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## Startup Biases

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*This Article provides an original descriptive account of bias in the startup context and explains why litigation is eschewed and what happens when it is used as a mechanism to combat bias in the venture capital ecosystem. Further, this Article identifies two particular phenomena in the startup context that exacerbate gender and racial bias. First, homophily — the idea that like attracts like — abounds and has been part of the DNA of venture capital since its inception. The thick networks that developed as venture capital made its way from the East Coast to the West Coast were limited to an elite group that were predominantly white and male. Second, because startups are not subject to a robust set of rules and regulations, they operate under a private ordering structure which allows startups to focus on growing the company. Therefore, whether gender or racial bias is addressed (if at all) depends on the company's priorities. This lack of rules and regulations is both a blessing and a curse in the startup world.*

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*While it allows startups maximum flexibility, it also prevents startups from being subject to a set of laws like they would be in a public company setting. Indeed, evolving practices in the public company realm have limited applicability in the private company setting. This Article offers both legal and non-legal tools to address startup biases, including legal reform applicable to unicorns and investors of a certain size, the diversification of deal leads and referrals, the recruitment of more investors who are women and racial and ethnic minorities, among others. The proposed solutions are intended to disrupt the homophily-influenced infrastructure of startups so that long-lasting changes can occur. Otherwise, we will be where we always are — with women and racial and ethnic minorities receiving a paltry share of venture capital funding.*

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## INTRODUCTION

Guilty. That was the verdict for Elizabeth Holmes in four of the eleven charges of fraud.<sup>1</sup> Even before her conviction, Holmes’ actions had severe repercussions for other women in startups. Many women noted that on top of already having to prove they belonged in the “male-dominated field of startups,” they now also faced the “additional hurdle of fighting assumptions that they were like Ms. Holmes . . . .”<sup>2</sup> Moreover, they noted that their male counterparts did not share this additional hurdle.<sup>3</sup> One

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<sup>1</sup> David Streitfeld, *The Epic Rise and Fall of Elizabeth Holmes*, N.Y. TIMES (Jan. 3, 2022), <https://www.nytimes.com/2022/01/03/technology/elizabeth-holmes-theranos.html> [<https://perma.cc/9NDG-MJT7>] [hereinafter *The Epic Rise*]. The list of white-collar crimes that get prosecuted in Silicon Valley is a short one. David Streitfeld, *In Silicon Valley, Criminal Prosecutors See No Evil*, N.Y. TIMES, <https://www.nytimes.com/2021/09/07/technology/silicon-valley-prosecutions.html> (last updated Sept. 17, 2021) [<https://perma.cc/2M54-YSGW>] [hereinafter *In Silicon Valley*].

<sup>2</sup> Erin Griffith, *They Still Live in the Shadow of Theranos’s Elizabeth Holmes*, N.Y. TIMES, <https://www.nytimes.com/2021/08/24/technology/theranos-elizabeth-holmes.html> (last updated Nov. 14, 2021) [<https://perma.cc/96M8-B7AV>]. In contrast, men in the startup world were not tainted in the aftermath of bad behavior from certain larger-than-life founders, such as Adam Neumann. See also Charlie Warzel, *Elon Musk’s Texts Shatter the Myth of the Text Genius*, ATLANTIC (Sept. 30, 2022), [https://www.theatlantic.com/technology/archive/2022/09/elon-musk-texts-twitter-trial-jack-dorsey/671619/?utm\\_source=apple\\_news](https://www.theatlantic.com/technology/archive/2022/09/elon-musk-texts-twitter-trial-jack-dorsey/671619/?utm_source=apple_news) [<https://perma.cc/58FV-EYSQ>] (presenting a breezy exchange between Elon Musk and Larry Ellison, founder of Oracle, where Ellison offered Musk an investment of “[a] billion . . . or whatever you recommend” to take Twitter private). The tech world remains dominated by “the boys’ club and power networks,” which have facilitated and allowed for “the lazy quality of this dealmaking” and ultimately “reveal something deeper about the brokenness of this investment ecosystem and the ways that it is driven more by vibes and grievances than due diligence.” *Id.*

<sup>3</sup> Griffith, *supra* note 2.

journalist stated the following in her coverage of Holmes: “What I found most compelling was hearing from female founders, especially in life sciences and health care. Many of them told me that the downfall of Elizabeth Holmes is still impacting them.”<sup>4</sup> As an example, some women founders in health technology startups report being compared to her in an unfavorable fashion.<sup>5</sup> Holmes’ trial “raise[d] issues of deception, gender, transparency, out-of-control hype and the sartorial influence of the Apple co-founder Steve Jobs . . . .”<sup>6</sup> The Holmes case is just one example of how biases proliferate in the startup world. Venture capital (“VC”) is famously known for funding some of the most transformational startups (and now public company behemoths) of our time, such as Apple, Amazon, Facebook,<sup>7</sup> Google,<sup>8</sup> and Netflix. But for every great startup that is funded, there are many more that are not. For entrepreneurs who are women or racial and ethnic minorities, gender and racial bias play a significant role in why this is the case. One CEO observed, “[a]lthough VCs would have

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<sup>4</sup> Lauren Jackson, *Does Elizabeth Holmes’s Gender Matter?*, N.Y. TIMES, <https://www.nytimes.com/2021/09/17/podcasts/elizabeth-holmes-gender.html> (last updated Sept. 13, 2022) [<https://perma.cc/38YM-ERX4>].

<sup>5</sup> Griffith, *supra* note 2. One female founder noted that the constant analogies to Holmes are likely due to few female-founded companies being able to grow to a certain size and profile; thus, the companies that do have their actions magnified as a result. *Id.* Moreover, female founders must typically navigate questions that their male counterparts do not. *Id.*

<sup>6</sup> Streitfeld, *In Silicon Valley*, *supra* note 1. It does not appear that bad behavior of white, male founders in the startup world taints other white male founders’ prospect of being funded. *See, e.g.*, Eric Newcomer & Brad Stone, *The Fall of Travis Kalanick Was a Lot Weirder and Darker Than You Thought*, BLOOMBERG (Jan. 18, 2018, 2:00 AM PST), <https://www.bloomberg.com/news/features/2018-01-18/the-fall-of-travis-kalanick-was-a-lot-weirder-and-darker-than-you-thought> [<https://perma.cc/3633-537E>] (recounting the various mistakes of Travis Kalanick, the founder of ridesharing startup Uber). Francesca Billington, *The Vast Majority of Venture Dollars Go to White Male Founders, Report Finds*, DOT.LA (Jan. 21, 2021), <https://dot.la/venture-capital-2650047652.html> [<https://perma.cc/8VKW-GW3V>] (summarizing a report that “tracked the top 100 U.S. VC firms accounting for \$68 billion in funding across 3,304 companies,” which found that startups by top VCs were nearly 90% male).

<sup>7</sup> On October 28, 2021, Facebook changed its name to Meta Platforms, Inc. Meta Platforms, Inc., Current Report (Form 8-K) (Oct. 28, 2021), <https://www.sec.gov/Archives/edgar/data/1326801/000132680121000071/fb-20211028.htm> [<https://perma.cc/7PWN-9R9H>].

<sup>8</sup> In 2015, Google implemented a holding company reorganization where Google became a direct, wholly owned subsidiary of Alphabet. GOOGLE INC., Current Report (Form 8-K) (Aug. 10, 2015), [https://www.sec.gov/Archives/edgar/data/1288776/000128877615000039/a20150810form8-k.htm?xid=nl\\_daily](https://www.sec.gov/Archives/edgar/data/1288776/000128877615000039/a20150810form8-k.htm?xid=nl_daily) [<https://perma.cc/NXG9-RVRM>].

founders believe that their decision is built on complete rationality, the reality is that many VCs still have personal bias and are influenced by their peers.’”<sup>9</sup> This presents a problem because in order to continue to innovate at the highest levels, founders need to be drawn from every part of our society, not only a select part.

Gender and racial bias in startups have received significant scholarly attention in the business scholarship context.<sup>10</sup> However, in the legal academy, studies on such biases primarily focus on the public company, and more specifically, its board.<sup>11</sup> Public companies report their diversity numbers, but not in the numbers one would expect. As an example, among the Fortune 500 companies, 256 of them published racial and ethnic data in 2020, but only twenty-two companies provided a breakdown of the percentage of minorities in their companies.<sup>12</sup> For these companies, legal solutions have come in the form of state legislatures mandating the representation of women and racial and ethnic minorities on public

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<sup>9</sup> Paige Gross, *Elizabeth Holmes Is Guilty. What Does the Theranos Trial Verdict Mean for Founders and Investors Alike?*, TECHNICAL.LY (Jan. 4, 2022, 7:37 PM), <https://technical.ly/2022/01/04/elizabeth-holmes-theranos-trial-guilty-verdict-founders-investors-due-diligence/> [<https://perma.cc/4MK3-B87L>].

<sup>10</sup> Jason Greenberg & Ethan Mollick, *Activist Choice Homophily and the Crowdfunding of Female Founders*, 62 ADMIN. SCI. Q. 341, 344 (2017); see discussion *infra* Part II.B.

<sup>11</sup> See, e.g., Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855 (2011) (discussing that increased reliance on market- or economic-based rationales for board diversity has led to little change in the number of women and people of color in the boardroom); 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) (discussing the California law mandating a diversity requirement on public corporations and how it relates to the presence of women on boards); Lisa M. Fairfax, *Separation Anxiety: A Cautious Endorsement of the Independent Board Chair*, 47 IND. L. REV. 237 (2014) (discussing shareholders’ call for independent board leadership at JP Morgan, a public company, and the impact the separation of CEO and board chair would have); see also Afra Afsharipour, *Women and M&A*, 12 U.C. IRVINE L. REV. 359, 366 (2022) (analyzing the gender disparities within large merger and acquisition transactions, recognizing that women are significantly “underrepresented as legal and financial advisors”).

<sup>12</sup> Marco Quiroz-Gutierrez, *The Top 20 Fortune 500 Companies on Diversity and Inclusion*, FORTUNE (June 2, 2021, 1:30 AM PDT), <https://fortune.com/2021/06/02/fortune-500-companies-diversity-inclusion-numbers-refinitiv-measure-up/> [<https://perma.cc/58W8-CMM7>]. But see Ashley Marchand Orme, *Big Companies Are Already Collecting Important Data on Workforce Diversity. More of Them Need to Make It Public*, FORTUNE (Feb. 9, 2022, 2:30 AM PST), <https://fortune.com/2022/02/09/diversity-inclusion-dei-intersectional-data-eo-1-reports/> [<https://perma.cc/7S79-YY4G>] (noting that more companies are disclosing EEO-1 reports).

company boards. The Nasdaq Stock Market also proposed new listing rules to promote board diversity using a “comply-or-disclose” framework which requires annual disclosure about voluntary self-identified gender and racial characteristics and LGBTQ+ status of board members;<sup>13</sup> it was approved by a divided Securities and Exchange Commission (the “SEC”) in August 2021.<sup>14</sup>

The problem of gender and racial bias in venture-backed startups, however, cannot be solved in a similar fashion. Private ordering — “the development of firm-specific governance terms”<sup>15</sup> — undergirds much of how startups operate; it has shortcomings when using a diversity, equity, and inclusion (“DEI”) lens. Unless founders or investors prioritize diversifying startups and get to the root of the problem — “disparity of opportunity”<sup>16</sup> — private ordering is ill equipped to address gender and racial bias.

This Article fills a gap in the current scholarship on gender and race in corporations by looking at the issue from a private company perspective. Specifically, it provides an original descriptive account of the startup ecosystem and how it remains homogeneous. Put simply, the absence of

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<sup>13</sup> Disclosure on board diversity began in 2022 while meeting board diversity requirements takes a tiered approach and commenced in 2023. The Nasdaq Stock Market LLC; Order Approving Proposed Rule Changes, Exchange Act Release No. 34-92590, 86 Fed. Reg. 44,424, 44,424 (Aug. 12, 2021); NASDAQ, NASDAQ’S BOARD DIVERSITY RULE: WHAT NASDAQ-LISTED COMPANIES SHOULD KNOW (2022), <https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf> [<https://perma.cc/WM2C-EKDV>].

<sup>14</sup> SEC Approves New Nasdaq Board Diversity Rules, GIBSON DUNN (Aug. 12, 2021), <https://www.gibsondunn.com/sec-approves-new-nasdaq-board-diversity-rules/> [<https://perma.cc/YC4Y-WJGY>]. More recently, staffers for House Financial Services Chairwoman, Maxine Waters, and Diversity and Inclusion Subcommittee Chairwoman Joyce Beatty, stated in a December 2021 report that the SEC and other financial market regulators should require public “companies to disclose racial and gender pay equity audits, board director demographics and other diversity-related measures.” Ellen Meyers, *Democrats’ Report Urges Diversity, Pay Equity Disclosure Bills*, ROLL CALL (Dec. 9, 2021, 7:00 AM), <https://www.rollcall.com/2021/12/09/democrats-report-urges-diversity-pay-equity-disclosure-bills/> [<https://perma.cc/B8A5-52QS>] (noting that these legislative recommendations by Democrats will likely face pushback from Republicans “who have largely opposed mandatory disclosure”).

<sup>15</sup> Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. 373, 378 (2018) [hereinafter *Governance by Contract*].

<sup>16</sup> Allison Herren Lee, Comm’r, U.S. Sec. & Exch. Comm’n, Diversity Matters, Disclosure Works, and the SEC Can Do More, Remarks at the Council of Institutional Investors Fall 2020 Conference (Sept. 22, 2020), <https://www.sec.gov/news/speech/lee-cii-2020-conference-20200922> [<https://perma.cc/4GF4-NSDW>] (citing SEC Commissioner Allison Herren Lee’s comments regarding diversity in public companies).

rules and regulations perpetuates this lack of diversity which then has a detrimental effect on how much startups can innovate. This Article describes how companies are funded and shows how founders and investors dictate who is on the board and whether DEI initiatives are prioritized. In particular, it illustrates that startups need both legal and non-legal tools to address gender and racial biases and explains why the private ordering<sup>17</sup> on which VC has historically relied upon is inadequate unless the entire ecosystem, from founders to investors to advisors (such as their legal counsel) to limited partners, chooses to diversify.

By doing so, the Article makes three primary contributions. First, it provides an original descriptive account of startup biases and shows how a set of processes and practices emerged in VC financings that continue to impact who gets funded, what terms are negotiated, and who is on the board. Legal academics have primarily studied corporate governance and DEI issues in the public company context.<sup>18</sup> Private companies, in contrast, have received much less attention. They operate under a vastly different set of rules — one might say a lack of them — and less information is available to conduct analyses. This Article provides examples that illustrate how bias permeates the startup landscape, which influences who gets to fund startups, who makes investment decisions, and who obtains funding; the confluence of all these factors also ultimately determines whether DEI initiatives are prioritized or discussed at all. As an example, historically, limited partners originated from the ranks of a select few schools, foundations, pension funds, and wealthy investors.<sup>19</sup> It

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<sup>17</sup> Private ordering can be defined as “tailoring a firm’s corporate governance to meet its individual needs.” Jill E. Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 WASH. U. L. REV. 913, 913 (2022) [hereinafter *Stealth Governance*].

<sup>18</sup> See, e.g., Lissa Lamkin Broome & Kimberly D. Krawiec, *Signaling Through Board Diversity: Is Anyone Listening?*, 77 U. CIN. L. REV. 431 (2008) (discussing preliminary findings on the ethnic and gender make-up of corporate boards through interviews representing 96 public company board experiences at 85 different public companies); Lisa M. Fairfax, *Just Say Yes? The Fiduciary Duty Implications of Directorial Acquiescence*, 106 IOWA L. REV. 1315, 1325-28 (2021) (exploring how shareholder demands to alter corporate governance policies and procedures at public companies have changed procedures at public companies dramatically within short span of time); Lisa M. Fairfax, *Shareholder Democracy on Trial: International Perspective on the Effectiveness of Increased Shareholder Power*, 3 VA. L. & BUS. REV. 1, 27-28 (2018) (citing Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795, 811-12 (1993) (noting the distinction between public and private funds and the pressure public funds face to focus on local and social issues)).

<sup>19</sup> “In fiscal 2020, Stanford raised \$1.36 billion in donations and Harvard \$1.2 billion, more than the entire endowments of most colleges . . . larger endowments can take bigger risks in search of higher returns and are offered the chance to invest in fast-growing companies before

is only when instances of social reckoning occur, such as the #MeToo Movement and Black Lives Matter, that changes start to happen.

Second, current corporate governance mechanisms do not work well in the DEI context.<sup>20</sup> In fact, negative consequences have emerged from the absence of any directives on DEI issues. Since startups are not subject to the robust regulations of the securities law regime that public companies are, DEI matters are an afterthought; the focus is on ensuring the startup's survival and next big financing. This Article argues that the founder-centric approach to corporate governance in startups means that the diversification of the startup ecosystem largely depends on founders and, to a lesser extent, investors.<sup>21</sup> This Article identifies a number of suboptimal implications for corporate law and governance as a result of this approach from a DEI perspective.

Third, a holistic account of startup biases illustrates how corporate governance in startups is not a neutral set of processes. Instead, how and when corporate governance is implemented largely depends on a few key players. This is not to suggest that when corporate governance measures are implemented, they are done incorrectly, but with respect to DEI issues, they fall woefully short. This has resulted in a patchwork of DEI initiatives that is not built into the infrastructure of startups. The data predicts that this patchwork method will continue and have negative consequences as

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they go public — opportunities not available to poorer schools . . . HBCUs, with their tiny endowments, don't have the risk tolerance and long-term investment horizon of richer investors." Lizette Chapman & Janet Lorin, *A \$250 Million Fund Steers HBCU Endowments into Venture Capital*, BLOOMBERG BUSINESSWEEK (May 27, 2021, 1:00 AM PDT), <https://www.bloomberg.com/news/articles/2021-05-27/advancement-initiative-wants-to-steer-hbcu-endowments-into-venture-capital> [<https://perma.cc/QEB9-VXHU>].

<sup>20</sup> See Jennifer S. Fan, *The Landscape of Startup Corporate Governance in the Founder-Friendly Era*, 18 N.Y.U. J.L. & BUS. 317, 370-72 (2022) [hereinafter *The Landscape of Startup Corporate Governance*] (noting that the lawyers interviewed expressed that startup corporate governance generally functions well without bright-line rules).

<sup>21</sup> Jennifer S. Fan, *Nontraditional Investors*, 48 BYU L. REV. 463, 463-64 (2022) (noting that with the proliferation of nontraditional investors, the VC ecosystem is even more founder-friendly than before); see, e.g., Sheryl Estrada, *'We Need to Be on the 700th Black Woman Starting a Unicorn Company' Instead of Just a Few, Says the Founder of Incredible Health*, FORTUNE (Oct. 13, 2022, 4:52 PM PDT), <https://fortune.com/2022/10/13/incredible-health-founder-we-need-700-black-woman-starting-unicorns-not-just-a-few/> [<https://perma.cc/V89S-QAYP>] (illustrating "the importance of tapping into networks, especially in the venture capital business, where 'ecosystems' of other founders, investors, and business leaders play a vital role").



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startups grow, as was the case with Uber and WeWork.<sup>22</sup> A fundamental shift in how DEI issues are approached is necessary for any meaningful advancement to occur regarding the diversification of who gets funding, who sits on the board, and who gets to participate in VC financings. Absent the will of the founders and investors of startups to change the current system, the numbers of women and racial and ethnic minorities who receive funding will continue to remain low, with incremental change or change driven by social forces being the norm.

This Article proceeds as follows. Part I provides a brief historical timeline of how the world of VC and VC-backed startups evolved, with relatively few women and racial minorities playing any significant role. Part II delves into current day startup biases, showcasing how persistent and deep-rooted these biases are. In particular, it illustrates how women and racial minorities remain largely absent from the startup ecosystem due to systemic bias. Part III examines how the problems of gender and racial bias have been addressed in the public company context and explains why similar legal mechanisms would likely not work for startups because of how they operate, receive financing, and the culture in which they do business. This Part will show that in the founder-friendly era of startups, much depended on the proclivities of the founder and whether DEI was a priority for him/her/them. More specifically, it will discuss the role of private ordering in diversity initiatives and predicts that a patchwork approach to DEI will continue to be the norm unless there is some fundamental change. Part IV offers legal and non-legal options to create a path forward for combatting gender and racial bias in startups, such as legal reforms applicable to unicorns and investors of a certain size, the diversification of investors and limited partners, the use of contractual mechanisms, and the examination of current hiring practices.

## I. THE EVOLUTION OF STARTUP BIASES

Since the inception of venture-backed startups, women and racial minorities have been historically excluded from startups and VC. This Part

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<sup>22</sup> Suhauna Hussain, *Facing Backlash, WeWork Adds One Woman to Its All-Male Board*, L.A. TIMES (Sept. 4, 2019, 2:46 PM PT), <https://www.latimes.com/business/story/2019-09-04/wework-frances-frei-board-ipo> [<https://perma.cc/YD62-6RFM>] [hereinafter *Facing Backlash*]; Sara Ashley O'Brien, *New Uber Report Shows It Slipped on Black Representation After Layoffs*, CNN BUSINESS, <https://www.cnn.com/2020/11/20/tech/uber-diversity-report/index.html> (last updated Nov. 20, 2020, 2:07 PM EST) [<https://perma.cc/G8Z5-4R59>].

offers historical context for the startup biases examined in this Article and charts the rise of venture-backed startups.

*A. A Brief History of Startup Biases*

Startups and the VC world have been exclusively male and white since their early days. A brief history of VC and the startups they spawned follows.

1. 1930s

In the 1930s, the heirs to U.S. family fortunes, such as the Rockefellers, Whitneys, and Bessemers, began to invest in emerging, risky ventures, recognizing that the technology spin-offs originating from World War II military research and development had the potential to become new, profitable ventures.<sup>23</sup> These same families later set up companies to “find and formalize investments in new and emerging industries.”<sup>24</sup> This risk capital was invested in a variety of new industries and was not limited to technology. During this time, the families focused on the East Coast and used family money to fund investments.<sup>25</sup>

2. 1940s

Then, in 1946, Massachusetts Institute of Technology president Karl Compton, Massachusetts Investors Trust chairman Merrill Griswold, Federal Reserve Bank of Boston president Ralph Flanders, and Harvard Business School professor General Georges F. Doriot (the “father of venture capital”) formed the first modern VC firm — American Research and Development Corporation (“ARDC”).<sup>26</sup> For private companies, risk capital had typically originated from wealthy families like the

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<sup>23</sup> Steve Blank, *The Secret History of Silicon Valley 11: The Rise of “Risk Capital” Part 1*, STEVE BLANK (Oct. 26, 2009), <https://steveblank.com/2009/10/26/the-secret-history-of-silicon-valley-11-the-rise-of-%E2%80%9Crisk-capital%E2%80%9D-part-1/> [<https://perma.cc/6RMQ-4GW5>].

<sup>24</sup> *Id.* For example, John Whitney wrote a check for \$5 million to start the J.H. Whitney Company and Laurence Rockefeller wrote a check for \$1.5 million to start the Rockefeller Brothers, Inc. (which was later renamed Venrock). *Id.*

<sup>25</sup> *Id.* Risk capital meant “investing where others feared.” *Id.*

<sup>26</sup> *Venture History 101*, VENTURE FORWARD, <https://ventureforward.org/education/history-101/> (last visited Nov. 15, 2021) [<https://perma.cc/NVG2-JTMU>]; Blank, *supra* note 23. Note that ARD was a publicly traded VC firm (it raised \$3.5 million as a closed-end mutual fund) and was therefore regulated by the SEC. It wasn’t until 30 years later that VC firms would be organized in the form they are today — limited partnerships. *Id.*

Rockefellers and Vanderbilts, but ARDC also raised money from institutional investors, such as insurance companies, investment trusts, mutual funds, and universities, to invest in companies that used technologies developed in World War II.<sup>27</sup> ARDC would go on to fund many of the technology startups in the region around Boston's Route 128.<sup>28</sup> The firm also invested \$70,000 for a 77% ownership in the Digital Equipment Company ("DEC"); over the next fourteen years, DEC's value increased to \$355 million.<sup>29</sup> "ARDC proved that there was interest from institutional investors (not just family money) to invest in VC firms, and that risk capital could provide hands-on, active management, not just money."<sup>30</sup> Women and minorities were noticeably absent as the nascent VC landscape took shape.

### 3. 1950s and 1960s

Another pivotal moment in VC history was when Arthur Rock, a New York banker and student of Doriot's, assisted eight founders in the Bay Area<sup>31</sup> to secure funding from serial entrepreneur Sherman Fairchild; they formed the transistor company Fairchild Semiconductor in 1957.<sup>32</sup> Rock went on to form the Bay Area's first VC firm in 1961 with the financial backing of four of the eight founders of Fairchild Semiconductor.<sup>33</sup> Prior to the formation of Rock's VC firm, VC firms in the U.S. were primarily located in the Northeast region (Boston and New York).<sup>34</sup> Fairchild Semiconductor itself would go on to generate thirty-one spinoffs.<sup>35</sup> The development of the startup ecosystem in the Northeast and Bay Area was

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<sup>27</sup> *Venture History 101*, *supra* note 26.

<sup>28</sup> Blank, *supra* note 23.

<sup>29</sup> *Venture History 101*, *supra* note 26.

<sup>30</sup> *Id.*

<sup>31</sup> *Venture History 101*, *supra* note 26. The eight founders (all white males) — Jay Last, Robert Noyce, Sheldon Roberts, Julius Blank, Eugene Kleiner, Jean Hoerni, Gordon Moore, and Victor Grinich — had originally been recruited by William Shockley, a Nobel Prize winning inventor who helped to create "a new 'semiconductor device' that could control and amplify electric signals." RHETT MORRIS & MARIANA PENIDO, ENDEAVOR INSIGHT, HOW DID SILICON VALLEY BECOME SILICON VALLEY? THREE SURPRISING LESSONS FOR OTHER CITIES AND REGIONS 4-5, 7 (2014), <https://endeavor.org/tr/wp-content/uploads/2016/01/How-SV-became-SV.pdf> [<https://perma.cc/V4B2-WN5L>]. All eight of them left Shockley's company after one year. *Id.* at 5.

<sup>32</sup> MORRIS & PENIDO, *supra* note 31, at 6.

<sup>33</sup> *Id.* at 8.

<sup>34</sup> *Venture History 101*, *supra* note 26.

<sup>35</sup> MORRIS & PENIDO, *supra* note 31, at 9.

fairly homogenous — women or racial or ethnic minorities are not mentioned in the early history of VC.<sup>36</sup>

Although the Small Business Investment Act of 1958 conferred authority to the Small Business Administration to create new small business investment companies (also known as “SBICs”) to finance early-stage companies just like VC firms did,<sup>37</sup> the SBICs did not actively participate in the startups and had other challenges that led to their decline.<sup>38</sup> In the 1960s, the limited partnership structure of VC emerged; it is the structure still used today.<sup>39</sup>

#### 4. 1970s and 1980s

Venture capital for minorities appears to have originated from the Minority Enterprise Small Business Investment Companies (“MESBICs”), which were first chartered in 1970.<sup>40</sup> One of the early VC firms to invest in startups founded by minorities, UNC Ventures (then known as Urban National Corporation), was founded in 1971 by Kenneth

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<sup>36</sup> After extensive research involving several books and articles discussing VC’s, no names of women or minorities were present. In part, this may be due to the fact that such information was not kept at the time. However, in reviewing information about the history of Silicon Valley, nearly every individual who is mentioned is not diverse. *See, e.g.*, Corey Protin, Matthew Stuart & Matt Weinberger, *Animated Timeline Shows How Silicon Valley Became a \$2.8 Trillion Neighborhood*, BUS. INSIDER (Dec. 18, 2020, 2:30 PM), <https://www.businessinsider.com/silicon-valley-history-technology-industry-animated-timeline-video-2017-5> [<https://perma.cc/28PE-2FHT>] (documenting the history of Silicon Valley, absent reference to any diverse individuals).

<sup>37</sup> Small Business Investment Act of 1958, Pub. L. No. 85-699, 72 Stat. 689.

<sup>38</sup> Paul A. Gompers, *The Rise and Fall of Venture Capital*, 23 BUS. & ECON. HIST. 2, 6-7 (1994).

<sup>39</sup> *Venture History 101*, *supra* note 26.

<sup>40</sup> Timothy Bates, William Bradford & Julia Sass Rubin, *The Viability of the Minority-Oriented Venture-Capital Industry Under Alternative Financing Arrangements*, 20 ECON. DEV. Q. 178, 179 (2006). “Back in the days when SBA-chartered MESBICs made up the minority-oriented venture-capital industry, most of the MESBICs were, in fact, asset-based lenders . . . . No more than ten MESBICs seriously pursued VC investing.” Timothy Bates & William Bradford, *Analysis of Venture-Capital Funds that Finance Minority-Owned Businesses*, REV. BLACK POL. ECON. 1, 6 (2004), [https://www.researchgate.net/publication/46537211\\_Analysis\\_of\\_Venture-Capital\\_Funds\\_that\\_Finance\\_Minority-Owned\\_Businesses\\_By?stream=top](https://www.researchgate.net/publication/46537211_Analysis_of_Venture-Capital_Funds_that_Finance_Minority-Owned_Businesses_By?stream=top) [<https://perma.cc/F6AS-DMPL>]. The later incarnation of MESBICs was the National Association of Investment Companies (“NAIC”) where the “predominant orientation is VC investing,” however, “[i]t is clearly not true that all NAIC members are VC oriented. Further, many have objectives other than financing [minority owned business enterprises].” *Id.* at 5-6 (noting geographic and industry orientation of NAIC members).

H. Miller and Tull N. Gearrard, two white Harvard graduate students.<sup>41</sup> Despite the growth in VC firms, there is very little mention of women.<sup>42</sup> Patricia Cloherty is an exception. She joined Apax Partners, Inc. (formerly Patricof & Co. Ventures, Inc.) in 1970 and eventually became its Co-Chairperson, President, and General Partner.<sup>43</sup> She also served as

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<sup>41</sup> Mark Lowery, *Capitalists on a Mission*, BLACK ENTER., Nov. 1994, at 166, 166-71, [https://books.google.com/books?id=dFwEAAAAMBAJ&pg=PA6&lpg=PA6&dq=cassandra+hayes+black+enterprise+1994+countdown+to+25&source=bl&ots=Op4ks3Na5o&sig=ACfU3U3FpEtdw0rbNldIva1pFv6t9S\\_oTw&hl=en&sa=X&ved=2ahUKewj54aOx2sn1AhVkfjQIHTYmAYEQ6AF6BAgaEAM#v=onepage&q=cassandra%20hayes%20black%20enterprise%201994%20countdown%20to%2025&f=false](https://books.google.com/books?id=dFwEAAAAMBAJ&pg=PA6&lpg=PA6&dq=cassandra+hayes+black+enterprise+1994+countdown+to+25&source=bl&ots=Op4ks3Na5o&sig=ACfU3U3FpEtdw0rbNldIva1pFv6t9S_oTw&hl=en&sa=X&ved=2ahUKewj54aOx2sn1AhVkfjQIHTYmAYEQ6AF6BAgaEAM#v=onepage&q=cassandra%20hayes%20black%20enterprise%201994%20countdown%20to%2025&f=false) [https://perma.cc/48HJ-WB3N]; Ed Dugger, *Seeing What You Look for*, REINVENTURE CAP. (Dec. 17, 2015), <https://reinventurecapital.com/ed-talk-3/> [https://perma.cc/TJY4-N363]. Edward Dugger III, an African American man, became the head of UNC Ventures; its first two funds raised over \$28 million and was “leveraged into more than \$1 billion and created about 7,000 new jobs.” Lowery, *supra*, at 166-67. Urban National Corporation was founded in 1971 with \$10 million provided by commercial banks, corporations, insurance companies, foundations, institutional investors, and university endowments. *An Open Letter to Minority Businesses from Urban National Corporation*, BLACK ENTER., Oct. 1974, at 46, 46, [https://books.google.com/books?id=E4B-KrvPHMkC&pg=PA47&dq=urban%20national%20corp.&hl=en&sa=X&ved=2ahUKewjBuvCvj-P1AhVOI0QIHSkaDeMQ6AF6BAgJEAI&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=newsletter\\_axiosprorata&stream=top#v=onepage&q=urban%20national%20corp.&f=false](https://books.google.com/books?id=E4B-KrvPHMkC&pg=PA47&dq=urban%20national%20corp.&hl=en&sa=X&ved=2ahUKewjBuvCvj-P1AhVOI0QIHSkaDeMQ6AF6BAgJEAI&utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiosprorata&stream=top#v=onepage&q=urban%20national%20corp.&f=false) [https://perma.cc/H5LJ-FHTU]. Investors in UNC included Aetna Life & Casualty Insurance Co., the Ford Foundation, Gulf Oil, Harvard, Massachusetts Institute of Technology, Mobil, Salomon Brothers, the United Church of Christ pension fund, and 15 others. Thomas W. Lippman, *Risking Minority Ventures*, WASH. POST (Feb. 28, 1982), <https://www.washingtonpost.com/archive/business/1982/02/28/risking-minority-ventures/6874652a-5cd0-41c3-b3e2-034a4bcc9da3/> [https://perma.cc/TRN9-UR5Y]. When it was formed, “minority business in the United States consisted mostly of small family-owned retail stores, funeral parlors, and other traditional enterprises requiring little technological input and lacking growth opportunity.” *Id.* Urban National Corporation “invest[ed] risk capital throughout the U.S. in businesses which are controlled by [members of the] [B]lack[], Puerto Rican[], Mexican American[], Native American [communities], and members of other minority groups.” The amounts invested ranged from \$100,000 to \$500,000. *An Open Letter to Minority Businesses from Urban National Corporation*, *supra*, at 46. In 1982, Urban National Corporation reported the following racial composition of the companies it had invested in: “Afro-American 62.6[%]; Asian American, 12.5[%]; Hispanic, Indo-American and Native American, 8.3[%] each.” Lippman, *supra*.

<sup>42</sup> See, e.g., TOM NICHOLAS, VC: AN AMERICAN HISTORY 262-65 (2019) (noting that the “inescapable fact” about VC during the 1980s was its “lack of racial and gender diversity.” Additionally, the 1986 directory of the National Venture Capital Association showed that only 7% of the associates and partners were women).

<sup>43</sup> Ed Shanahan, *Patricia Cloherty, Trailblazing Venture Capitalist, Dies at 80*, N.Y. TIMES (Oct. 5, 2022), <https://www.nytimes.com/2022/10/05/business/dealbook/patricia->

President and Chairperson of the National Venture Capital Association.<sup>44</sup> The National Venture Capital Association was established in 1973 as a trade organization to provide a lobbying voice in Washington, D.C. for VC firms and their portfolio companies.<sup>45</sup> In the 1970s, several significant laws were passed that further helped develop the VC ecosystem. One of these laws, the Revenue Act of 1978, decreased the capital gains tax rate from 49.5% to 28%.<sup>46</sup> Then in 1979, there were changes to the Employee Retirement Income Security Act's "prudent man rule," which allowed pension funds — a major source of capital to VC funds today — "to allocate up to 10[0%] of their capital to VC funds."<sup>47</sup> Many notable VC firms were formed during this decade, including Sequoia Capital and Kleiner Perkins Caufield & Byers, among others.<sup>48</sup> Some of today's most well-known (and biggest) VC-backed companies were also created in the 1970s and 1980s: Apple, FedEx, Genentech, and Microsoft, among them.<sup>49</sup> In 1985, the U.S. had more than 290 VC firms.<sup>50</sup>

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cloherty-dead.html [https://perma.cc/X5UJ-WNZF] (noting Cloherty was also chief executive of Delta Private Equity Partners).

<sup>44</sup> James R. Hagerty, *Patricia M. Cloherty, Venture-Capital Star, Started Her Career from Scratch*, WALL ST. J. (Oct. 13, 2022), <https://www.wsj.com/articles/patricia-m-cloherty-venture-capital-star-started-her-career-from-scratch-11665686280> [https://perma.cc/UU45-93QX].

<sup>45</sup> *Venture History 101*, *supra* note 26.

<sup>46</sup> Gompers, *supra* note 38, at 10; *see also* Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763, 2868.

<sup>47</sup> *Venture History 101*, *supra* note 26; Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amending in scattered sections of 26 and 29 U.S.C.).

<sup>48</sup> *Venture History 101*, *supra* note 26.

<sup>49</sup> *Id.* It appears that each of the founders for these companies were white. *See* The Editors of Encyclopaedia Britannica, *Biotechnology*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/technology/biotechnology#ref926012> (last updated Jan. 5, 2023) [https://perma.cc/6AF9-P9HZ] (mentioning Genentech Inc. was founded by Robert A. Swanson and Herbert Boyer); The Editors of Encyclopaedia Britannica, *Frederick W. Smith*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Federal-Express> (last updated Jan. 19, 2023) [https://perma.cc/HT6H-Z3RY] (stating Federal Express was founded by Frederick W. Smith); Mark Hall & Gregg Pascal Zachary, *Microsoft Corporation*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Microsoft-Corporation> (last updated Apr. 3, 2023) [https://perma.cc/8T4A-69M5] (stating Microsoft Corporation was founded by Bill Gates and Paul Allen); Steven Levy, *Apple Inc.*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Apple-Inc> (last updated Mar. 29, 2023) [https://perma.cc/B6SL-LQ68] (noting Apple was founded by Steve Jobs and Steve Wozniak).

<sup>50</sup> *Venture History 101*, *supra* note 26.

## 5. 1990s

The high technology industry boomed in the 1990s with the founding of companies like Amazon, eBay, Google, Netflix, Netscape, Salesforce, and Yahoo!.<sup>51</sup> Each of these companies was formed by white men, with the exception of Yahoo!, which was co-founded by an Asian American male, Jerry Yang.<sup>52</sup> The VC industry experienced similar growth with more than 700 active firms.<sup>53</sup>

## 6. The Post-Dot-Com Boom

The post-dot-com boom brought different types of VC firms.<sup>54</sup> Many focused on particular industries or stages (e.g., early stage, late stage) and expanded their services beyond lending startups their expertise; VCs also offered business development, marketing, and recruitment.<sup>55</sup> Software, services, and social media startups abounded in the mid-2000s to mid-2010s.<sup>56</sup> Accelerators and incubators also began to gain a foothold in the industry.<sup>57</sup> Before the Great Recession, the VC industry had approximately

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<sup>51</sup> *Id.* 26. All of the founders of the companies listed are white and male, with the exception of Yahoo!'s co-founder, Jerry Yang. See The Editors of Encyclopaedia Britannica, *eBay*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/eBay#ref988328> (last visited Dec. 5, 2021) [<https://perma.cc/2QTK-ZT6A>]; Mark Hall & William L. Hosch, *Google*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Google-Inc> (last updated Mar. 3, 2023) [<https://perma.cc/R2QV-7ECR>]; William L. Hosch, *Netflix*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Netflix-Inc> (last updated Apr. 3, 2023) [<https://perma.cc/XSL5-76JK>]; William L. Hosch, *Salesforce.com*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Salesforcecom> (last updated Mar. 2, 2023) [<https://perma.cc/NHT2-LDYE>]; The Editors of Encyclopaedia Britannica, *Jeff Bezos*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Jeff-Bezos> (last updated Mar. 24, 2023) [<https://perma.cc/PS2S-MFJN>]; Henry R. Norr, *Netscape Communications Corp.*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Netscape-Communications-Corp> (last visited Dec. 5, 2021) [<https://perma.cc/5AVC-MENX>]; The Editors of Encyclopaedia Britannica, *Yahoo!*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Yahoo-Inc> (last updated Mar. 3, 2023) [<https://perma.cc/9CVJ-YWGS>].

<sup>52</sup> See The Editors of Encyclopaedia Britannica, *Yahoo!*, *supra* note 51.

<sup>53</sup> *Venture History 101*, *supra* note 26.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* These were also largely founded by white men. For example, Techstars is an accelerator founded in 2006 by David Cohen, David Brown, Brad Feld, and Jared Polis. *10 Years of History*, TECHSTARS, <http://www.history.techstars.com> (last visited Nov. 20, 2022), [<https://perma.cc/CEX9-KU4E>]. Other influential parties to the VC ecosystem were also founded by white men. For example, SV Angel is an angel group founded in 2009 by

900 active firms.<sup>58</sup> Some of the VC firms formed during this period were former founders, typically white men, such as Andreessen Horowitz.<sup>59</sup> John Doerr of Kleiner Perkins, a well-known venture capitalist, famously stated, “That correlates more with any other success factor that I’ve seen in the world’s greatest entrepreneurs. If you look at [Amazon founder Jeff] Bezos, or [Netscape founder Marc] Andreessen, [Yahoo co-founder] David Filo, the founders of Google, they all seem to be white, male, nerds who’ve dropped out of Harvard or Stanford[,] and they absolutely have no social life.”<sup>60</sup>

## 7. 2010s

The 2010s continued to be dominated by white men.<sup>61</sup> This decade also brought another change to VC with the creation of micro-VC firms that

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Ron Conway. *Ronald Conway*, CRUNCHBASE, <https://www.crunchbase.com/person/ron-conway> (last visited Nov. 20, 2022) [<https://perma.cc/B7PL-ZX38>]; Akhilesh Ganti, *Angel Investor Definition and How It Works*, INVESTOPEDIA, <https://www.investopedia.com/terms/a/angelinvestor.asp> (last updated Mar. 22, 2022) [<https://perma.cc/7KUE-NLCF>] (defining angel investor as “a high-net-worth individual who provides financial backing for small startups or entrepreneurs, typically in exchange for ownership equity in the company”).

<sup>58</sup> *Venture History 101*, *supra* note 26.

<sup>59</sup> Marc Andreessen and Ben Horowitz, who founded the VC firm Andreessen Horowitz in 2009, co-founded Netscape and Opsware (formerly Loudcloud), respectively, prior to becoming venture capitalists. *Marc Andreessen*, ANDREESSEN HOROWITZ, <https://a16z.com/author/marc-andreessen/> (last visited Nov. 21, 2022) [<https://perma.cc/P4KY-ZLVT>]. Even in the way that these venture capitalists are described is testament to how people view the world of VC as the province of white males. “In many respects, [Andreessen] is the quintessential Silicon Valley venture capitalist: an imposing, fortyish, long-celebrated white man.” Tad Friend, *Tomorrow’s Advance Man*, NEW YORKER (May 11, 2015), <https://www.newyorker.com/magazine/2015/05/18/tomorrows-advance-man> [<https://perma.cc/79XN-XGDJ>] (mentioning Ben Horowitz as a co-founder).

<sup>60</sup> Sam Colt, *John Doerr: The Greatest Tech Entrepreneurs Are ‘White, Male, Nerds,’* BUS. INSIDER (Mar. 4, 2015, 10:58 AM), <https://www.businessinsider.com/john-doerr-the-greatest-tech-entrepreneurs-are-white-male-nerds-2015-3> [<https://perma.cc/22VV-SDE6>]. In relation to the number of women venture capitalists, Doerr admitted, “‘We collectively are pathetic on the issue. Six percent of venture capitalists are female,’ Doerr said. ‘That’s just dumb.’ He said the Pao suit was the ‘right issue, but the wrong case.’” Cromwell Schubarth, *John Doerr Says Number of Women VCs Is ‘Pathetic,’ Outlines Kleiner’s Plan*, SILICON VALLEY BUS. J., <https://www.bizjournals.com/sanjose/blog/techflash/2015/07/john-doerr-says-number-of-women-vcs-is-pathetic.html> (last updated July 15, 2015, 8:38 AM PDT) [<https://perma.cc/P5DM-2ST3>].

<sup>61</sup> Scott Austin, *White Men Still Dominate the Venture Industry*, WALL ST. J. (Nov. 21, 2011, 12:55 PM ET), <https://www.wsj.com/articles/BL-VCDB-11676> [<https://perma.cc/>



invested “small amounts of capital into a large number of seed or pre-seed stage companies. Though the risk is higher for firms at these very early stages of a company’s growth, the return potential is commensurate.”<sup>62</sup> There was also an increase in corporate venture capital (“CVC”) and non-traditional sources of capital, such as private equity funds and mutual funds.<sup>63</sup> Unicorns also became increasingly prominent during this time period.<sup>64</sup> It seemed that as long as startups continued to be funded at record-breaking rates, there was little incentive to change who received such funding. Although there were more women and racial and ethnic minorities, very few of them achieved unicorn status.<sup>65</sup>

## 8. Today

Although VC is primarily concentrated in California, Massachusetts, and New York, there are signs that other VC ecosystems are emerging across the U.S.<sup>66</sup> Founders, investors, and the venture capitalists

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83GH-ER5N] (“Of more than 460 respondents [to a diversity poll conducted by the National Venture Capital Association and Dow Jones VentureSource] identifying themselves as investors, 89% were men . . . [and] 86% of investors identify themselves as Caucasian.”).

<sup>62</sup> *Venture History 101*, *supra* note 26.

<sup>63</sup> Jennifer S. Fan, *Catching Disruption: Regulating Corporate Venture Capital*, 2018 COLUM. BUS. L. REV. 341, 351.

<sup>64</sup> Jennifer S. Fan, *Regulating Unicorns: Disclosure and the New Private Economy*, 57 B.C. L. REV. 583, 583 (2016) [hereinafter *Regulating Unicorns*] (defining unicorns as “private companies with valuations of a billion dollars or more”). Today, unicorns are “not a rarity” and are “ubiquitous.” *Id.* at 587.

<sup>65</sup> See Lisa Abeyta, *Why Are Almost All Unicorn Companies Founded by Men? Only Investors Can Answer That*, INC.COM (Feb. 28, 2018), <https://www.inc.com/lisa-abeyta/3-things-investors-are-getting-wrong-about-women-entrepreneurs.html> [<https://perma.cc/5DVX-YFYA>].

<sup>66</sup> Compare Richard Florida, *Venture Capital Remains Highly Concentrated in Just a Few Cities*, BLOOMBERG CITYLAB (Oct. 3, 2017, 12:47 PM PDT), <https://www.bloomberg.com/news/articles/2017-10-03/the-geographic-concentration-of-venture-capital> [<https://perma.cc/5LHZ-AH68>] (noting that while VC is primarily in California, Massachusetts, and New York, VC is moving to Portland, Pittsburgh, Detroit, Nashville, Las Vegas, and other cities. However, while these cities have “more venture capital investment today than they had a decade or so ago,” they still account for a “small fraction of national venture capital investment or startup deals”), with Chris Metinko & Gené Teare, *More Opportunity than Capital: Venture Dollars Spread Throughout the US*, CRUNCHBASE NEWS (May 20, 2021), <https://news.crunchbase.com/news/fastest-growing-states-venture-capital-investment/> [<https://perma.cc/XCK5-BETU>] (noting that in Michigan, VC dollars spiked 886% since 2016; North Carolina: Witnessed second largest increase, jumping nearly 410% in the last five years; Texas: Had a slight bump from 2019 — making it the fourth largest venture market, with its venture funding more than doubling

themselves have been, and continue to be, predominately white and male.<sup>67</sup> Although there have been efforts to prioritize the expansion of VC to different regions and to increase the representation of women in racial and ethnic minorities in startups and VC firms, progress has been slow.<sup>68</sup> In 2020, before COVID-19 hit, there were “1,300 active firms, \$444 billion in assets under management, and \$120 billion in dry powder (i.e., capital still to deploy to startups).”<sup>69</sup> Yet, despite the embarrassment of riches, the wealth has not been evenly distributed. Instead, the VC world is still concentrated in a select few, and women and racial and ethnic minorities are rarely among them. In fact, in 2020, funding to these groups decreased compared to prior years.<sup>70</sup> Globally, there was a 27% decrease in venture funding to female-founded companies in 2020 compared to the same period in 2019.<sup>71</sup> “Some speculate that the pandemic made investors more wary of risks and more likely to stick to their existing networks —

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in the last five years; Washington: While Washington companies received only 2.7% of all VC invested in the U.S. in 2020 — that number equates to over \$4.4 billion and places Washington fifth in dollars; and Georgia: Venture money going to companies in Georgia has more than doubled in the last five years — a more than 142% jump. “Buffington compares Atlanta to where the Bay Area was in the late 1980s or 1990s”).

<sup>67</sup> Jennifer S. Fan, *Innovating Inclusion: The Impact of Women on Private Company Boards*, 46 FLA. STATE U. L. REV. 345, 405 (2019) [hereinafter *Innovating Inclusion*]; see *id.* at 354-64.

<sup>68</sup> Fan, *The Landscape of Startup Corporate Governance*, *supra* note 20, at 383-84 (noting that DEI issues “continue to be one of the most intransigent issues for startups to address[,]” that “there is very little discussion” in private companies about DEI issues, and that “[t]his trend will likely continue unless DEI issues are prioritized in a meaningful way”).

<sup>69</sup> *Venture History 101*, *supra* note 26.

<sup>70</sup> Ashley Bittner & Brigitte Lau, *Women-Led Startups Received Just 2.3% of VC Funding in 2020*, HARV. BUS. REV. (Feb. 25, 2021), <https://hbr.org/2021/02/women-led-startups-received-just-2-3-of-vc-funding-in-2020> [<https://perma.cc/F7WX-VGXX>] (“Some speculate that the pandemic made investors more wary of risks and more likely to stick to their existing networks — which is very much a ‘boys’ club’ and tougher for women to break into.”); CRUNCHBASE, CRUNCHBASE DIVERSITY SPOTLIGHT 2020: FUNDING TO BLACK & LATINX FOUNDERS 8 (2020), [http://about.crunchbase.com/wp-content/uploads/2020/10/crunchbase\\_diversity\\_report\\_2020.pdf](http://about.crunchbase.com/wp-content/uploads/2020/10/crunchbase_diversity_report_2020.pdf) [<https://perma.cc/VUY6-W8QE>] [hereinafter DIVERSITY SPOTLIGHT 2020] (noting that as of August 2020, funding to Black and Latinx companies went from \$3.0 billion (2019) to \$2.3 billion); Gené Teare, *Global VC Funding to Female Founders Dropped Dramatically This Year*, CRUNCHBASE NEWS (Dec. 21, 2020), <https://news.crunchbase.com/news/global-vc-funding-to-female-founders/> [<https://perma.cc/C85L-25PR>] [hereinafter *Global VC Funding*] (“Global venture funding to female-founded companies fell significantly in 2020 . . . a 27[%] decrease over the same period last year.”).

<sup>71</sup> Teare, *Global VC Funding*, *supra* note 70.

which is very much a ‘boys club’ and tougher for women to break into.”<sup>72</sup> Funding to Black and Latinx companies decreased from \$3.0 billion in 2019 to \$2.3 billion in 2020.<sup>73</sup>

## II. CURRENT DAY STARTUP BIASES

Founders of VC-backed startups are a homogenous group.<sup>74</sup> Many founders of VC-backed startups are white males educated at top universities in the United States, with an increasing number of degrees from abroad.<sup>75</sup> It is a well-established fact — and has been for many years — that very few women and entrepreneurs who are racial and ethnic minorities receive VC funding. The decision-makers are still predominantly white and male. In essence, it is still a boys’ club.<sup>76</sup> This Part discusses recent business and legal scholarship that show how gender and racial disparities continue to be perpetuated to this day in the startup

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<sup>72</sup> Bittner & Lau, *supra* note 70; see Priyamvada Mathur, *Quarterly VC Funding for Female Founders Drops to Three-Year Low*, PITCHBOOK (Oct. 8, 2020), <https://pitchbook.com/news/articles/vc-funding-female-founders-drops-low> [<https://perma.cc/77X2-P5P9>]; see also Dan Primack, *Venture Capital Is Still Very Much a Boys’ Club*, AXIOS (Feb. 14, 2019), <https://www.axios.com/venture-capital-women-tech-diversity-29c3f2f0-2d1e-4ec5-b542-7878ab149d45.html> [<https://perma.cc/D5RK-XM6R>] (“Only 9.65% of decision-makers at U.S. venture capital firms are women.”).

<sup>73</sup> CRUNCHBASE, DIVERSITY SPOTLIGHT 2020, *supra* note 70, at 8.

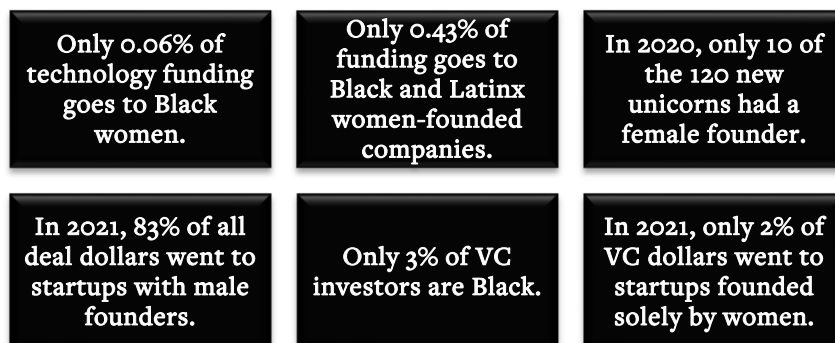
<sup>74</sup> See DIVERSITY VC & RATEMYINVESTOR, DIVERSITY IN U.S. STARTUPS 8 (2020), [https://ratemyinvestor.com/DiversityVCReport\\_Final.pdf](https://ratemyinvestor.com/DiversityVCReport_Final.pdf) [<https://perma.cc/PYK8-QKA8>].

<sup>75</sup> *Id.* (noting 71.6% of founders in 2018-2019 were white); see also Joanna Glasner, *Where Funded Founders Went to School*, CRUNCHBASE NEWS (May 22, 2019), <https://news.crunchbase.com/news/where-funded-founders-went-to-school/> [<https://perma.cc/PA9Z-BZ3F>] (citing Stanford as the top producer of startup founders); cf. Jessica Stillman, *The 10 Universities that Produce the Most Startup Founders*, INC. (Sept. 12, 2016), <https://www.inc.com/jessica-stillman/the-10-universities-that-produce-the-most-startup-founders.html> [<https://perma.cc/8S2S-8YXN>] (noting that while an Ivy League degree can help, founders can come from other educational backgrounds and find success).

<sup>76</sup> In five years, the number of female decision-makers doubled, but the “the industry isn’t close to parity, even in terms of new hires.” Dan Primack, *Venture Capital Is Still a Boys’ Club*, AXIOS (Mar. 16, 2021), <https://www.axios.com/2021/03/16/vc-venture-capital-women-jobs-equality-board> [<https://perma.cc/7RQB-LAM3>]. It may be the case that women are perceived as risk adverse while men are seen as risk takers; being a risk taker is seen as an asset in VC. One study found that gendered assumptions reinforce the myth of female underperformance in entrepreneurship. “Men are good investments until they prove otherwise. Women are unsound investments until they prove they are worth taking a risk on.” Iris Bohnet, Siri Chilazi, Anisha Asundi & Lili Gil Valletta, *Be Like an Orchestra: How to Eliminate Gender Bias in Venture Capital Funding*, KING’S C. LONDON (Oct. 29, 2019), <https://www.kcl.ac.uk/news/be-like-an-orchestra-how-to-eliminate-gender-bias-in-venture-capital-funding> [<https://perma.cc/C7QH-7E2H>].

context. The numbers below highlight just a sampling of how few women and racial and ethnic minorities are a part of the startup ecosystem.

#### NOTABLE STATISTICS



These statistics are illustrative of the lack of diversity in the VC ecosystem and will be explained in more detail below.

#### A. Overview of Biases Faced by Women and Minorities

Women and minorities tend to fare poorly in terms of raising capital for their startups. Recent statistics demonstrate how much less funding these types of entrepreneurs receive. Although women start 38% of new businesses in the U.S., “only between 2% and 6% of those founders receive VC funding . . . [t]here is a problem here, and ‘leaning in’ is not enough to solve it.”<sup>77</sup> As an example, although there was an 83% increase in the dollar amount of VC investments in startups solely founded by women (equivalent to almost \$6.4 billion) from 2020 to 2021, the percentage of VC dollars that women founders received amounted to a mere 2%; this was the lowest percentage women had received from VC since 2016.<sup>78</sup> The numbers for founders who self-identify as racial minorities are even lower; in 2020, only 2.6% of VC money went to Black

<sup>77</sup> *Why VCs Aren't Funding Women-Led Startups*, KNOWLEDGE AT WHARTON (May 24, 2016), <https://knowledge.wharton.upenn.edu/article/vcs-arent-funding-women-led-startups/> [<https://perma.cc/4Y62-7SMZ>]; see also Bittner & Lau, *supra* note 70 (“In 2019, 2.8% of funding went to women-led startups; in 2020, that fell to 2.3%.”).

<sup>78</sup> Jordan Rubio & Priyamvada Mathur, *An Exceptional Year for Female Founders Still Means a Sliver of VC Funding*, PITCHBOOK (Jan. 10, 2022), <https://pitchbook.com/news/articles/female-founders-dashboard-2021-vc-funding-wrap-up> [<https://perma.cc/8WTM-5FVQJ>].

and Latino-founded startups.<sup>79</sup> Women of color fare the worst, with only 0.06% of technology funding going to Black women<sup>80</sup> and 0.43% of all VC funding going to Black and Latinx women-founded companies.<sup>81</sup> Consequently, it is challenging for women and people of color to both innovate and grow quickly to dominate a particular space unless they receive such funding.

However, the relative absence of women and racial and ethnic minorities is not due to a pipeline problem. Approximately 3% of the nation's payroll workforce — or 3.9 million workers — work in “core” tech occupations.”<sup>82</sup> According to the Bureau of Labor and Statistics, science, technology, engineering, and math (“STEM”) employment is projected to increase by about 13% between 2012 and 2022, which is quicker than the 11% estimated for all occupations.<sup>83</sup> There have been promising signs that interest in STEM is growing among women and racial and ethnic communities. Total graduate enrollment in science and

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<sup>79</sup> CRUNCHBASE, DIVERSITY SPOTLIGHT 2020, *supra* note 70, at 4; *Women and Minority Founders in the Venture Capital Pipeline*, ELEVATE CAP., <https://elevate.vc/women-and-minority-founders-in-the-venture-capital-pipeline/> (last visited Nov. 15, 2021) [<https://perma.cc/9XBU-ZPBC>] (noting there may be some correlation between the low number of BIPOC founders receiving funding and the number of Black and Latinx investors which is 3% of venture capitalists); Lisa Stone, *Diversity as Superpower: The (Well-Known) Data Against Homogenous Teams in Venture Capital*, FORBES (Sept. 22, 2020, 2:41 PM EDT), <https://www.forbes.com/sites/committeeof200/2020/09/22/diversity-as-uperpower-the-well-known-data-against-homogeneous-teams-in-venture-capital/?sh=30c4147f2019> [<https://perma.cc/3EZH-FJMJ>].

<sup>80</sup> Geri Stengel, *Investing in Black Women Tech Founders Is an Investment in Innovation and Growth*, FORBES (Oct. 1, 2020, 7:04 AM EDT), <https://www.forbes.com/sites/geristengel/2020/10/01/investing-in-black-women-tech-founders-is-an-investment-in-innovation-and-growth/?sh=30eb5ef1466c> [<https://perma.cc/6WDC-B977>].

<sup>81</sup> DIGITALUNDIVIDED, STILL BUILDING: PROJECTDIANE 2021 UPDATE (2021), <https://www.digitalundivided.com/reports/still-building-project-diane-2021-update> [<https://perma.cc/UX4T-XXWC>]. In conducting research for this Article, the author found very little information about Asian American or Latinx individuals in the startup ecosystem. These two groups remain understudied. The lack of academic research in these areas may perpetuate some of the startup biases.

<sup>82</sup> These numbers are based on data collected from November 2009 to May 2012. Drew Desilver, *How U.S. Tech-Sector Jobs Have Grown, Changed in 15 Years*, PEW RSCH. CTR. (Mar. 12, 2014), <https://www.pewresearch.org/fact-tank/2014/03/12/how-u-s-tech-sector-jobs-have-grown-changed-in-15-years/> [<https://perma.cc/RFA4-KPAY>].

<sup>83</sup> Dennis Vilorio, U.S. Bureau of Lab. Stat., *STEM 101: Intro to Tomorrow's Jobs*, OCCUPATIONAL OUTLOOK Q., Spring 2014, at 3, 6, <https://www.bls.gov/careeroutlook/2014/spring/art01.pdf> [<https://perma.cc/H5C4-MHBM>] (discussing outlook and wages for STEM employment).

engineering programs increased by 35% from 2000 to 2010.<sup>84</sup> It grew 65% for Hispanic/Latino students, 55% for American Indian/Alaska Native students, and 50% for African American students.<sup>85</sup> Furthermore, the 2019 U.S. Census data reported that women outnumbered men in the U.S., making up 50.8% of the population.<sup>86</sup> Since 2014, women have outpaced men in obtaining four-year college degrees.<sup>87</sup> Despite the educational advancements of women, in big companies, the likelihood of a CEO named John or David is higher than for the CEO to be a woman.<sup>88</sup>

As the numbers above illustrate, the issue of gender and racial bias in startups has not yet been widely studied in the legal academy. These startup biases remain an intractable problem in the startup ecosystem and have consequences for future innovations. If talent is not an issue, what can explain the lack of women and racial and ethnic minorities in the startup ecosystem?

In trying to replicate startup successes, those who built the startup ecosystem relied on the “interpersonal choice homophily,” which is analogous to “birds of a feather flock together.”<sup>89</sup> At a basic level, this

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<sup>84</sup> HEATHER B. GONZALEZ & JEFFREY J. KUENZI, CONG. RSCH. SERV., R42642, SCIENCE, TECHNOLOGY, ENGINEERING, AND MATHEMATICS (STEM) EDUCATION: A PRIMER 12 (2012), <https://sgp.fas.org/crs/misc/R42642.pdf> [<https://perma.cc/JZV4-B5FT>].

<sup>85</sup> *Id.* at 12 n.39.

<sup>86</sup> *ACS Demographic and Housing Estimates*, U.S. CENSUS BUREAU (2019), <https://data.census.gov/table?tid=ACSDP5Y2019.DP05> [<https://perma.cc/P8G2-HFXS>] (reporting that women made up 50.8% of the American population in 2019).

<sup>87</sup> Erin Duffin, *Percentage of the U.S. Population with a College Degree, by Gender 1940-2021*, STATISTA (July 27, 2022), <https://www.statista.com/statistics/184272/educational-attainment-of-college-diploma-or-higher-by-gender/> [<https://perma.cc/C6M2-Q24U>].

<sup>88</sup> Justin Wolfers, *Fewer Women Run Big Companies than Men Named John*, N.Y. TIMES (Mar. 2, 2015), [https://www.nytimes.com/2015/03/03/upshot/fewer-women-run-big-companies-than-men-named-john.html?\\_r=0](https://www.nytimes.com/2015/03/03/upshot/fewer-women-run-big-companies-than-men-named-john.html?_r=0) [<https://perma.cc/S3T2-MA45>]. *But cf.* Emma Hinchliffe, *Women CEOs Run More Than 10% of Fortune 500 Companies For the First Time in History*, FORTUNE (Jan. 12, 2023, 4:59 AM PST), <https://fortune.com/2023/01/12/fortune-500-companies-ceos-women-10-percent/> [<https://perma.cc/4S2M-73TG>] (recognizing that for the first time in history, more than 10% of Fortune 500 companies are led by women).

<sup>89</sup> Greenberg & Mollick, *supra* note 10, at 345. “Scholars have identified [various] dimensions under which interpersonal choice homophily operates, including shared values or status characteristics . . . . The former refers primarily to shared beliefs, preferences, and other ‘internal states,’ while the latter refers to definable socio-demographic characteristics, including race and ethnicity, age, and education.” *Id.* at 345. However, just because interpersonal choice homophily exists does not always mean that the person in the same group will advocate for a similarly situated person. “[C]ontrary to the underlying logic of interpersonal choice homophily, women and racial minorities in high-status work

means that connection is fostered through the similarities one shares with another person.<sup>90</sup> The shared similarities could include class,<sup>91</sup> gender,<sup>92</sup> race, or ethnicity,<sup>93</sup> among others. Homophily has also been used to explain VC investment.<sup>94</sup> Individuals may share similar personal and professional networks, have attended the same schools, and had the same upbringing. “The problem is that the homophily principle gets baked into the system. And women can’t access these networks.”<sup>95</sup> Women simply do not have the sponsors to support and develop them.<sup>96</sup> “Women entrepreneurs face challenges in getting access to thought-leaders — people who can help them think through problems they may be facing: social capital, intellectual capital, and things that are important in addition to financial capital[.]”<sup>97</sup> The same holds true for racial and ethnic minorities as well, only the problem is even more pronounced.<sup>98</sup>

Numerous studies have concluded that diverse teams lead to better outcomes in startups. Diverse founding teams have a higher rate of return

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groups will not necessarily advocate for same-gender or same-race colleagues due to their personal concerns about not being valued by their work group.” *Id.* at 347.

<sup>90</sup> “Homophily — the tendency of individuals to associate with others based on shared characteristics — is one of the most frequently studied mechanisms in the social sciences.” *Id.* at 341. In speaking about VC, what is known as “induced homophily originates from distributional differences in female and male venture capitalists and professional network access.” *Id.* at 344.

<sup>91</sup> *Id.* at 341 (citing Denise B. Kandel, *Status Homophily, Social Context, and Participation in Psychotherapy*, 71 AM. J. SOCIO. 640 (1966)).

<sup>92</sup> *Id.* at 341 (first citing Herminia Ibarra, *Homophily and Differential Returns: Sex Differences in Network Structure and Access in an Advertising Firm*, 37 ADMIN. SCI. Q. 422 (1992), and then citing Adam M. Kleinbaum, Toby E. Stuart & Michael L. Tushman, *Discretion Within Constraint: Homophily and Structure in a Formal Organization*, 24 ORG. SCI. 1316 (2013)).

<sup>93</sup> *Id.* (citing Yu Xie & Zhen Zeng, *A Preference-Opportunity-Choice Framework with Applications to Intergroup Friendship*, 114 AM. J. SOCIO. 615 (2008)).

<sup>94</sup> *Id.* at 341 (citing Deepak Hegde & Justin Tumlinson, *Does Social Proximity Enhance Business Partnerships? Theory and Evidence from Ethnicity’s Role in U.S. Venture Capital*, 60 MGMT. SCI. 2355 (2014)).

<sup>95</sup> *Why VCs Aren’t Funding Women-Led Startups*, *supra* note 77.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*; Greenberg & Mollick, *supra* note 10, at 344 (citing Toby E. Stuart & Olav Sorenson, *Strategic Networks and Entrepreneurial Ventures*, 1 STRATEGIC ENTREPRENEURSHIP J. 211, 223 (2007)) (“If nascent entrepreneurs have gender homophilous networks, then the typical would-be female entrepreneur has few pre-established relationships with early-stage investors. One reason then why women may participate infrequently in entrepreneurship is that, compared to men, they are poorly positioned in the networks that facilitate entrepreneurial activity.”).

<sup>98</sup> See discussion *infra* Part II.C.

than white founding teams.<sup>99</sup> Teams of diverse founders in VC-backed startups have better financial outcomes on average, “including 30% higher multiples on invested capital (“MOIC”) when companies are acquired or go public, plus better valuations for startups with at least one female founder (63% better than all-male teams) and/or with at least one ethnically diverse team member reporting to the CEO (65% better than all-white teams).”<sup>100</sup> Consider that “[o]f all the U.S. VC firms that scored a top-quartile fund between 2009 and 2018, 69.2% of them had women in decision-making roles.”<sup>101</sup> Studies by business law scholars also conclude that a lack of diversity is detrimental to startups. “The difference [in return from non-diverse startups compared to diverse startups] is dramatic. Along all dimensions measured, the more similar the investment partners, the lower their investments’ performance.”<sup>102</sup> Diverse teams can also promote other types of diversity. For example, Black- and Latinx-founded

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<sup>99</sup> Collin West, Gopinath Sundaramurthy & Marlon Nichols, *Deconstructing the Pipeline Myth and the Case for More Diverse Fund Managers*, KAUFFMAN FELLOWS (Feb. 4, 2020), [https://www.kauffmanfellows.org/journal\\_posts/the-pipeline-myth-ethnicity-fund-managers](https://www.kauffmanfellows.org/journal_posts/the-pipeline-myth-ethnicity-fund-managers) [<https://perma.cc/4PR6-8XTY>]. In a study done by the Kauffman Fellows that evaluated “tens of thousands of diverse teams,” they found, along with other such studies, “that ethnically diverse teams outperform homogeneous teams. . . . Diverse Founding Teams have higher returns when cash is returned to investors. Historically, they have earned a 3.26x median realized multiple on IPOs and acquisitions, compared to a 2.50x realized multiple for White Founding Teams, a 30% increase.” *Id.*

<sup>100</sup> Stone, *supra* note 79.

<sup>101</sup> PITCHBOOK & ALL RAISE, ALL IN: WOMEN IN THE VC ECOSYSTEM 24 (2019), [https://files.pitchbook.com/website/files/pdf/PitchBook\\_All\\_Raise\\_2019\\_All\\_In\\_Women\\_in\\_the\\_VC\\_Ecosystem.pdf](https://files.pitchbook.com/website/files/pdf/PitchBook_All_Raise_2019_All_In_Women_in_the_VC_Ecosystem.pdf) [<https://perma.cc/F49N-3G2Z>]. In fact, “[w]hen U.S. VC firms increased the proportion of female partners, they benefited with 9.7% more profitable exits and a 1.5% spike in overall fund returns annually,” explained Lisa Stone of WestRiver Group.” Claire Diaz-Ortiz, *1 Change that Can Fix the VC Funding Crisis for Women Founders*, TECHCRUNCH (Sept. 18, 2021, 6:30 AM PDT), <https://techcrunch.com/2021/09/18/1-change-that-can-fix-the-vc-funding-crisis-for-women-founders/> [<https://perma.cc/FTM4-LBXB>].

<sup>102</sup> Stone, *supra* note 79 (quoting Paul Gompers & Silpa Kovvali, *The Other Diversity Dividend*, HARV. BUS. REV., July-Aug. 2018, at 72-77). Other studies demonstrate that individual investment exits and overall fund returns also suffer when teams are homogenous. For example, one such study states “5.8% lower success rates for investments by VCs with shared ethnicity, and 11.5% lower success rates for investments by VCs with shared school backgrounds.” WEST RIVER GRP., *THE POWER OF DIVERSITY: WHY HOMOGENOUS TEAMS IN VENTURE CAPITAL ARE BAD FOR BUSINESS* 3 (2021), <https://static1.squarespace.com/static/55a59a52e4b030d5436bdf26/t/614e1f6a5d50ee4aed23fbe1/1632509803950/WRG-The-Power-of-Diversity-09232021.pdf> [<https://perma.cc/EQ8X-M8NU>].



companies have a higher percentage of female founders than other startups.<sup>103</sup>

Despite these facts, founders who are women and racial and ethnic minorities have limited access to capital compared to white founding teams — less than 25% of all startups that receive funding have a diverse founder on the team.<sup>104</sup> The numbers are even lower at the later rounds of financings where “80% of Series D and E rounds (4 out of 5) have all-White founders.”<sup>105</sup>

According to the U.S. Equal Employment Opportunity Commission, the high-tech sector<sup>106</sup> is “a major source of economic growth fueling the U.S. economy.”<sup>107</sup> If more diverse individuals were to participate, innovation would likely increase even more. According to Ethan Mollick, a professor of management at the Wharton School at the University of Pennsylvania, “Every year that goes by where we continue to fund the exact same pool of overwhelmingly male, overwhelmingly white founders is one where we are missing out on the opportunities to find important new innovations and develop new enterprises that a more diverse founder base would support[.]”<sup>108</sup> Ultimately, by failing to diversify, the startup ecosystem will have fewer innovations.

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<sup>103</sup> CRUNCHBASE, DIVERSITY SPOTLIGHT 2020, *supra* note 70, at 17 (“For Black- and Latinx-founded companies, 36[%] have a female founder, a much higher percentage than we find more broadly in the U.S. Since 2015, the percentage of capital to companies with at least one female founder in this cohort is at 22[%].”).

<sup>104</sup> West et al., *supra* note 99 (“Our data show that more than 75% of all rounds are raised by White Founding teams. . . . who will then go on and become repeat founders or venture partners if their companies are successful.”).

<sup>105</sup> *Id.*

<sup>106</sup> *Diversity in High Tech*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/special-report/diversity-high-tech> (last visited Nov. 7, 2021) [<https://perma.cc/5ACK-NNKZ>] (defining “high tech” as “industries that employ a high concentration of employees in science, technology, engineering and mathematics (STEM) occupations and the production of goods and services advancing the use of electronic and computer-based production methods. This sector requires a substantial professional labor force and employs about a quarter of U.S. professionals and about 5-6[%] of the total labor force”).

<sup>107</sup> *Id.*

<sup>108</sup> *Why VCs Aren’t Funding Women-Led Startups*, *supra* note 77; Benjamin P. Edwards & Ann C. McGinley, *Venture Bearding*, 52 UC DAVIS L. REV. 1873, 1903 (2019) (noting that “[g]ender bias in venture capital investment processes may generate suboptimal returns for investors and society”).

*B. Female-Founded Startups*

Venture-backed startups are infamous for their glaring lack of female founders. However, not so long ago, Elizabeth Holmes of Theranos fame captured the public's imagination, claiming that she had revolutionized blood testing — diagnostic blood tests could be run from blood samples coming from a mere fingerprick.<sup>109</sup> Theranos “was a revolutionary idea thought up by a woman hailed as a genius who styled herself as a female Steve Jobs . . . [she] was the world's youngest female self-made billionaire.”<sup>110</sup> Holmes had modeled herself on a male entrepreneur and became the one woman to represent all other female founders. “[T]here is a willingness to worship geniuses in Silicon Valley . . . . Americans are eternally optimistic, eternally willing to worship new heroes.”<sup>111</sup> Those dubbed geniuses typically tend to be white and male, which reflects the homophily principle. When Holmes became part of this rarefied group, it represented progress in diversity to many; “people wanted to believe this fairytale . . . .”<sup>112</sup>

Now, however, Holmes has been found guilty of fraud, and the same community that once praised her is casting doubts on the next generation of female entrepreneurs.<sup>113</sup> “There has long been a culture of faking it until you make it in Silicon Valley, and [Holmes] is a product of that culture.”<sup>114</sup> Notably, the VC community has not lionized a founder from a racial minority or woman of color in a similar fashion.

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<sup>109</sup> Roger Parloff, *This CEO Is Out for Blood*, FORTUNE (June 12, 2014, 4:37 AM PDT), <https://fortune.com/2014/06/12/theranos-blood-holmes/> [<https://perma.cc/JMH9-9ZLZ>].

<sup>110</sup> Avery Hartmans, Sarah Jackson, Áine Caine, Azmi Haroun & Lloyd Lee, *The Rise and Fall of Elizabeth Holmes, the Former Theranos CEO Found Guilty of Wire Fraud and Conspiracy, Who Has Been Sentenced to More Than 11 Years in Prison*, BUS. INSIDER, <https://www.businessinsider.com/theranos-founder-ceo-elizabeth-holmes-life-story-bio-2018-4> (last updated Dec. 7, 2022, 3:19 PM) [<https://perma.cc/DL5Z-X5GT>].

<sup>111</sup> Kari Paul, *‘People Wanted to Believe’: Reporter Who Exposed Theranos on Elizabeth Holmes’ Trial*, YAHOO! FIN. (Aug. 28, 2021), <https://finance.yahoo.com/news/people-wanted-believe-reporter-exposed-050009328.html> [<https://perma.cc/9LJX-6HC8>].

<sup>112</sup> *Id.* (“[Holmes] served [the genius] myth, but there was also a gender component to it. She was going to be the first woman who reached billionaire status and join the pantheon of these tech leaders. People were really rooting for her — young girls were writing her letters . . . . Unfortunately, it was a fairytale that wasn’t true.”). One could argue that this fairytale led to the tokenization of one woman founder, Holmes, and excluded other equally if not more qualified women from getting startup funding because having only one woman founder role model in startups was deemed to be progress.

<sup>113</sup> See Griffith, *supra* note 2; Streitfeld, *The Epic Rise*, *supra* note 1.

<sup>114</sup> Paul, *supra* note 111.

Female-only-founded startups reached a high of 2.8% of VC funding in 2019 but declined to 2.3% in 2020 during the pandemic.<sup>115</sup> Overall, women raised less capital in 2020, although the reasons for the decline are still being studied.<sup>116</sup> Very few startups led by women become unicorns — “just [ten] of the 120 new unicorns joining the [Crunchbase Unicorn] [B]oard have a female founder.<sup>117</sup> Over \$130 billion was deployed by VCs in 2017 and 2018.<sup>118</sup> Despite the amount of money raised by startups generally, that did not translate to similarly high dollar amounts for female-founded companies. All Raise CEO Pam Kostka noted, “In 2019 we saw a staggeringly small amount of U.S. VC funding go to female-founded companies . . . . So it’s no surprise that with a looming economic recession, women are, again, being disproportionately impacted, with record low funding going to female founders.”<sup>119</sup> At first glance, 2021 seemed better for women. U.S. venture-backed companies with a female founder or co-founder raised \$25.12 billion — the most raised compared to any prior year.<sup>120</sup> This uptick was partly due to an increase in women founders’ participation in late-stage deals and high-value sectors.<sup>121</sup> While 2022 saw a worsening of VC market conditions, female-founded companies fared relatively well: “[C]ompanies with at least one female founder . . . raised about \$38 billion in venture funding . . . while startups with only female founders have garnered \$4.3 billion.”<sup>122</sup> In terms of decision-makers at U.S. VC firms in 2020, women comprised nearly

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<sup>115</sup> Teare, *Global VC Funding*, *supra* note 70.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* In-home health care testing company, Everlywell, is one of the few female-led startups to join the ranks of unicorns. *Id. But cf. id.* (“[C]ompanies with both male and female co-founders receive funding more consistently — “above \$20 billion each year since 2017, ranging between 9[%] and 10[%] of overall dollars raised, with 2017 an outlier at 13[%].”).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Jordan Rubio, Priyamvada Mathur & James Thorne, *Female Founders Are Having a Standout Year—That’s Not the Whole Story*, PITCHBOOK (Aug. 26, 2021), <https://pitchbook.com/news/articles/female-founders-standout-year-venture-capital-fundraising> [<https://perma.cc/U8GU-LHFC>].

<sup>121</sup> *Id.*

<sup>122</sup> Jordan Rubio, *Female Founders Take the Good with the Bad in a Challenging 2022*, PITCHBOOK (Dec. 19, 2022), <https://pitchbook.com/news/articles/2022-female-founders-year-in-review> [<https://perma.cc/FS2G-VG8X>] (noting that despite the deteriorating VC market conditions of 2022, “the share of female co-founded VC[-backed companies] ticked up to 15.4% of total US VC funding . . . the highest it’s been since 2017”).

12.4%.<sup>123</sup> Although this is an improvement over the past, it becomes clear that progress is slow when put into a broader context. Consider that 61% of U.S. VC firms had no women decision-makers.<sup>124</sup> Also, the investment amounts that women decision-makers can commit to likely differs from those of male decision-makers.<sup>125</sup>

A deeper dive into the data belies a more troubling picture. There is a widening funding gulf between all-women teams and mixed-gender teams.<sup>126</sup> Also, the increase in funding to female founders is not at the level that the record-breaking fundraising activity in the overall VC market would suggest. Some speculate it is because female VCs only control a small percentage of VC money.<sup>127</sup> Startups with all male founders raised approximately 75% of all rounds from 2019 to 2021.<sup>128</sup> Eighty-three percent of all deal dollars also went to startups with male founders.<sup>129</sup> In addition, the percentage of U.S. startups with at least one female founder has had slight progress from 2017 to 2020. In 2017, it was 22%.<sup>130</sup> There was an annual increase of 2% from 2018 to 2020, with the percentage of female founders at U.S. startups calculated at 28% in 2020.<sup>131</sup>

Women are also underrepresented on boards of directors. One study showed that 60% of 200 of the most heavily funded private venture-backed companies based in the U.S. do not have a single woman on their board.<sup>132</sup>

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<sup>123</sup> Dan Primack, *More Women Are Top VC Decision-Makers, But Parity Is a Long Way Off*, AXIOS (July 21, 2020), <https://www.axios.com/women-venture-capital-gender-equality-3811e58d-6d89-48ea-bd13-6dc3e03a8911.html> [<https://perma.cc/3ZLH-3D6Q>] [hereinafter *More Women Are Top*]. The prior numbers were 9.65% in 2019, 8.93% in 2018, 7% in 2017, and 5.7% in 2016. *Id.*

<sup>124</sup> *Id.* “The lack of women in leadership at US startups may be getting attention from media, lawmakers, founders and VCs, but progress is slow. Only about 40% of US startups have at least one woman in the C-suite or on the board of directors.” SILICON VALLEY BANK, 2020 WOMEN IN US TECHNOLOGY LEADERSHIP REPORT 3 (2020), [https://www.svb.com/globalassets/library/uploadedfiles/content/trends\\_and\\_insights/reports/women-in-us-technology-leadership-2020-silicon-valley-bank.pdf](https://www.svb.com/globalassets/library/uploadedfiles/content/trends_and_insights/reports/women-in-us-technology-leadership-2020-silicon-valley-bank.pdf) [<https://perma.cc/CU56-VC8B>].

<sup>125</sup> Primack, *More Women Are Top*, *supra* note 123.

<sup>126</sup> Rubio et al., *supra* note 120.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> SILICON VALLEY BANK, *supra* note 124, at 4.

<sup>131</sup> *Id.*

<sup>132</sup> Gené Teare, *2019 Study of Gender Diversity in Private Company Boardrooms*, CRUNCHBASE NEWS (Dec. 11, 2019), <https://news.crunchbase.com/news/2019-study-of-gender-diversity-in-private-company-boardrooms/> [<https://perma.cc/4CX3-4E8T>] [hereinafter *2019 Study of Gender Diversity*].

Often, a woman is not added to the board of directors until the company is about to go public. Some commentators have speculated that this is done for optics and to avert criticism.<sup>133</sup> “Even the most heavily funded private companies trail far behind public companies — including those with recent IPOs — when it comes to women in the boardroom.”<sup>134</sup> This study demonstrated that the board, which is comprised of founders/management (called “executive directors” in the study), investors, and independents, suffered from the “downstream effects of the lack of gender diversity within the entrepreneurial and investing communities.”<sup>135</sup> The numbers were telling: 4% of the executive directors were women; 5% of the investor directors were women; and 19% of the independent directors were women.<sup>136</sup> For newly-public companies, 18% have women on their boards.<sup>137</sup>

In terms of leadership, a 2017 report found that female executives were more likely to be the head of human resources than any other leadership positions in male-founded tech companies.<sup>138</sup> Women are also increasingly in the general counsel seat in large corporations, but the number of women in such roles is still low, and these positions are very rarely held by women of color.<sup>139</sup> A 2020 study found that 40% of startups

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<sup>133</sup> See, e.g., Gillian Tan & Ellen Huet, *WeWork Chairman Says Diversity Is Coming to All-Male Board*, BLOOMBERG, <https://www.bloomberg.com/news/articles/2019-10-31/wework-executive-chairman-claire-promises-more-board-diversity> (last updated Oct. 31, 2019, 12:49 PM PDT) [<https://perma.cc/HX8W-9TVZ>]; Hussain, *Facing Backlash*, *supra* note 22.

<sup>134</sup> Teare, *2019 Study of Gender Diversity*, *supra* note 132.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*; see, e.g., Kweilin Ellingrud, Alexis Krivkovich, Marie-Claude Nadeau & Jill Zucker, *Closing the Gender and Race Gaps in North American Financial Services*, MCKINSEY & CO. (Oct. 21, 2021), <https://www.mckinsey.com/industries/financial-services/our-insights/closing-the-gender-and-race-gaps-in-north-american-financial-services> [<https://perma.cc/67RQ-WSPZ>] (“The highest levels of corporate leadership are still dominated by men . . . 64[%] of financial-services C-suite executives are still White men, and 23[%] are White women — leaving just 9[%] of C-suite positions held by men of color and 4[%] by women of color.”).

<sup>138</sup> Dinah Brin, *Women at Tech Companies Still Struggle to Reach C-Suite*, SOC’Y FOR HUM. RES. MGMT., <https://www.shrm.org/ResourcesAndTools/hr-topics/technology/Pages/Women-at-Tech-Companies-Still-Struggle-to-Reach-CSuite.aspx> (last visited Feb. 22, 2022) [<https://perma.cc/SE3P-43NQ>].

<sup>139</sup> Ruiqi Chen, *Biggest Companies Lost Black Legal Chiefs in 2020, Survey Says*, BLOOMBERG L. (Aug. 9, 2021, 3:00 AM), <https://news.bloomberglaw.com/business-and-practice/biggest-companies-lost-black-legal-chiefs-in-2020-survey-says> [<https://perma.cc/5BBS-6QNB>] (“Female general counsel increased by 2.36%, which includes a net gain of

had at least one woman on the board of directors, and 42% had at least one woman in an executive position.<sup>140</sup> However, only 14% of U.S. startups have a female CEO, and many of these CEOs are at companies with founding teams that have at least one woman.<sup>141</sup> In male-only founding teams, the number of female CEOs drops dramatically to 2%.<sup>142</sup>

Based on 90,000 venture-backed U.S. startups from 2001 to 2018, the Kauffman Fellows Research Center reviewed a dataset of over 400,000 employees, including board members, founders, and C-level executives, and determined that only 15%, or 60,000 of them, were women.<sup>143</sup> Although data shows that startups with at least one female founder raised more money per round than all-male founding teams, many more all-male teams receive VC money.<sup>144</sup> Although on the surface it appears that progress is being made, a more careful look at the bigger picture illustrates that the steps are incremental at best, with all-male teams taking the lion's share of VC funding. The number of startups with at least one female founder increased from approximately 4% to over 20% between 2000 and 2018.<sup>145</sup> However, all-male founding startups raised record levels of VC money during the same time period.<sup>146</sup> This disparity was especially pronounced in 2018 when all-male-founded startups raised \$100 billion compared to \$12 billion in companies with one or more female founders.<sup>147</sup> To put this in perspective, male-only founding teams raised \$8.33 for every \$1 that a startup with a female founder raised in 2018.<sup>148</sup>

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eight seats within the Fortune 1000 for White women, the report said, for a total of 296 female legal chiefs.”).

<sup>140</sup> SILICON VALLEY BANK, *supra* note 124, at 3.

<sup>141</sup> *Id.* at 5.

<sup>142</sup> *Id.*

<sup>143</sup> Collin West & Gopinath Sundaramurthy, *Startups with At Least 1 Female Founder Hire 2.5x More Women*, KAUFFMAN FELLOWS (Oct. 17, 2019), [https://www.kauffmanfellows.org/journal\\_posts/female\\_founders\\_hire\\_more\\_women](https://www.kauffmanfellows.org/journal_posts/female_founders_hire_more_women) [https://perma.cc/FYA2-G6X4] [hereinafter *Startups with At Least 1 Female Founder*].

<sup>144</sup> Collin West & Gopinath Sundaramurthy, *Data Show that Gender-Inclusive Founding Teams Have Greater Success in Fundraising and Innovation*, KAUFFMAN FELLOWS (Oct. 3, 2019), [https://www.kauffmanfellows.org/journal\\_posts/data-show-that-gender-inclusive-founding-teams-have-greater-success-in-fundraising-and-innovation](https://www.kauffmanfellows.org/journal_posts/data-show-that-gender-inclusive-founding-teams-have-greater-success-in-fundraising-and-innovation) [https://perma.cc/S2TH-4PPA] (“From the first round of funding to the last, companies with at least one woman founder were able to raise millions more than companies without any women founders, with the difference growing larger as companies continued to grow and raise further rounds of capital.”).

<sup>145</sup> *Id.* (drawing support from Figure 1).

<sup>146</sup> West & Sundaramurthy, *Startups with At Least 1 Female Founder*, *supra* note 143.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

One study concluded that “[g]iven the high failure rate of startups, and the rarity of a massive startup return like Google or Facebook, we find that all-male-founded teams are receiving significantly more opportunities to arrive at a rare but powerful outcome than female-founded startups.”<sup>149</sup>

This lack of funding for female founders is significant for two reasons. First, since high technology companies are a key driver of economic growth, the gender gap in this industry threatens overall national competitiveness.<sup>150</sup> Consider that only two to six percent of the 38% of new businesses started in the U.S. by female founders receive VC funding.<sup>151</sup> This is in part due to women not being in high-growth industries or simply not asking for such funds, so they receive less money.<sup>152</sup> Second, female-founded startups may use different funding sources simply due to their lack of access to VC which may limit how fast their operations can scale. In a survey in which 350 female tech startup leaders responded, nearly 80% reported using their own savings to start their businesses.<sup>153</sup>

Implicit stereotypes<sup>154</sup> and workplace culture also perpetuate startup biases and cause women to leave the tech industry in high numbers.<sup>155</sup> “[R]easons . . . include a ‘hostile’ male culture, a sense of isolation[,] and lack of a clear career path . . . . The attitudes holding [women] back are subtle, and hence more difficult to challenge.”<sup>156</sup>

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<sup>149</sup> *Id.*

<sup>150</sup> *Why VCs Aren't Funding Women-Led Startups*, *supra* note 77.

<sup>151</sup> *Id.*

<sup>152</sup> *Winning Negotiations: Why 'Women Don't Ask'*, KNOWLEDGE AT WHARTON (Oct. 16, 2014), <https://knowledge.wharton.upenn.edu/article/winning-negotiations-women-dont-ask/> [<https://perma.cc/QP2C-EPN7>].

<sup>153</sup> SUSAN COLEMAN, ALICIA ROBB & DANE STANGLER, SOURCES OF ECONOMIC HOPE: WOMEN'S ENTREPRENEURSHIP 4, 11 (2014), [https://www.kauffman.org/wp-content/uploads/2019/12/sources\\_of\\_economic\\_hope\\_womens\\_entrepreneurship.pdf](https://www.kauffman.org/wp-content/uploads/2019/12/sources_of_economic_hope_womens_entrepreneurship.pdf) [<https://perma.cc/F8R3-V7VL>].

<sup>154</sup> “[I]mplicit stereotypes (as measured by the Implicit Association Test) predict not only the initial bias in beliefs but also the suboptimal updating of gender-related expectations when performance-related information comes from the subjects themselves.” Ernesto Reuben, Paola Sapienza & Luigi Zingales, *How Stereotypes Impair Women's Careers in Science*, 111 PNAS 4403, 4403 (2014), <https://www.pnas.org/content/pnas/111/12/4403.full.pdf> [<https://perma.cc/Z42F-7GUJ>].

<sup>155</sup> Tracey Lien, *Why Are Women Leaving the Tech Industry in Droves?*, L.A. TIMES (Feb. 22, 2015, 5:05 AM PT), <https://www.latimes.com/business/la-fi-women-tech-20150222-story.html> [<https://perma.cc/LL7H-3F45>].

<sup>156</sup> *Id.*

A 2008 study noted that 52% of female scientists, engineers, and technologists leave their careers.<sup>157</sup> To put this in perspective, if attrition decreased by 25% through corporate initiatives, “there would [be] 220,000 [additional] highly qualified [female STEM] workers.”<sup>158</sup>

Although prior studies attributed pipeline issues or personal choices as reasons why women are pushed out of science, the culprit is bias, according to Professors Joan C. Williams, Katherine W. Phillips, and Erika V. Hall.<sup>159</sup> Furthermore, “bias [functions] differently depending on a woman’s race or ethnicity.”<sup>160</sup> Based on a survey of 557 female scientists and in-depth interviews with sixty female scientists, they determined that the biases women face in STEM are categorized into five patterns.

First is the “Prove-it-Again” category, where “[t]wo-thirds of the women . . . report[] having to prove themselves over and over again; their successes discounted [and] their expertise questioned.”<sup>161</sup> For Black women, it was even higher — 75% of them experienced this phenomenon.<sup>162</sup> Second is the “Tightrope,” where “women find themselves walking a tightrope between being seen as too feminine to be competent, and too masculine to be likable.”<sup>163</sup> Thirty-four percent reported that they were expected to play a traditionally feminine role; for Asian women, it was 41%.<sup>164</sup> Over half of the women stated that there were repercussions for speaking their minds or being seen as outspoken or decisive; this was especially true of Black and Latina women who were viewed as angry when behaving in this manner.<sup>165</sup> Third is the “Maternal Wall,” where women who had children reported their “commitment and competence [were] questioned” and their opportunities decreased after having children.<sup>166</sup> Fourth is the “Tug-of-War,” where “women who have encountered discrimination early in their careers often distance themselves

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<sup>157</sup> Sylvia Ann Hewlett, Carolyn Buck Luce & Lisa J. Servon, *Stopping the Exodus of Women in Science*, HARV. BUS. REV. (June 2008), <https://hbr.org/2008/06/stopping-the-exodus-of-women-in-science> [<https://perma.cc/ET75-VG6G>].

<sup>158</sup> *Id.*

<sup>159</sup> Joan C. Williams, *The 5 Biases Pushing Women out of Stem*, HARV. BUS. REV. (Mar. 24, 2015), <https://hbr.org/2015/03/the-5-biases-pushing-women-out-of-stem> [<https://perma.cc/2CCC-FJFF>].

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*



from other women.”<sup>167</sup> Fifth, women — primarily Black and Latina women — experienced isolation in their workplace.<sup>168</sup>

Although over 80% of U.S. women in STEM fields report that they love what they do, they are 32% more likely than their male counterparts to leave the industry within a year because they feel marginalized in their positions.<sup>169</sup> In part, it may be due to the biases that they experience, as described above. And it is these same biases that women face in startups.

In addition to the aforementioned biases, there are a variety of biases that women entrepreneurs face that men simply do not because of their gender. According to one study, good-looking males are 36% more persuasive in getting investors to invest in their companies.<sup>170</sup> This halo effect of good looks applies to a variety of business sectors, including cleantech, digital media, education, legal services, and technology innovation.<sup>171</sup> Even so, plain-looking men come ahead of women, and overall, even with identical pitches, male entrepreneurs were 60% more likely to pitch successfully to investors compared to women.<sup>172</sup> Looks did not seem to matter for women in terms of whether or not they received funding.<sup>173</sup> “In the context of entrepreneurship, there is so little objective data to go on in the early stages of a venture [that it] makes it easier [for VCs] to be influenced, whether implicitly or explicitly, and make judgments based on personal attributes like gender.”<sup>174</sup>

The dynamics of how women and men approach entrepreneurship also may play a part in terms of who gets funding and why women may not

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Sylvia Ann Hewlett, *What's Holding Women Back in Science and Technology Industries*, HARV. BUS. REV. (Mar. 13, 2014), <https://hbr.org/2014/03/whats-holding-women-back-in-science-and-technology-industries> [<https://perma.cc/S45T-79L3>].

<sup>170</sup> Alison Wood Brooks, Laura Huang, Sarah Wood Kearney & Fiona E. Murray, *Investors Prefer Entrepreneurial Ventures Pitched by Attractive Men*, 111 PNAS 4427, 4428 (2014), <https://www.pnas.org/content/pnas/111/12/4427.full.pdf> [<https://perma.cc/9NHL-N2C9>].

<sup>171</sup> *Id.* at 4430.

<sup>172</sup> *Id.* at 4428.

<sup>173</sup> *Id.*

<sup>174</sup> *Why VCs Aren't Funding Women-Led Startups*, *supra* note 77.

choose to go the startup route.<sup>175</sup> Investors may also question the commitment of women.<sup>176</sup>

When faced with difficult choices about who should receive funding during the COVID-19 pandemic, early-stage startups with female founders and co-founders were disproportionately impacted;<sup>177</sup> in fact, investments in such companies decreased to 2017 levels.<sup>178</sup>

### C. Racial and Ethnic Minorities in Startups

The numbers of racial and ethnic minorities are even bleaker in the startup ecosystem. Black individuals comprise 3% of VC investors<sup>179</sup> and have founded 1.7% of VC-backed startups.<sup>180</sup> In 2020, only 0.6% of U.S.

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<sup>175</sup> *Id.* (“[T]o be an entrepreneur, you have to be over confident — you must believe that you’re better than everyone around you,” says Mollick. ‘If entrepreneurship is based in part on hubris, [the] male hubris, female humility effect tells us something about why women are less likely to do start-ups.’”).

<sup>176</sup> *Id.* (“VCs might unconsciously question whether a woman founder would be willing to compromise on her family life for the sake of her business,” [Saikat Chaudhuri, executive director of Wharton’s Mack Institute for Innovation Management] says. ‘Despite growing numbers of men who report work/life balance as a concern, they often don’t face the same scrutiny in the community.’”).

<sup>177</sup> Alex Wilhelm & Natasha Mascarenhas, *Pandemic’s Impact Disproportionately Reduced VC Funding for Female Founders*, TECHCRUNCH (Nov. 2, 2020, 8:04 AM PST), <https://techcrunch.com/2020/11/02/pandemics-impact-disproportionately-reduced-vc-funding-for-female-founders/> [<https://perma.cc/WX8N-9Z5C>].

<sup>178</sup> Alex Wilhelm, *Funding for Female Founders Falls to 2017 Levels as Pandemic Shakes up the VC Market*, TECHCRUNCH (Oct. 9, 2020, 7:15 AM PDT), <https://techcrunch.com/2020/10/09/funding-for-female-founders-falls-to-2017-levels-as-pandemic-shakes-up-the-vc-market/> [<https://perma.cc/8GS2-4WY3>].

<sup>179</sup> *Home*, BLACK VC, <https://www.blckvc.org/> (last visited Nov. 28, 2021) [<https://perma.cc/63VN-BCDX>]. Historically, VCs have not recruited at HBCUs, but organizations like HBCUvc are aiming to change that. Amy Scott & Stephanie Hughes, *Recruiting the Next Generation of Venture Capitalists from Historically Black Colleges*, MARKETPLACE TECH (June 28, 2021), <https://www.marketplace.org/shows/marketplace-tech/recruiting-the-next-generation-of-venture-capitalists-from-historically-black-colleges/> [<https://perma.cc/B65K-NJW6>]. There are over 100 HBCUs nationwide. *What Is an HBCU?*, U.S. DEP’T OF EDUC., <https://sites.ed.gov/whhbcu/one-hundred-and-five-historically-black-colleges-and-universities/> (last visited Dec. 20, 2022) [<https://perma.cc/P599-XSQA>]. The Black-white wealth gap also impacts whether Black individuals participate in entrepreneurship at all. In 2019, the median white household held over 7.8 times more wealth than the typical Black household (\$188,200 versus \$24,100). Emily Moss, Kriston McIntosh, Wendy Edelberg & Kristen Broady, *The Black-White Wealth Gap Left Black Households More Vulnerable*, BROOKINGS INST. (Dec. 8, 2020), <https://www.brookings.edu/blog/up-front/2020/12/08/the-black-white-wealth-gap-left-black-households-more-vulnerable/> [<https://perma.cc/Z3S4-2PZX>].

<sup>180</sup> DIVERSITY IN U.S. STARTUPS, *supra* note 74.

venture funding went to Black-founded startups.<sup>181</sup> Only 1.3% of VC-backed startups have a Latinx founder.<sup>182</sup> From 2015 to August 2020, Black and Latinx founders received 2.4% of VC funding.<sup>183</sup> A study by the Kauffman Fellows Research Center reported that “79.2% of startup executives were White, 15.6% Asian, 2.6% Latinx, 2.1% Black, and 0.5% Other.”<sup>184</sup> This data set represents a large divide between the Latinx working-age population in the U.S., which is 17%, and the percentage of Latinx startup executives, which is 2.6%; for the Black community, their working-age population is 13%, but their startup executive representation is only 2.1%.<sup>185</sup> Although Latinx and Black students have earned record rates of bachelor’s and master’s degrees, with a 350% and 55% increase, respectively, from 1980 to 2016, those gains have not been reflected in their representation in startups.<sup>186</sup> “In fact, U.S. startups need 6.7 [times] more Latinx and 5.6 [times] more Black executives to match working-age U.S. demographics.”<sup>187</sup> Furthermore, “[i]n California, Asian Americans were among the least likely to be promoted to manager or executive positions . . . .”<sup>188</sup>

Similar to women, racial and ethnic minorities have a higher rate of return compared to white male founding teams. The Kauffman Fellows report found that “Diverse Founding Teams have higher returns when cash is returned to investors. Historically, they have earned a 3.26x median realized multiple on IPOs and acquisitions, compared to a 2.50x realized multiple for White Founding Teams, a 30% increase.”<sup>189</sup>

Other studies support the Kauffman Fellows’ findings. According to a Boston Consulting Group report, companies with diverse executive teams had 19% more “innovation revenue” than their non-diverse

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<sup>181</sup> Marlize van Romburgh & Gené Teare, *Funding to Black Startup Founders Quadrupled in Past Year, but Remains Elusive*, CRUNCHBASE NEWS (July 13, 2021), <https://news.crunchbase.com/news/something-ventured-funding-to-black-startup-founders-quadrupled-in-past-year-but-remains-elusive/> [<https://perma.cc/Y9YW-SFEA>].

<sup>182</sup> DIVERSITY IN U.S. STARTUPS, *supra* note 74.

<sup>183</sup> CRUNCHBASE DIVERSITY SPOTLIGHT 2020, *supra* note 70, at 8.

<sup>184</sup> Nichols et al., *supra* note 99. This report used software to analyze images of startup executives from 260,000-plus startups to produce the data for their empirical study.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Jennifer S. Fan, *Diversifying Startups and VC Power Corridors*, TECHCRUNCH (Aug. 29, 2021, 5:32 AM PDT), <https://techcrunch.com/2021/08/29/diversifying-startups-and-vc-power-corridors/> [<https://perma.cc/6G3K-PTXB>] [hereinafter *Diversifying Startups*].

<sup>189</sup> Nichols et al., *supra* note 99.

counterparts.<sup>190</sup> A McKinsey & Company study on boards reported that ethnically and culturally diverse boards of directors were “43% more likely to experience higher profits.”<sup>191</sup> The data also suggests a correlation between diversity and better financial performance. As an example, companies with racial and ethnic diversity in the top quartile are “35% more likely to have financial returns” above the industry median; for companies with gender diversity in the top quartile, it is 15% more likely.<sup>192</sup> Based on the data, it appears that a pipeline problem does not exist and that investing in diverse teams leads to better financial outcomes for companies.<sup>193</sup>

Despite these facts, a selection bias exists. Researchers found no ethnically diverse founders for 77% of all Seed and Series A rounds.<sup>194</sup> Three out of every four venture rounds went to all white founding teams; in Series E and later rounds, 80% went to such teams.<sup>195</sup> “As in other professions, venture capitalists invest in people that look like themselves, have similar views, and have similar upbringings.”<sup>196</sup> It is the homophily principle at work again.

The numbers for Black women in startups are even worse than the already low numbers of racial and ethnic minorities in startups. In the U.S.,

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<sup>190</sup> Rocío Lorenzo, Nicole Voigt, Miki Tsusaka, Matt Krentz & Katie Abouzahr, *How Diverse Leadership Teams Boost Innovation*, BOS. CONSULTING GRP. (Jan. 23, 2018), <https://www.bcg.com/en-us/publications/2018/how-diverse-leadership-teams-boost-innovation> [<https://perma.cc/V4QC-MP3L>].

<sup>191</sup> DAME VIVIAN HUNT, LAREINA YEE, SARA PRINCE & SUNDIATU DIXON-FYLE, MCKINSEY & CO., *DELIVERING THROUGH DIVERSITY* 13, 14 (2018), <https://www.mckinsey.com/business-functions/people-and-organizational-performance/our-insights/delivering-through-diversity> [<https://perma.cc/8TNR-XBUT>].

<sup>192</sup> Dame Vivian Hunt, Dennis Layton & Sara Prince, *Why Diversity Matters*, MCKINSEY & CO. (Jan. 1, 2015), <https://www.mckinsey.com/business-functions/people-and-organizational-performance/our-insights/why-diversity-matters> [<https://perma.cc/9AWY-PQY5>].

<sup>193</sup> Nichols et al., *supra* note 99.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* (“Despite having a fraction of the access, Diverse Founding Teams raised 60% more in their rounds (median \$40 [million] per Series E financing for diverse teams compared to \$25 [million] per Series E financing for all-White founding teams . . .”).

<sup>196</sup> *Id.*; see also Ashton Jackson, *Why Mentorship and Access to Capital Are ‘Critical’ Keys to Closing the VC Gap for Entrepreneurs of Color*, CNBC: MAKE IT, <https://www.cnbc.com/2022/02/03/mentorship-and-access-to-capital-are-critical-to-closing-the-vc-gap-for-entrepreneurs-of-color.html> (last updated Feb. 4, 2022, 10:09 AM EST) [<https://perma.cc/A9RL-C26X>] (citing additional scrutiny and skepticism founders of color face).

64% of new women-owned businesses are started by women of color.<sup>197</sup> Although this number appears promising, a closer examination of the intersection of race and gender in startups reveals that the numbers are not so rosy. Although Black women-owned businesses increased by 50% from 2014 to 2019,<sup>198</sup> Black women continue to receive a paltry amount of all venture funding.<sup>199</sup>

### III. ADDRESSING BIASES: THE PUBLIC COMPANY VS. THE PRIVATE COMPANY

The business world is no stranger to gender and racial biases, and the startup ecosystem is no exception. This Part will document how public companies tackled the lack of women and racial and ethnic minorities in their ranks. In particular, it will illustrate how the law has been used to address these problems. It will then detail how the life cycle of a startup makes it difficult to employ legal strategies that are used in the public company context to tackle the problems of gender and racial biases. The manner in which startups operate, how they raise funds, and the startup culture in which they exist dictate that a different approach is necessary to combat biases. The role of private ordering in the startup ecosystem and its relevance to startup biases will also be discussed, specifically

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<sup>197</sup> Stone, *supra* note 79.

<sup>198</sup> AM. EXPRESS, THE 2019 STATE OF WOMEN-OWNED BUSINESSES REPORT 4 (2019), [https://s1.q4cdn.com/692158879/files/doc\\_library/file/2019-state-of-women-owned-businesses-report.pdf](https://s1.q4cdn.com/692158879/files/doc_library/file/2019-state-of-women-owned-businesses-report.pdf) [<https://perma.cc/RM3R-C4FF>].

<sup>199</sup> See, e.g., Dominic-Madori Davis, *Black Founders Still Raised Just 1% of All VC Funds in 2022*, TECHCRUNCH (Jan. 6, 2023, 8:30 AM PST), <https://techcrunch.com/2023/01/06/black-founders-still-raised-just-1-of-all-vc-funds-in-2022/?tpcc=nltermsheet> [<https://perma.cc/D6PK-LHZT>] (reiterating the dearth of funding for Black-founded companies in 2022); Megan Rose Dickey, *An Update on Black Women Raising Startup Funding*, TECHCRUNCH (June 13, 2018, 6:00 AM PDT), <https://techcrunch.com/2018/06/13/an-update-on-black-women-raising-startup-funding/> [<https://perma.cc/Y9HV-47PN>] (finding that “[o]f the [B]lack women who raised less than \$1 million in funding, the average raised amount is \$42,000”); Sophia Kunthara, *Black Women Still Receive Just a Tiny Fraction of VC Funding Despite 5-Year High*, CRUNCHBASE NEWS (July 16, 2021), <https://news.crunchbase.com/news/something-ventured-black-women-founders/> [<https://perma.cc/RB4Y-D3EC>] (reporting that funding of Black women comes primarily in the pre-seed or seed level; after that there is a “valley of death”); Daniela Pierre-Bravo, *There’s a Venture Capital Funding Gap for Latina Founders. Here’s How We Can Close It*, MSNBC (Jan. 5, 2023, 9:52 AM PST), <https://www.msnbc.com/know-your-value/business-culture/venture-capital-funding-gap-latina-founders-n1302279> [<https://perma.cc/M3KY-U37L>] (discussing the “venture capital funding crisis for Latina founders,” who currently “receive less than two percent” of funding); Stengel, *supra* note 80.

addressing the patchwork framework that has been developed to address DEI issues.

### A. How Public Companies Combat Biases

Securities laws provide a robust set of laws to govern public companies.<sup>200</sup> Once a company has registered its shares with the SEC, it is subject to a number of rules and regulations, such as mandatory quarterly and annual reports,<sup>201</sup> current reports on certain specified events,<sup>202</sup> and mandated corporate governance structures.<sup>203</sup> The SEC has tackled the problem of diversity differently, leaving it up to companies to determine how to define diversity without any mandate of affirmative action to

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<sup>200</sup> U.S. Sec. & Exch. Comm'n, *The Laws that Govern the Securities Industry*, INVESTOR.GOV, <https://www.investor.gov/introduction-investing/investing-basics/role-sec/laws-govern-securities-industry> (last visited Dec. 6, 2021) [<https://perma.cc/7AJW-BRVD>]; *Securities Law History*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/securities\\_law\\_history](https://www.law.cornell.edu/wex/securities_law_history) (last visited Dec. 6, 2021) [<https://perma.cc/W4BR-ETUG>]; *Securities Act of 1933*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/securities\\_act\\_of\\_1933](https://www.law.cornell.edu/wex/securities_act_of_1933) (last visited Dec. 29, 2021) [<https://perma.cc/M6GF-BKET>]; *Securities Exchange Act of 1934*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/securities\\_exchange\\_act\\_of\\_1934](https://www.law.cornell.edu/wex/securities_exchange_act_of_1934) (last visited Dec. 29, 2021) [<https://perma.cc/2Z4F-GXHM>].

<sup>201</sup> U.S. SEC. & EXCH. COMM'N, FORM 10-Q, <https://www.sec.gov/files/form10-q.pdf> (last visited Dec. 19, 2022) [<https://perma.cc/QG28-VDDR>]; U.S. SEC. & EXCH. COMM'N, FORM 10-K, <https://www.sec.gov/files/form10-k.pdf> (last visited Dec. 19, 2022) [<https://perma.cc/GZ7C-VQBH>].

<sup>202</sup> U.S. SEC. & EXCH. COMM'N, FORM 8-K, <https://www.sec.gov/files/form8-k.pdf> (last visited Dec. 19, 2022) [<https://perma.cc/WDG5-2WJ9>].

<sup>203</sup> 17 C.F.R. § 229.407(d) (2023); 17 C.F.R. § 240.10A-3 (2023); 17 C.F.R. § 229.407(e) (2023) (noting the compensation committee); 17 C.F.R. § 229.407(c) (2023); Standards Relating to Listed Company Audit Committees, 68 Fed. Reg. 18,787, 18,788 (Apr. 16, 2003) (to be codified at 17 C.F.R. pts. 228, 229, 240, 249, 274). NYSE and Nasdaq also have additional rules. See N.Y. STOCK EXCH., NYSE LISTED COMPANY MANUAL SECTION 303A CORPORATE GOVERNANCE STANDARDS FREQUENTLY ASKED QUESTIONS (2021), [https://www.nyse.com/publicdocs/nyse/regulation/nyse/FAQ\\_NYSE\\_Listed\\_Company\\_Manual\\_Section\\_303A\\_7\\_28\\_2021.pdf](https://www.nyse.com/publicdocs/nyse/regulation/nyse/FAQ_NYSE_Listed_Company_Manual_Section_303A_7_28_2021.pdf) [<https://perma.cc/S8KD-EX7Y>] (noting the requirements of Section 303A.05(a), Section 303A.06, and Section 303A.04(a)); *Nasdaq 5600 Series*, NASDAQ: LISTING CTR., <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series> (last visited Dec. 19, 2022) [<https://perma.cc/LAE6-3682>] (noting the requirements of Section 5602(c)(2), Section 5602(d)(2)(A), and Section 5605(e)). This is not to suggest the information is always easy to find. See Jens Frankenreiter, Cathy Hwang, Yaron Nili & Eric Talley, *Cleaning Corporate Governance*, 170 U. PENN. L. REV. 1, 3-5 (2021) (revealing that the legal field's faith in the accuracy and integrity of small, specialized collections of corporate governance data is misplaced and highlights the dubious practice of stifling public access to public records).

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improve the state of diversity in public companies. A slew of state laws and nongovernmental initiatives has also emerged to address the issue of diversity. Progress on the issue of diversity on boards has also been driven by public companies themselves, who choose to make it a priority.<sup>204</sup> An overview of the diversity efforts taken by the SEC, Congress, and states follow, along with nongovernmental initiatives and individual public company efforts.

### 1. The SEC

In 2009, the SEC approved a final rule regarding proxy disclosure enhancements.<sup>205</sup> One of the issues that the rule addressed was diversity, but it only required disclosure of diversity on boards of directors, and the definition of diversity could be determined by the boards or committees of the boards. In considering the rule, the SEC agreed with commenters that “it is useful for investors to understand how the board considers and addresses diversity, as well as the board’s assessment of the implementation of its diversity policy.”<sup>206</sup> The SEC adopted amendments to Item 407(c) of Regulation S-K mandating disclosure of whether and how a nominating committee contemplates diversity in identifying nominees for the board of directors.<sup>207</sup> Furthermore, if the board or a nominating committee has a policy regarding diversity and the identification of director nominees, the implementation of such policy and the assessment of its effectiveness requires disclosure.<sup>208</sup> Diversity was intentionally not defined to allow companies “to define diversity in ways that they consider appropriate.”<sup>209</sup>

Over a decade later, in 2020, the SEC amended Regulation S-K to require disclosure of human capital management by public companies.<sup>210</sup> It decided on a principles-based approach which ultimately gave more

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<sup>204</sup> Afsharipour, *supra* note 11, at 364.

<sup>205</sup> Proxy Disclosure Enhancements, 74 Fed. Reg. 68,333, 68,334 (Dec. 23, 2009) (to be codified at 17 C.F.R. pts. 229, 239, 240, 249, 274).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 68,343-44.

<sup>209</sup> *Id.* at 68,344 (noting diversity could “include differences of viewpoint, professional experience, education, skill, and other individual qualities and attributes that contribute to board heterogeneity, while others may focus on diversity concepts such as race, gender and national origin”).

<sup>210</sup> Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63,726, 63,737 (Oct. 8, 2020) (to be codified at 17 C.F.R. pts. 229, 239, 240).

flexibility to the public companies disclosing such information; “human capital” was also left undefined.<sup>211</sup> Human capital management has two key components: workers are viewed as an “intangible asset, falling in the same category as patents, copyright, franchises, goodwill, trademarks, trade names, computer software, and data”,<sup>212</sup> and includes “matters that are identified as contributing to workers’ ability to deliver long-term value . . . such as labor practices, employee health and safety, employee engagements, and diversity and inclusion . . .”<sup>213</sup> Therefore, whether diversity is discussed depends on whether a particular public company believes that it is relevant.

## 2. Congressional Efforts

Congress also attempted to address the issue of diversity on boards of directors. In 2019, U.S. House of Representatives member Gregory Meeks, a representative for New York’s Fifth Congressional District, introduced the Improving Corporate Governance Through Diversity Act of 2019,<sup>214</sup> he reintroduced the bill in 2021.<sup>215</sup> The bill mandated the disclosure of racial, ethnic, and gender composition and veteran status of boards of directors and executive officers for certain issuers of securities.<sup>216</sup> It also required any plan to promote racial, ethnic, and gender diversity to be disclosed.<sup>217</sup> Furthermore, the establishment of a Diversity Advisory Group by the SEC would report on strategies to expand gender,

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<sup>211</sup> *Id.* at 63,737-40.

<sup>212</sup> George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TUL. L. REV. 639, 644 (2021).

<sup>213</sup> *Id.* at 644-45.

<sup>214</sup> Improving Corporate Governance Through Diversity Act of 2019, H.R. 5084, 116th Cong. (2019); Improving Corporate Governance Through Diversity Act of 2021, H.R. 1277, 117th Cong. (2022).

<sup>215</sup> Press Release, U.S. Rep. Gregory Meeks, *Rep. Meeks and Sen. Menendez Reintroduce Corporate Diversity Bill* (Feb. 23, 2021), <https://meeks.house.gov/media/press-releases/rep-meeks-and-sen-menendez-reintroduce-corporate-diversity-bill> [<https://perma.cc/E8KL-V9NA>]; Majority Press Releases, *Menendez Introduces Bill to Promote Corporate Diversity*, U.S. SENATE COMM. ON BANKING, HOUS., & URB. AFFS., (Feb. 23, 2021), <https://www.banking.senate.gov/newsroom/majority/menendez-bill-corporate-diversity> [<https://perma.cc/HW4L-75FM>].

<sup>216</sup> H.R. 5084 § 2.

<sup>217</sup> *Id.*



racial, and ethnic diversity among members of the board of directors.<sup>218</sup> The bill, however, did not pass.<sup>219</sup>

In addition to legislative efforts for board diversity, Congress also addressed inequities in the workplace. Notably, the legislation “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021” allows people to choose between going to court or arbitrating in sexual harassment or assault cases; it is also retroactive and invalidates existing forced arbitration clauses.<sup>220</sup> It passed by unanimous consent in the Senate and by a 335-97 vote in the House of Representatives.<sup>221</sup>

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<sup>218</sup> *Id.* § 3.

<sup>219</sup> *Id.* § 1.

<sup>220</sup> Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, H.R. 4445, 117th Cong. (2022) (including full bill); *see also* Deirdre Walsh, *Congress Approves Bill to End Forced Arbitration in Sexual Assault Cases*, NPR (Feb. 10, 2022, 12:16 PM ET), <https://www.npr.org/2022/02/10/1079843645/congress-approves-bill-to-end-forced-arbitration-in-sexual-assault-cases> [<https://perma.cc/UQN7-8UJ6>] (summarizing the bill).

<sup>221</sup> *US Congress Approves Sexual Harassment Bill in #MeToo Milestone*, GUARDIAN (Feb. 10, 2022, 1:59 PM EST), <https://www.theguardian.com/us-news/2022/feb/10/us-congress-sexual-harassment-me-too> [<https://perma.cc/E2X8-PACE>].

The chart below summarizes the various efforts to diversify the board at the federal level:

**THE UNITED STATES: FEDERAL LAWS FOR BOARD DIVERSITY**

The SEC	<b>17 C.F.R. § 229.407</b> – Corporate Governance	Approved
The SEC	17 C.F.R. § 229, 239, 240, 249 & 274 – Proxy Disclosure Enhancements	Approved
Congress	<b>H.R. 5084</b> – Improving Corporate Governance Through Diversity Act of 2019 (introduced by Congressman Gregory Meeks)	Did not pass; Reintroduced in 2021 as H.R. 1277
Congress	<b>H.R. 4455</b> – Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (introduced by Congresswoman Cheri Bustos)	Approved
Congress	<b>H.R. 1277</b> – Improving Corporate Governance Through Diversity Act of 2021 (introduced by Congressman Gregory Meeks)	Introduced; Reported by U.S. House Committee on Financial Services on January 20, 2022

### 3. State Laws

Generally, state laws focus on gender diversity and fall into one of three categories — “they mandate, encourage or require disclosure of board diversity.”<sup>222</sup> Only a few states have passed laws that mandate or encourage board diversity; they apply only to public companies, and, with the exception of California, the board diversity measure only applies to women and not racial or ethnic minorities.<sup>223</sup>

<sup>222</sup> Fan, *Diversifying Startups*, *supra* note 188.

<sup>223</sup> See discussion *infra* Part III.A.3.a-b.

Racial and ethnic minorities represent 40% of the U.S. population, but only 12.5% of board members of the 3,000 largest public companies come from such groups.<sup>224</sup> Among boards of Fortune 500 companies, African American/Black individuals held 8.7% of board seats, Hispanic/Latino(a) persons 4.1%, and Asian/Pacific Islander individuals 4.6%.<sup>225</sup> Despite the underrepresentation of minorities on boards, legislation regarding minority directors has been sparse.

One example of it, however, is California's AB 979.<sup>226</sup> The law required that public companies headquartered in California have at least one director from a racial or ethnic minority community by the end of 2021; the law aimed to increase minority representation among corporate executives by the end of 2022.<sup>227</sup> However, in a 2021 court decision by Judge Terry Green of the Los Angeles County Superior Court, the board diversity law related to race and ethnicity was found in violation of the Equal Protection Clause of the California Constitution.<sup>228</sup>

For states that have passed laws requiring disclosure of board diversity, two of them include companies other than public ones.<sup>229</sup> These proposed laws are in different stages in state legislatures, and they vary — the laws may apply to non-public companies (e.g., Connecticut), have both mandatory and disclosure requirements, and may include fines for failing to meet the board diversity requirement. Very few of the proposals include board diversity provisions (either on a mandatory or disclosure basis) for racial or ethnic minorities.<sup>230</sup> A more detailed discussion follows the

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<sup>224</sup> Peter Eavis, *Diversity Push Barely Budgets Corporate Boards to 12.5%*, *Survey Finds*, N.Y. TIMES, <https://www.nytimes.com/2020/09/15/business/economy/corporate-boards-black-hispanic-directors.html> (last updated Sept. 7, 2021) [<https://perma.cc/E46B-T2P3>].

<sup>225</sup> DELOITTE & ALL. FOR BD. DIVERSITY (ABD), *MISSING PIECES REPORT: THE BOARD DIVERSITY CENSUS OF WOMEN AND MINORITIES ON FORTUNE 500 BOARDS* 19 (6th ed., 2021).

<sup>226</sup> Assemb. B. 979, 2020 Leg., Reg. Sess. (Cal. 2020).

<sup>227</sup> *Id.* Underrepresented community includes someone “who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender.” *Id.* § 3(e)(1).

<sup>228</sup> *Crest v. Padilla*, No. 20ST-CV-37513, 2022 WL 1073294, at \*2 (Cal. Super. Ct. Apr. 1, 2022).

<sup>229</sup> See discussion *infra* Section III.A.3.c (noting that Maryland and New York laws can apply to private companies).

<sup>230</sup> See discussion *infra* Section III.A.3.d (noting how only Connecticut and Oregon include board diversity provisions for racial or ethnic minorities).

various state laws and proposed legislation to illustrate the scope of the laws passed.

*a. Mandates Board Diversity*

The first instance of a board gender diversity law originated in California. Under SB 826,<sup>231</sup> by the end of 2019, public companies headquartered in California were required to have a minimum of one woman on each of their boards; by the end of 2021, the minimum threshold increases to two if the board has five directors and three if it has six or more directors.<sup>232</sup> Between 2019 and March 2021, board seats held by women in public companies headquartered in California increased by 93.6% under the law.<sup>233</sup> The Secretary of State of California annually publishes information on board diversity.<sup>234</sup> The law was recently ruled to be unconstitutional,<sup>235</sup> but the California Secretary of State noted that the state intended to appeal the ruling.<sup>236</sup> Regardless of whether the law is reinstated or not, it appears to have helped spur gender diversity in the boardroom. A gender equity nonprofit reported that the number of

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<sup>231</sup> S.B. 826, 2018 Leg., Reg. Sess. (Cal. 2018).

<sup>232</sup> Female is defined as “an individual who self-identifies her gender as a woman, without regard to the individual’s designated sex at birth” in the statute.

<sup>233</sup> CAL. PARTNERS PROJECT, CLAIM YOUR SEAT: WOMEN OF COLOR ON CALIFORNIA’S PUBLIC COMPANY BOARDS 8 (2021). Note that this law is currently being challenged in court. *See Meland v. Weber*, 2 F.4th 838, 842 (9th Cir. 2021) (reversing the district court’s dismissal for lack of standing of an action brought by a corporate shareholder challenging the constitutionality of California Senate Bill 826, which requires all public corporations headquartered in California to have a minimum number of females on their boards of directors); *see also* Ann Lipton, *Meland v. Weber and Board Diversity*, BUS. L. PROF BLOG (July 3, 2021), [https://lawprofessors.typepad.com/business\\_law/2021/07/meland-v-weber-and-board-diversity.html](https://lawprofessors.typepad.com/business_law/2021/07/meland-v-weber-and-board-diversity.html) [<https://perma.cc/SW7H-VR8R>] (analyzing the court’s findings and arguing that “the connection that the court found between the law and the shareholder’s injury were . . . attenuated”).

<sup>234</sup> Cal. S.B. 826 § 2(d); *see* CAL. SEC’Y OF STATE, WOMEN ON BOARDS: MARCH 2021 REPORT (2021), <https://bpd.cdn.sos.ca.gov/women-on-boards/wob-report-2021-02.pdf> [<https://perma.cc/KP2C-TB6B>] (holding the California Secretary of State’s most recent report).

<sup>235</sup> *See Crest v. Padilla*, No. 19STCV27561, 2020 WL 13104648, at \*1-2 (Cal. Super. Ct. June 3, 2020).

<sup>236</sup> Alisha Haridasani Gupta, *Another California Board Diversity Law Was Struck Down, but It Already Had a Big Impact*, N.Y. TIMES (May 19, 2022), <https://www.nytimes.com/2022/05/19/business/california-board-diversity-women.html> [<https://perma.cc/LK2C-Z5P7>].

companies in California with no female directors decreased to 1% in 2021; before the law was passed in 2018, it was 28%.<sup>237</sup>

In Washington State, the Women on Corporate Boards Act became law in 2020.<sup>238</sup> Under the law, by January 1, 2022, public companies must have a “gender-diverse board,” which means that such companies have “individuals who self-identify as women comprise at least [25%] of the [board of] directors” for at least 270 days preceding the applicable annual shareholders meeting.<sup>239</sup> If it does not meet the requirement, the public company is required to deliver to its shareholders a “board diversity discussion and analysis.”<sup>240</sup>

*b. Encourages Board Diversity*

Other states passed laws encouraging gender-diverse boards. Pennsylvania and Colorado have similar laws that urge publicly traded corporations to have diverse boards within certain time frames; the minimum number of women on boards would depend on the size of the board.<sup>241</sup>

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<sup>237</sup> *SB 826 2018-2021 Data Comparison Chart*, GOOGLE SPREADSHEETS, <https://docs.google.com/spreadsheets/d/1tnyOPP0m7WhBMpCSROOWX13E3cRBzL91Y6RT8vwYj1U/edit#gid=0> (last visited June 27, 2022) [<https://perma.cc/W8ZV-WWBX>]. The non-profit that made the data, named California Partners Project, was co-founded by Jennifer Siebel Newsom, the spouse of Governor Gavin Newsom. Gupta, *supra* note 236. “‘There’s no boardroom in America that isn’t talking about diversity,’ said Megan Wang, the chief operating officer of theBoardlist, which helps companies find board director candidates. ‘The law certainly accelerated something we had been talking about for decades. But we’re in a moment in time where legislation is one lever, and there are many other things at play right now.’” *Id.*

<sup>238</sup> S.B. 6037, 66th Leg., Reg. Sess. (Wash. 2020).

<sup>239</sup> *Id.*

<sup>240</sup> The board diversity discussion and analysis must meet the following requirements:

[T]he discussion and analysis must include information regarding the public company’s approach to developing and maintaining diversity on its board of directors. This would include how the board or appropriate committee “considered the representation of any diverse groups in identifying and nominating candidates for election as director . . .”, any policy adopted by the board for such identification and nomination, and the use of term limits and mandatory retirement age policies for its directors.

*Id.* at 2.

<sup>241</sup> Pennsylvania urges that by 2021 boards with nine board members have at least three of those members be women; boards with five to eight director seats have at least two women; and boards with fewer than five members have at least one female member. H.R. 114, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019). Colorado urges publicly traded companies

*c. Requires Disclosure of Board Diversity*

Illinois, Maryland, and New York have laws requiring disclosure with respect to board diversity. In Illinois, the disclosure law applies only to publicly traded corporations with “principal executive offices located in Illinois” and requires corporations to disclose both the gender and racial or ethnic diversity of their board members to the Secretary of State.<sup>242</sup> The University of Illinois Systems will then aggregate this data and publish a report that includes a rating system assessing the representation of women and minorities on boards.<sup>243</sup> In Maryland, the disclosure law applies to tax-exempt, nonstock corporations with a budget over \$5 million and domestic stock corporations with over \$5 million in total sales, but does not apply to private companies if at least 75% of its shareholders are family members.<sup>244</sup> The required disclosure includes the number of female board members as well as the total number of members; the Comptroller will publish this information by January 1 each year.<sup>245</sup> New York’s law applies to any for-profit corporation doing business in New York State.<sup>246</sup> The Secretary of State’s office will conduct an annual study looking at the total number of female board members, the change in female board representation, and the aggregate percentage of female board representation for all boards of directors.<sup>247</sup>

*d. Proposed Legislation*

The following states have proposed legislation on board diversity: Connecticut, Hawaii, Massachusetts, Michigan, New Jersey, Oregon, and Ohio. Some states propose fines as a way to incentivize compliance by companies. The proposed Connecticut law applies to any corporation with

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from January 2018 to December 2020 to increase female representation on boards as follows: boards with nine board members should have at least three female members; boards with five to eight members should have at least two women; and boards with fewer than five members should have at least one female member. H.R.J. Res. 17-1017, 71st Gen. Assem., 1st Reg. Sess. (Colo. 2017).

<sup>242</sup> H.B. 3394, 101st Gen. Assem., Reg. Sess. (Ill. 2019).

<sup>243</sup> *Id.* § 8.12(d)-(e); see RICHARD A. BENTON & EUNMI MUN, ILLINOIS CORPORATE BOARD DIVERSITY, INCLUSION, AND REPRESENTATION REPORT – 2020, at 2-7 (2020), <https://ler.illinois.edu/wp-content/uploads/2021/07/Illinois-Board-Diversity-Report-2020-Revised-2.pdf> [<https://perma.cc/KR2Z-LFZ8>] (holding the University of Illinois’ most recent report).

<sup>244</sup> H.B. 1116, 2019 Leg., Reg. Sess. (Md. 2019).

<sup>245</sup> *Id.* at 6.

<sup>246</sup> S. 4278, 2019-2020 Leg., Reg. Sess. (N.Y. 2020).

<sup>247</sup> *Id.* § 2.

its principal place of business in Connecticut; requires disclosure of gender, racial, and ethnic identities of board members; and requires at least one board member to be from an underrepresented group.<sup>248</sup>

In Hawaii, the proposed law has both mandatory and disclosure elements.<sup>249</sup> The law would apply to publicly held domestic corporations with their principal place of business in Hawaii and require a gender-diverse board by the end of 2021.<sup>250</sup> The proposed law set out the following requirements: by the end of 2023, it required that boards with more than five members must have a minimum of three male or non-binary directors and three female or non-binary directors; boards with five members must have at least two male or non-binary directors and two female or non-binary directors; and boards with four or fewer members must have at least one male or non-binary director and one female or non-binary director.<sup>251</sup> Under the proposed law, the Department of Commerce and Consumer Affairs would have published a list of all companies with at least one male or non-binary director and one female or non-binary director, as well as an annual report.<sup>252</sup>

Massachusetts' proposed law applies to publicly held domestic or foreign corporations with principal executive offices in Massachusetts and, like Hawaii, has both mandatory and disclosure elements.<sup>253</sup> It would require at least one female board member by the end of 2021.<sup>254</sup> By the end of 2023, it would require that boards with more than six members have at least three female members; and boards with five or fewer members have at least two female members.<sup>255</sup> The Secretary of the Commonwealth would be responsible for publishing an annual report documenting board diversity.<sup>256</sup>

In Michigan, the proposed law applies to publicly held domestic or foreign corporations with principal executive offices in Michigan and requires at least one female director before January 1, 2021.<sup>257</sup> Beginning in 2023, boards with six or more members must have at least three female

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<sup>248</sup> H.B. 5930, 2021 Gen. Assemb., Reg. Sess. (Conn. 2021).

<sup>249</sup> S.B. 193, 31st Leg., Reg. Sess. (Haw. 2021). The bill passed in the Senate but did not receive a hearing in the House.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> S.B. 1879, 191st Gen. Ct., Reg. Sess. (Mass. 2019-2020).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> S.B. 115, 2019 Gen. Assemb., Reg. Sess. (Mich. 2019).

directors; boards with five members must have at least two female directors; and boards with four or fewer members must have at least one female director.<sup>258</sup> Violation of these requirements will result in a fine of up to \$100,000 for a first violation and up to \$300,000 for each subsequent violation; the administrator will publish an annual report documenting board diversity.<sup>259</sup>

In New Jersey, the proposed law applies to publicly held domestic or foreign corporations with principal executive offices in New Jersey and requires at least one female director by the end of 2019.<sup>260</sup> By the end of 2021, boards with six or more directors must have at least three female directors; boards with five directors must have at least two female directors; boards with four or fewer directors must have at least one female director.<sup>261</sup> Violation of these requirements will result in a fine of up to \$100,000 for a first violation and up to \$300,000 for subsequent violations; the Secretary of State will publish an annual report documenting board diversity.<sup>262</sup>

The proposed law in Oregon applies to publicly held corporations with principal executive offices in Oregon.<sup>263</sup> It requires boards to “have a minimum of one female director and one director who is a member of an underrepresented community.”<sup>264</sup> Violation of this requirement will result in a fine of \$100,000 for a first violation and \$300,000 for any subsequent violations.<sup>265</sup> The Secretary of State will publish an annual report documenting board diversity.<sup>266</sup>

The proposed law in Ohio applies to publicly held corporations in Ohio.<sup>267</sup> It encourages boards with nine or more members to have at least three female directors; boards with less than nine but greater than five members to have at least two female directors; and boards with four or fewer members to have at least one female director.<sup>268</sup>

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<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> S.B. 3469, 218th Leg., Reg. Sess. (N.J. 2019).

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> H.B. 3110, 81st Leg. Assemb., Reg. Sess. (Or. 2021).

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

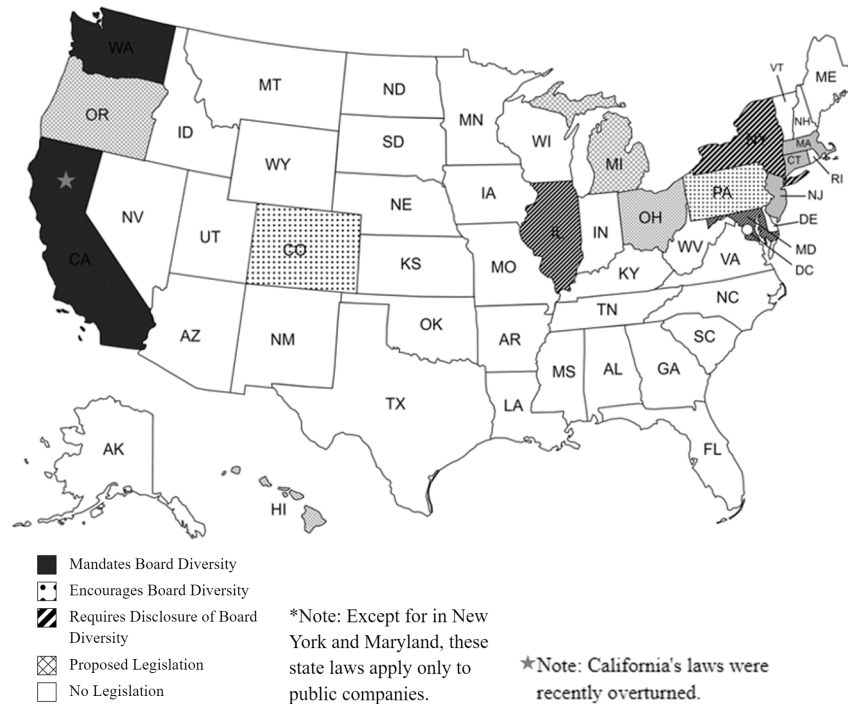
<sup>267</sup> H.R. 344, 131st Gen. Assemb., Reg. Sess. (Ohio 2015-2016).

<sup>268</sup> *Id.*



The map below summarizes the various state laws for board diversity.

### THE UNITED STATES: STATE LAWS FOR BOARD DIVERSITY



#### 4. Non-Governmental Initiatives

Non-governmental initiatives are also being launched. For example, Goldman Sachs committed to only managing initial public offerings for companies with at least two diverse board members, one of whom must be a woman.<sup>269</sup> BlackRock expects at least two women on every board; if it believes a company has not adequately considered diversity in its board composition within a reasonable time period, it may vote against the nominating or governance committee for a perceived lack of commitment

<sup>269</sup> *Board Diversity Initiative*, GOLDMAN SACHS, <https://www.goldmansachs.com/our-commitments/diversity-and-inclusion/board-diversity/> (lasted visited Nov. 9, 2021) [<https://perma.cc/GQA7-8BV5>]; *Goldman Sachs' Commitment to Board Diversity*, GOLDMAN SACHS (Feb. 4, 2020), <https://www.goldmansachs.com/our-commitments/diversity-and-inclusion/launch-with-gs/pages/commitment-to-diversity.html> [<https://perma.cc/D2YH-6BYM>]. Initially, Goldman Sachs required only one woman on the board.

to board effectiveness.<sup>270</sup> State Street Global Advisors, one of the largest asset-management firms in the world, also famously launched the Fearless Girl campaign, which was intended to publicize one of their index funds that included gender-diverse companies with a high number of women in senior leadership positions.<sup>271</sup> In addition, there are groups of corporate leaders creating their own initiatives to diversify corporations. For example, the 30% Club, led by chairpersons and CEOs, aims to increase the representation of women on boards and C-suite positions by at least 30%.<sup>272</sup> Some corporations are also supporting organizations promoting racial justice and inclusion.<sup>273</sup> Salesforce is taking a multi-pronged approach by committing to expanding its Black workforce,<sup>274</sup> supporting

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<sup>270</sup> BLACKROCK, OUR APPROACH TO ENGAGEMENT ON BOARD DIVERSITY: INVESTMENT STEWARDSHIP 2-3 (2021), <https://www.blackrock.com/corporate/literature/publication/blk-commentary-engaging-on-diversity.pdf> [<https://perma.cc/LF8W-8NZS>].

<sup>271</sup> A bronze sculpture, titled “Fearless Girl,” was at the center of the campaign. Some commentators, however, questioned State Street’s motives as a few months after the statue was unveiled, State Street — the very organization that commissioned the statue — paid \$5 million “to settle claims by the U.S. Department of Labor that it had systemically discriminated against female and Black employees through unfair pay practices.” One critic of the campaign called it “fake corporate feminism.” Sheelah Kolhatkar, *The Ongoing Saga of the “Fearless Girl” Statue*, NEW YORKER (Jan. 7, 2022), <https://www.newyorker.com/business/currency/the-ongoing-saga-of-the-fearless-girl-statue> [<https://perma.cc/4VZH-G2WZ>].

<sup>272</sup> *Global Chair, Ann Cairns, Talks to BBC Radio 4 About Women on Boards and at Senior Executive Level*, 30% CLUB, <https://30percentclub.wardourdigital.co.uk/> (last visited Nov. 9, 2021) [<https://perma.cc/DHX6-J8F4>].

<sup>273</sup> Lauren Feiner, *Tech Companies Made Big Pledges to Fight Racism Last Year – Here’s How They’re Doing So Far*, CNBC, <https://www.cnbc.com/2021/06/06/tech-industry-2020-anti-racism-commitments-progress-check.html> (last updated June 6, 2021, 1:03 PM EDT) [<https://perma.cc/8N79-DBTN>]. High tech public companies, previously funded by VC money, like Airbnb, Amazon, Apple, Box, Cisco, Facebook, Google, Microsoft, Netflix, PayPal, to name a few, committed to various programs to promote racial justice. The commitments range from increasing representation within corporations at the manager and board levels, giving to racial justice organizations, spending on more diverse suppliers, creating forums for Black employees, creating pipelines to diversify companies, creating anti-racism content for the workplace, helping Black-owned small businesses, and other initiatives.

<sup>274</sup> Salesforce has committed to double the U.S. representation of Black employees in leadership (VP and above) and increase the U.S. representation of Black employees by 50% by the end of 2023. Dominique Fluker, *12 Companies Ramping up Their Diversity & Inclusion Efforts — And How You Can Too*, GLASSDOOR FOR EMPLOYERS (May 8, 2021), <https://www.glassdoor.com/employers/blog/inspiration-for-ramping-up-diversity-inclusion-efforts/> [<https://perma.cc/68LC-7LYA>].

organizations that work on racial equality and justice,<sup>275</sup> and using its purchasing power to help advance equality.<sup>276</sup> On a policy level, Salesforce is advocating for: policies to address the equity gap, police reform, hate crimes, and the use of technology in a nondiscriminatory manner.<sup>277</sup> Nasdaq also proposed mandating disclosure of board diversity under its new listing standards to the SEC.<sup>278</sup> Newly-public Remitly took several steps to address biases. It hired a DEI head in 2020, pledged to match employee donations to racial justice organizations (up to \$25,000), offered a learning tool called Crescendo which provides weekly, individually-focused learning content on Slack (e.g., allyship, Black Lives Matter movement), and provided opportunities for its Black employees to develop their networks within the tech community.<sup>279</sup> In addition, Nasdaq's Board Diversity Rule "is a disclosure standard designed to encourage a minimum board diversity objective for companies and provide stakeholders with consistent, comparable disclosures concerning a company's current board composition."<sup>280</sup> It is not a mandate; if a Nasdaq-listed company does not have at least two diverse directors, it can explain why in its proxy statement, information statement for its annual shareholder meeting, or website.<sup>281</sup> Institutional investors such as BlackRock and State Street have also created policies to encourage

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<sup>275</sup> *Our Progress So Far on Racial Equality and Justice — Reflecting During Black History Month*, SALESFORCE NEWS & INSIGHTS (Feb. 11, 2021), <https://www.salesforce.com/news/stories/progress-so-far-on-racial-equality-and-justice/> [<https://perma.cc/UD8G-PERB>].

<sup>276</sup> Ebony Beckwith & Tony Prophet, *Taking Action for Racial Equality and Justice*, SALESFORCE NEWS & INSIGHTS (June 10, 2020), <https://www.salesforce.com/news/stories/taking-action-for-racial-equality-and-justice/> [<https://perma.cc/QAU6-3XRR>]. Salesforce donated \$1 million to the NAACP and partnered with BET and United Way to donate \$500,000 to help Black American families. It also sponsors national and regional diverse supplied development councils and associations.

<sup>277</sup> Fluker, *supra* note 274.

<sup>278</sup> *Nasdaq to Advance Diversity Through New Proposed Listing Requirements*, NASDAQ (Dec. 1, 2020, 7:15 AM EST), <https://www.nasdaq.com/press-release/nasdaq-to-advance-diversity-through-new-proposed-listing-requirements-2020-12-01> [<https://perma.cc/85PM-M9FX>].

<sup>279</sup> *10 Tech Companies Championing Diversity, Equity and Inclusion in the Workplace*, STARTUPBEAT (Aug. 19, 2020), <https://startupbeat.com/10-tech-companies-championing-diversity-equity-and-inclusion-in-the-workplace/34325/> [<https://perma.cc/LD98-7YGV>].

<sup>280</sup> NASDAQ, NASDAQ'S BOARD DIVERSITY RULE: WHAT NASDAQ-LISTED COMPANIES SHOULD KNOW 1 (2022), <https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf> [<https://perma.cc/Y3UY-9ANV>].

<sup>281</sup> *Id.* at 2 (stating diverse directors include "one who self-identifies as female and one who self-identifies as either an underrepresented minority or LGBTQ+ . . .").

diversity.<sup>282</sup> Lastly, standard-setting organizations, such as the Embankment Project for Inclusive Capitalism, Global Reporting Initiative, International Organization for Standardization, Sustainability Accounting Standards Board, and the World Economic Forum, have worked on setting human capital management reporting standards, which include diversity-related metrics.<sup>283</sup>

## 5. Public Company Efforts

Finally, there are the public companies themselves who are working on diversifying their boards. Companies now realize that they need to be proactive for diversity to become a reality. Only 33% of public company

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<sup>282</sup> BLACKROCK, BLACKROCK INVESTMENT STEWARDSHIP: PROXY VOTING GUIDELINES FOR U.S. SECURITIES 6-7 (2022), <https://www.blackrock.com/corporate/literature/factsheet/blk-responsible-investment-guidelines-us.pdf> [<https://perma.cc/R4KX-BCXG>]. BlackRock “believe[s] boards should aspire to 30% diversity of membership and encourage companies to have at least two directors on their board who identify as female and at least one who identifies as a member of an underrepresented group.” BlackRock asks that boards disclose: (1) “The aspects of diversity that the company believes are relevant to its business and how the diversity characteristics of the board, in aggregate, are aligned with a company’s long-term strategy and business model,” (2) “The process by which candidates are identified and selected, including whether professional firms or other resources outside of incumbent directors’ networks have been engaged to identify and/or assess candidates, and whether a diverse slate of nominees is considered for all available board nominations,” and (3) “The process by which boards evaluate themselves and any significant outcomes of the evaluation process, without divulging inappropriate and/or sensitive details.” BlackRock also notes that “To the extent that, based on [their] assessment of corporate disclosures, a company has not adequately accounted for diversity in its board composition within a reasonable timeframe, [it] may vote against members of the nominating/governance committee for an apparent lack of commitment to board effectiveness.” *Id.* Under State Street Global Advisors’ goals for “Enhancing Racial and Ethnic Diversity Disclosure” in U.K. and U.S. markets are three implemented voting guidelines: (1) “In 2021, [it] will vote against the Chair of the Nominating & Governance Committee at companies in the S&P 500 and FTSE 100 that do not disclose, at minimum, the gender, racial and ethnic composition of their boards;” (2) “In 2022, [it] will vote against the Chair of the Compensation Committee at companies in the S&P 500 that do not disclose their EEO-1 survey responses;” and (3) “In 2022, [it] will vote against the Chair of the Nominating & Governance Committee at companies in the S&P 500 and FTSE 100 that do not have at least one director from an underrepresented community on their boards.” STATE ST. GLOB. ADVISORS, SUMMARY OF MATERIAL CHANGES TO STATE STREET GLOBAL ADVISORS’ 2021 PROXY VOTING AND ENGAGEMENT GUIDELINES 2 (2021), <https://www.ssga.com/library-content/pdfs/global/proxy-voting-and-engagement-guidelines.pdf> [<https://perma.cc/4NX5-4GQP>].

<sup>283</sup> For more information about private standard-setting initiatives in human capital management, see *infra* Part III.A.4. See generally Georgiev, *supra* note 212, at 644 (differentiating between human capital and human capital management).

directors surveyed in PwC's 2021 Annual Corporate Directors Survey held the view that board diversity will "happen naturally."<sup>284</sup> Eighty-six percent of the directors favored companies promoting equality in the workplace, and 52% said that it should be tied to incentive plan goals.<sup>285</sup> In fact, five out of ten directors support linking executive compensation to the goals of diversity and inclusion.<sup>286</sup> Directors point to the following benefits of diversity: unique perspectives are brought into the boardroom (93%), improvement of relationship with investors (90%), and better board performance (85%).<sup>287</sup> They also noted some negatives — over a majority of survey respondents viewed political correctness as a driving factor (58%), and some directors believed that boards had nominated additional unneeded candidates (31%) or had nominated unqualified candidates (27%).<sup>288</sup> The top search criteria for new directors is racial or ethnic diversity, followed by industry and operational expertise.<sup>289</sup> For years, directors of public company boards have discussed board diversity, but progress has been slow.<sup>290</sup> Over the past ten years, female directors on S&P 500 boards of directors increased over 12% — from 16% to 28%.<sup>291</sup> But at these companies, the percentage of directors from racial minority groups remains small — 5% are Black, and 3% are Latinx.<sup>292</sup> Diversity efforts have remained a focal point on boards, with 93% of directors saying that their board has taken steps to diversify over the past two years.<sup>293</sup> They cite replacing retiring directors with diverse board members (69%) as a common change.<sup>294</sup> Furthermore, more than a majority (54%) of the

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<sup>284</sup> PRICEWATERHOUSECOOPERS [PWC] GOVERNANCE INSIGHTS CTR., THE DIRECTOR'S NEW PLAYBOOK: TAKING ON CHANGE 4 (2021), <https://www.pwc.com/us/en/services/governance-insights-center/assets/pwc-2021-annual-corporate-directors-survey.pdf> [<https://perma.cc/PKD7-CHJL>].

<sup>285</sup> *Id.* at 17.

<sup>286</sup> *Id.* at 4.

<sup>287</sup> *Id.* at 13.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 4.

<sup>290</sup> *Id.* at 11.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* Some scholars have suggested board term limits to help diversify boards. *See, e.g.,* Darren Rosenblum & Yaron Nili, *Board Diversity by Term Limits?*, 71 ALA. L. REV. 211, 238-42 (2019) (discussing empirical findings about increased diversity that arises from term limits on corporate board positions).

directors responded that board diversity information is included in their company's proxy statement.<sup>295</sup>

*B. How Private Companies Differ from Public Companies*

In the private company sphere, the information about the startups themselves is opaque.<sup>296</sup> From a state perspective, the company is required to file its articles of incorporation, but cost may prevent someone from getting a copy of the articles.<sup>297</sup> If securities are issued, a Form D is filed.<sup>298</sup> Much of the company's inner workings are never known unless the company goes public. Also, the implementation of corporate governance measures is largely driven — or not driven — by the company itself.<sup>299</sup>

In contrast, a public company needs to be much more transparent and provide information to the public because it is subject to a robust set of rules and regulations.<sup>300</sup> Also, as noted in the discussion above, public companies have prioritized DEI efforts in a way that private companies have not. In part, this may be due to resources and the private companies' life cycle.

Professors Dorothy Lund and Elizabeth Pollman argue that “in the United States, [public company] corporate governance has become a ‘system’ composed of an array of institutional players, with a powerful shareholderist orientation.”<sup>301</sup> They further contend that the “corporate

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<sup>295</sup> PWC GOVERNANCE INSIGHTS CTR., *supra* note 284, at 11.

<sup>296</sup> Some in the tech industry have tried to combat this lack of information by creating public spreadsheets. *See, e.g.,* Alex Wilhelm, *This Public Spreadsheet Lists Black Founders Who Have Raised VC, and the Investors Backing Them*, TECHCRUNCH (July 1, 2020, 8:00 AM PDT), <https://techcrunch.com/2020/07/01/this-public-spreadsheet-lists-black-founders-and-the-investors-who-have-backed-them/> [<https://perma.cc/EP9Y-LB6V>] (listing Black founders of VC-backed companies and their investors).

<sup>297</sup> Fan, *Regulating Unicorns*, *supra* note 64, at 611 n.171 (noting that Delaware refers to this as the “certificate of incorporation” while other states refer to this as the “articles of incorporation”).

<sup>298</sup> U.S. SEC. & EXCH. COMM'N, FORM D: NOTICE OF EXEMPT OFFERING OF SECURITIES (2021), <https://www.sec.gov/about/forms/formd.pdf> [<https://perma.cc/WV2P-K74R>]; *see* Fan, *Regulating Unicorns*, *supra* note 64, at 611 n.171.

<sup>299</sup> Fan, *The Landscape of Startup Corporate Governance*, *supra* note 20, at 361 (noting that while a “best practices framework is used to implement corporate governance structures within a startup, such implementation is influenced by stage of growth and board dynamics”).

<sup>300</sup> *See* discussion *supra* Part II.A (discussing how public companies are regulated).

<sup>301</sup> Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2563 (2021). These institutional players include “proxy

governance machine” exerts “influence over important aspects of public company governance.”<sup>302</sup> In the private company context, a similar machine does not exist. Instead, corporate governance measures are driven at the behest of the increasingly influential founders who are in managerial roles in the company.<sup>303</sup> The exception is in the case of an economic downturn, where investors take the lead in driving the corporate governance process.<sup>304</sup> Circumstances may also dictate if corporate governance is prioritized, such as prior to the time a company is about to be acquired or go public.<sup>305</sup> Social reckonings, such as the one precipitated by Black Lives Matter, or media scrutiny may also galvanize companies into action.<sup>306</sup> In the case of DEI, it is left to the discretion of founders and investors to prioritize diversifying their company at the board or workforce levels. Many times, DEI issues are not addressed at all.<sup>307</sup>

By relying on private ordering, private companies can have maximum flexibility. They can determine their own corporate governance norms at their own pace at a time that they deem appropriate.<sup>308</sup> “[I]nnovation in corporate law has largely relied on private ordering.”<sup>309</sup> In this way, it is

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advisors, stock exchanges, ratings agencies, institutional investors and associations . . . .”  
*Id.* at 2565-66.

<sup>302</sup> *Id.* at 2566.

<sup>303</sup> Fan, *The Landscape of Startup Corporate Governance*, *supra* note 20, at 361 (noting that the implementation of corporate governance infrastructure is influenced by stage of growth and board dynamics).

<sup>304</sup> *Id.*

<sup>305</sup> *See id.*

<sup>306</sup> “Finance, tech and retail firms are proclaiming support for a protest movement that has galvanized the American public amid a pandemic that has disproportionately claimed [B]lack lives and livelihoods.” Tracy Jan, Jena McGregor, Renae Merle & Nitasha Tiku, *As Big Corporations Say ‘Black Lives Matter,’ Their Track Records Raise Skepticism*, WASH. POST (June 13, 2020, 6:21 PM EDT), <https://www.washingtonpost.com/business/2020/06/13/after-years-marginalizing-black-employees-customers-corporate-america-says-black-lives-matter/> [<https://perma.cc/JT7K-NGB8>].

<sup>307</sup> Fan, *The Landscape of Startup Corporate Governance*, *supra* note 20, at 340 (noting that since companies are “more focused on growth or survival; DEI issues are a secondary consideration, if they are considered at all”).

<sup>308</sup> Jill E. Fisch, *Leave It to Delaware: Why Congress Should Stay Out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 743 (2013) [hereinafter *Leave It to Delaware*] (“Variation among corporations with respect to the most appropriate governance structure coupled with frequent fluctuations in market conditions that create new governance needs or cause prior structures to become obsolete enhances the value of corporate law rules that are dynamic and flexible.”).

<sup>309</sup> *Id.* at 743 n.80 (referring to “issuer-specific tailoring of a firm’s governance structures through charter and bylaw provisions” although private ordering “may be embodied in a traditional contract”).

in the hands of corporations to determine the way to move forward most effectively.<sup>310</sup> “Private ordering is consistent with Delaware’s enabling approach to corporate law, as well as the widely held expectation that market discipline will lead issuers to adopt governance terms that are value-enhancing.”<sup>311</sup> However, private ordering is not without problems, as governance terms are typically under the board’s control, with shareholders having little say. “[T]he board, acting alone, may fail to select optimal governance structures for a variety of reasons.”<sup>312</sup> In contrast, in the startup context, the holders of the majority of the common stock — who are the founders — do have a say because they typically have a seat on the board.<sup>313</sup> Private ordering is largely done through shareholder agreements.<sup>314</sup> This “stealth governance,” one scholar argues, is troubling because it “sacrifices important corporate law values including transparency, predictability[,] and standardization.”<sup>315</sup> Startup attorneys interviewed in a different study, however, provided a starkly different view on this topic. The general consensus from these attorneys is that the way that startup corporate governance currently operates works well.<sup>316</sup> Admittedly, transparency is still an issue, but primarily to the employees

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<sup>310</sup> “[T]he enabling approach defers to private ordering to determine how each firm should be organized to advance its particular needs and interests most effectively.” Troy A. Paredes, Comm’r, U.S. Sec. & Exch. Comm’n, Statement at Open Meeting to Adopt the Final Rule Regarding Facilitating Shareholder Nominations (“Proxy Access”) (Aug. 25, 2010), <http://www.sec.gov/news/speech/2010/spch082510tap.htm> [<https://perma.cc/S4V9-VPN6>].

<sup>311</sup> Fisch, *Governance by Contract*, *supra* note 15, at 400.

<sup>312</sup> *Id.*

<sup>313</sup> Fan, *The Landscape of Startup Corporate Governance*, *supra* note 20, at 323 (noting that in the “VC-backed private company context” majority common stockholders are often part of management”).

<sup>314</sup> Fisch, *Stealth Governance*, *supra* note 17, at 916 (arguing that “the scope of these contracts has expanded to governance issues such as inspection rights, appraisal rights and fiduciary duties, as well as the allocation of control and the composition of the board of directors”).

<sup>315</sup> *Id.* (noting that “[s]hareholder agreements facilitate unequal treatment of shareholders and pose a particular risk when they are used to limit the rights of minority shareholders in private companies”). In the public company context, there is an ongoing debate about the virtues and downsides of increased shareholder power. Compare William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 658-59 (2010), with Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 836 (2005).

<sup>316</sup> See generally Fan, *The Landscape of Startup Corporate Governance*, *supra* note 20, at 323 (noting that typically lead investors request, and get, a board seat; other investors may request board observer roles).



since the investors who are holders of preferred stock typically have information rights through the Investors' Rights Agreement.<sup>317</sup> Investors may also get additional information about the startup as a board member or board observer.<sup>318</sup> As a compromise, and in light of the ever-increasing number of unicorns, it may be better if some of the larger private companies are required to make certain information public.<sup>319</sup> In this way, the employees, who start off as option holders and later become stockholders once they are able to exercise their options,<sup>320</sup> can obtain more information.

The documents used in VC financings — the Certificate of Incorporation,<sup>321</sup> the Stock Purchase Agreement,<sup>322</sup> the Investors' Rights Agreement,<sup>323</sup> the Right of First Refusal and Co-Sale Agreement,<sup>324</sup> and

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<sup>317</sup> See *id.* at 332; NAT'L VENTURE CAP. ASS'N, INVESTORS' RIGHTS AGREEMENT (2021), <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fnvca.org%2Fwp-content%2Fuploads%2F2021%2F08%2FNVCA-2020-Investors-Rights-Agreement-August-2021.docx&wdOrigin=BROWSELINK> [<https://perma.cc/YAR2-7D33>] [hereinafter INVESTORS' RIGHTS AGREEMENT].

<sup>318</sup> Fan, *The Landscape of Startup Corporate Governance*, *supra* note 20, at 350 (“If there are non-traditional investors, such as a mutual fund or [CVC], they may get a board observer seat.”).

<sup>319</sup> Fan, *Regulating Unicorns*, *supra* note 64, at 608-10 (discussing recommended disclosures for unicorns such as, but not limited to, posting their “restated certificate of incorporation on both the SEC website and the unicorn’s website,” and highlighting its “key terms” on the “Form D filings in layperson’s language”).

<sup>320</sup> *Id.*

<sup>321</sup> NAT'L VENTURE CAP. ASS'N, CERTIFICATE OF INCORPORATION (2020), <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fnvca.org%2Fwp-content%2Fuploads%2F2021%2F11%2FNVCA-2020-Certificate-of-Incorporation-September-1-2020-2.docx&wdOrigin=BROWSELINK> [<https://perma.cc/83BN-6BXC>].

<sup>322</sup> NAT'L VENTURE CAP. ASS'N, STOCK PURCHASE AGREEMENT (2020), <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fnvca.org%2Fwp-content%2Fuploads%2F2020%2F09%2FNVCA-2020-Stock-Purchase-Agreement-1-September-1-2020.docx&wdOrigin=BROWSELINK> [<https://perma.cc/2N93-7REH>].

<sup>323</sup> NAT'L VENTURE CAP. ASS'N, INVESTORS' RIGHTS AGREEMENT, *supra* note 317.

<sup>324</sup> NAT'L VENTURE CAP. ASS'N, RIGHT OF FIRST REFUSAL AND CO-SALE AGREEMENT (2020), <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fnvca.org%2Fwp-content%2Fuploads%2F2020%2F09%2FNVCA-2020-Right-of-First-Refusal-Agreement-September-1-2020.docx&wdOrigin=BROWSELINK> [<https://perma.cc/K7F6-XG9Q>].

the Voting Agreement<sup>325</sup> — are fairly predictable and standardized.<sup>326</sup> Model documents are available on the National Venture Capital Association’s website and closely model the documents used by law firms who regularly practice in the startup space.<sup>327</sup> Because of the close network of repeat players in the ecosystem, there is an understanding of baseline expectations in governance and other legal matters.<sup>328</sup> Whether or not they are prioritized is a different matter due to the flexibility afforded to startups. Mandates may be difficult to implement, therefore startups need to identify other ways to meaningfully diversify the startup landscape. Where the model documents fall particularly short is in diversifying the board, C-suite, or employee base. Even in public companies, progress in

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<sup>325</sup> NAT’L VENTURE CAP. ASS’N, VOTING AGREEMENT (2020), <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fnvca.org%2Fwp-content%2Fuploads%2F2020%2F07%2FNVCA-2020-Voting-Agreement.docx&wdOrigin=BROWSELINK> [https://perma.cc/Y5D6-3LEV].

<sup>326</sup> *Model Legal Documents*, NAT’L VENTURE CAP. ASS’N, <https://nvca.org/model-legal-documents/> (last visited Nov. 28, 2021) [https://perma.cc/5MS4-VJCE].

<sup>327</sup> There are several law firms who regularly practice in the startup space. *See, e.g.*, Cooley, LLP; Wilson Sonsini Goodrich & Rosati; Perkins Coie. *Cooley GO Launches NVCA Financing Documents Generator*, COOLEY LLP (Feb. 22, 2021), <https://www.cooley.com/news/coverage/2021/2021-02-22-cooley-go-launches-nvca-financing-documents-generator> [https://perma.cc/2KLV-DQ25] (noting the Cooley GO center is designed to “help entrepreneurs grow their businesses, [launching] a document generator that produces initial drafts of the primary venture financing documents on the National Venture Capital Association forms — an industry standard for US venture financings”); WILSON SONSINI GOODRICH & ROSATI, *EMERGING COMPANIES* (2021), <https://www.wsgr.com/print/v2/content/4743/Emerging-Companies.pdf> [https://perma.cc/TVD9-4567] (includes a Term Sheet Generator and Convertible Note Term Sheet Generator — the Emerging Companies Practice (“ECP”) platform “streamlines, automates, and digitizes the typical legal processes along a start-up’s journey — from incorporation to fundraising to exit”); *Perkins Coie Emerging Companies Practice Launches startupPerColator*, PERKINS COIE (Mar. 15, 2012), <https://www.perkinscoie.com/en/news-insights/perkins-coie-emerging-companies-practice-launches.html> [https://perma.cc/KYZ4-JGWC] (noting Perkins’ startupPerColator is a “user-friendly interactive website that enables entrepreneurs to generate the legal documents needed to form a Delaware “C” corporation, free of charge,” and also includes other documents such as “a Certificate of Incorporation, Bylaws, Action by Written Consent of the Sole Incorporator” and more). An argument could be made that this is the startup equivalent of what Lund and Pollman describe as the corporate governance machine in the public company context. Lund & Pollman, *supra* note 301.

<sup>328</sup> *Cf.* Fan, *Nontraditional Investors*, *supra* note 21 (noting that nontraditional investors have impacted the current ecosystem in significant ways which also has implications for corporate governance).

diversifying the board has proven to be slow.<sup>329</sup> The only way to diversify startups is to focus not only on the board level but across the entire startup ecosystem: founders, investors, limited partners, workforce, board and executive composition, and startup culture.

### C. Litigation

Some may question why litigation is not used to effect change. One reason is the cost, but the primary impediments are reputation and fear of repercussions. Because of the close nature of everyone in the innovation ecosystem, litigation is generally avoided. One notable exception to that, however, is the Ellen Pao case.

Ms. Pao filed a suit in California Superior Court alleging that her employer, storied VC firm Kleiner Perkins Caufield & Byers, failed to promote her due to her gender and fired her for complaining.<sup>330</sup> The details that emerged from the case were damaging to Kleiner Perkins Caufield & Byers but ultimately were not enough to result in a win for Ms. Pao.<sup>331</sup>

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<sup>329</sup> See discussion *supra* Part II.A (discussing how public companies are being regulated to diversify boards).

<sup>330</sup> David Streitfeld, *Ellen Pao Loses Silicon Valley Bias Case Against Kleiner Perkins*, N.Y. TIMES (Mar. 27, 2015), <https://www.nytimes.com/2015/03/28/technology/ellen-pao-kleiner-perkins-case-decision.html> [<https://perma.cc/SPV4-3Y44>].

<sup>331</sup> *Id.* But cf. Maria Aspan, *Ellen Pao Paved the Way For a #MeToo Reckoning in Silicon Valley. Now She's Calling out Tech's 'Embarrassing' Lack of Accountability*, FORTUNE (Oct. 6, 2022, 3:30 AM PDT), <https://fortune.com/2022/10/06/ellen-pao-metoo-movement-silicon-valley-vcs/> [<https://perma.cc/V33F-YSX2>] (quoting Ms. Pao's reflection on her lawsuit: "[I]t opened a conversation and shed light on a problem that many people didn't want to talk about . . . [W]e saw the frameworks and we supported them, without understanding that they were broken, and that they could actually change. [Today, t]here's a much deeper awareness of systemic problems"); Michal Lev-Ram, *How David Lowe Took on Pinterest, Tesla, and Rivian to Become Silicon Valley's Go-To Lawyer*, FORTUNE (Feb. 15, 2022, 3:00 AM PST), <https://fortune.com/2022/02/15/discrimination-lawsuit-tesla-rivian-pinterest-david-low-lawyer/> [<https://perma.cc/EJD3-LPXU>] (noting gender discrimination lawsuits filed by David Lowe against high tech companies in Silicon Valley).

A few gender discrimination cases have been filed against high technology public companies, such as Facebook<sup>332</sup> and Twitter,<sup>333</sup> but they are typically eschewed in the private company realm. The sparseness of court filings itself is revealing. Few women or racial and ethnic minorities are willing to put themselves through the hardships and scrutiny that accompany litigation. Also, in the past, mandatory arbitration provisions in employment contracts may have prevented employees, particularly women facing sexual harassment, from pursuing litigation (if they had the option at all).<sup>334</sup>

#### D. Social Movements

During social movements, private companies seemed to make the most progress on the issue of diversity. At the height of the #MeToo Movement, the pervasive sexual harassment that women faced in startups came to

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<sup>332</sup> Chia Hong, a former manager at Facebook, claimed that she was “discriminated against, harassed, and retaliated against” because of her sex and race which eventually led to her termination. Complaint at 2, *Hong v. Facebook, Inc.*, (Cal. Super. 2015) (No. Civ. 532943), 2015 WL 1262142, <https://static01.nyt.com/packages/pdf/business/ChiaHongvsFacebookcomplaint.pdf> [<https://perma.cc/G7LP-XW37>] (drawing attention to number nine listed in the fact section notes that Hong was “discriminated against, harassed, and retaliated against during her employment and was terminated”).

<sup>333</sup> A former engineer, Tina Huang, alleged that Twitter’s promotion process was unfair and favored men; she sought class action status. *Huang v. Twitter, Inc.*, No. CGC-15-544813, 2019 WL 6726329 (Cal. Ct. App. Dec. 4, 2019); Madeline Stone, *Twitter Has an ‘Arbitrary and Unjust’ System for Promoting Employees, Claims Lawsuit*, BUS. INSIDER (Mar. 23, 2015, 12:32 PM), <https://www.businessinsider.com/twitter-lawsuit-claims-arbitrary-and-unjust-system-for-employee-promotions-2015-3> [<https://perma.cc/7JWQ-H9EK>]; *Huang v. Twitter, Inc.*, LEAGLE, <https://www.leagle.com/decision/incaco20191204020> (last visited Dec. 6, 2021) [<https://perma.cc/UHN7-ZZXB>].

<sup>334</sup> Employees at high technology and other companies were subject to mandatory arbitration agreements so they did not have the option of litigation even if they wanted to. Orly Lobel, *Exit, Voice & Innovation: How Human Capital Policy Impacts Equality (& How Inequality Hurts Growth)*, 57 HOUS. L. REV. 781, 786 (2020). Orly observed:

“In more subtle ways, NDAs, noncompetes, innovation assignment clauses, mandatory arbitration, and secrecy policies remove the tongues of employees, inventors, creators, and entrepreneurs, prohibiting them from speaking up against the institution and from using their potential to impact the path of an industry. Most recently, the ways NDAs serve to silence victims of workplace harassment have been at the center of public debates. But such restrictions also limit the ability of employees to dissent, compete, and assert both their concerns and creativity in a wide range of contexts.”

*Id.*

light.<sup>335</sup> The custom of including arbitration provisions came into question, and many startups began to remove such provisions from their employment agreements.<sup>336</sup> Many states also enacted laws related to the use of arbitration provisions in employment agreements concerning sexual harassment.<sup>337</sup> These laws conflicted with the Federal Arbitration Act<sup>338</sup> and led to litigation, such as *Latif v. Morgan Stanley & Co. LLC*<sup>339</sup> in New York and *Chamber of Commerce v. Becerra* in California.<sup>340</sup> In 2022, Congress passed a law ending forced arbitration in cases of sexual harassment and assault.<sup>341</sup>

As Black Lives Matter gained momentum, both public and private companies began taking notice.<sup>342</sup> Venture investors increased their commitments to support Black founders.<sup>343</sup> Generally, statements from the

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<sup>335</sup> Xuan-Thao Nguyen, *#MeToo Innovators: Disrupting the Race and Gender Code by Asian Americans in the Tech Industry*, 28 *ASIAN AM. L.J.* 17, 31-35 (2021), <https://lawcat.berkeley.edu/record/1216698> [<https://perma.cc/FVB5-P2HR>]; Fan, *Innovating Inclusion*, *supra* note 67, at 379.

<sup>336</sup> Fan, *Innovating Inclusion*, *supra* note 67, at 398-99.

<sup>337</sup> *See, e.g.*, New York's N.Y. C.P.L.R. Section 7515 (2019) (prohibiting the use of arbitration agreements for sexual harassment claims irrespective of the Federal Arbitration Act); Assemb. B. 51 (Cal. 2019) (prohibiting employers from mandating arbitration agreements as a condition of employment and forbids any discrimination or retaliation against employees who do not sign such an agreement).

<sup>338</sup> Fed. Arbitration Act, 9 U.S.C. §§ I-16 (1925), 43 Stat. 883 (codified as 61 Stat. 669), <https://sccinstitute.com/media/37104/the-federal-arbitration-act-usa.pdf> [<https://perma.cc/UX6K-FCQP>].

<sup>339</sup> No. 18-cv-11528, 2019 WL 2610985 (S.D.N.Y. June 26, 2019) (holding that the Federal Arbitration Act preempted the state law ban on required arbitration in sexual harassment cases).

<sup>340</sup> 438 F. Supp. 3d 1078 (E.D. Cal. 2020) (reversing, in part, the district court's conclusion that CA AB 51 is preempted by the Federal Arbitration Act and affirming the determination that the civil and criminal penalties associated with AB 51 were preempted).

<sup>341</sup> H.R. 4455, *supra* note 220.

<sup>342</sup> *See* Jennifer S. Fan, *Woke Capital Revisited*, 46 *SEATTLE U. L. REV.* 18-22 (forthcoming 2023) (on file with author). "[P]erhaps more than anything, it was George Floyd's murder . . . and the ensuing racial justice movement . . . that lit a fire under Silicon Valley." Romburgh & Teare, *supra* note 181.

<sup>343</sup> As an example, in the first half of 2021, Black-founded companies received 1.2% of all U.S. venture funding which was double the amount of 2020. Romburgh & Teare, *supra* note 181. In the aftermath of Floyd's murder, venture funds such as SoftBank's \$100 million SB Opportunity Fund, which supports Black, Latinx, and Native American startup founders, were launched. *SB Opportunity Fund*, CRUNCHBASE, <https://www.crunchbase.com/organization/sb-opportunity-fund> (last visited Feb. 22, 2022) [<https://perma.cc/6FT4-GQZT>].

high technology realm were supportive of the movement.<sup>344</sup> Nonetheless, there were some outliers. Some companies, including Coinbase<sup>345</sup> (which was private at the time), put employees on notice that talking about political issues could not happen on company time. Coinbase characterized itself as an apolitical (except for cryptocurrency) company that was “mission-focused.”<sup>346</sup> It even offered those who disagreed with that stance a severance package; about 5% of the staff took Coinbase’s offer.<sup>347</sup> Although the company claimed that this did not adversely impact its racial diversity significantly, other viewpoints emerged.<sup>348</sup>

From a corporate law and governance perspective, relying too heavily on particular players in the startup landscape and outside forces to diversify has suboptimal implications. Although social movements may spur certain action, meaningful progress is not guaranteed. Additionally, a movement that currently has popular support may generate promises of change but may not ultimately translate into action. If diversity is an important value of the company, then the CEO and board need to be aligned on the issue. Consider that if the board consistently defers to the founder/CEO’s viewpoint that he/she/they do not want to prioritize diversity, then there are few levers that the board can use. In the private company setting, the lead investors are typically on the board and are motivated to be in a good relationship with management so that their funds can participate in the next round of financing.<sup>349</sup> There is not the same type of stakeholder orientation that some public companies have. Instead, the focus is on growing the company and securing that next round of

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<sup>344</sup> See Romburgh & Teare, *supra* note 181.

<sup>345</sup> Brian Armstrong, *Coinbase Is a Mission Focused Company*, COINBASE BLOG (Sept. 27, 2020), <https://blog.coinbase.com/coinbase-is-a-mission-focused-company-af882df8804> [<https://perma.cc/58Y4-XNUC>] [hereinafter *Coinbase*]. Coinbase went public in April 2021. Paul R. La Monica, *Coinbase Goes Public with a Nearly \$100 Billion Valuation*, CNN BUS., <https://www.cnn.com/2021/04/14/investing/coinbase-stock-direct-listing/index.html> (last updated Apr. 14, 2021, 4:11 PM EDT) [<https://perma.cc/XZF5-DXM2>].

<sup>346</sup> Armstrong, *Coinbase*, *supra* note 345.

<sup>347</sup> Brian Armstrong, *A Follow Up to Coinbase Being a Mission Focused Company*, COINBASE BLOG (Oct. 8, 2020), <https://www.coinbase.com/blog/coinbase-is-a-mission-focused-company> [<https://perma.cc/3PL5-P22Q>].

<sup>348</sup> Nathaniel Popper, *‘Tokenized’: Inside Black Workers’ Struggles at the King of Crypto Start-Ups*, N.Y. TIMES, <https://www.nytimes.com/2020/11/27/technology/coinbase-cryptocurrency-black-employees.html> (last updated Apr. 15, 2021) [<https://perma.cc/QZH5-934P>].

<sup>349</sup> See Elizabeth Pollman, *Startup Governance*, 168 U. PA. L. REV. 155, 178-99 (2019) (discussing horizontal and vertical tensions).

funding.<sup>350</sup> Another reality that makes it challenging to diversify the board or funder is the abundance of capital. With so much available money, founders have their pick of funders if their startup is in the right space.<sup>351</sup> In particular, serial entrepreneurs easily get funding under better deal terms than first-time entrepreneurs.<sup>352</sup> One study concludes that repeat founders experience less equity dilution and can retain more board control in dealings with venture capitalists.<sup>353</sup> Furthermore, these entrepreneurs are able to obtain higher valuations for their startups even if their prior startups performed poorly.<sup>354</sup> This brings us back to the homophily principle, where like attracts like. The fact that serial entrepreneurs have been funded before not only perpetuates the cycle of the same entrepreneurs getting funded, but they also receive better deal terms, too.

#### IV. LEGAL AND NON-LEGAL OPTIONS TO INCREASE DIVERSITY

The ramifications of failing to address these types of biases in the startup context and eschewing the law as a tool to fix the problem for fear of stifling innovation are important for a few reasons.

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<sup>350</sup> Fan, *The Landscape of Startup Corporate Governance*, *supra* note 20, at 321 (noting that “DEI initiatives under the corporate governance umbrella” are generally not prioritized because the “focus is on the startup’s growth or survival”).

<sup>351</sup> Nicolás Rivero, *2021 Has Already Shattered Yearly Records for Startup Funding*, QUARTZ (Oct. 18, 2021), <https://qz.com/2074714/2021-has-already-shattered-yearly-records-for-startup-funding/> [<https://perma.cc/96M8-B7AV>] (noting that in the first nine months of 2021, fundraising for startups had shattered previous yearly fundraising records).

<sup>352</sup> See Charles Eesley & Edward Roberts, *Cutting Your Teeth: Learning from Rare Experiences*, RESEARCHGATE 1, 10 (Mar. 31, 2006), [https://www.researchgate.net/publication/228367183\\_Cutting\\_Your\\_Teeth\\_Learning\\_from\\_Rare\\_Experiences](https://www.researchgate.net/publication/228367183_Cutting_Your_Teeth_Learning_from_Rare_Experiences) [<https://perma.cc/ZLE5-8NN8>] (noting that even if founders had a little prior entrepreneurial experience, there was a benefit for their subsequent ventures); Paul Gompers, Anna Kovner, Josh Lerner & David Scharfstein, *Skill vs. Luck in Entrepreneurship and Venture Capital: Evidence from Serial Entrepreneurs*, NAT’L BUREAU OF ECON. RSCH. [page preceding 1] (2006), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=933932](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=933932) [<https://perma.cc/X8UK-6JLQ>] (concluding that serial entrepreneurs generate higher returns for VC investors); Priyanka Mashelkar, *The Phenomenon of the Serial Entrepreneur*, THE STARTUP—MEDIUM (Aug. 8, 2021), <https://medium.com/swlh/the-phenomenon-of-the-serial-entrepreneur-243bc6ee88e6> [<https://perma.cc/FB8V-XN75>] (citing that “more than 80% of unicorns had at least one partner who was a serial entrepreneur”).

<sup>353</sup> Rajarishi Nahata, *Success Is Good but Failure Is Not So Bad Either: Serial Entrepreneurs and Venture Capital Contracting*, 58 J. CORP. FIN. 624, Abstract (2019), <https://www.sciencedirect.com/science/article/abs/pii/S092911991830498X> [<https://perma.cc/25WX-5XCY>].

<sup>354</sup> *Id.*

First, by exclusively relying on private ordering and the free market, the number of racial minorities and women who are entrepreneurs has remained low for many years. Second, by not proactively addressing these biases, society may be missing out on innovations.<sup>355</sup> Third, the existing biases affect entrepreneurs' incentives to continue with their entrepreneurial endeavors.

In sum, we need to consider both legal and non-legal solutions to combat bias; otherwise, we tacitly support the notion that the status quo is acceptable and may ironically impede the innovation that U.S. entrepreneurship has become famous for. Legal reform in this area will likely have maximum impact, but it must apply across the VC ecosystem. Such reform needs to be strategically tailored to the size of startups and their investors.

#### A. *Strategic Application of Laws to Startups and Investors*

As this Article has illustrated, private ordering has its limitations with respect to advancing DEI initiatives in the startup ecosystem. To address startup biases, legal reforms are necessary as there is a limit to how much the market and government can each accomplish individually.<sup>356</sup> But the implementation of these reforms needs to be calibrated properly — such reforms should not apply to all startups. Laws that public companies are subject to would not work for smaller startups. Unicorns, however, would have the resources to comply with DEI laws. Furthermore, investors with over \$1 billion in total assets managed would also be able to do so. Some of the states with the most developed VC ecosystems, such as California, Massachusetts, and New York, already have or had laws or proposed legislation that provide helpful starting points. This Article proposes a hybrid mandate/disclosure structure for private companies and investors

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<sup>355</sup> The rate of innovation would quadruple in America if women, minorities, and those from low-income backgrounds invented at identical rates to men from top quintile families. Alex Bell, Raj Chetty, Xavier Jaravel, Neviana Petkova & John Van Reenen, *Who Becomes an Inventor in America? The Importance of Exposure to Innovation*, 134 Q.J. ECON. 647, 653 (2019).

<sup>356</sup> Consider that France passed Law No. 2021-1774 (also called the Rixain Law) on December 24, 2021, which extended gender diversity quotas beyond the boards of directors and corporate officers to management bodies and senior executives of large companies (defined as companies with over 1,000 employees over the past three years). Anne Reffay, *France Strengthens Its Regulation on Gender Diversity*, ASHURST, <https://www.ashurst.com/en/news-and-insights/legal-updates/france-strengthens-its-regulation-on-gender-diversity/> (last visited June 27, 2022) [<https://perma.cc/4W3L-2FJQ>].



of a certain size or scale, perhaps measured in terms of valuations and total assets under management, respectively, with potential penalties attached to encourage compliance. As an example, with respect to unicorns, the law could require a specific number of female directors and directors from racial and ethnic minorities by particular dates, disclosure of diversity metrics at both management and workforce levels, and fines to encourage compliance. Similarly, the law could require the same of investors with total assets managed of \$1 billion or more. Transparency is helpful in understanding the scope of the problem, but it cannot be the sole solution to the problem. There must be adequate mechanisms to incentivize private companies to make the necessary disclosures. Furthermore, disclosure needs to be standardized, and diversity needs to be defined. Otherwise, one runs into the same problems that public companies have faced with disclosure around diversity — it is difficult to compare how one company may be doing in relation to another, especially if there is not a commonly understood definition of what diversity means. The intended audience for the disclosure would be current and future investors and employees (who are likely stockholders in the company).

Another potential legal change could be to revisit the definition of an accredited investor.<sup>357</sup> Although the SEC recently expanded the definition

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<sup>357</sup> An “accredited investor” is “a bank, savings and loan association, insurance company, registered investment company, business development company, or small business investment company or rural business investment company;” “an SEC-registered broker-dealer, SEC- or state-registered investment adviser, or exempt reporting adviser;” “a plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in excess of \$5 million;” “an employee benefit plan (within the meaning of the Employee Retirement Income Security Act) if a bank, insurance company, or registered investment adviser makes the investment decisions, or if the plan has total assets in excess of \$5 million;” “a tax exempt charitable organization, corporation, limited liability corporation, or partnership with assets in excess of \$5 million;” “a director, executive officer, or general partner of the company selling the securities, or any director, executive officer, or general partner of a general partner of that company;” “an enterprise in which all the equity owners are accredited investors;” “an individual with a net worth or joint net worth with a spouse or spousal equivalent of at least \$1 million, not including the value of his or her primary residence;” “an individual with income exceeding \$200,000 in each of the two most recent calendar years or joint income with a spouse or spousal equivalent exceeding \$300,000 for those years and a reasonable expectation of the same income level in the current year or;” “a trust with assets exceeding \$5 million, not formed only to acquire the securities offered, and whose purchases are directed by a person who meets the legal standard of having sufficient knowledge and experience in financial and business matters to be capable of evaluating the merits and risks of the prospective investment;” “an entity of a type not otherwise qualifying as accredited that own investments in excess of \$5 million;” “an individual holding in good standing any of the

by including “a knowledgeable employee,” among others, it would still likely exclude large swaths of women and racial and ethnic minorities from being able to invest as they may not meet the definition of an accredited investor.<sup>358</sup> Instead, they could participate as a non-accredited investor, but those types of investors are limited under Regulation D.

*B. Diversify Deal Leads and VC Firms*

Venture capital is one of the important drivers of economic value.<sup>359</sup> A group of business scholars administered a survey of leading VC firms between November 2015 and March 2016 and received nearly 900 responses; they followed up the survey with dozens of interviews.<sup>360</sup> The survey found that over 30% of deals “come from leads from VCs’ former colleagues or work acquaintances.”<sup>361</sup> Nearly 30% originate from VCs contacting entrepreneurs.<sup>362</sup> Another 20% of deals are generated from other investors’ referrals.<sup>363</sup> Only 8% come from existing portfolio

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general securities representative license (Series 7), the investment adviser representative license (Series 65), or the private securities offerings representative license (Series 82);” “a knowledgeable employee, as defined in rule 3c-5(a)(4) under the Investment Company Act, of the issuer of securities where that issuer is a 3(c)(1) or 3(c)(7) private fund or;” “a family office and its family clients if the family office has assets under management in excess of \$5 million and whose prospective investments are directed by a person who has such knowledge and experience in financial and business matters that such family office is capable of evaluating the merits and risks of the prospective investment.” *Frequently Asked Questions About Exempt Offerings*, U.S. SEC. & EXCH. COMM’N, [https://www.sec.gov/education/smallbusiness/exemptofferings/faq?auHash=rh5WfJi9h3wRzP6X2anOmgYldhPHNuo-3Vw0YNZyR\\_M#faq2](https://www.sec.gov/education/smallbusiness/exemptofferings/faq?auHash=rh5WfJi9h3wRzP6X2anOmgYldhPHNuo-3Vw0YNZyR_M#faq2) (last visited Dec. 22, 2022) [<https://perma.cc/PHN5-HTD7>]. *See generally* 17 C.F.R. § 230.501 (2023).

<sup>358</sup> One might argue that individuals could participate as non-accredited investors, but under Regulation D, there is a 35-person limit for non-accredited investors in a VC financing under Rule 506(b) which is the most commonly used exemption from registration in VC financings. *See* 17 C.F.R. § 230.506(b) (2023).

<sup>359</sup> Paul Gompers, Will Gornall, Steven N. Kaplan & Ilya A. Strebulaev, *How Venture Capitalists Make Decisions*, HARV. BUS. REV. (Mar.–Apr. 2021), <https://hbr.org/2021/03/how-venture-capitalists-make-decisions> [<https://perma.cc/7G9E-5KXU>] (“Consider that in 2015 public companies that had received VC backing accounted for 20% of the market capitalization and 44% of the research and development spending of U.S. public companies.”).

<sup>360</sup> *Id.* (stating they “asked about how they source deals, select and structure investments, manage portfolio companies post-investment, organize themselves, and manage their relationships with limited partners (who provide the capital VCs invest)”).

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

companies' referrals, and 10% come from company management's cold email pitches.<sup>364</sup> These results show that connections to "the right social and professional circles" can make a tremendous difference in whether or not entrepreneurs are funded.<sup>365</sup> Venture capitalists acknowledged that this reality likely disadvantages entrepreneurs who are not white men.<sup>366</sup> As leaders, venture capitalists have the opportunity to rectify the underrepresentation of women and racial minorities in funding for startups. Even with access to a venture capitalist, chances of securing funding are very low.<sup>367</sup> On average, for each deal a VC firm closes, it considers 101 opportunities.<sup>368</sup>

Given the importance of deal sourcing and networks, one of the changes that should be considered is having more opportunities for investors to connect with historically underrepresented entrepreneurs (i.e., women and racial and ethnic minorities) in startups.<sup>369</sup> This idea could be memorialized in the Limited Partnership Agreement that is signed between the limited partners and the VC firm (the general partner).

Another avenue of change may lie in rethinking the leadership ranks of VC firms. One possible solution would be to create a Chief Diversity Officer position. Someone in this position could help the firm strategize about how to invest in more diverse startups. Perhaps this starts internally by hiring more diverse individuals into the VC firms themselves. This one change in and of itself could provide meaningful change — a recent study found that more female investors led to double the rate of investment in female entrepreneurs.<sup>370</sup>

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<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

<sup>366</sup> *Id.*

<sup>367</sup> *Id.*

<sup>368</sup> *Id.* ("Twenty-eight of those opportunities will lead to a meeting with management; [ten] will be reviewed at a partner meeting; 4.8 will proceed to due diligence; 1.7 will move on to the negotiation of a term sheet with the start-up; and only one will actually be funded.").

<sup>369</sup> See, e.g., *Techstars and J.P. Morgan Partner to Invest in Diverse Entrepreneurs*, BUS. WIRE (Mar. 28, 2022, 8:00 AM EDT), <https://www.businesswire.com/news/home/20220325005514/en/Techstars-and-J.P.-Morgan-Partner-to-Invest-in-Diverse-Entrepreneurs?tpcc=nltermsheet> [<https://perma.cc/YHS7-7JZ9>] (highlighting a recent accelerator program designed to invest in diverse entrepreneurs to "advance[e] equitable access to funding in major economic centers").

<sup>370</sup> "More . . . [f]emale investors could lead to more investments in startups founded by women, even if the funds don't have a particular mandate to invest in women entrepreneurs. [F]emale VC and private equity partners invest in almost twice as many female entrepreneurs as male partners do." Mahira Dayal, *Women-Led Venture Funds*

*C. Diversify Limited Partners and Investors*

Many startups are incorporated in Delaware.<sup>371</sup> Delaware's corporate law is based on a theory of enablement and is contractually based.<sup>372</sup> There is a debate in corporate law about the implications of the contractual approach to corporate law for regulatory policy. Some scholars argue that contract principles necessitate deference to the structure of the contract agreed upon by those negotiating it.<sup>373</sup> In contrast, there are scholars who believe in constraining the bounds of this deference.<sup>374</sup> In *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*,<sup>375</sup> then-Chancellor Strine embraced the contractual model of the corporation.<sup>376</sup>

Furthermore, one scholar notes that "Delaware's indeterminacy encourages parties in business transactions to resolve disputes through negotiation and settlement."<sup>377</sup> However, this same indeterminacy also has the effect of inaction on particular issues, such as diversifying startups, if the issue is not perceived to rise to the level of importance as, for example, the economic terms of a deal.

Therefore, one of the requisite elements to create a more diverse startup ecosystem is to address the problem from a contractual perspective. For

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*Have Already Raised More Money Than Last Year*, THE INFO. (May 12, 2022, 10:37 AM PDT), <https://www.theinformation.com/articles/women-led-venture-funds-have-already-raised-more-money-than-last-year?shared=eeb8e9b37bbcecc4> [<https://perma.cc/U79A-EAXC>].

<sup>371</sup> LEWIS S. BLACK, JR., DEL. DEP'T OF STATE DIV. OF CORPS., WHY CORPORATIONS CHOOSE DELAWARE 4 (2007), [https://corpfiles.delaware.gov/whycorporations\\_web.pdf](https://corpfiles.delaware.gov/whycorporations_web.pdf) [<https://perma.cc/3GYR-8Q78>] (noting reasons for this include practitioners' familiarity with Delaware law, Delaware is friendly to companies, Delaware judges' deep corporate expertise, and Delaware case law).

<sup>372</sup> Fisch, *Leave It to Delaware*, *supra* note 308, at 742.

<sup>373</sup> *E.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHER, THE ECONOMIC STRUCTURE OF CORPORATE LAW 14 (Harv. Univ. Press 1996).

<sup>374</sup> *E.g.*, Lucian Arye Bebchuk, *Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments*, 102 HARV. L. REV. 1820, 1822 (1989) (showcasing another side of the argument, that there are "reasons for placing significant limits on [corporations'] freedom to opt out").

<sup>375</sup> *Boilermakers Loc. 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013).

<sup>376</sup> Strine relied on a theory of implied consent and shareholders' right to challenge bylaws adopted by the board of directors in his decision. Fisch, *Governance by Contract*, *supra* note 15, at 376-77. "The *Boilermakers* decision reflected a powerful endorsement of contractual freedom in corporate law." *Id.* at 381. Professor Fisch notes that "the tension between *Boilermakers/ATP* and *AFSCME* poses a challenge to the contemporary understanding that the contractual nature of the corporate form warrants the high level of judicial deference to private ordering reflected in *Boilermakers*." *Id.* at 376-77.

<sup>377</sup> Fisch, *Leave It to Delaware*, *supra* note 308, at 742.

example, limited partners who invest in VC funds could obligate their general partners to a type of Rooney Rule<sup>378</sup> or Mansfield Rule<sup>379</sup> via contract where they mandate the consideration of diverse candidates for board and management positions in portfolio companies in their limited partnership agreement.<sup>380</sup> There are downsides, however, such as performative interviews where the hiring committee has no intention to engage with a diverse candidate in a meaningful way. Also, companies cannot simply consider one diverse candidate. Multiple diverse candidates should be included in the hiring process; otherwise, it becomes an exercise in window dressing.<sup>381</sup>

In addition, encouraging the diversification of the investor pool in VC financings is another avenue of change. Some venture capitalists have already begun to do this through diversity riders in term sheets.<sup>382</sup> “The rider calls for firms to make commercial best efforts to include as a co-investor in the financing at least one Black person or member of another underrepresented group . . . .”<sup>383</sup> These “diverse check writers” will help

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<sup>378</sup> Fan, *Innovating Inclusion*, *supra* note 67, at 401 n.356 (“The Rooney Rule was first adopted in the National Football League, where it requires all teams to interview at least one person of color each time a head coaching or general manager role comes open.”); Jason Del Rey, *Amazon Will Adopt a ‘Rooney Rule’ to Increase Board Diversity After Its Initial Opposition Sparked Employee Outrage*, RECODE (May 14, 2018, 4:49 PM EDT), <https://www.recode.net/2018/5/14/17353626/amazon-rooney-rule-board-diversity-reversal-shareholder-proposal> [<https://perma.cc/R9PB-PVEC>] (noting that Amazon now includes women and people of color when considering candidates for its boards of directors).

<sup>379</sup> Fan, *Innovating Inclusion*, *supra* note 67, at 402 (“The Mansfield Rule . . . requires participating law firms to track the diversity of candidates and include at least 30% women and minority individuals in their candidate pools for promotions, senior level hiring, and significant leadership roles in the firm[.]”).

<sup>380</sup> Fan, *Diversifying Startups*, *supra* note 188; *see also* Shaded Ezyaydi, *The Stress and Frustration of Finding Out You Are a Token Hire*, WIRED (Oct. 28, 2020, 5:00 AM), <https://www.wired.co.uk/article/token-hiring-blm-coronavirus> [<https://perma.cc/4EW5-JU3S>] (“BLM has put the spotlight back on diversity within business, but companies need to make sure that this isn’t done through panicked token hiring. Education and training [are critical for] understanding diversity, while also making sure that diverse voices play a part in the hiring process . . . .”).

<sup>381</sup> *See* Noor Zainab Hussain, *Wells Fargo Pauses Diverse Slate Hiring Policy After Reports of Fake Job Interviews*, REUTERS, <https://www.reuters.com/business/wells-fargo-pauses-diverse-slate-hiring-policy-after-reports-fake-job-interviews-2022-06-06/> (last updated June 6, 2022, 4:02 PM PDT) [<https://perma.cc/WJ4Z-EVS2>] (illustrating a contemporary example of performative interviews).

<sup>382</sup> *Diversity Rider*, ACT ONE VENTURES, <https://actoneventures.com/diversity-rider/> (last visited Dec. 4, 2021) [<https://perma.cc/FG2F-S3HZ>].

<sup>383</sup> Alejandro Guerrero, *How Venture Capital Can Increase Diversity Where It Matters Most*, FORTUNE (Oct. 8, 2020, 2:30 PM PDT), <https://fortune.com/2020/10/08/venture->

to “unlock access and wealth creation.”<sup>384</sup> In essence, if the idea of the diversification of the investor pool gains traction as an optimal arrangement from a contractual standpoint, then these diversity riders may become more commonplace.<sup>385</sup>

*D. The Role of Social Movements in DEI*

Another lever to push startups into action outside of the legal bounds of corporate law and contract law is social movements. Industries ripe for change, such as the VC ecosystem, can use the momentum of social movements and the spotlight they have shown on a particular issue to make progress on DEI efforts. Consider that in the aftermath of Black Lives Matter, VC firms committed to investing millions of dollars in Black entrepreneurs.<sup>386</sup> A McKinsey & Company study suggested that those in the VC community “could go even further and dedicate money directly to HBCU-housed funds, allowing HBCUs to make investment decisions that would most benefit their communities.”<sup>387</sup> The VC community could also partner with HBCUs to match students with job opportunities.<sup>388</sup> In terms

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capital-diversity-investing-vc-cap-table-rider/ [https://perma.cc/V9LW-9J29] (noting the commitment of 22 firms to use the rider, including First Round Capital, Maveron, SVB Capital, among others).

<sup>384</sup> *Id.*; see also Johan Cassel, Josh Lerner & Emmanuel Yimfor, *Racial Diversity in Private Capital Fundraising* 4 (NBER, Working Paper No. w30500, 2022), <https://ssrn.com/abstract=4229123> [https://perma.cc/K2EY-W9T9] (finding that differences in funding to minority-owned groups “may be driven by preferences on the part of the limited partners,” also known as “taste-based discrimination”).

<sup>385</sup> “The corporation is a complex set of explicit and implicit contracts, and corporate law enables the participants to select the optimal arrangement for the many different sets of risks and opportunities . . . . No one set of terms will be best for all; hence the ‘enabling’ structure of corporate law.” Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1418 (1989).

<sup>386</sup> Frankki Bevins, Kathryn Fox, Duwain Pinder, Shelley Stewart III & Jimmy Sarakatsannis, *How HBCUs Can Accelerate Black Economic Mobility*, MCKINSEY & CO. (July 30, 2021), <https://www.mckinsey.com/industries/education/our-insights/how-hbcus-can-accelerate-black-economic-mobility> [https://perma.cc/ZCQ2-BWE7] (citing traditional VC firm, Andreessen Horowitz, and corporate venture capitalist, SoftBank, among those who made pledges; note that the article characterizes them as traditional VC firms, but that is only partially correct); see Fan, *Nontraditional Investors*, *supra* note 21, at 477.

<sup>387</sup> Bevins et al., *supra* note 386, at 9. Similarly, Mackenzie Scott made impactful contributions by donating to HBCUs in the wake of Black Lives Matter. Elizabeth Redden, *A Fairy Godmother for Once-Overlooked Colleges*, INSIDE HIGHER ED (Jan. 4, 2021), <https://www.insidehighered.com/news/2021/01/04/mackenzie-scott-surprises-hbcus-tribal-colleges-and-community-colleges-multimillion> [https://perma.cc/28LE-M8ZU].

<sup>388</sup> Bevins et al., *supra* note 386, at 9.

of investment opportunities, HBCUs could also be invited to participate as limited partners in VC funds. Traditionally, the Ivy League schools and Stanford University were participants in such funds.<sup>389</sup> Essentially, this has allowed wealthy schools to become even richer, while HBCUs have historically been left behind. Consider that “none of the ninety institutions of higher education in the U.S. with endowments of more than \$1 billion is an HBCU.”<sup>390</sup>

The investments these universities made led to remarkable increases in each of their respective endowments.<sup>391</sup> To cite one example, Yale University’s endowment tripled over two decades due to an investment portfolio that included VC, private equity, and hedge funds.<sup>392</sup> If HBCUs enjoyed the same opportunities as Yale and could participate as a limited partner in a VC fund, such participation could likely have a similarly positive result on HBCUs’ endowments. Howard University’s chief investment officer, Frank Bello, estimates that Howard would have had “at least [ten] times its returns if it had invested in the most recent cohort of tech startups.”<sup>393</sup>

Black Lives Matter also galvanized some investors to raise money for funds to invest in the Black community. For example, Base10 Partners has raised \$250 million for a fund called the Advancement Initiative, which plans to allot a certain amount of the profits from the fund to HBCU

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<sup>389</sup> Chapman & Lorin, *supra* note 19 (noting that larger endowments, such as the ones that Stanford and Harvard have, “can take bigger risks in search of higher returns and are offered the chance to invest in fast-growing companies before they go public — opportunities not available to poorer schools”). The average endowment amount per student was \$410,000 for non-HBCUs and \$15,000 for HBCUs. *Id.*

<sup>390</sup> *HBCUs Struggle to Close the Endowment Gap*, CANDID. PHILANTHROPY NEWS DIG. (July 19, 2017), <https://philanthropynewsdigest.org/news/hbcus-struggle-to-close-the-endowment-gap> [<https://perma.cc/SR6Y-9RZA>]; see also Kia Kokalitcheva, *1 Big Thing: A Little-Known Chapter of VC History*, AXIOS PRO RATA (Feb. 5, 2022), [https://www.axios.com/newsletters/axios-pro-rata-060fc0a0-5899-44d1-8169-4d6fe7e297ab.html?utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=newsletter\\_axiosprorata&stream=top](https://www.axios.com/newsletters/axios-pro-rata-060fc0a0-5899-44d1-8169-4d6fe7e297ab.html?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiosprorata&stream=top) [<https://perma.cc/BL3D-N8H7>] (reporting that in 2020, “114 predominantly white institutions” had endowments over \$1 billion whereas the median endowment size for an HBCU was \$95.6 million).

<sup>391</sup> Chapman & Lorin, *supra* note 19.

<sup>392</sup> In contrast to Yale’s \$31 billion endowment, Florida A&M University, an HBCU, has an endowment of \$100 million. *Id.* “The difference in endowments leads to an ever-widening gap in everything from the ability to give student aid and attract top professors to improving campuses and building cutting-edge [STEM] complexes.” *Id.*

<sup>393</sup> *Id. But cf. id.* (“Not everyone agrees that venture investments are appropriate for small endowments.”). Admittedly, there is still the danger of HBCUs investing in low-performing funds.

endowments and student scholarships.<sup>394</sup> It is unique in that it targets HBCUs as its main investors.<sup>395</sup> Furthermore, schools can “invest as little as they like, pay no fees, and receive their own share of the fund’s profits along with half of Base10’s share.”<sup>396</sup> There are benefits to startups, too. Founders have said that when HBCUs share in their success, it helps employee morale and recruitment efforts for more diverse candidates.<sup>397</sup>

Typically, VC firms require a certain investment amount from their limited partners and have both a management fee of 2% and carried interest (share of the fund’s profits that compensate fund managers; it is only issued if the fund meets or performs above a certain level) of 20%.<sup>398</sup> More HBCUs could participate in venture funds if the fee structure changed and they were allowed to invest a smaller amount, as was the case with the Advancement Initiative.

The #MeToo Movement similarly changed existing practices in private companies regarding arbitration provisions, as discussed in Part II above. The key to change was for advocates to capitalize on the attention social movements brought to particular issues related to gender and racial inequities. However, social movements are not self-sustaining. Therefore, the infrastructure needs to be built to ensure that the progress made through social movements is not lost when the focus shifts to another issue. Private ordering does not provide such an infrastructure. Instead, startups must look to contractual frameworks, different models of funds, and changes in company culture (discussed below) to achieve any meaningful progress.

#### E. Funds Focused on Diversity

“Intentional” funding is also one of the keys to building a culture of DEI.<sup>399</sup> Some of the earliest forms of such funding came from the CVC

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<sup>394</sup> Njera Perkins, *Base10 Partners Raises \$250M Fund to Connect HBCU Endowments and Scholarships to Venture Capital*, AFROTECH (May 28, 2021), <https://afrotech.com/base10-partners-raises-250m-fund-for-hbcus> [<https://perma.cc/AGW4-AG5A>]. In the U.S., Base10 Partners is among the largest Black-led funds; according to the National Venture Capital Association, “only a handful of Black-founded firms have funds or \$100 million or more . . . .” Chapman & Lorin, *supra* note 19.

<sup>395</sup> Chapman & Lorin, *supra* note 19.

<sup>396</sup> *Id.*

<sup>397</sup> *Id.*

<sup>398</sup> James Chen, *Carried Interest Explained: Who It Benefits and How It Works*, INVESTOPEDIA, <https://www.investopedia.com/terms/c/carriedinterest.asp> (last updated July 28, 2022) [<https://perma.cc/DBN3-4R89>].

<sup>399</sup> *Women and Minority Founders in the Venture Capital Pipeline*, *supra* note 79.



realm. Comcast Ventures — the corporate venture arm of Comcast — launched a \$20 million fund to invest in companies headed by women and minorities in 2011.<sup>400</sup> Intel Capital — the corporate venture arm of Intel — created a \$125 million diversity fund to invest in startups with diversity in the management ranks in 2014.<sup>401</sup> AOL announced a \$10 million fund focused on consumer internet startups led by women that same year.<sup>402</sup>

Now, funds that focus on funding historically underrepresented entrepreneurs with the aim of promoting diversity have emerged. As an example, the Female Founders Fund (“FFF”), a New York-based early-stage fund started in 2014, focuses on investing in female, women of color, and LGBTQ+ founders.<sup>403</sup> It has raised three funds to date: Fund I raised \$6 million, Fund II raised \$25 million, and Fund III raised \$57 million; over fifty female-led startups have received money from FFF.<sup>404</sup> Institutional investors include Cambridge Associates, the Doris Duke Charitable Foundation, Goldman Sachs, Melinda French Gates’ Pivotal Ventures, Plexo Capital, and Twitter.<sup>405</sup> 23andMe founder Anne Wojcicki, YouTube CEO Susan Wojcicki, and Houseparty co-founder Sima Sistani are also investors.<sup>406</sup> Melinda French Gates, founder of Pivotal Ventures, explained why investing in women is critical: “[W]e are missing out on transformational ideas by not putting resources behind women[.] [W]e need women founders and funders at the table . . . to build a more prosperous and inclusive econom[y]. New and innovative ideas come from everywhere; we can’t keep looking in the same old packages.”<sup>407</sup> In Fund III, the check size has also increased to between \$750,000 to \$1 million; over half of the fund will be allocated to follow-on funding.<sup>408</sup> FFF is investing in startups focused on digital health, the development of workplace tools, climate change, and education.<sup>409</sup>

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<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

<sup>403</sup> Christine Hall, *Female Founders Fund Closes Third Fund with \$57M for Female Founders*, TechCrunch (July 13, 2021, 5:00 AM PDT), <https://techcrunch.com/2021/07/13/female-founder-fund-closes-third-fund-with-57m-for-female-bipoc-founders/> [<https://perma.cc/277T-EDFN>].

<sup>404</sup> *Id.*

<sup>405</sup> *Id.*

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*

<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

The funds helping underrepresented entrepreneurs have also appeared in new entrepreneurial enclaves. The Houston-based Artemis Fund, launched in 2019, closed a \$15 million fund in 2021.<sup>410</sup> It focuses on investing in women-led startups.<sup>411</sup> The limited partners have an equal equity share among them and are divided evenly between men and women.<sup>412</sup> In Indianapolis, Indiana, Sixty8 Capital launched a \$20 million fund that is focused on funding underrepresented founders in the early stages of a company.<sup>413</sup>

Another example is MaC Venture Capital, a majority Black VC firm with a Hollywood producer, former mayor of Washington, D.C., and a technology veteran at the helm.<sup>414</sup> It raised a \$103 million fund to invest in young companies founded by people of color.<sup>415</sup> “The firm’s philosophy: Women and people of color should be represented in the business and cultural life of the nation, particularly in the tech industry that drives so much innovation and so much of the economy.”<sup>416</sup>

In particular, it may be prudent to focus intentional funding at the seed stage. “This is the stage where metrics matter less, and founders are assessed on more subjective criteria. Black and Latinx founders often experience rejection from investors because they do not fit a certain profile, according to New Age Capital.”<sup>417</sup> Harlem Capital Partners co-

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<sup>410</sup> Chris Mathews, *Venture Group The Artemis Fund Targets Five More Investments from First \$15M Fund*, HOUS.INNO (June 20, 2021, 6:00 AM CDT), <https://www.bizjournals.com/houston/inno/stories/news/2021/06/20/artemis-fund-inaugural-fund-portfolio-companies.html> [<https://perma.cc/Y4SZ-WY5J>]; THE ARTEMIS FUND, <https://www.theartemisfund.com/> (last visited Nov. 15, 2021) [<https://perma.cc/22YW-6TTS>].

<sup>411</sup> THE ARTEMIS FUND, *supra* note 410.

<sup>412</sup> Ron Miller, *The Artemis Fund Focuses on Women Founders in Underserved Communities*, TECHCRUNCH (July 9, 2021, 10:53 AM PDT), <https://techcrunch.com/2021/07/09/the-artemis-fund-focuses-on-women-founders-in-underserved-communities/> [<https://perma.cc/EH7F-6JCF>].

<sup>413</sup> Ron Miller, *Indy VC Firm Sixty8 Capital Launches \$20M Fund Aimed at Underrepresented Founders*, TECHCRUNCH (May 10, 2021, 7:27 AM PDT), <https://techcrunch.com/2021/05/10/indy-vc-firm-sixty8-capital-launches-20m-fund-aimed-at-underrepresented-founders/> [<https://perma.cc/K7YJ-YWA4>].

<sup>414</sup> Jessica Guynn & Terry Collins, *Majority Black Venture Capital Firm Announces \$103 Million Fund to Invest in Entrepreneurs of Color*, USA TODAY, <https://www.usatoday.com/story/tech/2021/03/25/investment-california-majority-black-venture-capital-firm-entrepreneurs-color/6991796002/> (last updated Mar. 25, 2021, 4:03 PM ET) [<https://perma.cc/Y87Q-SB4Q>].

<sup>415</sup> *Id.*

<sup>416</sup> *Id.*

<sup>417</sup> CRUNCHBASE DIVERSITY SPOTLIGHT 2020, *supra* note 70, at 11.

founder Henri Pierre-Jacques, observes that in order to tackle the lack of diversity in an effective way, it is important to “fund[] early-stage, diversity-focused funds — as the problem starts with pre-seed and seed — to give diverse founders a chance to gain traction. Large funds will not solve this issue in the near term, rotation of partners takes too long, and the number of new team members added is too small.”<sup>418</sup> Considering diverse startups at an earlier stage would also allow investors to consider how homophily principles may influence their investment-making decisions.

In addition to cultivating intentional funding at an earlier stage, events and programs can be built around certain communities. There are some events that are exclusively for historically underrepresented entrepreneurs, such as the Founder Met Funder event held by All Raise for Black female founders.<sup>419</sup> More of these events may help create a robust network of contacts that can lead to investment opportunities. Equally important is the creation of programs to educate racial and ethnic minorities about VC. As an example, BLCK VC, a nonprofit organization aimed at increasing the number of Black investors in VC, has various programs, such as Black Venture Institute, which teaches Black operators how to become angel and venture investors,<sup>420</sup> and Breaking Into Venture, which teaches young Black professionals how to become part of the VC world.<sup>421</sup>

#### F. Cultural Changes & Transparency

In a recent tweet, Elon Musk joked, “Am thinking of starting new university: Texas Institute of Technology & Science.”<sup>422</sup> The acronym is

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<sup>418</sup> *Id.* at 12. *But cf.* Courtney Connley, *Black and Latinx Founders Have Received Just 2.6% of VC Funding So Far in 2020, According to New Report*, CNBC (Oct. 8, 2020, 3:16 PM EDT), <https://www.cnbc.com/2020/10/07/black-and-latinx-founders-have-received-just-2point6percent-of-vc-funding-in-2020-so-far.html> [<https://perma.cc/HBJ7-HZHZ>] (noting that others suggest a more broad-based approach by including racial and ethnic minorities as part of investors’ main portfolio instead of “a separate, niche or impact program”).

<sup>419</sup> Megan Rose Dickey, *Building Paths to Funding for Black Female Founders*, TECHCRUNCH (Sept. 3, 2020, 9:14 AM PDT), <https://techcrunch.com/2020/09/03/building-paths-to-funding-for-black-female-founders/> [<https://perma.cc/4DF3-E2XC>].

<sup>420</sup> *Black Venture Institute*, BLCK VC, <https://www.blckvc.org/black-venture-institute> (last visited Feb. 22, 2022) [<https://perma.cc/MFP9-J36Z>].

<sup>421</sup> *Breaking into Venture*, BLCK VC, <https://www.blckvc.org/breaking-into-venture> (last visited Feb. 22, 2022) [<https://perma.cc/2BUD-F99K>].

<sup>422</sup> Elon Musk (@elonmusk), TWITTER (Oct. 28, 2021, 10:20 PM), [https://twitter.com/elonmusk/status/1453954994546229253?s=20&t=j\\_RnsTNQPdJPylS9hWENQ](https://twitter.com/elonmusk/status/1453954994546229253?s=20&t=j_RnsTNQPdJPylS9hWENQ) [<https://perma.cc/25Q6-8A6H>].

unfortunately just one example of the sexism women experience in the technology sector.<sup>423</sup> “A survey by Accenture and Girls Who Code found that half of the women in tech roles leave their jobs by the time they’re [thirty-five], with 37% — the largest percentage — citing ‘noninclusive company culture’ as their main reason for quitting.”<sup>424</sup> An Uber board member once made a sexist joke during a presentation about sexism when the company was still private.<sup>425</sup>

Pinterest also provides a case study of gender and racial discrimination.<sup>426</sup> It highlights how inequities are compounded in the technology sector when one is both a member of a racial minority and a woman.<sup>427</sup> Two Black Pinterest employees, Ifeoma Ozoma and Aerica Shimizu Banks, publicly exited the company due to inequity in pay and working in a culture where they were subject to Internet threats.<sup>428</sup> “[T]he

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<sup>423</sup> There are those like Reshma Saujani, the founder and CEO of Girls Who Code, who are striving to close the gender gap in technology and combatting the stereotypes that coding is only for males. Reshma Saujani, *Barbie Is Blind to the Many Girls Who (Really, Actually) Code*, VOX (Nov. 19, 2014, 12:30 PM EST), <https://www.vox.com/2014/11/19/11633054/barbie-is-blind-to-the-many-girls-who-really-actually-code> [<https://perma.cc/K2CT-7AMU>] (“Girls are taught that in tech, women are nowhere to be found, while boys are either antisocial hackers locked in a basement, or greedy, hoodie-wearing, Red Bull-chugging jerks. By the time girls hit middle school and high school, they’ve internalized the myths.”).

<sup>424</sup> Ananya Bhattacharya, *In One Tweet, Elon Musk Captures the Everyday Sexism Faced by Women in STEM*, QUARTZ AT WORK (Nov. 1, 2021), [https://qz.com/work/2082746/elon-musks-tweet-captures-everyday-sexism-faced-by-women-in-stem/?utm\\_source=YPL](https://qz.com/work/2082746/elon-musks-tweet-captures-everyday-sexism-faced-by-women-in-stem/?utm_source=YPL) [<https://perma.cc/M2V4-2FG7>].

<sup>425</sup> *Id.*

<sup>426</sup> Although Pinterest is now a public company, the allegations of racial and gender discrimination dated back to the time it was a private company. Zoe Schiffer, *Inside Pinterest, More Tales of Workplace Discrimination*, THE VERGE (Sept. 11, 2020, 12:37 PM EDT), <https://www.theverge.com/2020/9/11/21429619/pinterest-workplace-discrimination-finance-team-unequal-culture-bias> [<https://perma.cc/MY36-PWPS>] (suggesting a pattern of unequal treatment for women and people of color in the department — including inappropriate comments from managers, unequal pay, and leveling — through interviews with four former employees).

<sup>427</sup> Megan Rose Dickey, *Pinterest’s \$22.5M Settlement Highlights Tech’s Inequities, Say Former Employees Who Alleged Discrimination*, TECHCRUNCH (Dec. 15, 2020, 3:31 PM PST), <https://techcrunch.com/2020/12/15/pinterests-22-5m-settlement-highlights-techs-inequities-say-former-employees-who-alleged-discrimination/> [<https://perma.cc/XV5U-2C65>] [hereinafter *Pinterest’s \$22.5M Settlement*].

<sup>428</sup> Julie Bort & Taylor Nicole Rogers, *The Two Black Employees Who Took on Pinterest Explain Why They Quit, Their Fight for Pay, the Death Threats, the Private Investigator: ‘It Was a Torturous Experience,’* BUS. INSIDER (June 24, 2020, 5:00 AM), <https://www.businessinsider.com/two-black-former-pinterest-employees-discuss-their-fight-for-pay-2020-6> [<https://perma.cc/C2BX-SV65>].

hope was for Pinterest to make them whole and address its culture of alleged [racial and gender] discrimination.”<sup>429</sup> Ultimately, they received less than a year’s worth of severance.<sup>430</sup> In contrast, the outcome for the former chief operating officer of Pinterest, Françoise Brougher, who sued for gender discrimination, was vastly different.<sup>431</sup> In response to allegations of racial and gender discrimination, Pinterest employees staged a walkout that followed Brougher’s lawsuit.<sup>432</sup> A petition was also circulated; it called for systemic change, including transparency regarding promotion levels, retention metrics, and compensation, and setting diversity goals in hiring and promoting.<sup>433</sup> Brougher settled with Pinterest for \$22.5 million, with \$20 million going to Brougher and her attorneys and \$2.5 million donated to nonprofits that support women and underrepresented women in the technology sector.<sup>434</sup> Pinterest and Brougher released a joint statement: “‘Françoise welcomes the meaningful steps Pinterest has taken to improve its workplace environment and is encouraged that Pinterest is committed to building a culture that allows all employees to feel included and supported[.]’” As COO, Brougher had more resources compared to Ozoma and Banks to pursue litigation.<sup>435</sup> She was also fortunate that the walkout and petition kept the allegations of gender discrimination at the forefront of the public’s mind.

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<sup>429</sup> Dickey, *Pinterest’s \$22.5M Settlement*, *supra* note 427.

<sup>430</sup> *Id.*

<sup>431</sup> Julie Bort, *Pinterest’s Former COO Françoise Brougher Has Filed a Gender Discrimination Suit Against the Company*, BUS. INSIDER (Aug. 11, 2020, 5:02 PM), <https://www.businessinsider.com/pinterests-former-coo-has-filed-a-gender-discrimination-suit-2020-8> [<https://perma.cc/9PS8-TQ4H>].

<sup>432</sup> Megan Rose Dickey, *Pinterest Employees Are Walking Out Today in Light of Discrimination Allegations*, TECHCRUNCH (Aug. 14, 2020, 9:03 AM PDT), <https://techcrunch.com/2020/08/14/pinterest-employees-are-walking-out-today-in-light-of-discrimination-allegations/> [<https://perma.cc/X62S-ZCYB>]; *see also* Jennifer S. Fan, *Employees as Regulators: The New Private Ordering in High Technology Companies*, 2019 UTAH L. REV. 973, 997 (mentioning walkout as a form of action that employees of high tech companies can take) [hereinafter *Employees as Regulators*].

<sup>433</sup> Change at Pinterest, *To: Ben Silbermann, CEO of Pinterest. Put an End to All Forms of Discrimination and Retaliation at Pinterest*, COWORKER.ORG, <https://www.coworker.org/petitions/put-an-end-to-all-forms-of-discrimination-and-retaliation-at-pinterest-1> (last visited Nov. 22, 2021) [<https://perma.cc/6DZK-PSL9>].

<sup>434</sup> Kate Duffy, *Pinterest Has Paid \$22.5 Million to Settle a Gender Discrimination Suit from Former Executive Françoise Brougher, Who Claimed She Was Fired After Speaking up*, BUS. INSIDER (Dec. 15, 2020, 3:50 AM), <https://www.businessinsider.com/pinterest-francoise-brougher-gender-discrimination-suit-coo-2020-12> [<https://perma.cc/TJR2-HDGR>]. Coincidentally, Ozoma and Banks were both women of color.

<sup>435</sup> Dickey, *Pinterest’s \$22.5M Settlement*, *supra* note 427.

To implement cultural changes, some have pursued the litigation route, but that is only available to a select few who have the resources. Instead, the cultural changes that need to occur to address racial and gender inequities may come at the behest of the employees themselves.<sup>436</sup> Before determining what type of intervention might be appropriate to help ameliorate the ill effects of startup biases among women and ethnic and racial minorities, startups first and foremost need transparency to determine how they are faring on diversity metrics. In an effort to be more transparent on the composition of their companies, some public tech companies have released data on their gender and racial diversity, but startups should provide this as well.<sup>437</sup> Specifically, larger private companies — such as unicorns — with the resources to provide such information should be mandated to do so. Although startups will likely push back and argue that their focus should be on building the company, the long-term health of the company is dependent on building a diverse company which numerous studies have illustrated leads to better outcomes. If startups rely on private ordering alone, it will be up to the founders and investors to push this issue forward. They may choose not to do so for many reasons. Therefore, to make progress, laws should be passed to require unicorns to report their gender and racial diversity.

### G. Rethinking Hiring Practices and Mentorship

In addition to the different types of funds that have arisen, startup hiring practices should also be scrutinized. One study concluded that a company with a female founder and a female executive is six times more likely to hire women.<sup>438</sup> Furthermore, female-founded companies are two and half times more likely to hire women than all male-founded companies.<sup>439</sup> Therefore, part of the solution to fixing gender diversity lies in hiring more female executives and funding more female founders. One way to hire

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<sup>436</sup> See, e.g., Fan, *Employees as Regulators*, *supra* note 432, at 990-98 (discussing ways in which high tech employees can affect change).

<sup>437</sup> Some public tech companies including Snap, Tesla, Oracle, Netflix, Google, Microsoft, Facebook, and Apple have all published diversity reports and data. Biz Carson, *Tech Company Diversity Reports Are More Important Than Ever*, PROTOCOL (Oct. 28, 2021), <https://www.protocol.com/workplace/diversity-tracker/diversity-report-recent-companies> [<https://perma.cc/KGY8-7U62>].

<sup>438</sup> West & Sundaramurthy, *Startups with At Least 1 Female Founder*, *supra* note 143.

<sup>439</sup> *Id.* (“Companies with only male founders showed a tendency to not have as many women as executives, board members, or employees. The impact is more pronounced for employees and executives in industries like consumer services and healthcare, which, . . . has a greater percentage of female founders.”).

more female executives may be through a blind hiring process. Consider that when a blind application process was used in one study, more women were hired.<sup>440</sup>

Mentorship should also be reexamined in different parts of the VC ecosystem. Consider that in VC, “women venture capitalists do not benefit, on average, from having good colleagues in the firm in which they work. Male venture capitalists, in contrast, benefit significantly from having good colleagues within their firms.”<sup>441</sup> One study found that “women benefit from greater bureaucracy, formal feedback mechanisms, and hierarchies.”<sup>442</sup> VC firms — both large and small — could build a formal mentorship infrastructure that supports women and racial and ethnic minorities by having more experienced venture capitalists provide feedback on how to analyze a particular deal or suggest how to think about new hires or board positions for a startup.<sup>443</sup> “Mentoring programs make companies’ managerial echelons significantly more diverse: On average, they boost the representation of [B]lack, Hispanic, and Asian-American women, and Hispanic and Asian-American men, by 9% to 24%.”<sup>444</sup> In addition, “[i]n industries where plenty of college-educated nonmanagers are eligible to move up, like chemicals and electronics, mentoring programs also increase the ranks of white women and [B]lack men by 10% or more.”<sup>445</sup> Although the study was not done in a VC context, it is still relevant to employee and manager relationships generally and illustrates the value of mentoring programs.

#### CONCLUSION

Although gender and racial and ethnic bias on boards and their companies have been an unfortunate fixture in the world of startups, scant attention has been paid to it in the private company context. Instead, the

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<sup>440</sup> Claire Cain Miller, *Is Blind Hiring the Best Hiring?*, N.Y. TIMES MAG. (Feb. 25, 2016), <https://www.nytimes.com/2016/02/28/magazine/is-blind-hiring-the-best-hiring.html> [<https://perma.cc/8L4K-4M6D>].

<sup>441</sup> Paul A. Gompers, Vladimir Mukharlyamov, Emily Weisburst & Yuhai Xuan, *Gender Gaps in Venture Capital Performance*, 57 J. FIN. & QUANTITATIVE ANALYSIS 485, 511 (2022).

<sup>442</sup> *Id.*

<sup>443</sup> See Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV. (July–Aug. 2016), <https://hbr.org/2016/07/why-diversity-programs-fail> [<https://perma.cc/6MET-NPDW>] (supporting the notion that formal mentorship programs are critical to maintaining diversity once diverse candidates enter an organization).

<sup>444</sup> *Id.*

<sup>445</sup> *Id.*

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focus has been on imposing rules and regulations in public companies to address the issue.<sup>446</sup> It is time to look at other avenues to tackle startup biases since relying on private ordering has not worked. Regulators should explore whether certain laws to advance diversity which only apply to public companies, can be applied to unicorns and certain VC firms. Even if these efforts fall short, it begins a conversation on how to remedy the pervasive startup biases.

Venture capitalists operate in a world of pattern recognition and what some scholars have dubbed homophily. This homophily has meant that many women and racial and ethnic minorities who are startup founders have either not been funded or grossly underfunded, despite the enumerated benefits of diversity in terms of returns and other metrics. Also, with eye-popping returns from their investments in various startups, many venture capitalists are reluctant to change how they identify new ventures for funding because the current system has made them extremely rich. The absence of any meaningful change with respect to diversity in the startup ecosystem shows the shortcomings of private ordering. Although private ordering is viewed as a way to ensure flexibility and customization with respect to corporate governance, it is not a beneficial way to advance diversity. Over seven decades have passed since VC investing started, yet little progress has been made in diversifying the VC ecosystem. As this Article has illustrated, startup biases are built into the VC ecosystem.

To tackle startup biases, the problem needs to be approached from a multipronged perspective that encompasses both legal and non-legal tools. It also needs to target not only the issue of board diversity, but diversity in management, investors, workforce, and limited partners which invest in VC firms. Unless a holistic approach is undertaken to address startup biases, progress will be incremental at best, and the biases that plague startups will continue to exist.

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<sup>446</sup> See discussion *supra* Part III.A (discussing how public companies are regulated to address gender, racial, and ethnic bias).