Inclusivity in Corporate Scholarship

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Thanks to Nancy Levit, Laura Rothstein, and Judith Resnik for inviting us to contribute this Essay and to Katherine Blansett and Cindy He for excellent research assistance.

Abstract

For the past two decades, a growing number of women, people of color, and LGBTQ+ scholars have reshaped corporate law scholarship. This Essay, prepared for the UMKC Law Review "Now. Women, Equality, and the Legal Academy" symposium, explores how their contributions have challenged dominant narratives in corporate law. While these contributions span a wide range of issues, three central themes emerge. First, much of this scholarship contributes to long-standing debates in corporate law by critically examining existing governance structures and introducing new perspectives that challenge conventional views on corporate purpose, power, and value. Second, and strongly connected to the first theme, women and queer scholars have led inquiries into Environmental, Social, and Governance (ESG) frameworks. Third, a substantial body of scholarship confronts the persistent gap and underrepresentation of women, including women of color, in corporate law, governance, and leadership. These works reveal how structural exclusion, entrenched networks, and persistent biases sustain that underrepresentation. Much of this scholarship adopts an interdisciplinary perspective to demonstrate the business advantages of diversity, equity, and inclusion (DEI) in corporate governance. In line with this symposium, we focus on the latter two themes, having addressed the first in previous and ongoing work. Building on those themes, this Essay explores the Trump administration's attacks on DEI across numerous sectors, with a focus on corporate actors. It is too soon to ascertain if this assault will also undermine inclusion-focused scholarship in corporate law and governance--or spur a new wave of scholarship on the governance risks associated with crony capitalism.

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INCLUSIVITY IN CORPORATE SCHOLARSHIP

Afra Afsharipour, Naomi Cahn, June Carbone, and Darren Rosenblum*

I. INTRODUCTION

For the past two decades, a growing number of women, people of color, and LGBTQ+ scholars have reshaped corporate law scholarship. This Essay explores how their contributions have challenged dominant narratives in corporate law. While these contributions span a wide range of issues, three central themes emerge.[1] First, much of this scholarship contributes to long-standing debates in corporate law by critically examining existing governance structures and introducing new perspectives that challenge conventional views on corporate purpose, power, and value. Second, and strongly connected to the first theme, women and queer scholars have led inquiries into Environmental, Social, and Governance (ESG) frameworks. Third, a substantial body of scholarship confronts the persistent gap and underrepresentation of women, including women of color, in corporate law, governance, and leadership. These works reveal how structural exclusion, entrenched networks, and persistent biases sustain that underrepresentation.[2] Much of this scholarship adopts an interdisciplinary perspective to demonstrate the business advantages of diversity, equity, and inclusion (DEI) in corporate governance.

In line with this symposium, we focus on the latter two themes, having addressed the first in previous and ongoing work. Building on those themes, this Essay explores the Trump administration's attacks on DEI across numerous sectors, with a focus on corporate actors. It is too soon to ascertain if this assault will also undermine inclusion-focused scholarship in corporate law and governance—or spur a new wave of scholarship on the governance risks associated with crony capitalism.

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[1] While we identify three major themes, there are large overlaps between each theme, particularly in analyzing Environmental, Social and Governance (ESG) and Diversity, Equity & Inclusion (DEI) as subsets of broader corporate governance concerns.

[2] *See* Afra Afsharipour & Matthew Jennejohn, *Gender and the Social Structure of Exclusion in U.S. Corporate Law*, 90 U. CHI. L. REV. 1819, 1819 (2023); Sarah C. Haan, *Corporate Governance and the Feminization of Capital*, 74 STAN. L. REV. 515, 515 (2022); Afra Afsharipour, *Women and M&A*, 12 U.C. IRVINE L. REV. 359, 377 (2022); *see also* NAOMI CAHN, JUNE CARBONE & NANCY LEVIT, FAIR SHAKE: WOMEN AND THE FIGHT TO BUILD A JUST ECONOMY 139 (2024) (arguing that women's marginalization within corporate workplaces corresponds to winner-take-all environments that prize those who can break the rules and get away with it).

II. WIDENING THE APERTURE OF CORPORATE LAW SCHOLARSHIP

In the past two decades, women, people of color, and LGBTQ+ scholars have widened the aperture of corporate governance scholarship and contributed to institutional reform. For example, an influential 2001 paper proclaimed the "end of history" in corporate law—claiming that there was "no longer any serious competitor" to the view that corporate law should prioritize long-term shareholder value.[3] However, thanks in part to a broader group of scholars, that debate has flourished and evolved.

Diverse voices have challenged long-standing assumptions about corporate law's goals and values. This section addresses two aspects of this re-examination: ESG and representation.

A. ESG: Evolving Debates and Emerging Models in ESG

Over the past decade, a large body of scholarship has examined ESG issues, closely linking them to broader debates on corporate purpose.

Women scholars have led much of this inquiry. They have illustrated how various actors—including investors, stakeholders, governments, international and transnational institutions, academics, and even corporate managers themselves—pressure companies to address environmental and social concerns.[4] Some scholars have advanced rationales for ESG that emphasize the necessity for companies to prioritize sustainability, employee welfare, and local communities.[5] They often draw upon the contributions of women and queer scholars who have both reconceptualized the corporation[6] and urged corporate boards and managers to serve as "trustees for the entity and for the society in which that entity is situated."[7] Others have critically assessed ESG's opportunities and challenges.[8]

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[3] Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 447-54 (2001) (providing only two references to the work of women scholars, the exceptions being Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999), and ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993)).

[4] *See* Cynthia A. Williams, *Comparative and Transnational Developments in Corporate Social Responsibility*, *in* RESEARCH HANDBOOK ON COMPARATIVE CORPORATE GOVERNANCE 92 (Afra Afsharipour & Martin Gelter eds., 2021); Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 HARV. BUS. L. REV. 441, 441 (2019).

[5] *See* Blair & Stout, *supra* note 3, at 250; Virginia Harper Ho, *Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 J. CORP. L. 59, 60 (2010); Ann M. Lipton, *Not Everything is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REG. 499, 527 (2020); Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VA. L. REV. 441, 488 (2022).

[6] *See* Blair & Stout, *supra* note 3, at 253.

[7] *See* Kellye Y. Testy, *Capitalism and Freedom—For Whom? Feminist Legal Theory and Progressive Corporate Law*, 67 LAW & CONTEMP. PROBS. 87, 92 (2004).

[8] *See* Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2563 (2021); Elizabeth Pollman, *The Making and Meaning of ESG*, 14 HARV. BUS. L. REV. 403, 407 (2024); *see also* Kristin N. Johnson, *Banking on Diversity: Does Gender Diversity Improve Financial Firms' Risk Oversight?*, 70 SMU L. REV. 327, 376 (2017) (describing the value of diversity in combating groupthink).

Several scholars have underscored the need for standardized and stakeholder-inclusive disclosures, advocating for a shift from performative rhetoric to more robust, enforceable practices that can drive meaningful change. Accordingly, they have examined the evolution to mandatory ESG disclosures, with some arguing that voluntary disclosures inadequately serve investors and stakeholders assessing ESG performance. This focus builds on early work by scholars such as Cynthia Williams, who called for expanded corporate disclosure to promote corporate social transparency, including on human rights and environmental issues.[9] As Jill Fisch has noted, "despite the growth in the volume of sustainability disclosure, private ordering has not been successful in producing sustainability disclosures that meet investors' needs."[10] Thus, Fisch calls for a mandatory "Sustainability Discussion and Analysis (SD&A)" in SEC filings to "promote comparability and reliability."[11] Other scholars have critiqued the current U.S. corporate disclosure regime, noting the SEC's "blind spots" in ESG disclosures and its narrow, investor-focused framework.[12] These scholars have argued for a more inclusive approach to ensure meaningful transparency and accountability.[13] Lisa Fairfax, however, has challenged the framing of voluntary versus mandatory ESG disclosure as a "false disclosure choice," noting that voluntary and mandatory disclosures are part of a continuum and that voluntary reporting often precedes and shapes regulatory mandates.[14]

Some scholars have grappled with the intersection of directors' responsibilities and ESG. For example, Williams suggests that the evolving legal landscape may require directors and officers to take climate and ESG risks seriously as part of their fiduciary duties, suggesting that legal obligations may help ensure better ESG efforts and accountability.[15] Virginia Harper Ho examines ESG as part of the board's monitoring and risk management responsibilities.[16] Others agree that ESG has the potential to drive change in corporate law and corporate conduct, but recognize that the absence of standardized metrics and robust enforcement undermines this potential.[17]

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[9] *See* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1301-02 (1999).
[10] Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 947 (2019).
[11] *Id.* at 952.
[12] *See* Lipton, *supra* note 5, at 502-03; Cynthia A. Williams & Donna M. Nagy, *ESG and Climate Change Blind Spots: Turning the Corner on SEC Disclosure*, 99 TEX. L. REV. 1453, 1455-56 (2020).
[13] *See* Lipton, *supra* note 5, at 503; Williams & Nagy, *supra* note 12, at 1484.
[14] Lisa M. Fairfax, *Dynamic Disclosure: An Exposé on the Mythical Divide Between Voluntary and Mandatory ESG Disclosure*, 101 TEX. L. REV. 273, 279-81 (2022).
[15] Cynthia A. Williams, *Fiduciary Duties and Corporate Climate Responsibility*, 74 VAND. L. REV. 1875, 1896-03, 1916 (2021); *see also In re* McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343 (Del. Ch. 2023) (ruling that the failure to investigate sexual harassment complaints can be a breach of fiduciary duties).
[16] *See* Virginia Harper Ho, *Board Duties: Monitoring, Risk Management & Compliance*, *in* RESEARCH HANDBOOK ON COMPARATIVE CORPORATE GOVERNANCE, *supra* note 4, at 242.
[17] *See* Lisa M. Fairfax, *From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm*, 99 B.U. L. REV. 1301, 1301-07, 1322-23 (2019); Michal Barzuza, Quinn Curtis & David H. Webber, *The Millennial Corporation: Strong Stakeholders, Weak Managers*, 28 STAN. J.L. BUS. & FIN. 255, 255-58, 262-63 (2023).

Scholars have also shed light on the rise of ESG frameworks, examining their origins, evolution, and potential future. A significant concern with ESG is a lack of consensus on both its definition and measurement. Here, Elizabeth Pollman's contribution unpacks the history of ESG, showing how it has developed into a "highly flexible moniker that can vary widely by context, evolve over time, and collectively appeal to a broad range of investors and stakeholders."[18] Pollman contends, however, that this same flexibility has "engender[ed] confusion, unrealistic expectations, and greenwashing that could inhibit corporate accountability or crowd out other solutions to pressing environmental and social issues."[19]

B. Inclusion: Barriers, Accountability, and Reforms

Substantial scholarship addresses the persistent underrepresentation of women, including women of color, in corporate law, governance, and leadership. These works show that underrepresentation stems not from pipeline or individual ambition, but from structural exclusion, entrenched networks, and persistent biases.[20] Many also offer a comprehensive understanding of the obstacles to greater inclusion and outline multifaceted strategies for achieving meaningful inclusion in corporate governance.

Recent work on gender and corporate governance builds on the scholarly contributions of scholars such as Kathleen Lahey, Sarah Salter, Theresa Gabaldon, and Ronnie Cohen.[21] They were among the first to build on the insights of feminist legal theory to analyze the basis of structural exclusion in corporate governance, and their work continues to shape the discourse today.[22] As early as 1985, Lahey and Salter argued that corporate law scholarship prioritized traditional (masculinist) inquiry and that "[o]nly when female legal scholars actively study and promote feminist values such as participation, decentralization, and power sharing will a serious challenge to the patriarchal mentality of the business [] be possible."[23]

This transformative vision surfaced in Gabaldon's foundational work, which introduced feminist approaches that exposed how core doctrines, such as

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[18] Pollman, *supra* note 8, at 407.
[19] *Id.* at 403.
[20] *See, e.g.*, Afsharipour & Jennejohn, *supra* note 2, at 1823; Haan, *supra* note 2, at 523; Afsharipour, *Women and M&A*, *supra* note 2, at 359.
[21] Both Professors Gabaldon and Cohen build upon the work of Kathleen A. Lahey & Sarah W. Salter. *See generally* Kathleen A. Lahey & Sarah W. Salter, *Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism*, 23 OSGOODE HALL L.J. 543 (1985) (Lahey and Salter's scholarship is recognized as one of the earliest and most rigorous feminist critiques of corporate law's structural biases). *See* Theresa A. Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387, 1414 (1992); Ronnie Cohen, *Feminist Thought and Corporate Law: It's Time to Find Our Way up from the Bottom (Line)*, 2 AM. U. J. GENDER & L. 1, 26-27 (1994).
[22] *See* Testy, *supra* note 7, at 96-98; Janis Sarra, *The Gendered Implications of Corporate Governance Change*, 1 SEATTLE J. SOC. JUST. 457, 469-71 (2002).
[23] Lahey & Salter, *supra* note 21, at 543.

limited liability, reinforce social values that disadvantage vulnerable groups.[24] Building on Gabaldon's contributions, Cohen's analysis highlighted how corporate law's focus on competition, hierarchy, and profit maximization excludes values associated with women's experiences, such as care, cooperation, and social responsibility.[25]

Expanding on these foundational critiques, important literature by scholars such as Jayne Barnard, Lisa Fairfax, and Marleen O'Connor examined corporate governance power structures and highlighted persistent barriers facing women and people of color in corporate leadership. Barnard, an early advocate for board diversity, examined the barriers to women's advancement on corporate boards,[26] criticizing boards' "cohesiveness" and "clubbiness," while citing "shrinking board sizes" and "old-fashioned gender bias" as persistent barriers.[27] Some scholars explore this effect in more specific contexts, such as family firms. For example, Mary Condon asserted that corporate structures reinforce traditional gender roles and power imbalances within family businesses by structuring ownership, control, and recognition in ways that often disadvantage women.[28] Fairfax's work targeted board nomination processes, which systematically disadvantaged people of color and women. She advocated for more intentional efforts to disrupt boards' "good old boys network."[29] This early board diversity scholarship spawned a multi-faceted array of literature examining board diversity.[30]

Beyond this scholarship, an emerging body of literature examined women leaders' experiences beyond the board. O'Connor described the "double bind" where women executives "cannot be too masculine or feminine,"[31] noting that even women with higher moral tendencies will not last because "occupational experiences will override socialized gender roles."[32] Recent work layers on a "triple bind" that women face.[33] As June Carbone, Naomi Cahn, and Nancy Levit explain, corporate women lose not only when they do not follow men's rules, but also when they do, facing harsher penalties than men for self-centered, rule-

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[24] *See* Gabaldon, *supra* note 21, at 1429.
[25] *See* Cohen, *supra* note 21, at 11; *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, 425 (2018) (arguing that modern antidiscrimination law is ineffective in addressing gender disparities in "tournament" style corporate environments).
[26] Jayne W. Barnard, *More Women on Corporate Boards? Not So Fast*, 13 WM. & MARY J. WOMEN & L. 703, 703-04 (2007).
[27] *Id*. at 710-15.
[28] Mary G. Condon, *Limited by Law? Gender, Corporate Law and the Family Firm*, *in* LAW AS A GENDERING PRACTICE 181 (Dorothy E. Chunn & Dany Lacombe, eds., 73d ed. 2000).
[29] Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 58 WIS. L. REV. 795, 839–40 (2005).
[30] *See* Darren Rosenblum, *Diversity and the Board of Directors: A Comparative Perspective*, *in* RESEARCH HANDBOOK ON COMPARATIVE CORPORATE GOVERNANCE, *supra* note 4, at 179.
[31] Marleen A. O'Connor, *Women Executives in Gladiator Corporate Cultures: The Behavioral Dynamics of Gender, Ego, and Power*, 65 MD. L. REV. 465, 468 (2006).
[32] *Id*. at 475.
[33] *See* June Carbone, Naomi Cahn & Nancy Levit, *Women, Rule-Breaking, and the Triple Bind*, 87 GEO. WASH. L. REV. 1105 (2019).

breaking behavior.[34] The resulting exclusion perpetuates a perception that women lack what it takes to succeed.[35]

Such work provided the conceptual groundwork for subsequent research examining institutional governance. Recent empirical studies build on and reinforce theoretical critiques by women authors in the 1990s. Afra Afsharipour and Matthew Jennejohn's research on the Delaware Chancery litigation network—U.S. corporate law's hub—shows that women are not only underrepresented but also occupy peripheral positions within the litigation network.[36] This structural exclusion also surfaces in the M&A context, where Afsharipour shows that "over a seven-year period, women make up [an] average [of] 10.5% of lead legal advisors for buyers in large M&A deals," even though women constituted over 20% of partners and close to half of associates.[37] Jennifer Fan's analysis of private company boards in tech sectors supported similar findings.[38] Fan argues that lasting change requires cultural, business, and legal factors aligning to prioritize gender diversity, laying the blame for women's exclusion on entrenched structures, networks, and attitudes.[39]

Some scholars present more systemic and historical analyses of governance. Janis Sarra examined how corporate governance instantiates highly gendered power dynamics in corporate leadership, particularly in the way traditional governance structures exclude or devalue women's contributions to corporate life.[40] These gendered power dynamics mirror those in the domestic sphere, where women's labor has similarly been undervalued.[41] Sarah Haan's history of the "feminization of capital"—the transformation of American shareholders from majority male to majority female—shows how this transformation "shape[d] foundational ideas of corporate governance theory."[42] Haan proposes that we should thus re-examine core concepts in corporate governance through a gender-focused lens that assesses the intersection of gender and capital in shaping corporate norms.[43]

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[34] *Id.* at 1126–27.
[35] *Id.*
[36] Afsharipour & Jennejohn, *supra* note 2, at 1853.
[37] Afsharipour, *Women and M&A*, *supra* note 2, at 359; Tracey E. George, Mitu Gulati & Albert Yoon, *Gender, Credentials and M&A*, 48 BYU L. REV. 723, 723 (2022).
[38] Jennifer S. Fan, *Innovating Inclusion: The Impact of Women on Private Company Boards*, 46 FLA. ST. U. L. REV. 345, 372-73 (2018).
[39] *Id.* at 348, 364-67.
[40] Sarra, *supra* note 22, at 469-71.
[41] *See* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1573 (1983); *see also* Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51, 52 (1997) (showing the double devaluation of Black women's domestic work).
[42] Haan, *supra* note 2, at 516.
[43] *Id*. at 516, 573-74; *see also* Carol Liao, *Power and the Gender Imperative in Corporate Law*, *in* CREATING CORPORATE SUSTAINABILITY: GENDER AS AN AGENT FOR CHANGE 282 (Beate Sjåfjell & Irene Lynch Fannon eds., 2018) (highlighting the gendered predisposition of entrenched ideologies in corporate law); *see also* Carol Liao, *An Anti-Racist Feminist Agenda for Sustainable Corporate Law*, *in* A RESEARCH AGENDA FOR CORPORATE LAW 143 (Christopher M. Bruner & Marc Moore eds., 2023) (arguing that gendered, colonial, and racist foundations of the corporation have influenced how corporate interests are prioritized and protected).

Other scholarship has explored remedies for leadership underrepresentation. Darren Rosenblum argued that mandates requiring the inclusion of women on boards reflected a consequential feminization of capital.[44] Rosenblum and Daria Roithmayr conducted a qualitative study of the French quota, showing that the inclusion of women made governance more methodical, while Aaron Dhir examined the Norwegian quota model and found similar results regarding the benefits of women's inclusion.[45] Afsharipour examined the controversial Indian quota system, revealing that the "token" requirement of one woman still made a significant difference.[46] And, of course, there is an extensive body of literature outside of law, in the fields of management and finance, that evaluates various remedies for underrepresentation.[47]

Women scholars have also led research analyzing intersections of racial equality, board diversity, and corporate accountability. Cheryl Wade's contribution connecting racial discrimination and board fiduciary duties demonstrates how racism is associated with fiduciary duty shortcomings.[48] Her analysis of high-profile discrimination cases against leading firms reveals a persistent pattern of board denial and inaction in the face of discrimination complaints.[49] Wade contends that corporate racism not only disadvantages people of color but also reflects and reinforces the privileged status of whites.[50] The result is a pattern of "irrational defensiveness" and "cosmetic reforms that fail to address root causes."[51]

Recent work directly addresses many companies' cosmetic engagement with racial matters, arguing that much engagement presents "market fundamentalist, value-extractive" approaches to racial equity that reify "existing racial hierarchies and fails to produce change."[52] Using examples from civil rights movements and recent corporate responses to the 2020 racial justice protests, Gina-Gail Fletcher and H. Timothy Lovelace argue that, rather than achieving meaningful racial equity, corporate actions frame racial equity as a means to

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[44] *See* Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 BERKELEY BUS. L.J. 55, 73 (2009).

[45] *See* Darren Rosenblum & Daria Roithmayr, *More Than a Woman: Insights into Corporate Governance After the French Sex Quota*, 48 IND. L. REV. 889, 911-13 (2015); *see* AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY 147–172 (2015).

[46] *See* Afra Afsharipour, *The One Woman Director Mandate: History and Trajectory*, *in* CORPORATE GOVERNANCE IN INDIA: CHANGE AND CONTINUITY 85 (Asish K. Bhattacharyya ed., 2016).

[47] *See, e.g.*, Daniel T. Greene et al., *Reconciling the Evidence on Board Diversity Mandates*, 95 HKU JOCKEY CLUB ENTER. SUSTAINABILITY GLOB. RSCH. INST. (forthcoming 2025); Costanza De Acutis, Andrea Weber & Elisabeth Wurm, *The Effects of Board Gender Quotas: A Meta-Analysis*, IZA INST. LAB. ECON. NO. 17333 (Sept. 2024).

[48] *See* Cheryl L. Wade, *Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure*, 63 U. PITT. L. REV. 389, 390, 395-96 (2001) (in the Texaco case, for example, management dismissed complaints as "a bunch of militants," yet the complaints led to a $176 million settlement and significant reputational damage for the companies).

[49] *Id.* at 394.

[50] *Id.* at 429-30.

[51] *Id.* at 394, 399.

[52] Gina-Gail S. Fletcher & H. Timothy Lovelace, Jr., *Corporate Racial Responsibility*, 124 COLUM. L. REV. 361, 367 (2024).

"wealth maximization without government intervention."[53] Such framing, they contend, subordinates human dignity and advances an antiregulatory agenda that "reifies existing hierarchies, keeping the status quo fixed" for current beneficiaries.[54] Fletcher and Lovelace emphasize that greater inclusion in board and C-suite composition is one step toward advancing racial justice.[55]

LGBTQ+ inclusion entered corporate governance debates after California and Nasdaq incorporated it into broader diversity mandates.[56] Rosenblum and Jeremy McClane explored governance benefits arising from their inclusion, focusing on the traits that might open board engagement to difference.[57] Rosenblum then examined the challenge of LGBTQ+ inclusion, given that many leaders already hold power while remaining in the closet, arguing that inclusion requires making corporate hierarchies less heterosexist.[58] Considering queer inclusion raises questions about how governance should account for other differences, such as class, national or generational status, or even ability.

Beyond board diversity, scholarship addresses market-driven DEI accountability through "equality metrics"[59] and diversity disclosures.[60] Fletcher and Veronica Root Martinez argue that such standardized, empirical disclosures can reveal "current demographic diversity of the workforce and supply chain" while helping advance "measurable, specific plans to improve racial equity."[61] In the international human rights context, Erika George examines the role of metrics in corporate accountability.[62] Similarly, Atinuke Adediran makes a strong case that diversity should be central to the burgeoning debate over ESG disclosures, convincingly showing that diversity disclosure benefits both shareholders and stakeholders.[63] These calls for additional disclosure echo earlier calls by scholars like Wade, who advocated mandatory disclosures of potential civil rights liability to prevent companies from issuing "self-serving distortions" about their diversity efforts.[64]

Much of this literature clarifies the importance of gender and racial equality for effective corporate governance, especially within broader ESG goals. Meaningful change requires sustained multifaceted efforts, including legal and

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[53] *Id.* at 411.
[54] *Id.* at 415.
[55] *See id.* at 422.
[56] *See* Darren Rosenblum, *Queers, Closets and Corporate Governance*, 80 BUS. LAW. 413, 415 (2025).
[57] Jeremy McClane & Darren Rosenblum, *Why Corporate Boards Should Include LGBTQ+ People*, 46 SEATTLE U. L. REV. 255 (2023).
[58] *See* Rosenblum, *supra* note 56.
[59] *See* Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, 130 YALE L.J. FORUM 869, 869-70 (2021).
[60] *See* Atinuke O. Adediran, *Disclosing Corporate Diversity*, 109 VA. L. REV. 307 (2023).
[61] Martinez & Fletcher, *supra* note 59, at 875.
[62] ERIKA GEORGE, INCORPORATING RIGHTS: STRATEGIES TO ADVANCE CORPORATE ACCOUNTABILITY 147 (2021).
[63] *See* Adediran, *supra* note 60, at 309-10.
[64] Wade, *supra* note 48, at 420.

regulatory reforms and efforts from various corporate governance actors, including investors.[65]

III. THE DEI BACKLASH AND THE FUTURE OF CORPORATE SCHOLARSHIP

Diverse corporate law scholars have led the way not only in examining the advantages of greater diversity but also in discussing its limitations, pressing for reforms, and showing the links between greater diversity and corporate performance. From the century's beginning, when Norway adopted corporate board mandates, until 2023, the corporate world witnessed a seemingly inexorable rise in the emphasis on diversity as a critical element of good governance. Champions of greater diversity have emphasized, however, that the impact of gender diversity does not come from "adding women and stirring."[66] Instead, scholars work to tease out the causal factors: recruiting, retaining, and maintaining a diverse workforce requires different management practices than sustaining a corporate monoculture.[67] The study of corporate diversity thus offers an opportunity to examine which management practices matter and the impact they have not just on recruiting a more diverse workforce but also on corporate performance.

Most proposals to mandate increased diversity combine the normative case for diversity with an instrumental case, suggesting that the absence of diverse boards and management teams signals problems with a company that go beyond the lack of diversity itself. In 2020, for example, California passed statutes mandating that publicly held corporations, with principal offices in California, include at least one woman and one director from an underrepresented community, including racial and sexual minorities.[68] The legislation was justified both on the basis of past discrimination, including the dramatic underrepresentation of women on California boards, where a quarter of publicly traded companies had none, and by the value that more diverse perspectives bring to corporate management.[69]

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[65] *See, e.g.*, Cathy Hwang & Emily Winston, *The Limits of Corporate Governance*, 47 SEATTLE U.L. REV. 677 (2024) (challenging shareholder primacy and arguing that regulation is the optimal means for curtailing misbehavior by corporations).

[66] June Carbone, *Board Diversity: People or Pathways?*, 85 LAW & CONTEMP. PROBS. 167, 168 (2022).

[67] *See* Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377, 384 (2014) (concluding that that social science literature does not establish that the addition of women per se increases diversity); *see also* Alice H. Eagly, *When Passionate Advocates Meet Research on Diversity, Does the Honest Broker Stand a Chance?*, 72 J. SOC. ISSUES 199, 201 (2016) (generally critiquing failure to establish diversity as a causal factor once appropriate controls are added); *see also* Darren Rosenblum, *When Does Sex Diversity on Boards Benefit Firms?*, 20 U. PA. J. BUS. L. 429, 443 (2018) (arguing that the "big tent of instrumentalists, filled with both sincere instrumentalists and normative proponents and opponents, seems to inflate diversity's value").

[68] CAL. CORP. CODE §§ 301.3-301.4 (West 2021).

[69] *See* Laurel Wamsley, *California Becomes 1st State to Require Women on Corporate Boards*, NPR (Oct. 1, 2018, at 04:47 PM), https://www.npr.org/2018/10/01/653318005/california-becomes-1st-

Nasdaq similarly recognized this when it required corporate boards trading on the exchange to have at least one female director and one who identified as a member of certain racial groups or as LGBTQ+ (or to publicly disclose the company's reasons for not meeting this diversity objective), and to report their diversity statistics.[70] Before adopting the rule, Nasdaq issued a report finding that: "There is substantial evidence that board diversity enhances the quality of a company's financial reporting, internal controls, public disclosures, and management oversight."[71] It concluded that greater diversity contributed to better management and fraud prevention.[72]

The increasingly visible diverse voices in the legal academy and the compelling research on the business advantages of more diverse workforces have prompted a backlash. The major shift in diversification efforts began with the Supreme Court's *Students for Fair Admissions* (*SFFA)* decision, which voided affirmative action policies at public and private universities, overturning decades of precedent.[73] The prior year, courts found both California mandates—SB826 and AB979—unconstitutional.[74] The Nasdaq rule, imposing only disclosure mandates,

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state-to-require-women-on-corporate-boards#:~:text=%22We%20are%20not%20going%20to,will%20draw%20a%20$300%2C000%20fine [https://perma.cc/ZDV4-L8YN].

[70] *See* 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, 4424–25 (Aug. 6, 2021); *see also Nasdaq's Board Diversity Rule: What Companies Should Know*, NASDAQ 1, 2 (Feb. 28, 2023), https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf; *see also* Dan Mangan, *Appeals Court Will Rehear Challenge to Nasdaq Board Diversity Rule, Putting Mandate at Risk*, CNBC (Feb. 20, 2024, at 03:20 PM), https://www.cnbc.com/2024/02/20/appeals-court-to-rehear-nasdaq-diversity-rule-challenge.html [https://perma.cc/ED5Q-474G] (emphasizing that these efforts have been attacked as "woke" or as discriminatory quotas); Dan Byrne, *Nasdaq's Diversity Rule Faces a Conservative Backlash*, CORP. GOVERNANCE INST., https://www.thecorporategovernanceinstitute.com/insights/news-analysis/nasdaqs-diversity-rule-faces-a-conservative-backlash/ [https://perma.cc/39VU-NFE3] (last visited June 5, 2024).

[71] 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. at 4431; *see also* Afra Afsharipour, *Investment Bankers and Inclusive Corporate Leadership*, 46 SEATTLE U. L. REV. 221, 226-29 (2023) (describing investor pressure for greater diversity); *see also* Naomi Cahn, June Carbone & Nancy Levit, *The Instrumental Case for Corporate Diversity*, 40 MINN. J. L. & INEQ. 117, 139-40 (2022) ("In short, Nasdaq reported that firms with greater diversity were less likely to be engaged in the practices most closely associated with short-termism and competitive pay: earnings management, accounting manipulation and fraud, and the suborning of internal controls.").

[72] *See* NASDAQ, *supra* note 70; *see also* Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity, Exchange Act Release No. 34-90574, 85 Fed. Reg. 80472, 80473 (Dec. 4, 2020).

[73] *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 230 (2023).

[74] *See* Herbert Smith Freehills Kramer, *Diversity in the Boardroom: Nasdaq's Diversity Disclosure Rules Struck Down by En Banc Fifth Circuit Court of Appeals*, JD SUPRA (Jan. 6, 2025), https://www.jdsupra.com/legalnews/diversity-in-the-boardroom-nasdaq-s-7672812/ [https://perma.cc/2EU7-TGHJ].

was overturned by the Fifth Circuit in a 9-8 split, finding that the SEC exceeded its authority.[75]

The following month, President Trump took office for the second time and immediately began targeting DEI. Trump's January 20, 2025, Executive Order entitled "Ending Radical and Wasteful Government DEI Programs and Preferencing"[76] barred all governmental DEI efforts. The next day, Trump's order, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity"[77] sought to "encourage the private sector to end illegal discrimination and preferences, including DEI."[78] This federal effort sparked similar pushes by ten state attorneys general, who published a letter targeting the six most prominent financial institutions, pressuring them to eliminate DEI and ESG programs while warning of reprisals for advancing "discriminatory employment quotas."[79]

This backlash is part of a broader anti-DEI movement driven by politicians, activists, and segments of the public challenging these programs' effectiveness and legality. Firms that previously led the push for inclusion and DEI efforts after 2020, such as BlackRock, made a direct about-face on many of their core diversity commitments.[80] Dozens of major employers identified DEI as a *risk factor* in 2024 filings, and some high-profile companies publicly abandoned diversity targets, cancelled inclusion trainings, or even dropped the term "DEI" from communications.[81] The trend of eliminating DEI roles and programs, including a decrease in the number of chief diversity officers, began in 2023 amid political shifts and has since greatly intensified.[82] Some academics have also questioned the effectiveness of existing DEI programs.[83]

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[75] *See* All. for Fair Bd. Recruitment v. SEC, 85 F.4th 226, 232 (5th Cir. 2023) (noting Edward Blum, the conservative legal activist who overturned U.S. affirmative action policies in *Students for Fair Admission v. Harvard*, initiated the suit); All. for Fair Bd. Recruitment v. SEC, 125 F.4th 159, 168 (5th Cir. 2024); Jody Godoy, *Conservatives Challenging Nasdaq Board Diversity Rule Appeal to Full 5th Circuit*, REUTERS (Oct. 25, 2023, at 03:41 PM), https://www.reuters.com/legal/conservatives-challenging-nasdaq-board-diversity-rule-appeal-full-5th-circuit-2023-10-25/; Andrew Ramonas, *Nasdaq Board Diversity Rules Struck Down by Fifth Circuit (2)*, BLOOMBERG L. (Dec. 11, 2024, at 9:02 PM), https://news.bloomberglaw.com/esg/nasdaq-board-diversity-regulations-struck-down-by-fifth-circuit.

[76] Exec. Order No. 14151, 90 Fed. Reg. 8339 (Jan. 29, 2025).

[77] Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 31, 2025).

[78] *Id.*

[79] *See* Letter from Ken Paxton, Att'y Gen. of Tex., to JPMorgan Chase, Bank of America, Morgan Stanley, Goldman Sachs, Citigroup, & BlackRock (Jan. 23, 2025), https://www.texasattorneygeneral.gov/sites/default/files/images/press/Paxton%20Financial%20Institutions%20Letter%20Final.pdf.

[80] *See* Silla Brush, *BlackRock Ends Diversity Goals, Merges DEI Staff into New Team*, FORTUNE (Feb. 28, 2025, at 02:05 PM), https://fortune.com/2025/02/28/blackrock-diversity-dei-new-team/ [https://perma.cc/N2Q5-ARM8].

[81] *See id.*

[82] *See* Lisa Talbot, Rebecca Wise & Rima Ramchandani, *The Backlash Against DEI in the U.S. and What It Means for Canadian and Cross-Border Companies*, MONDAQ (Feb. 12, 2025), mondaq.com/canada/diversity-equity-inclusion/1582918/the-backlash-against-dei-in-the-us-and-what-it-means-for-canadian-and-cross-border-companies [https://perma.cc/GZX7-TQS5].

[83] *See e.g.*, Denise Robb & Sarah Rana, *Cutting the Cord: Good Riddance to Ineffective DEI Programs*, 17 INDUS. & ORGANIZATIONAL PSYCH. 507, 508 (2024).

While these attacks have undermined many corporate inclusion efforts, women have seen a rise in representation—with benefits for their companies. One of the most striking shifts has been in the number of female CEOs at Fortune 500 companies. Female representation increased from under 1% in 2000 to 6% in 2017,[84] and, for the first time, surpassed 10% in 2023.[85] During the ten-year period from 2013 to 2023, in which the increase occurred, female CEOs outperformed their male counterparts, producing returns of 384% compared to 261% for the male-led companies.[86]

The backlash has not fazed scholars interested in inclusion. Research on *who* occupies leadership positions, and *how* people from different backgrounds contribute to effective corporate governance, will continue. Corporate scholars have been careful in their efforts to tease out the differences between mandated diversity and greater diversity more generally. Today, in any company of significant size, an all-white, all-male management team should be a red flag, suggesting an unusual degree of cronyism, in-group favoritism, politicized decision-making, or distrust. This observation aligns with Nasdaq's findings that link shoddy practices to a lack of diversity. The ongoing study and critique of these patterns, and of the subtle, sometimes pernicious causal mechanisms behind them, is critical to assessing and reforming corporate management in theory and in practice, continuing the work of prior generations of diverse scholars who reshaped the debate.[87]

Attacks—whether valid counterpoints or ad hominem—provide a moment to pause. Scholars must revisit how to communicate to a broader audience to clarify the reasons that inclusion mattered in the first place. Indeed, this challenge requires us to stand up to advance inclusion during an even more challenging time. How will inclusion-focused scholars respond when the wind is facing them instead

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[84] *See* Richard L. Zweigenhaft, *Diversity Among Fortune 500 CEOs from 2000 to 2020: White Women, Hi-Tech South Asians, and Economically Privileged Multilingual Immigrants from Around the World*, WHO RULES AM. (Jan. 2021), https://whorulesamerica.ucsc.edu/diversity/diversity_update_2020.html [https://perma.cc/B9XG-CSHL].

[85] Emma Hinchliffe, *Women CEOs Run 10.4% of Fortune 500 Companies. A Quarter of the 52 Leaders Became CEO in the Last* Year, FORTUNE (June 5, 2023, at 06:45 PM), https://fortune.com/2023/06/05/fortune-500-companies-2023-women-10-percent/ [https://perma.cc/NT6K-MQDP].

[86] Jeremy Schneider, *Are Female CEOs Better than Male CEOs?*, PERS. FIN. CLUB (Mar. 7, 2023), https://www.personalfinanceclub.com/are-female-ceos-better-than-male-ceos/ [https://perma.cc/MUH3-F55N] (emphasizing that these figures do not necessarily mean that female CEOs outperform male CEOs because they are women. Instead, the female CEOs' success may indicate that female CEOs outperform the men because they rose to the top executive ranks through different pathways that make them better prepared for leadership or that the companies willing to choose female CEOs are better run in ways that go beyond the identity of their top executives). *See also* Carbone, *supra* note 66, at 210-11.

[87] Among the contributions different perspectives bring are different conceptions of time and the contributions to the corporate theory debate. *See, e.g.*, Lynn A. Stout, *The Corporation as a Time Machine: Intergenerational Equity, Intergenerational Efficiency, and the Corporate Form*, 38 SEATTLE U. L. REV. 685 (2015); *see also* June Carbone, *Women and Corporate Governance: Time Horizons and Stakeholder Analysis*, 99 CHI.-KENT L. REV. 199 (2024); June Carbone & Nancy Levit, *The Death of the Firm*, 101 MINN. L. REV. 963 (2017).

of behind them? With so much experience and essential work, we predict ongoing—and expanded—scholarly investigation into how gender, race, and other forms of difference affect firm governance.

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