks and business operations particularly recognize diversity's value. For example, in response to an anti-DEI shareholder proposal, Bristol Myers Squibb, a highly regulated and complex business, stated that a commitment to inclusion "helps drive our strategic goal to reach more patients with our transformative medicines. A workforce fueled by varied backgrounds, experiences, personal characteristics and viewpoints helps us expand our patient population, because it drives strategy designed to deliver greater access to varied clinical trial patients across geographic regions and address the changing demographics of

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[285] *See generally* Gennaro Bernile, Vineet Bhagwat & Scott Yonker, *Board Diversity, Firm Risk, and Corporate Policies*, 127 J. FIN. ECON. 588 (2017).
[286] *See* Wiersema & Mors, *supra* note 260; *see also* Chen et al., *The Role of Female Directors, supra* note 257, at 72 (2019).
[287] Margarethe F. Wiersema & Marie Louise Mors, *Women Directors and Board Dynamics: Qualitative Insights from the Boardroom*, 50 J. MGMT. 2413 (2023).
[288] For an overview of these studies, *see* Cahn, Carbone & Levit, *Instrumental Case*, *supra* note 42, at 137-40.
[289] RISKS OF RETREAT, *supra* note 9; Visa Proxy Statement, *supra* note 254, at 105 (stating that Visa "structure[s] [its] total rewards and benefits package to attract and retain a talented and engaged global workforce," that "attracting, developing, and advancing the best talent globally is critical to [its] continued success," and that Visa "continue[s] to evolve [its] programs to meet employee needs" in order to remain an employer of choice).
[290] RISKS OF RETREAT, *supra* note 9, at 18-20. There is also sufficient concern that the latest wave of anti-DEI efforts could unleash an era of rampant discrimination. See Nikole Hannah-Jones, *How Trump Upended 60 Years of Civil Rights in Two Months*, N.Y. TIMES MAG., (June 27, 2025), https://www.nytimes.com/2025/06/27/magazine/trump-civil-rights-law-discrimination.html.

the communities where we do business and the patients we serve."[291] Similarly, Gilead Sciences, a biopharmaceutical company known for developing therapies to treat life-threatening infectious diseases, defended against anti-DEI shareholder proposals by stressing that its commitment to inclusion was critical to its mission and is "a strategic business imperative that generates a competitive advantage, increases access to innovation, enables greater agility in our supply chain and supports socio-economic inclusion across our society."[292] Shareholders at both Bristol Myers Squibb and Gilead overwhelmingly supported each company's position, voting decisively to reject anti-DEI proposals.[293]

Given the precatory nature of proxy proposals, the reality that few investors vote, and those who do overwhelmingly side with management, one might find reason to be skeptical about our use of these proxy votes. This is particularly true given the politicized nature of the proposers. Just because these proxy votes fail does not equate to management endorsement of DEI.[294] However, the overwhelming shareholder rejection does carry some weight. It shows that firms believe, and that institutional and retail investors agree, that continuing inclusion policies holds more value for the firm. Even if one has the right to be skeptical, such votes do reflect shareholder attempts to maximize long-term value.

In conclusion, our study of proxy materials reveals that the headlines that the corporate world has jumped off the DEI ship are profoundly misleading. Instead, our research shows that many leading public companies proactively choose to continue with their long-term DEI policies, and their shareholders overwhelmingly support them in this effort.

Conclusion

We aim to encourage those in the corporate sphere to slow down. This moment of accelerating technological and geopolitical uncertainty is a textbook example of precisely when corporations most need robust, diverse governance frameworks. Good governance requires deliberation. The rapid abandonment of inclusive practices signals a deeper crisis in corporate governance, one that we have shown threatens the foundations of effective business leadership.

Our analysis reveals three interconnected phenomena that disrupt corporate governance. First, the rise and sudden fall of inclusion efforts exposes the fragility of corporate commitments when faced with political shifts. Companies spent years building inclusion commitments only to jettison them speedily. Such actions seem like a cry for help – they reflect a troubling susceptibility to momentary and reactionary decision-making over long-term thinking.

Second, the technology sector's dominance has undermined governance norms, normalizing concentrated power, excessive risk-taking, and the marginalization of cautious voices. "Founder mode" governance, such as WeWork's spectacular failure, amidst an array of other tech

[291] BMS Proxy Statement, *supra* note 279, at 111-12.
[292] Gilead Sciences, 2025 Proxy Statement, at 96 (2025) https://s29.q4cdn.com/585078350/files/doc_events/2025-Notice-of-Annual-Meeting-of-Stockholders-and-Proxy-Statement.pdf.
[293] *See* IMPACTIVIZE REPORT, *supra* note 244.
[294] Many thanks to Jill Fisch for this point.

busts,[295] underscores the echo-chambers that homogenous elites create. They validate poor decisions while silencing essential dissent. Recent Delaware corporate law changes suggests that Delaware's once steadfast legal infrastructure—including its high-quality, specialized courts—faces immense pressure in the face of this dominance, further undermining long-standing corporate governance norms.[296]

Finally, extensive interdisciplinary research confirms that inclusive practices prove essential to good governance, which matters immensely in ensuring strong long-term firm performance. Firms with boardrooms full of yes-men (or yes-women) cannot compete – long-term – with the wisdom of a board with broad expertise and at least some cautious voices. Diverse teams enhance deliberative processes, improve information gathering, and strengthen risk management.[297] The past two decades have revealed the extent to which inclusive leadership enhances good governance – allowing firms to invest in risky opportunities while counterbalancing them with appropriate caution.

Our discussion aligns with research indicating that inclusion benefits decision-making within corporate governance by counteracting groupthink, enabling the gathering of information from diverse sources, including stakeholders such as employees, customers, and suppliers, and facilitating comprehensive risk assessments for complex decisions. While some firms likely did engage in DEI to virtue-signal, that is no longer the case. The many leading firms that have "stuck to their guns" do so because they have strongly embraced the long-term business value of inclusion.

Every crisis presents an opportunity. The anti-DEI backlash, coupled with the vigorous defense mounted by leading companies, underscores why inclusion matters for effective corporate governance. Diversity is not a constraint to excellence, but a prerequisite. Companies must embed this understanding in governance structures, succession planning, and corporate culture at large. Cycles of excess and reform, crisis and response, mark the history of corporate governance. We are at a turning point in which careful leadership once again faces a test of fundamental assumptions about how to govern firms.

Process matters most. Boards must not only appear deliberate; they must embrace and follow best practices. Decisions on inclusion – whether to bolster, alter, or even reduce programs – should be made deliberately, reflecting the values of good governance. Ultimately, any decision regarding a firm's diversity program should embody the core principles of effective governance that we emphasize in this essay.

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[295] *See* Dave Smith, *Everyone's Wondering If, and When, the AI Bubble Will Pop. Here's What Went Down 25 Years Ago that Ultimately Burst the Dot-com Boom*, FORTUNE (Sept. 28, 2025), https://fortune.com/2025/09/28/ai-dot-com-bubble-parallels-history-explained-companies-revenue-infrastructure/.

[296] *See* Christina M. Sautter, *Delaware's SB21 Continues 150 Years of Corporate Power and Regulatory Capture*, PROMARKET (June 23, 2025), https://www.promarket.org/2025/06/23/delawares-sb21-continues-150-years-of-corporate-power-and-regulatory-capture/; Marcel Kahan & Edward B. Rock, *The New Political Economy of Delaware Corporate Lawmaking*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 6, 2025), https://corpgov.law.harvard.edu/2025/10/06/the-new-political-economy-of-delaware-corporate-lawmaking/.

[297] *See generally* Brummer & Strine, *supra* note 42.

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