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BOARD DIVERSITY BY TERM LIMITS?

Darren Rosenblum & Yaron Nili

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BOARD DIVERSITY BY TERM LIMITS?

Darren Rosenblum* & Yaron Nili**

Four-fifths of the corporate board seats in the United States are held by men and a shocking number of companies lack any female representation on their boards. While institutional investors have pushed these companies for change, California took a more aggressive step and followed several European countries by mandating a quota for board representation. Heated argument has ensued over what diversity we should prioritize and what mechanisms should be used to promote diversity. Yet could these challenges be avoided altogether through the use of term limits?

This Article is the first academic inquiry exploring the connection between term limits and the sex diversification of the corporate board. Drawing upon quantitative data on director turnover in the S&P 1500 and qualitative data on S&P 500 firms with term limits, our research shows that firms experiencing higher board turnover have more sex diversity. We argue that term limits, a mechanism that increases turnover, may correlate with improved sex diversity on boards. Our findings suggest that promoting term limits in the United States offers a market-based mechanism that could avert this polarized diversity debate.

INTRODUCTION

At the time the #MeToo movement¹ roiled the control of the founders of The Weinstein Company and Wynn Resorts, the boards of those companies were nearly all male, with the exception of one woman sitting on Wynn's board.² Both firms faltered—one to bankruptcy—upon revelations of sexual

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1. The #MeToo movement deals with sexual violence and makes sure the most marginalized survivors have access to resources. This movement is more than just a hashtag—it is the start of a longer conversation about sexual violence, a space for community healing, and an opportunity for people to voice their experiences. Alix Langone, *#MeToo and Time's Up Founders Explain the Difference Between the 2 Movements – And How They're Alike*, TIME (Mar. 22, 2018, 5:21 PM), <http://time.com/5189945/whats-the-difference-between-the-metoo-and-times-up-movements/>; see also, Abigail Hess, *Why Steve Wynn's Resignation May Be #MeToo's Most Significant Milestone Yet*, CNBC (Feb. 7, 2018, 3:08 PM), <https://www.cnbc.com/2018/02/07/steve-wynns-exit-may-be-metooos-most-significant-milestone-yet.html>.

2. At the time, Wynn's board consisted of nine men and one woman: John J. Hagenbuch, Dr. Ray R. Irani, Admiral Jay L. Johnson, Robert J. Miller, Ambassador Clark T. Randt Jr., Alvin V. Shoemaker, J. Edward Virtue, D. Boone Wayson, Stephen A. Wynn, and Patricia Mulroy. Wynn Resorts, Ltd., 2017 Proxy Statement (Schedule 14A), at 4–9 (Mar. 10, 2017); Erik Pederson, *Two More Weinstein Company Board Members Quit Amid Harvey Weinstein Scandal*, DEADLINE (Oct. 6, 2017, 6:40 PM), <https://www.nytimes.com/2018/03/19/business/weinstein-company-bankruptcy.html>.

harassment by their founder—CEOs.³ Similarly, at the time of its fuel economy scandal, Volkswagen had an all-male management board and counted only four women among its twenty-person supervisory board,⁴ one of whom was the wife and former nanny of the supervisory board chairman.⁵

Did the board demographics of Weinstein, Wynn, and Volkswagen play a role in the scandals that ensued? Given the domination of these boards by men with long-standing ties, it seems likely.⁶ In the United States, senior white men dominate board rooms, and they do so for a very long time. The average independent director on an S&P 500 board is a 63.1-year-old white male and will serve for nearly a decade (and often much longer).⁷ In 2017, board turnover remained shockingly low with an average of just 0.81 new directors per S&P 500 board.⁸ Such dominance by a homogeneous group constitutes a textbook recipe for groupthink.

3. Brooks Barnes, *Weinstein Company Files for Bankruptcy and Revokes Nondisclosure Agreements*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/business/weinstein-company-bankruptcy.html>; Christopher Palmeri, *Wynn Resorts Tumbles as Founder Accused of Pattern of Harassment*, BLOOMBERG BUS. (Jan. 26, 2018, 12:22 PM), <https://www.bloomberg.com/news/articles/2018-01-26/wynn-resorts-tumbles-on-steve-wynn-sexual-harassment-report> (discussing how Wynn Resorts Ltd. shares sank over 8% following the reports that Steve Wynn sexually harassed many women).

4. VOLKSWAGEN, MEMBERS OF THE BOARD OF MGMT. AND THEIR APPOINTMENTS (2012), <https://annualreport2012.volkswagenag.com/corporategovernance/executivebodies/boardofmanagement.html>. The 2015 Volkswagen scandal revealed that up to 11 million cars worldwide were loaded with illegal software that falsified emissions data. Hiroko Tabuchi & Jack Ewing, *Volkswagen to Pay \$14.7 Billion to Settle Diesel Claims in U.S.*, N.Y. TIMES (June 27, 2016), <http://www.nytimes.com/2016/06/28/business/volkswagen-settlement-diesel-scandal.html>.

5. James B. Stewart, *Problems at Volkswagen Start in the Boardroom*, N.Y. TIMES (Sept. 24, 2015), <http://www.nytimes.com/2015/09/25/business/international/problems-at-volkswagen-start-in-the-boardroom.html>. With the two-tier board structure typical of the German system, it is unusual that Volkswagen's malfeasance went without notice; however, the supervisory board was composed of outsiders, many of whom were part of the controlling families and other related individuals. *Id.* Professor Charles M. Elson noted that Volkswagen's governance was a breeding ground for scandal, and "[i]t was an accident waiting to happen." *Id.* The firm's peculiar "hybrid of family control, government ownership and labor influence" played a role in the scandal. *Id.* In 2012, Ferdinand Piëch, head of the company's supervisory board, managed to get his admittedly unqualified wife, a former kindergarten teacher, a position on the board. *Id.* The supervisory boardroom is described, by Professor Elson, as "an echo chamber": a place where "[o]utside views rarely penetrate." *Id.* Some blame the increased emphasis on labor in the firm's decisions, which favored employment over long-term prospects. See Chris Bryant & Richard Milne, *Volkswagen's 'Uniquely Awful' Governance at Fault in Emissions Scandal*, CNBC (Oct 4, 2015, 7:48 AM), <https://www.cnn.com/2015/10/04/volkswagens-uniquely-awful-governance-at-fault-in-emissions-scandal.html>; see also Chris Bryant, *Ursula Piëch Joins VW Supervisory Board*, FIN. TIMES (April 19, 2012), <https://www.ft.com/content/3d118e86-8a52-11e1-a0c8-00144feab49a>.

6. Half of Wynn's board of directors had served in their positions for more than ten years. See Wynn Resorts, Ltd., 2017 Proxy Statement, *supra* note 2, at 4–7; see also Stewart, *supra* note 5; Shawn Tully, *How a Handful of Billionaires Kept Their Friend Harvey Weinstein in Power*, FORTUNE (Nov. 19, 2017), <https://fortune.com/2017/11/19/weinstein-scandal-board-battles/>.

7. SPENCER STUART, 2017 SPENCER STUART U.S. BOARD INDEX 5, 18 (2017), https://www.spencerstuart.com/~media/ssbi2017/ssbi_2017_final.pdf [hereinafter 2017 BOARD INDEX].

8. *Id.* at 2.

Diversity may provide a tailored remedy. Diversity fosters decision-making which involves a more careful analysis.⁹ Groups without diversity consistently make weaker decisions than those made by groups with experiential diversity.¹⁰ Diverse boards may also more effectively avoid or manage scandalous governance failures.¹¹

The lack of diversity on boards has not gone unnoticed. Firms increasingly allocate substantial resources to diversify their leadership as they face pressure from investors and governments.¹² Ever since Norway adopted quotas for sex diversity over a decade ago, a slew of countries have joined its ranks and begun mandating board inclusion.¹³ Even in the quota-resistant United States,¹⁴ California responded in 2018 by requiring all publicly traded companies to include at least one woman on the board of directors by the end of 2019 and increasing this mandate to at least two women for five-member boards and three women for six-member and larger boards by August 2021.¹⁵ California may have started

9. Lisa H. Nicholson, *Making In-Roads to Corporate General Counsel Positions: It's Only a Matter of Time?*, 65 MD. L. REV. 625, 637 (2006) (explaining how homogenous groups can “limit [their] discussions . . . without surveying the full range of alternatives”); Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J. L. BUS. & FIN. 85, 99 (2000) (explaining that diversifying boards may prevent groupthink, mitigate a board’s tendency to conform, and promote board scrutiny of decision-making).

10. See Darren Rosenblum & Daria Roithmayr, *More Than a Woman: Insights into Corporate Governance After the French Sex Quota*, 48 IND. L. REV. 889, 930 (2015); see also SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES 132–74 (2007) (examining the power of collective wisdom and suggesting that diversity, rather than individuality, contributes to superior outcomes for group decision-making).

11. See PAGE, *supra* note 10, at 132–74.

12. Michele E. A. Jayne & Robert L. Dipboye, *Leveraging Diversity to Improve Business Performance: Research Findings and Recommendations for Organizations*, 43 HUM. RESOURCE MGMT. 409, 409 (2004); David A. Katz & Laura A. McIntosh, *Gender Diversity and Board Quotas*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 27, 2018), <https://corpgov.law.harvard.edu/2018/07/27/gender-diversity-and-board-quotas/>.

13. See Nicola Clark, *Getting Women Into Boardrooms, by Law*, N.Y. TIMES (Jan. 27, 2010), <http://www.nytimes.com/2010/01/28/world/europe/28iht-quota.html> (discussing proposed legislation regarding quotas across several European countries); Claire Cain Miller, *Women on Boards: Where the U.S. Ranks*, N.Y. TIMES (Mar. 10, 2015), <https://www.nytimes.com/2015/03/11/upshot/women-on-boards-where-the-us-ranks.html>; see also James Kanter, *E.U. Considers Quotas for Women in Boardrooms*, N.Y. TIMES (Mar. 4, 2012), <http://www.nytimes.com/2012/03/05/business/global/eu-considers-quotas-for-women-in-boardrooms.html> (reporting on a 2012 gender quota proposal in the European Union).

14. See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 319–20 (1978) (holding that racial quotas are unconstitutional as part of a college admissions policy).

15. Kim Elsesser, *California Mandates Women on Corporate Boards, but Do Quotas Work?*, FORBES (Oct. 2, 2018, 5:04 PM), <https://www.forbes.com/sites/kimelsesser/2018/10/02/california-mandates-women-on-corporate-boards-but-do-quotas-work/#1b7bf7665866>. Part of the resistance to quotas in the United States focuses on the limitations on individual opportunity. *Id.* Another concern is the necessary use of the sex binary to determine whether someone can or cannot join a board. Within the United States, the first state to consider a quota, California, saw its bill proposed on January 3, 2018, requiring a quota for corporate boards. *Id.* The bill proposed to add §§ 301.3 and 2115.5 to the Corporations Code, “which would require domestic general [corporations] or foreign corporation[s] that [are] publicly held corporation[s]. . . whose principal executive offices . . . are located in California, to have a minimum of one female, as defined, on its board of directors” by December 31, 2019. S.B. 826, 2017–2018 Leg., Reg. Sess. (Cal. 2018). “The bill would increase that required minimum number to 2 female directors [on or before December 31, 2021] if the corporation has 5 [authorized] directors, or to 3 directors if the corporation has 6 or more [authorized] directors.” *Id.*

a larger movement towards quotas within the United States, as Illinois has passed its own law encouraging board diversity and New Jersey may soon follow suit.¹⁶

Yet while boards have become more diverse, such diversity rarely approaches critical mass:¹⁷ 79% of public corporations in California currently fail the 2021 standards.¹⁸

Many Californian companies that were failing the Californian mandate at the time of its passage stand out: Skechers, the third-largest U.S. footwear manufacturer, has a nine-man, no-woman board.¹⁹ TiVo also counts no women on its board. Facebook and Apple will be noncompliant unless they each add a woman to their boards by 2021,²⁰ along with as many as 377 other firms.²¹

Diversity mandates, however, confront substantial challenges: what kind of diversity should we prioritize? How do we know that someone is diverse? What mechanisms ensure diversity and at what cost? Perhaps most controversially, how can we favor certain individuals over others based on identity in the fairest manner possible?

While in other scholarly work we engage with arguments that explore *why* regulators and firms should pursue diversity and inclusion,²² this Article reveals

“[T]he Secretary of State [would be required] to publish . . . reports . . . documenting . . . the number of corporations in compliance with these provisions [and would be authorized] to impose fines for violations of the bill.” *Id.* The first violation would be a fine equal to the amount of the annual cash compensation for the directors of the corporation, and the second or subsequent violation would be a fine equaling three times the average annual cash compensation. *Id.* As of May 31, 2018, the bill passed with twenty-two votes *for* and eleven votes *against*, making California the first state in the United States to have such a law. *Id.*

16. Alexis Keenan, *California's New Female Board Member Mandate Could Be Ripe for a Constitutional Challenge*, YAHOO FIN. (Jan. 7, 2019), <https://finance.yahoo.com/news/californias-female-board-member-mandate-151829527.html>.

17. See generally MELISSA S. FISHER, WALL STREET WOMEN (2012). A group needs 35% minority representation for the minority members to have say in its decision-making. Rosabeth Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 AM. J. SOC. 965, 966 (1977). See Dan Marcec, *Equilar Gender Diversity Index: Q3 2017*, EQUILAR (Nov. 8, 2017), <http://www.equilar.com/reports/52-gender-diversity-index-q3-2017.html> (indicating that representation of women on Russell 3000 boards was steady at 16.2% from June to September of 2017, falling short of the desired 35%); see also 2018 Gender Diversity Index Key Findings, 2020 WOMEN ON BOARDS 4 (2018), https://www.2020wob.com/sites/default/files/2020WOB_GDI_Report_2018_FINAL.pdf (explaining that for the 898 Gender Diversity Index companies assessed, women held 22% of the board seats for 2018, not yet achieving 35%).

18. Tomas Pereira, *Gender Quotas in California Boardrooms*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Aug. 29, 2018), <https://corp.gov.law.harvard.edu/2018/08/29/gender-quotas-in-california-boardrooms/>.

19. Irina Ivanova, *Nearly 100 California Companies Have No Women on Their Board of Directors*, CBS NEWS (Oct. 1, 2018), <https://www.cbsnews.com/news/nearly-100-california-companies-have-no-women-on-board-of-directors/>.

20. *Id.*

21. Annalisa Barrett, *How Many California Companies Have to Add Women to Their Boards?*, LINKEDIN (Oct. 1, 2018), <https://www.linkedin.com/pulse/how-many-california-companies-have-add-women-boards-annalisa-barrett/?published=t>.

22. Darren Rosenblum, *When Does Sex Diversity on Boards Benefit Firms?*, 20 U. PA. J. BUS. L. 429, 429 (2017).

how companies can advance diversity without explicitly regulating diversity at all.

What if some diversity—specifically sex diversity—could be achieved merely by speeding up the merry-go-round of corporate board membership? If governance suffers from stultified groupthink, nonidentitarian term limits may be the perfect remedy. Limiting the service of directors on the board to a maximum term forces new arrivals, each of whom adds experiential diversity.²³ A market-based mechanism like term limits could avoid the controversy surrounding gender-classification policies, like a gender quota, entirely.

This Article focuses on term limits' ability to promote sex diversity within boardrooms—as opposed to race, class, and other kinds of diversity—for two reasons: (1) the plethora of public remedies for sex equality, and (2) the availability of data on board member composition by sex. The data available for our study rely on the male–female binary and exclude other sexes.²⁴ While this restricts our analysis, we hope that our examination of sex diversity on boards will spark work on other types of diversity.

Though term limits have proven controversial as a means of improving governance,²⁵ they constitute a workable method to advance board diversity. Scholars and advocates have recently begun to look toward term limits' potential for improving governance generally,²⁶ and a small but diverse cohort of U.S. firms have already adopted board term limits.²⁷ Most policies, however, have

23. See *infra* Part IV.

24. We use “sex” rather than “gender” because the discussion regarding board-member composition mandates a binary distinction between men and women rather than a more fluid framework. “‘Gender’ and ‘sex’ have distinct meanings: ‘gender’ denotes identity and traits related to sex, including the ‘masculine’ and the ‘feminine.’” Darren Rosenblum, “Trapped” in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 501 n.5 (2000). “Katherine Franke makes the distinction that [s]ex is regarded as a product of nature, while gender is understood as a function of culture.” *Id.* (alteration in original) (quoting Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 1 (1995)).

25. Some argue that term limits can threaten director performance and that board composition assessments and evaluations are more likely to contribute to corporate performance than term limits. Robert C. Pozen, *The Trend Towards Board Term Limits Is Based on Faulty Logic*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (June 1, 2015), <https://corpgov.law.harvard.edu/2015/06/01/the-trend-towards-board-term-limits-is-based-on-faulty-logic/>. Additionally, because “experienced directors make positive a contribution to [companies in the area of] strategic and monitoring decisions,” implementing term limits may be a short-sighted solution to independence issues. Ying Dou, Sidharth Sahgal & Emma Jincheng Zhang, *Should Independent Directors Have Term Limits? The Role of Experience in Corporate Governance* 1, 5 (U. New S. Wales, Working Paper, 2015), <http://ssrn.com/abstract=2089175>.

26. Yaron Nili, *The “New Insiders”: Rethinking Independent Directors’ Tenure*, 68 HASTINGS L.J. 97, 108–11 (2016). Yet, some argue that term limits can threaten director performance, and that “board composition [assessments and evaluations] are more likely to contribute to corporate performance than . . . term limits.” Pozen, *supra* note 25; see also Na Li & Aida Sijamic Wahid, *Director Tenure Diversity and Its Impact on Governance*, COLUM. L. SCH.: CLS BLUE SKY BLOG (Apr. 13, 2017), <http://clsbluesky.law.columbia.edu/2017/04/13/director-tenure-diversity-and-its-impact-on-governance/> (proposing “to further explore the idea of . . . optimal average board tenure”).

27. Only 5% of the S&P 1500 firms have term limits. Jon Lukomnik, *Board Refreshment Trends at S&P 1500 Firms*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 9, 2017), <https://corpgov.law.harvard.edu/2017/02/09/board-refreshment-trends-at-sp-1500-firms/>.

some delay before forcing members to leave.²⁸ This Article is the first academic inquiry exploring how term limits may improve board diversification in addition to any governance benefits,²⁹ potentially tilting the balance of the scales in favor of term limits.

This Article proceeds as follows: Part I frames our question—providing context for term limits and their role with respect to corporate boards. Part II makes the case for the utility of term limits, even in the face of some persuasive counterarguments, to establish a theory of how turnover and, by extension, term limits (which mandate turnover) might yield increased diversity. Part III presents our novel empirical data, showing that higher board turnover does in fact correlate with increased sex diversity. Within Part III, we describe our quantitative data from the S&P 1500 companies for the years 2007–2015. We also consider firms that faced a turnover “shock”—a large drop in tenure that reflects significant refreshment.³⁰ Part IV proposes a range of policy options for firms and legislators to act on this research. Ultimately, we conclude that a correlation exists between turnover and increased diversity and that turnover may reflect corporate cultures or broader economic factors that incentivize firms to change. Furthermore, while we cannot distinguish between turnover and term limits, term limits inevitably lead to increased turnover. We conclude that the correlation between term limits and gender diversity on corporate boards proves so substantial that it demands closer study.

I. WHY TENURE MATTERS NOW

Market disruptions such as the 2000 and 2008 crashes prompted heightened regulation and disclosure requirements through the passage of the Sarbanes–Oxley and Dodd–Frank Acts.³¹ Corporate boards bear much of this new

28. 2017 BOARD INDEX, *supra* note 7, at 19; *see also* Lukomnik, *supra* note 27.

29. In the popular press, reporters have asserted a link between term limits and diversity, but no fuller exploration or research exists to our knowledge. *See, e.g.*, Bob Ramsay, *Gender Diversity on Corporate Boards Won't Happen Until We Limit Terms*, GLOBE & MAIL (Dec. 5, 2015), <https://www.theglobeandmail.com/report-on-business/rob-commentary/gender-diversity-on-corporate-boards-wont-happen-until-we-limit-terms/article27612797/>.

30. We use a few different terms in this Article when discussing term limits. “Term limits” are provisions that require a director to leave the board after a specific number of years of service. “Tenure” is the actual length of time that a board member serves. We can calculate term limits and tenure as to either average levels of a board, a universe of companies, or specifically with regard to individuals. Importantly, board turnover interacts with board tenure. When a director leaves a board, their tenure is replaced by the new director’s tenure (which is zero) leading to a reduction in the board’s average tenure. Yet, while shorter tenure may suggest that there is higher turnover, to draw a direct inference presumes that the total number of board members does not change. In fact, the average size of boards has remained practically the same over the last ten years. 2017 BOARD INDEX, *supra* note 7, at 16.

31. *See* Nili, *supra* note 26 (discussing the “legislative acts and listings standards [that] transformed the voluntary shift in board composition into a mandatory one [and] increase[d] the responsibilities” of the board to act as monitors). *See generally* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

regulatory and investor scrutiny.³² While the past decade saw board responsibilities spike, tenure remains largely the same as before,³³ leaving firms bereft of the new perspectives that would ameliorate their governance.³⁴ As a result, term-limit policies merit more traction in U.S. corporate governance.³⁵

This Part will examine term limits. The paucity of corporate-term-limits literature led us to consider political term limits. In that context, refreshment may empower or enfeeble the officials subject to the term limits.³⁶ In the corporate context, a frank exploration of the political economy of the firm—its interaction with the state, elites, and political and economic power generally—clarifies how boards, dominated by incumbents, operate. This Part will describe how term limits work and why U.S. states and firms should put them into practice.

A. What Term Limits Do

Shareholders elect board members to govern the firm. The board in turn chooses the CEO of the firm.³⁷ It is, therefore, the job of the board to scrutinize and serve as a check on the company's executives or management. While existing U.S. regulations govern elements of board service, including the proportion of employee board members to independent board members,³⁸ no regulations

32. See Melvin Aron Eisenberg, *Legal Models of Management Structure in the Modern Corporation: Officers, Directors, and Accountants*, 63 CALIF. L. REV. 375, 376 (1975) (discussing that the board of directors is the core of modern corporate decision-making); Business Roundtable, *Principles of Corporate Governance*, HARV. L. SCH. F. CORP. GOVERNANCE & FIN. REG. (Sept. 8, 2016), <https://corpgov.law.harvard.edu/2016/09/08/principles-of-corporate-governance> (discussing the board of directors' "vital role [in] overseeing the company's management and business strategies to achieve long-term value creation").

33. See Ana Dutra, *A More Effective Board of Directors*, HARV. BUS. REV. (Nov. 5, 2012), <https://hbr.org/2012/11/a-more-effective-board-of-dire> (explaining how "[t]he definition of board effectiveness has shifted [as] a director now confronts . . . complex oversight accountability" and "personal risk and liability"); Lukomnik, *supra* note 27.

34. See Rosenblum & Roithmayr, *supra* note 10, at 889 (explaining how firms improved governance through the diversification of new perspectives).

35. See *id.* Only 27% of boards with a lead or presiding director impose term limits on the position, according to Deloitte's 2016 Board Practices Report, with half these firms adopting a four-year term limit, and a two-year term limit being the next common limit. Randi Morrison, *Board Practices: Lead/Presiding Director Term Limits*, SOC'Y FOR CORP. GOVERNANCE (May 15, 2017, 9:23 AM), <https://connect.societycorpgov.org/blogs/randi-morrison/2017/05/15/board-practices-leadpresiding-director-term-limits>. Data from the 2016 Spencer Stuart U.S. Board Index indicates "that 46% [of S&P firms] have no set term[, and o]f those that do, 19% have a 1-year term, 6% have a 2-year term, and 4% have a 3-year term." *Id.* Additionally, "Legal & General Investment Management re-issued its guidance on board refreshment[, which] indicat[es] that it will vote against lead independent directors if they have been serving for 15 years or longer[,]and other investors have adopted [a] tenure proxy voting guideline[]." *Id.*

36. See Rainbow Murray, *Quotas for Men: Reframing Gender Quotas as a Means of Improving Representation for All*, 108 AM. POL. SCI. REV. 520, 525 (2014) (describing that Mexican legislators are limited to serving two consecutive terms, which "indicate[s] the potential for complete political renewal within a single election").

37. STEPHEN M. BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* 155 (2008) (detailing the role of the board monitoring management); Jill E. Fisch, *Taking Boards Seriously*, 19 CARDOZO L. REV. 265, 269 (1997).

38. See Nili, *supra* note 26, at 109.

mandate term length; firms can, however, choose to impose term limits. Such limits in the United States are both rare and inconsistent in their duration and form.³⁹ Elsewhere around the world, however, regulators implemented board term limits in the hope that regularly refreshed boards may exercise more objective scrutiny over management.⁴⁰

Term limits take many forms. Some limits bar continued service by board members entirely after a given period while others restrict a board's aggregate tenure. Limits may apply to key committees, such as remuneration or oversight committees, barring board members from serving on such committees after a given period of service.⁴¹ Other requirements convert long-serving outside directors to insider status, commensurate with their reduced independence.⁴² These distinct forms of tenure reduction tailor the continued presence of new perspectives on boards. In addition, some firms have pursued "softer" limits which count tenure negatively in retention decisions.

Only 5% of the S&P 500 companies explicitly limit terms for nonexecutive directors.⁴³ These limits range from ten to twenty years: half are fifteen-year limits, and an additional five use a twelve-year limit.⁴⁴ Widespread disinterest prevails: two-thirds of the S&P 500 companies report no limits and only 3% report any interest in adopting limits.⁴⁵ In the United States, directors must impose retirement on themselves.⁴⁶ In this regard, the United States sits outside of this global norm of limiting tenure. Indeed, the commonplace nature of lengthy terms on U.S. boards may undermine the efficacy of their oversight.⁴⁷

39. Lukomnik, *supra* note 27.

40. See Dennis B. Veltrop et al., *The Relationship Between Tenure and Outside Director Task Involvement: A Social Identity Perspective*, 44 J. MGMT. 445, 446 (2018) ("Regulators in both European (e.g., the United Kingdom, Spain, the Netherlands) and non-European countries (e.g., India, Malaysia, Singapore), as well as various corporate bodies in the United States (e.g., Calpers, the National Association of Corporate Directors), advocate to limit outside director tenure." (footnote omitted)); Janet McFarland, *Governance Guidelines: Countries Set Out Rules on Directors' Tenure*, GLOBE & MAIL (Nov. 24, 2013), <http://www.theglobeandmail.com/report-on-business/careers/management/board-games-2013/countries-set-out-rules-on-directors-tenure/article15574442/>.

41. Nili, *supra* note 26, at 152–54. For example, as suggested by Nili, the scope of board tenure can be limited to audit and compensation committees to ensure director independence, or the length of tenure could be (1) limited to the current average tenure, (2) predetermined by each company with shareholder approval, or (3) limited by a "comply-or-explain rule," allowing companies to set limits but opt out by explaining why the limit would not be beneficial in order to ensure director independence. *Id.*

42. See Lukomnik, *supra* note 27.

43. 2017 BOARD INDEX, *supra* note 7, at 5. This reflects an increase of more than 20% from 2016 when only nineteen companies had term limits; see SPENCER STUART, 2016 SPENCER STUART U.S. BOARD INDEX 3 (2016), https://www.spencerstuart.com/~/_/media/pdf%20files/research%20and%20insight%20pdfs/spencer-stuart-us-board-index-2016.pdf [hereinafter 2016 BOARD INDEX].

44. 2017 BOARD INDEX, *supra* note 7, at 19.

45. *Id.* at 5–6.

46. See HEIDRICK & STRUGGLES, 2012 BOARD OF DIRECTORS SURVEY 5 (2012), <https://www.yumpu.com/en/document/read/31072332/2012-board-of-directors-survey-heidrick-struggles>.

47. See Nili, *supra* note 26, at 101 (arguing that directors with "long[er] tenures and insider backgrounds might . . . erode the true independence of the board").

B. *The Scholarly Debate Over Term Limits*

As common as term limits may be in the world, U.S. critics fear a loss of expertise. Supporters point to the need for independent and fresh perspectives to balance the board's essential functions—monitoring and advising.⁴⁸ As directors linger, they acquire expertise in the firm but also become entrenched.⁴⁹ Entrenchment undermines the independence necessary to monitor management without any conflict of interest.⁵⁰ Long-term directors develop fixed cognitive frameworks that diminish their capacity to evaluate senior management.⁵¹ These frameworks may even lead to some complacency among long-term directors, jeopardizing their oversight duties.⁵²

Firms have begun to replace traditional insiders with directors who appear “independent” for regulatory purposes but who actually function as insiders.⁵³ These “new insiders” acquire a structural bias that compromises their independent thinking.⁵⁴ Such close-knit boards may experience greater trust and openness but come up short on independence.⁵⁵ These long-term directors may

48. See *supra* note 26 and accompanying text.

49. See, e.g., Sterling Huang & Gilles Hilary, *Zombie Board: Board Tenure and Firm Performance*, 56 J. ACCT. RES. 1285, 1285 (2018) (finding evidence that long-tenured directors tend to be the most involved in the middle period of tenure, having less experience at the beginning of their directorship and more entrenchment at the end); Nikos Vafeas, *Length of Board Tenure and Outside Director Independence*, 30 J. BUS. FIN. & ACCT. 1043, 1062 (2003) (concluding that directors with longer tenure are associated with greater committee participation in the nominating and compensation committees but also associated with CEO entrenchment); Veltrop et al., *supra* note 40, at 449.

50. See Nili, *supra* note 26, at 101; Vafeas, *supra* note 49, at 1043 (suggesting that board tenure could be a determinant of the effectiveness and quality of board's monitoring capabilities); Li & Wahid, *supra* note 26; see also Veltrop et al., *supra* note 40, at 447.

51. See Li & Wahid, *supra* note 26. While some studies indicate that longer tenure results in better monitoring due to decreasing susceptibility to management influence, other studies indicate that longer tenure leads to a higher commitment to the status quo and to entrenchment, resulting in weaker monitoring. *Id.*; Nili, *supra* note 26, at 101 (arguing that longer tenures and insider backgrounds might erode board independence). Dennis Veltrop argues that director entrenchment means that directors are “unable to break established cognitive patterns and are less likely to consider solution alternatives.” Veltrop et al., *supra* note 40, at 446 (citation omitted); see also Vafeas, *supra* note 49.

52. *Director Term Limits Come Up for Review*, DIRECTORS & BOARDS, 2d Quarter 2008, at 18, <https://cpb-us-w2.wpmucdn.com/sites.udel.edu/dist/f/506/files/2012/11/DB-Ray-Troubh-Term-Limits-Cover-and-Article.pdf>; see also Li & Wahid, *supra* note 26 (suggesting that socially integrated, not tenure-diverse groups may take part in groupthink, become complacent, and foster “an inability to monitor firm management in the board setting”).

53. Nili, *supra* note 26, at 148–49.

54. *Id.* at 118. “Social ties to the upper management of [a] corporation . . . could threaten true independence,” and longer tenure can exacerbate the impact that these ties have on independence. *Id.* David Katz similarly suggests that longer tenure could create too close of a relationship between board members and the CEO. David A. Katz & Laura A. McIntosh, *Director Tenure Remains a Focus of Investors and Activists*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Aug. 1, 2016), <https://corpgov.law.harvard.edu/2016/08/01/director-tenure-remains-a-focus-of-investors-and-activists/> (discussing comply-or-explain policies in firms).

55. Nili, *supra* note 26, at 118–20 (“[S]ocial science and corporate governance literature [indicate] that a close-knit board can be beneficial for board performance, by increasing trust and openness between board members.”).

wield influence that restrains new directors in the boardroom in their thinking as well as with regard to incentives and social structures.⁵⁶

In the face of these challenges, term limits might ensure a non-compromised independence. The test would surface in the crucial board–CEO relationship.⁵⁷ When CEOs rise from within, a director with longer tenure will have a preexisting social relationship with the new CEO.⁵⁸ Even with an outsider CEO, board members may feel beholden to the CEO they chose, leaving tenured directors “less likely to stir the pot.”⁵⁹ This proclivity toward groupthink reflects how long-term directors may contribute less to the company.⁶⁰

Term limits correct many of these harms. They maintain the pool of institutional knowledge on boards but rotate members to ensure new perspectives and independent thinking.⁶¹ Monitoring of executive officers may improve—possibly even leading to more reasonable compensation.⁶² Unlike arguments for including gender, race, or other identitarian diversities to the board, term limits assume nothing about *who* the tenured diverse members are.⁶³

56. *Id.* at 118–22. “As tenure increases, . . . social ties [can] grow stronger . . . which exacerbates the potential threat to independence.” *Id.* at 118. Long tenures coupled with equity compensation run the risk of jeopardizing independent action if that action could damage the value of the director’s equity. *Id.* at 121. “[D]irectors might refrain from acting diligently . . . when [that] action would have a negative impact on firm value”; the disincentive to lower firm value increases the longer the director has served and the more equity they accrue in the company. *Id.* Director tenure and the increasingly close social ties to their peers can also have a negative impact on independence due to the director-election process. *Id.* at 122. In some instances, directors who face a lack of shareholder support can continue to hold their seat if their peers on the board determine that they should. *Id.*

57. *Id.* at 124 (describing CEO tenure as generally “shorter than that of a director, [so] an argument can be made that the more tenured directors are more independent vis-à-vis the CEO, and not the other way around”).

58. *Id.*

59. *Id.* Another argument for the status quo with respect to director tenure is that if directors “lose interest in [the] company[,] . . . stop contributing, or start missing board meetings[, t]hey should be replaced regardless of their tenure.” Pozen, *supra* note 25. Although this solution would be ideal, it may not work in a close-knit board of long-tenured members. As Nili noted, these directors rely on each other and management for reelection, and even if the shareholders do not support one of them, their job can be saved by their peers. Nili, *supra* note 26, at 122.

60. See Nili, *supra* note 26, at 124.

61. Li & Wahid, *supra* note 26.

62. *Id.* Steven Ramirez notes that heterogeneous working groups (as opposed to homogeneous groups) “show greater inclination for critical thinking and are less likely to . . . mindlessly conform to group” preconceptions or, in other words, participate in “groupthink.” Ramirez, *supra* note 9, at 99. Implementing tenure diversity will encourage more heterogeneous working groups and combat groupthink tendencies.

63. See Li & Wahid, *supra* note 26. However, despite these benefits, “there is [currently] no evidence that tenure diversity [leads to] better future market performance The findings are consistent with prior studies, which find that increased monitoring may interfere with the board’s advisory role.” *Id.*

Term limits certainly carry real costs. No formula exists for precisely *when* reduced independence overwhelms the expertise that comes with a longer tenure,⁶⁴ and the cost–benefit analyses prove challenging in either direction.⁶⁵

The arbitrary loss of well-qualified directors may undermine board performance,⁶⁶ and experienced directors may retain the assertiveness to counterbalance the CEO properly.⁶⁷ One study suggests that experienced directors may monitor strategy better.⁶⁸ Another points to higher levels of commitment to the company, as more experienced directors counterbalance CEO authority.⁶⁹ Alleged benefits of longer-tenured board members include lower CEO pay, higher CEO turnover, a lower likelihood of misreported earnings, and a higher likelihood of making high-quality acquisitions.⁷⁰

Accordingly, proponents of the status quo argue that rather than coerce change, the nominating committee should inventory the skills and experiences that the firm requires⁷¹ and assess objectively whether the board meets those needs.⁷² If not, change should happen regardless of tenure requirements.⁷³ The

64. The first question is open for debate. Several studies have been done that indicate that director tenure has a curvilinear (inverted “U” shape) effect on effectiveness, but effectiveness can be measured in too many ways to pinpoint the perfect point at which a director is on the downfall. *See* Veltrop et al., *supra* note 40, at 457. The study conducted by Sterling Huang and Gilles Hilary demonstrates that board tenure exhibits a “U”-shaped relation: “[D]irectors’ on-the-job learning improves firm value up to a threshold, at which point entrenchment dominates and firm performance suffers.” *See, e.g.*, Huang & Hilary, *supra* note 49, at 1285.

65. *See* Li & Wahid, *supra* note 26.

66. *See* Dou, Sahgal & Zhang, *supra* note 25, at 31.

67. *See* Pozen, *supra* note 25 (discussing how a study conducted by economists at the University of New South Wales indicated that “[c]ompanies with a higher proportion of experienced directors . . . were more likely to change chief executives when performance faltered” and “experienced directors were more likely to attend board meetings and [more likely to] become members of board committees”).

68. *See generally* Dou, Sahgal & Zhang, *supra* note 25.

69. *Id.* at 24 (indicating that director term limits would eliminate “a counterbalance to the CEO in the board room”). Some arguments against term limits are that long-term directors have experience, are hard to replace, and have a good sense of the company. *Director Term Limits Come Up for Review*, *supra* note 52, at 19; Li & Wahid, *supra* note 26.

70. Dou, Sahgal & Zhang, *supra* note 25, at 4. To evaluate the contribution of experienced directors to firms, an experienced director was defined as one with more than fifteen years of experience, and then the proportion of these directors on the board was utilized as the “explanatory variable in regressions where firm outcomes including CEO compensation, CEO turnover-performance sensitivity, earnings restatements, acquisition decisions, and acquisition performance were the dependent variables.” *Id.* at 2; *see also* Pozen, *supra* note 25.

71. *Director Term Limits Come Up for Review*, *supra* note 52, at 20. Kenneth Daly provided insight that term limits are the least popular method of refreshing board membership, as only 8.3% of respondents to a 2007 survey approved of term limits. *Id.*

72. Pozen, *supra* note 25. Assessments that “inventory [the] skills, experiences, and characteristics [that] the company needs” should be made, and “the nominating committee should evaluate whether these needs are being met by current board members or whether board composition should be adjusted.” *Id.*

73. *Director Term Limits Come Up for Review*, *supra* note 52, at 24. Some critics doubt the effectiveness of “trying to solve performance issues with term limits,” favoring term limits as a means to get fresh talent rather than as a means to deal with performance issues. *Id.*

rigidity of term limits may skate over the firm's specific circumstances, and the skills that a firm values and needs should determine board composition.⁷⁴

However, the nominating committee itself may become entrenched. Naturally occurring transitions—with a consistently rigorous and thorough nominating committee—would ideally ensure the board's independence. In reality, this rarely happens.

For that reason, term limits and tenure diversity mandates prove necessary to allow boards to balance longer-tenured directors with newness and actual independence. While term limits may only offer a rough approximation of which members should end their tenure on a board, they provide an effective tool to remove board members⁷⁵ and can improve the long-term health of a firm.⁷⁶

Recent years have seen greater emphasis on director tenure as a key metric of corporate governance. Shorter tenures signal good governance for company evaluations and voting recommendations by proxy advisors.⁷⁷ As a result, nearly all boards hold turnover as a goal: 89% of respondents to a Spencer Stuart survey noted that firms encourage regular board refreshment.⁷⁸ Despite this avowed support, turnover has remained low (only 0.8 new directors were added per board in 2017), and the average independent director tenure remains high at 8.2 years.⁷⁹

Though these counterarguments have perhaps led some market actors to move more slowly, term limits have begun to spread more rapidly. In 2018, the number of firms with term limits grew significantly—over 30% more as compared to 2017.⁸⁰ Indeed, the increased attention to tenure as a governance factor will continue to play a key role in the discourse regarding term limits.

74. *Id.* at 20–21. A good-quality, long-tenured director could still add value, but this director may be lost due to a rigidly imposed limit. *Id.*

75. *Id.* at 23. Regarding board evaluations, firms can be reluctant “to pull the trigger on a nonperforming director.” *Id.* Term limits “make it easier to rotate [a director] off.” *Id.*

76. Guhan Subramanian, *Corporate Governance 2.0*, HARV. BUS. REV. (Mar. 2015), <https://hbr.org/2015/03/corporate-governance-2-0>. One advocate of term limits proposes a reconceptualization of corporate governance that is based on three core principles. *Id.* The first principle is that “[b]oards [s]hould [h]ave the [r]ight to [m]anage the [c]ompany for the [l]ong [t]erm.” *Id.* The second principle is that “[b]oards [s]hould [i]nstall [m]echanisms to [e]nsure the [b]est [p]ossible [p]eople in the [b]oardroom.” *Id.* Term limits could be an instrument to achieve optimal board composition, ensuring a proper mix of skills and perspectives. *Id.* Requiring meaningful director evaluations could also make opportunities for director improvement clear. *Id.* The third principle is that “[b]oards [s]hould [g]ive [s]hareholders an [o]rderly [v]oice.” *Id.* This principle involves understanding the board's role in a way that guarantees that shareholders have choice. *Id.*

77. See 2017 BOARD INDEX, *supra* note 7. Director independence remains an important component of good governance, although the idea of “independence” has remained an ideal open to many interpretations. Katz & McIntosh, *supra* note 54.

78. 2017 BOARD INDEX, *supra* note 7, at 13.

79. *Id.* at 2, 5.

80. See *infra* Part IV.C.

II. HOW TERM LIMITS MAY ADVANCE SEX DIVERSITY

This Part explores the theoretical basis for using term limits to achieve diversity on corporate boards. First, it will examine the particularities of sex diversity in the U.S. context and the advantages of incumbency. Next, this Part will discuss arguments that both support and challenge the idea that term limits might disrupt male overrepresentation on boards.

A. The Challenge of Diversity Regulation in the United States

Sex diversity in firm leadership remains shockingly low. As the *New York Times* reported, fewer women run large corporations than men named John.⁸¹ Men named James, Robert, John, or William were four times more likely than women of all names to become a CEO.⁸² This overrepresentation of men at the upper echelons of the corporate world is astonishing.

Yet while 86% of directors participating in PwC's annual director survey felt that women should comprise between 21% and 50% of the board, only 28% of Russell 3000 boards have more than one-fifth of their board comprised of women.⁸³ Indeed, as of October 2017, women comprised an average of 16.2% of Russell 3000 boards.⁸⁴ Larger companies have a slightly better outlook, as women represent 19.7% of directors on Fortune 1000 boards.⁸⁵

Further, some U.S. boards have failed even to attempt to promote gender diversity.⁸⁶ A report noted that of the 1,500 largest Russell 3000 companies, seventy-six companies had no female directors within the past decade.⁸⁷ An additional thirteen companies added a female director for the first time in 2016.⁸⁸

81. 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>.

82. *Id.* The ratio of female CEOs to male CEOs of S&P firms is called the "Glass Ceiling Index"—an index value above one means that Jims, Bobs, Jacks, and Bills combined outnumber the total number of women. *Id.*

83. Institutional Shareholder Services, Inc., *Gender Parity on Boards Around the World*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 5, 2017), <https://corpgov.law.harvard.edu/2017/01/05/gender-parity-on-boards-around-the-world/>.

84. See Marccc, *supra* note 17. Despite the fact that the percentage of women on Russell 3000 boards was 16.2%, "the number of boards with zero women continues to decline . . . , and the number of boards that have reached parity" has increased. *Id.*

85. *2020 Women on Boards Closes in on National Campaign Goal*, BUS. WIRE (Nov. 10, 2016, 6:01 AM), <https://www.businesswire.com/news/home/20161110005237/en/2020-Women-Boards-Closes-National-Campaign-Goal>.

86. See Joann S. Lublin, *Dozens of Boards Excluded Women for Years*, WALL ST. J. (Dec. 27, 2016, 9:03 AM), <https://www.wsj.com/articles/dozens-of-boards-excluded-women-for-years-1482847381>.

87. *Id.* Lublin noted that firms who lack women "often operate in male-dominated industries such as energy." *Id.*

88. *Id.*

At this current rate, projections show that corporate boards will not reach gender parity until 2055.⁸⁹ In reaction to this slow growth, groups such as the Thirty Percent Coalition⁹⁰ and 2020 Women on Boards⁹¹ have attempted to increase female board participation at a faster rate, in part by refocusing the criteria, and thereby the women, considered for directorships.⁹²

The efforts of these organizations have garnered increased support from investors and large institutions.⁹³ With State Street, Vanguard, and BlackRock voicing their commitment to sex diversity,⁹⁴ it is “unsurprising [that] in 2017 the number of board diversity proposals reached an all-time high.”⁹⁵ Proxy advisors have also shown support for the movement. ISS, a leading shareholder advisory firm, recommended that shareholders vote in favor of all but two of the diversity proposals voted on in 2017.⁹⁶

Still, crucial questions remain, such as what diversity we should prioritize and how to identify diverse people.⁹⁷ The variety of diversity recognized now

89. Jeff Green & Emily Chasan, *Investors Push Corporate Boards to Add Women, People of Color*, BLOOMBERG (Mar. 2, 2017, 11:15 AM), <https://www.bloomberg.com/news/articles/2017-03-02/shareholders-target-pale-male-and-stale-corporate-boards>.

90. The Thirty Percent Coalition’s website provides: “The mission of the Thirty Percent Coalition is to promote gender diversity, including women of color, on corporate boards.” *Who We Are*, THIRTY PERCENT COALITION, <https://www.30percentcoalition.org/who-we-are> (follow “What is the Thirty Percent Coalition?” hyperlink) (last visited Oct. 10, 2019). Following the Coalition’s institutional investors’ initiatives, close to 300 companies have appointed a woman to their boards and, in many instances, a woman of color. *Id.* The Coalition’s investors represent more than \$4 trillion in assets under management and continue to have a major impact. *Id.*

91. *About*, 2020 WOMEN ON BOARDS, <https://www.2020wob.com/about> (last visited Sept. 13, 2019). The campaign 2020 Women on Boards seeks to make all boards composed of at least 20% women by the year 2020. *Id.*

92. *See id.*; @30PercentCo, TWITTER (Aug. 13, 2019, 4:00 AM), <https://twitter.com/30PercentCo/status/1161231019783131139>.

93. For example, on April 27, 2017, a shareholder proposal to add women and minorities to the board at Cognex Inc. has received 62.8% support, with major institutional investors voting in favor. Among the supporters were Allianz, AXA Investment Managers, State Board of Administration of Florida, State of Wisconsin Investment Board, Vanguard, BNY Mellon, and T. Rowe Price. Data was obtained from Proxy Insight and is on file with the author.

94. *See, e.g.*, Emily Chasan, *BlackRock Puts Its Votes Behind Proposals to Get Women on Boards*, BLOOMBERG (July 13, 2017, 7:02 PM), <https://www.bloomberg.com/news/articles/2017-07-14/blackrock-puts-its-votes-behind-proposals-to-get-women-on-boards>; Ryan Vlastelica, *Vanguard Calls for More Diverse Corporate Boards, Better Climate-Change Disclosures*, MARKETWATCH (Sept. 1, 2017, 7:37 AM), <https://www.marketwatch.com/story/vanguard-calls-for-more-diverse-corporate-boards-better-climate-change-disclosures-2017-08-31>.

95. Ronald O. Mueller & Elizabeth Ising, *Shareholder Proposal Developments During the 2017 Proxy Season*, HARV. L. SCH. F. CORP. GOVERNANCE & FIN. REG. (July 12, 2017), <https://corpgov.law.harvard.edu/2017/07/12/shareholder-proposal-developments-during-the-2017-proxy-season/> (“Thirty-five proposals calling for the adoption of a policy on board diversity or a report on steps to increase board diversity were submitted in 2017 as compared to 28 proposals submitted in 2016. As in 2016, a substantial number of board diversity proposals were withdrawn, likely due to commitments made by companies to the proponents of these proposals, such as adopting board recruitment policies inclusive of race and/or gender.”).

96. Green & Chasan, *supra* note 89 (noting that according to ISS Analytics, 2017 shareholder proposals regarding diversity were on pace to meet or exceed the number of similar proposals from 2016).

97. AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY 191–92 (2015) (explaining that firms sometimes include identity categories regarding diversity, such as race or gender, but can also define diversity ambiguously or not at all).

in the United States prompts concern over any specific identity intervention, such as sex quotas. Should the law remedy disparities of race, class, sexual orientation, gender identity, and other types of diversity?⁹⁸ Even larger questions besiege public diversity efforts such as: which methods and approaches work best to ensure diversity? What do such efforts cost and to whom?

Sex diversity in U.S. corporate leadership has lagged behind European firms.⁹⁹ Within the United States, quotas confront the barrier of a strong national emphasis on liberal notions of private property and a broad consensus that the private sector should determine its own fate without regulatory interference.¹⁰⁰ Liberalism typically rejects drawing differences based on identity. Yet countries that have utilized quotas assess compliance using the sex binary, imposing costs on men.¹⁰¹ Although in the long run this reliance on the sex binary may advance equality overall, from a liberal standpoint, it may aggravate inequalities.¹⁰²

98. See generally Darren Rosenblum, *Sex Quotas and Burkini Bans*, 92 TUL. L. REV. 469 (2017) (exploring the extent to which the advancement of women's rights comes at the disadvantage of other disenfranchised groups, such as racial and ethnic minorities, in the context of French board quotas).

99. See *Diversity and Women on Boards*, NORTON ROSE FULBRIGHT, <http://www.nortonrosefulbright.com/knowledge/technical-resources/the-uk-corporate-governance-portal/diversity-and-women-on-boards/> (last visited Sept. 15, 2019). The United Kingdom is an example of a county that considers other categories besides gender. *Id.*; see also Clark, *supra* note 13 (explaining that several European countries have established or are considering quota legislation).

100. Proponents for the California proposed bill argue that, as “the 5th largest economy in the world[California] should set an example for globally enlightened business practices[, and that] California has a responsibility to ensure that women are included in board discussions.” CAL. S. RULES COMM., OFFICE OF SENATE FLOOR ANALYSES FOR SB-826, AT 6 (2018), https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=2017201805B826 (follow “05/29/18- Senate Floor Analyses” hyperlink). They also point out that “[r]esearch shows that corporations with female directors outperform companies that [lack] women on boards.” *Id.* Women directors would serve as “role models for aspiring women leaders [within] corporations.” *Id.* at 7. Those who oppose the bill point out that a mandate “focused only on gender potentially elevates it as a priority over other aspects of diversity[, and that] companies are not focused on just one particular classification [of diversity], but rather all classifications.” *Id.* The opponents also suggest the bill would violate the Equal Protection Clauses of the U.S. Constitution and the California Constitution. *Id.*

101. See Loi 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle [Law 2011-103 of January 27, 2011, on the Balanced Representation of Women and Men on Boards of Directors and Supervisors and Equality], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 28, 2011, p. 1680. France adopted a law that requires men and women each to have at least 40% representation on corporate boards in 2011. *Id.* However, this quota compels *mixité*, which roughly translates to sex diversity, but refers to a clear binary of male/female, mandating a binary distinction between men and women. *Mixité*, LAROUSSE FRENCH DICTIONARY, <http://www.larousse.fr/dictionnaires/francais/mixite/C3%A9A9/51851> (last visited Aug. 28, 2019); see also David A. Matsa & Amalia R. Miller, *A Female Style in Corporate Leadership? Evidence from Quotas*, 5 AM. ECON. J. 136, 137 (2013); Clark, *supra* note 13 (explaining that Norway established a corporate board quota of 40% for either gender). Any person can acquire any skill set regardless of identity, and therefore, identity should not be a limiting factor: “Men and women may differ in the tools they choose to acquire, yet this does not in any way imply that they differ in the perspectives, heuristics, interpretations, and predictive models that they *could* acquire.” PAGE, *supra* note 10, at 307.

102. See generally KATE BORNSTEIN, GENDER OUTLAW: ON MEN, WOMEN AND THE REST OF US 65–69 (1994) (discussing the fluidity of gender and sex). The binary excludes persons of other sexes and genders, leaving them in a position of uncertainty. See *id.* People may transition from one sex to another or occupy a middle ground as a third sex or intersex. See *id.* They may also change from one gender to another, with or

Furthermore, while Europe embraces quotas for women, U.S. debates over equality remedies grow more conflicted, as evidenced by the market response to the California quota.¹⁰³ Moreover, quotas in the United States would face substantial constitutional challenges, as we already see in response to the California quota.¹⁰⁴

B. How Incumbency Reduces Diversity

In the midst of this fraught debate, we considered whether the *length* of board terms might affect inclusion efforts, shifting the focus from direct intervention to facilitating market forces that could improve diversity. Rising generations of professionals reflect greater diversity. Perhaps one way to generate greater inclusion would be to reduce incumbency to facilitate the inclusion of new perspectives.¹⁰⁵ Newness matters because of the immense privilege incumbency confers on those possessing it.¹⁰⁶

Political science literature on male overrepresentation in politics sheds light on this issue in the corporate context. Scholars have demonstrated the ways in which male dominance reproduces itself.¹⁰⁷ Male incumbents draw on two interrelated components: given and earned advantages.¹⁰⁸ “Given advantage,” a status that confers advantages on members of the dominant group, members

without medical assistance, without the purpose of “passing” as the other gender. *Id.* Categories such as drag queens and drag kings involve people who play around with gender identity and may not fall into such easy categorization. *Id.*

103. See Joseph Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California’s SB 826*, at 2–7 (Rock Ctr. for Corp. Governance, Working Paper No. 232, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3248791.

104. Felix von Meyerinck et al., *As California Goes, So Goes the Nation? The Impact of Board Gender Quotas on Firm Performance and the Director Labor Market* 38 (Feb. 22, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3303798; see also Tracy A. Thomas, *Reconsidering the Remedy of Gender Quotas*, HARV. J.L. & GENDER (Nov. 21, 2016), <http://harvardjlg.com/2016/11/reconsidering-the-remedy-of-gender-quotas/>.

105. Li & Wahid, *supra* note 26.

106. See generally Alison Bailey, *Privilege: Expanding on Marilyn Frye’s “Oppression,”* 29 J. SOC. PHIL. 104, 107–14 (1998).

107. Natalie Galea & Louise Chappell, *The Power of Masculine Privilege: Comparing Male Overrepresentation in the Australian Political and Construction Sectors*, EUR. CONSORTIUM POL. RES. 8 (2015), <https://ecpr.eu/Filestore/PaperProposal/db27f4fd-6ea4-47bc-ab7c-47e851750d69.pdf> (“It is for this reason, that Bjarnegård (2013) and Murray (2014) in the tradition of Eveline (1994; 1998) call for a shift in how gender inequality is problematized[.]”) See, e.g., ELIN BJARNEGÅRD, GENDER, INFORMAL INSTITUTIONS AND POLITICAL RECRUITMENT: EXPLAINING MALE DOMINANCE IN PARLIAMENTARY REPRESENTATION 1–15 (2013); Joan Eveline, *Heavy, Dirty and Limp Stories: Male Advantage at Work*, in GENDER AND INSTITUTIONS: WELFARE, WORK AND CITIZENSHIP 90 (Moirá Gatens & Alison Mackinnon eds., 1998); Murray, *supra* note 36, at 520–28.

108. Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women’s Studies*, in RACE, CLASS, AND GENDER: AN ANTHOLOGY 94 (3d ed. 1992); Bailey, *supra* note 106, at 107–14. Natalie Galea refers to male “privilege,” which we call “given advantage” because of the widespread use of the term in ways that may generate more heat than light. Galea & Chappell, *supra* note 107, at 8–9; see also ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 48 (1977).

who have “defined and allocated values to different social categories.”¹⁰⁹ Institutions reflect these rules and practices and allow privilege to lead to power through hierarchical systems.¹¹⁰ People from socioeconomically privileged backgrounds benefit from privileged educations, which lead to presumptions of competence and highly ranked jobs. Once in those positions, some with given advantage turn their positions into an “earned advantage” through an acquired “skill, asset, or talent.”¹¹¹ Simply stated, through hard work and advantageous placement, one can acquire abilities that have a market value.

Earned and given advantage intersect for incumbents, who acquire their position through networks of privilege and then benefit from their status as legitimate leaders within the company, leading firms to originally hire and, consequently, retain them. The incumbents have proven themselves through their earned advantage (often as former executives but also as experienced board members) and maintain the privilege of legitimacy, as they fit the demographic of the established hierarchy in firms. Not only do firms hesitate to force out these incumbents, but incumbents themselves think their contributions to the firm serve a unique and essential role.¹¹²

Nominating committees tend to choose people who have skills familiar and similar to theirs.¹¹³ Leaders find replacements for themselves in a process of corporate elite reproduction. As firms recruit and promote people, “forces exist which lead the men who manage to reproduce themselves in kind.”¹¹⁴ The leaders of the corporation view themselves as the standard-bearers for the corporation’s success; their skills prove essential for the firm’s continued profitability. Because corporate leaders believe their own abilities form a central part of the firm’s continued success, they identify for promotion those subordinates whose skills mirror their own.¹¹⁵ It is no coincidence that men dominate among such elites.

109. Galea & Chappell, *supra* note 107, at 8. See generally ALLAN G. JOHNSON, PRIVILEGE, POWER, AND DIFFERENCE (2001).

110. Bailey, *supra* note 106, at 116.

111. *Id.* at 109.

112. Interview transcript is with the authors.

113. See Amanda K. Packel, *Government Intervention into Board Composition: Gender Quotas in Norway and Diversity Disclosures in the United States*, 21 STAN. J.L. BUS. & FIN. 192, 198 (2016) (book review) (“The board nomination process relies very heavily on the social networks of existing directors, which tends to result in newly appointed directors with sociodemographic characteristics similar to those of existing directors.”); see also KANTER, *supra* note 108, at 68 (explaining that as men recruit and promote people, they find candidates that are reproductions of themselves, having the same skills as they do, which they view as valuable to the company).

114. *Id.* at vii.

115. See *id.* at 68 (“[T]he greater the tendency for a group of people to try to reproduce themselves, the more constraining becomes the emphasis on conformity.”).

C. Male Overrepresentation and Term Limits

Through this combination of earned advantage and privilege that develops and extends over generations, men—as individuals and as a group—maintain their positions within firms' boards, perhaps beyond their necessarily objective advantage over potential replacements. Viewed across the cohort of board members, this continued incumbency yields male overrepresentation, through which men's representation on boards extends beyond what they necessarily merit. Women's representation approaches only 20% of U.S. board positions.¹¹⁶ This male overrepresentation surpasses that of the political sphere, a phenomenon which has begun to receive appropriate scholarly attention in the past five years.¹¹⁷ Since men have locked in their control over corporate leadership, public policy should limit the feedback loop that allows these men to continuously select male successors and restrict the benefits of being an insider.¹¹⁸

Within the corporate sector, low turnover of directors limits the potential for increased diversity. If companies appoint new directors infrequently, the ability to increase the sex diversity of the board drops significantly.¹¹⁹ In addition, some cite lack of leadership experience as one of the main barriers to increased gender diversity in the boardroom.¹²⁰ Because women, as well as minorities, have yet to hold leadership positions within corporate America on the same scale and level as white men, this prerequisite for nomination limits the number of diverse candidates.¹²¹ However, the limited pool argument does not seem to fully explain the current disparities.¹²² Furthermore, the limited

116. See Kanter, *supra* note 17, at 987.

117. Rainbow Murray suggests “[c]urbing [male] overrepresentation [via] ceiling quotas for men”; this can “promote[] meritocracy by ensuring the proper scrutiny of politicians of both sexes,” as these quotas “provide[] an impetus for improving the criteria used to select and evaluate politicians[] neutralize the overly masculinized environment,” and “might facilitate better representation of both men and women.” Murray, *supra* note 36, at 520. See generally, BJARNEGÅRD, *supra* note 107.

118. Daria Roithmayr provides a parallel argument from the race context. She argues that whites established their power through cartels that consistently excluded blacks from success—whether that meant living in better neighborhoods or access to better jobs and professional networks. In all of these areas, Roithmayr demonstrates how whites “locked in” their advantage. DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* 36–38 (2014).

119. See, e.g., DHIR *supra* note 97, at 44; Nili, *supra* note 26, at 139 (“[T]he average turnover of board members and appointment of new directors has decreased in recent years. [As of 2016], the number of new appoint[ments] has dropped by twelve percent over the past five years and by twenty-seven percent over the past ten years.”).

120. Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 38 DEL. J. CORP. L. 377, 402–03 (2014). “The primary route to board directorship has long been through experience as a CEO,” and women have low representation in top executive positions, constituting only 3.5% of Fortune 1000 CEOs. *Id.*; see also DHIR, *supra* note 97, at 38–46.

121. See Lisa M. Fairfax, *Clogs in the Pipeline: The Mixed Data on Women Directors and Continued Barriers to Their Advancement*, 65 MD. L. REV. 579, 599–600 (2006) (discussing that corporations tend to select directors with executive experience); Rhode & Packel, *supra* note 120, at 402–03.

122. See Packel, *supra* note 115, at 198–99 (discussing that women indicate that low representation on boards results from the “closed social networks from which board appointments tend to draw,” whereas men indicate that low representation stems from the “pool problem”).

ability to network or add meaningful director experience for women exacerbates the issue, creating a self-perpetuating cycle.¹²³

Given how privilege entrenches men in board leadership positions and how male board members replace themselves in those positions with similarly skilled men, one might think that quotas for women present the only method for disrupting men's lock on corporate power. Although term limits may not eradicate sex disparities and that the various processes described above remain too strong to allow for more board churn to effect much change. However, several arguments explain why term limits and greater turnover in general might advance diversity, breaking the hold of incumbency on boards.

1. *Term Limits as Procedural Catalyst*

Existing literature shows how the implementation of quotas for women led firms to hire recruiting firms to assist them in finding women board members.¹²⁴ Firms with term limits or incentives to reduce tenure might adopt similar measures, as the hiring needs become more frequent. In systematizing the hiring process, the involvement of outside forces could disrupt the prior club-like process, where nominating committees simply selected classmates and others in their networks for new board positions.¹²⁵ Without the ability to extend terms, firms may find themselves using search firms to assist their process. Through the formalization of crafting descriptions, hiring firms and interviewing boards may be limited as to how much they can rely on potentially discriminatory notions of "fit" for the job.¹²⁶

In addition to the systemization of the search process, term limits could well expand the pool of candidates, therefore opening up more seats for women. Quotas for women certainly expanded the pool in Europe by drawing attention to potential board positions.¹²⁷ Term limits may provide comparable results to softer quotas. Forcing more turnover and creating more opportunities

123. *Id.* A 2012 study of 1,000 directors from fifty-eight countries found that while men tend to attribute lack of diversity to a "small pool" argument, women mostly attributed it to the male network argument. HEIDRICK & STRUGGLES, *supra* note 46, at 1–3; Galea & Chappell, *supra* note 107, at 7 (explaining that networking remains a masculine barrier for women seeking to be recruited to or retained on a board).

124. Rosenblum & Roithmayr, *supra* note 10, at 900; *see also* Murray, *supra* note 36, at 525 (explaining how quotas "modify [firms'] recruitment practices and free up seats for women candidates" on boards).

125. Amanda Packel indicates that women are underrepresented on boards due partly to social closure, or "the limited social networks of existing directors from which new directors often come." Packel, *supra* note 115, at 197 (quoting DHIR, *supra* note 97, at 71).

126. "Fit" also plays a key role in ensuring that new people conform to the expectations of the firm's established elite. *See, e.g.*, Lauren A. Rivera, *Hiring as Cultural Matching: The Case of Elite Professional Service Firms*, 77 AM. SOC. REV. 999, 1006 (2012). Firms often deploy the language of "fit" to describe whether an individual will succeed in a particular position. *Id.* at 1012. This subjective category reinforces extant social advantages for particular groups, and it subtly weeds out difference. *Id.* at 1003. The value of diversity may go beyond "fit" and its reduction of elite personnel to atomistic distinctions. *Id.* *See generally* PAGE, *supra* note 10.

127. *See* Rosenblum, *supra* note 22.

for people to join boards could inspire a broader group of people to seek board positions. This hypothesis, of course, assumes that people currently opt out of the pool because they presume a lack of real opportunity to penetrate the white male-dominated board club.

Moreover, newness itself may connect to diversity, as some work demonstrates. When new members join a group, it opens the potential to include distinct backgrounds, experiences and identities in the decision-making process.¹²⁸ Some of the most persuasive work on diversity demonstrates that the diversity of experience matters far more than diversity of identity.¹²⁹ If boards pursue better governance, they may deliberately seek out people with distinct experiences and identities so as to advance new or diverse voices on the board.

2. *Term Limits in Political Science*

Political science research points to potentially useful elements of term limits.¹³⁰ In the political context, term limits have been widely adopted,¹³¹ permitting more diversity in politics by forcing long-serving politicians out.¹³² Political service term limits, however, raise some issues. First, men may be more likely than women to hit the ground running when their networks mentor them on internal processes.¹³³ Experienced politician networks often exclude women, making it harder for them to acquire knowledge about how work happens.¹³⁴ Even so, it is conceivable that term limits do not foster greater women's participation.¹³⁵

Second, term limits, like any regulatory device, will relocate power. In the political context, politicians move from one role to another, with local executive

128. Rosenblum & Roithmayr, *supra* note 10, at 891 (explaining how women who were newly appointed to French boards were "more likely to be foreign, from non-elite professional and educational networks, less experienced and from specialties not traditionally represented on boards").

129. *See id.*

130. Murray, *supra* note 36 and accompanying text. *See generally* MAGDA HINOJOSA & JENNIFER M. PISCOPO, PROMOTING WOMEN'S RIGHT TO BE ELECTED: TWENTY-FIVE YEARS OF QUOTAS IN LATIN AMERICA (2013), <https://jenniferpiscopo.files.wordpress.com/2013/09/hinojosa-piscopo-final-english.pdf> (prepared for the Electoral Tribunal of the Federal Judicial Branch of Mexico).

131. *See* Carl Hulse, *As Trump Embraces Term Limits, Allies in Congress Pull Away*, N.Y. TIMES (Nov. 16, 2016), <https://www.nytimes.com/2016/11/17/us/politics/as-trump-embraces-term-limits-allies-in-congress-pull-away.html>.

132. *See generally* Susan J. Carroll & Krista Jenkins, Increasing Diversity or More of the Same? Term Limits and the Representation of Women, Minorities, and Minority Women in State Legislatures (Aug. 30, 2001) (unpublished manuscript), https://cawp.rutgers.edu/sites/default/files/resources/termlimitsdiversity_0.pdf.

133. *See* Murray, *supra* note 36, at 528.

134. *Id.* at 528. Masculine culture has served as a barrier to attracting women to firms and retaining women; such barriers "include informal recruitment, promotion and networking practices." Galea & Chappell, *supra* note 107, at 7.

135. Liz Farmer, *Term Limits Don't Lead to More Women in Politics*, GOVERNING (Apr. 22, 2016), <https://www.governing.com/topics/politics/gov-why-term-limits-dont-help-women-gain-ground-politics.html>.

offices often conferring more power to an individual than a legislative office.¹³⁶ A mayor has infinitely more options to influence policy than a city council member. If a firm adopts a term-limit arrangement, it may find that the remaining elite, more tenured members reshape the power structures to retain their power. This correlates to Nili's "new insider" argument, in which firms may respond to term limits by adopting informal rotations of company executives across leading firms, akin to cross-ownership arrangements in Europe.¹³⁷ Despite these potential unintended consequences, if we accept that term limits cannot provide a panacea, they do present important opportunities for improved governance.

3. *Term Limits and the Changing Landscape of Shareholder Engagement*

Granted, it may be the case that the structural bias that plagues boards may remain with each newly appointed member. The argument follows that term limits on their own do not alter the nature of or expand the pool of candidates, nor do they alone change the perception of what makes someone a valuable member of the board. If the definition of skills and expertise remains unchanged, perhaps term limits do not alter much, especially considering the already existing wide pool of male elites.

Yet, unlike other areas of corporate law where incumbents have the latitude to conduct the business of the corporation,¹³⁸ board composition and sex diversity have become a focal point of the investor community.¹³⁹ Calls for increased sex diversity in boardrooms are not new.¹⁴⁰ With increasing evidence

136. See HINOJOSA & PISCOPO, *supra* note 130, at 11–12.

137. See generally MARK J. ROE, THE POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE 49–61 (2003); Mark J. Roe, *Political Preconditions to Separating Ownership from Corporate Control*, 53 STAN. L. REV. 539, 570–73 (2000).

138. "Business-judgment rule" refers to the judicial:

presumption that in making business decisions not involving direct self-interest or self-dealing, corporate directors act on an informed basis, in good faith, and in the honest belief that their actions are in the corporation's best interest. This rule shields directors . . . from liability for unprofitable or harmful corporate transactions if the transactions were made in good faith, with due care, and within the directors' or officers' authority.

Business Judgment Rule, BLACK'S LAW DICTIONARY (10th ed. 2014).

139. Beth Healy, *State Street Global Advisors Presses Companies It Invests in to Add Women to Boards*, BOS. GLOBE (Mar. 7, 2017), <https://www.bostonglobe.com/business/2017/03/07/state-street-global-advisors-presses-companies-invests-add-women-boards/cE1LWXt6tK7DfveYnIFmpJ/story.html>.

140. See, e.g., KANTER, *supra* note 108; Kanter, *supra* note 17 (arguing in 1977 for critical mass theory and the need for boards to have at least 35% of directors be female to introduce new perspectives and increase corporate performance). For continued advocacy of the need for representation see FISHER, *supra* note 17. See also Li & Wahid, *supra* note 26 (discussing studies by Stevens (1978), Staw and Ross (1980), Janis (1982), and Beasley (1996) which explored board tenure length and its relation to board governance).

linking boardroom diversity with company performance,¹⁴¹ the push for diversity has gained traction within the investor community.¹⁴² State Street, Vanguard, and BlackRock have all taken public steps to promote and advocate for greater board diversity.¹⁴³ State Street and BlackRock have specifically drawn a line in the sand regarding sex diversity: promote more women or risk being voted out.¹⁴⁴ Even more recently, the New York City Comptroller and the New York City Pension Funds launched their own initiative focusing on board diversity disclosure,¹⁴⁵ and ISS and Glass Lewis have announced a new focus on gender diversity.¹⁴⁶

Investors have also been supporting these proposals more broadly.¹⁴⁷ Diversity proposals that were voted on received, on average, 28.3% of votes cast in 2017—compared to only 19.1% of votes cast in 2016—with 25% of such proposals passing and many more settling prior to a vote.¹⁴⁸ Most of these proposals requested that boards increase the diversity of their candidate pools, establish practices for identifying and adding female board directors,¹⁴⁹ and

141. *The Bottom Line: Connecting Corporate Performance & Gender Diversity*, CATALYST (Jan 15, 2004), <http://www.catalyst.org/media/companies-more-women-board-directors-experience-higher-financial-performance-according-latest>. One survey affirms that “greater diversity in boards and management are empirically associated with higher returns on equity, higher price/book valuations and superior stock price performance.” CREDIT SUISSE, *THE CS GENDER 3000: WOMEN IN SENIOR MANAGEMENT 3* (2014), <https://www.calpers.ca.gov/docs/diversity-forum-credit-suisse-report-2015.pdf>.

142. Healy, *supra* note 139.

143. See, e.g., Chasan, *supra* note 94; Vlastelica, *supra* note 94.

144. Sharo M. Atmeh et al., *State Street Global Advisors Announces New Gender Diversity Guidance*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Mar. 9, 2017), <https://corpgov.law.harvard.edu/2017/03/09/state-street-global-advisors-announces-new-gender-diversity-guidance/>; *BlackRock Vows New Pressure on Climate, Board Diversity*, CNBC (Mar. 13, 2017, 3:48 AM), <http://www.cnbc.com/2017/03/13/blackrock-vows-new-pressure-on-climate-board-diversity.html>.

145. *CamberView Partners, NYC Pension Funds Boardroom Accountability Project Version 2.0*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Sep. 19, 2017), <https://corpgov.law.harvard.edu/2017/09/19/nyc-pension-funds-boardroom-accountability-project-version-2-0/>.

146. *ISS Announces 2018 Benchmark Policy Updates*, ISS (Nov. 16, 2017), <https://www.issgovernance.com/iss-announces-2018-benchmark-policy-updates/> (announcing adoption of a new policy on board gender diversity in Canada); Dimitri Zagoroff, *Policy Guidelines Updated: United States, Canada, Shareholder Initiatives*, GLASS LEWIS (Nov. 22, 2017), <http://www.glasslewis.com/policy-guidelines-updated-united-states-canada-shareholder-initiatives/> (announcing “a phased policy that will see nomination committee chairs targeted with against/withhold recommendations if boards do not include a female director, or provide a cogent explanation for their absence, by 2019”).

147. See Green & Chasan, *supra* note 89. “ISS[, for instance,] recommended that shareholders vote ‘for’ all but two of the [diversity] proposals voted on in 2017.” Mueller & Ising, *supra* note 95.

148. Mueller & Ising, *supra* note 95.

149. For example, Discovery Communications received the following proposal in 2016:

Shareholders request that the Board of Directors prepare a report by September 2016, at reasonable expense and omitting proprietary information, on steps Discovery Communications is taking to foster greater diversity on the Board over time including but not limited to the following:

1. The inclusion of women and minority candidates in every pool from which Board nominees are chosen and our company’s plan to advance Board diversity;
2. An assessment of challenges experienced and progress achieved.

Discovery Commc’ns, Inc., Proxy Statement (Schedule 14A), at 76 (Mar. 30, 2016). In 2017, Discovery received the following proposal:

provide reports on actions taken by boards to increase diversity, or both.¹⁵⁰ One way investors affect policy is by withholding votes from directors' nominees to signal their dissatisfaction to the board.¹⁵¹

As a result, women are more likely to fill new seats. Indeed, women and minorities accounted for half of the 397 newest independent directors at S&P 500 companies in 2017.¹⁵² Additionally, the California State Teachers Retirement System (CalSTRS), a pension fund and activist investor, submitted letters to 125 California corporations without female directors, strongly suggesting the inclusion of women on the board.¹⁵³ Subsequently, thirty-five of these boards added at least one woman.¹⁵⁴

Shareholders request that the Board of Directors of Discovery Communications adopt a policy for improving board diversity (the 'Policy') requiring that the initial list of candidates from which new management-supported director nominees are chosen (the 'Initial List') by the Nominating and Corporate Governance Committee should include (but need not be limited to) qualified woman [sic] and minority candidates. The Policy should provide that any third-party consultant asked to furnish an Initial List will be asked to include such candidates.

Discovery Commc'ns, Inc., Proxy Statement (Schedule 14A), at 89 (Apr. 5, 2017).

150. See generally Rajeev Kumar, *2016 Annual Corporate Governance Review*, GEORGESON (2016), <https://www.georgeson.com/us/Documents/acgr/acgr2016.pdf>. Though influential institutional investors such as the California Public Employees' Retirement System (CalPERS) strongly support such proposals, some fund managers prefer to vote against such proposals and engage directly with the board. See, e.g., Green & Chasan, *supra* note 89.

151. If management ignores successful shareholder proposals, proxy advisory firms are likely to recommend against votes on individual directors (or the entire board), and such directors could be subject to potential withhold campaigns. See, e.g., GLASS LEWIS & CO., PROXY PAPER GUIDELINES: 2015 PROXY SEASON 7 (2015), https://web.archive.org/web/20160401213843/http://www.glasslewis.com/assets/uploads/2013/12/2015_GUIDELINES_United_States.pdf; INSTITUTIONAL S'HOLDER SERVS., UNITED STATES SUMMARY PROXY VOTING GUIDELINES: 2015 BENCHMARK POLICY RECOMMENDATIONS 13 (2014), <https://www.issgovernance.com/file/policy/2015summaryvotingguidelines.pdf>. "In essence, such practice has transferred so[-]called precatory shareholder proposals into quasi-binding resolutions." Kobi Kastiel & Yaron Nili, *In Search of the "Absent" Shareholders: A New Solution to Retail Investors' Apathy*, 41 DEL. J. CORP. L. 55, 76 (2016); see also Paul Rose, *Shareholder Proposals in the Market for Corporate Influence*, 66 FLA. L. REV. 2179, 2189-90 (2014). See generally Yonca Ertimur et al., *Board of Directors' Responsiveness to Shareholders: Evidence from Shareholder Proposals*, 16 J. CORP. FIN. 53 (2010) (providing empirical evidence that managers and directors who ignore majority-vote shareholder proposals are more likely to face sanctions in the labor market); Kobi Kastiel, *Against All Odds: Hedge Fund Activism in Controlled Companies*, 2016 COLUM. BUS. L. REV. 60 (discussing the mechanism behind the increasing disciplinary effect of SEC Rule 14a-8 shareholder proposals).

152. Jeff Green, *Women & Minorities Are the Majority of New Board Seats for the First Time*, BLOOMBERG (Dec. 6, 2017, 11:15 AM), <https://www.bloomberg.com/news/articles/2017-12-06/women-minorities-capture-most-new-board-seats-for-first-time>. According to a recent survey released by Spencer Stuart, of 397 independent director slots open in the 2017 proxy season, 36% went to women. See 2017 BOARD INDEX, *supra* note 7, at 3.

153. David A. Katz & Laura A. McIntosh, *Corporate Governance Update: Prioritizing Board Diversity*, HARV. L. SCH. F. CORP. GOVERNANCE & FIN. REG. (Jan. 30, 2017), <https://corpgov.law.harvard.edu/2017/01/30/corporate-governance-update-prioritizing-board-diversity/>.

154. *Id.*

4. Empty Term Limits

Not all term limits are created equal. As we further detail in Part III below, a great variance exists in the design of term limits. In that respect, for term limits to truly achieve their goal of limiting the ability of directors to overstay their time on a board, they must be “effective” term limits. In many cases, companies may announce the adoption of “empty” term-limit arrangements—ones with long implementation periods or extensive exemptions. These empty term-limit arrangements are designed in a manner that would not apply to the vast majority of directors and would render them ineffective.

For instance, take a company that adopts a term-limit arrangement that requires a director to leave after twenty years of service but also allows the board to extend the tenure of a director at its discretion. Although most directors retire before serving for twenty years, the board is likely to extend the tenure even beyond twenty years if a director is not ready to retire.

To be sure, even in the small subset of companies in the United States that have addressed board tenure, a majority set their threshold at or above fifteen years,¹⁵⁵ with many including exceptions for discretionary extensions by the board.¹⁵⁶ Therefore, for term limits to be a useful tool in the context of sex diversity, they must first be designed as an effective mechanism for creating turnover. Not surprisingly, in light of the lax term-limit arrangements, firms with term limits exhibit mixed results compared to a matched sample of firms without term limits.¹⁵⁷ These mixed results suggest both what drives the adoption of term limits and the need for more effective term limits.

As Figures 1 and 2 demonstrate, term-limit companies exhibit striking differences compared to the larger universe of companies, as well as to the set of matched companies. Whether as a direct result of the tenure limit or because these companies simply attend more to tenure as a corporate governance issue, term limit firms have a lower tenure than the rest of the sample, as well as when compared with the matched sample.

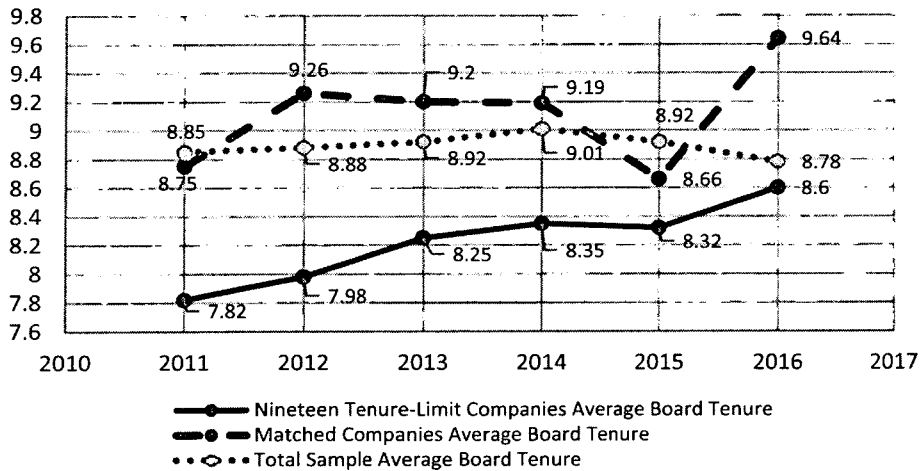
In 2016, for example, the term-limit sample’s average tenure was 8.6 years while in the matched sample it was 9.64 years. It should be noted that while the total sample’s average tenure has seen a decline in the last few years, average tenure has been trending up in the term-limit sample.

155. 2017 BOARD INDEX, *supra* note 7, at 5; Julie Hembrook Daum, *Board Evolution: The Forces Driving Board Composition and Succession*, in 2018 GOVERNANCE OUTLOOK: PROJECTIONS ON EMERGING BOARD MATTERS 1, 1 (2018), <https://www.spencerstuart.com/-/media/pdf-files/research-and-insight-pdfs/nacd2018.pdf>.

156. See, e.g., MASTERCARD INC., CORPORATE GOVERNANCE GUIDELINES 6 (2015), https://s2.q4cdn.com/242125233/files/doc_downloads/2018/10/Corporate-Governance-Guidelines-Sept-2018-Final.pdf [hereinafter MASTERCARD CORPORATE GOVERNANCE GUIDELINES].

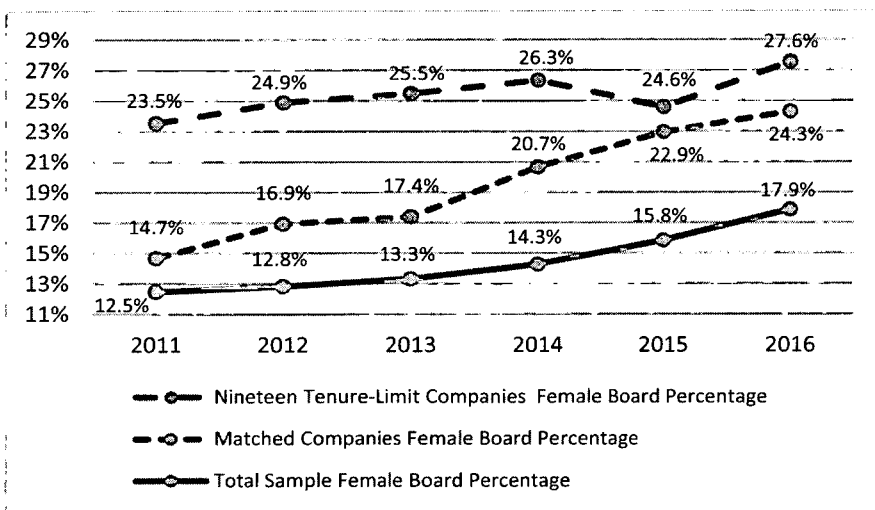
157. This is based on propensity score matching.

Figure 1. *Average Board Tenure in a Matched Sample*



Similar findings appear in Figure 2 below. The ratio of sex diversity in the term-limit sample surpasses both that of the matched sample and of the S&P 1500. For instance, in 2016, the percentage of women on boards in the S&P 1500 was 17.8%, while it stood at 27.5% in the term-limit sample. Yet again, the trend lines offer a more nuanced story. While the S&P 1500 and the matched sample saw significant improvement over the last six years, the increase in sex diversity among the term-limit firms proved more muted. In that respect, it seems that although the tenure-limit firms began from a better position, other companies are catching up.

Figure 2. *Sex Diversity Ratio in a Matched Sample*



Indeed, Figures 1 and 2 indicate that while term-limit firms have performed better in having lower overall tenure and higher sex diversity, their trend lines lag behind the rest of the market, including their matched firms. Tables 1 and 2 confirm these results, showing a negative (nonsignificant) correlation between increased tenure and diversity in the term-limit firms, while surprisingly showing a positive correlation in the matched sample.¹⁵⁸

Table 1. *Nineteen Companies with Term Limits*

	Female Board Percentage	Female Board Percentage	Female Board Percentage
Average Tenure	-0.0018	-0.0023	-0.0083
Year	0.0083	0.0082	0.0083
More Than 30% of Board with Fewer Than Six Years of Tenure		-0.0081	
More Than 50% of Board with Fewer Than Six Years of Tenure			-0.0073
Constant	0.2229***	0.2336***	0.2299***
N	131	131	131
R2	0.0188	0.0194	0.0193

Table 2. *Nineteen Matched Companies*

	Female Board Percentage	Female Board Percentage	Female Board Percentage
Average Tenure	.0027	.0076**	-.0006
Year	.0163***	.0151***	.0161***
More Than 30% of Board with Fewer Than Six Years of Tenure		.0466**	
More Than 50% of Board with Fewer Than Six Years of Tenure			-.0374
Constant	.0964***	.0278	.1336***
N	133	133	119
R2	.1583	.1984	.1746

158. Tables 1 and 2 present the results from Ordinary Least Square regressions, where the dependent variable is Female Board Percentage. This data includes nineteen companies with board-tenure limits and nineteen companies that match with the above table based on propensity score matching. Each column presents OLS results for Average Board Tenure, Year, and whether more than 30% or 50% of the board had fewer than six years of Tenure. Because the dependent variable is expressed in the form of a percentage, each variable indicates the percentage point change based on a one-unit change of the variable. For example, in the first column of Table 1, a one-year increase in Average Board Tenure results in a 0.12 percentage point decrease in Female Board Percentage, and in the first column of Table 2, a one-year increase in average board tenure results in a 0.32 percentage point increase in Female Board Percentage. Asterisks (***, **, *) indicate statistical significance (at 1%, 5%, 10%).

Firms that adopted term limits have better male-to-female ratios and lower overall tenure compared to those that did not. Interestingly, we also documented a much stronger trajectory of improvement within the companies that did not adopt term limits.

In that sense, after an initial period of refreshment, companies with term limits may experience stagnation. There may even be some tokenism at work, shielding these firms from further investor pressure based on their superior baseline statistics. Specific term-limit arrangements must be appropriate for a company's governance structure.

In sum, term limits may foster increased inclusion of distinct experiences and identities. As with any remedy, policymakers must be aware of circumvention efforts to ensure that these mechanisms truly advance their goals. Indeed, as this Part demonstrated, of the few firms with term limits in place, only a few have implemented their limits with any efficacy.

III. TERM LIMITS CORRELATE WITH INCREASED SEX DIVERSITY

Parts I and II laid out the normative backdrop regarding term limits and the potential use of tenure restrictions in the context of promoting better sex diversity in boardrooms. Yet, Part II also demonstrated the challenge posed by term-limit data. We now turn to examine the envisioned product of widely adopted and effective term limits—greater board turnover (often referred to as board refreshment).

Part III provides novel empirical findings regarding the interaction of board refreshment with sex diversity. We find that board turnover does in fact correlate with an increase in sex diversity.

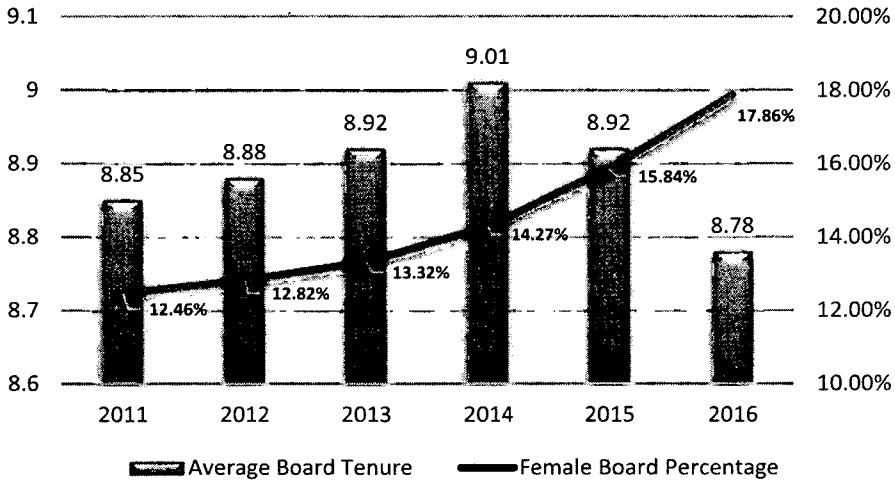
Our findings draw on quantitative and qualitative data. First, we examined the S&P 1500 companies and provided overall data on board turnover and sex diversity.¹⁵⁹ Second, we investigated whether S&P 1500 firms that have gone through a tenure “shock”—reflected through a large drop in their average board tenure—have also experienced a diversity boost. In addition to the quantitative data, we conducted interviews with several high-ranking executives in S&P 1500 companies to survey their views on term limits and board diversity. From the data above, we get a more complete picture of how tenure correlates with sex diversity.

159. See *supra* note 24 and accompanying text.

A. *The Correlation Between Tenure and Diversity*

The overall trends in diversification provide essential background for understanding how turnover affects firms. As Figure 3 notes, recent years have seen a widespread trend toward increased inclusion of women on boards.

Figure 3. *Overall Trends in the S&P 1500*



Overall, firms showed a marked increase, from nearly 12.5% in 2011 to nearly 18% in 2016. This increase in the United States occurred without any major regulatory efforts—it is owed to the increasingly widespread presumption that firms without any women on their boards fail to meet norms of governance.¹⁶⁰ Importantly, Figure 3 also shows that after a steady increase in the average tenure of boards, the last few years have reversed the trend. Starting in 2015, board tenure has been declining, and as Figure 3 illustrates, that decrease in average tenure has been accompanied by an increase in the rate of women who joined S&P 1500 boards.

The broader phenomenon reveals how prominent the effect of turnover is. Table 3 provides a regression analysis of the S&P 1500 companies over the 2010–2016 time period. A decrease in board tenure correlates significantly with an increase in sex diversity. Conversely, a one-year increase in average board tenure results in a 0.24 percentage point decrease in female board percentage.

160. See Business Roundtable, *supra* note 32 (indicating that to achieve effective board structure, it is vital to “develop a framework for identifying . . . diverse candidates that allows the nominating/corporate governance committee to consider women, minorities and others with diverse backgrounds as candidates for each open board seat”).

But when a substantial number of relatively new directors populate the board, the marked effects surface. When at least 30% of a board has served for less than six years, an increase in the average tenure is actually correlated with an improved ratio of women on the board. Perhaps many women may tend to stay for shorter tenures,¹⁶¹ therefore improving the ratios on boards where they do stay longer.

However, when at least half of the board is relatively new, an increase in the tenure again correlates with reduced sex diversity. It may be that the board has exhausted the turnover process, reducing the likelihood of adding new members, including women.

Table 3. *Full Sample*¹⁶²

	Female Board Percentage	Female Board Percentage	Female Board Percentage
Average Tenure	-0.0024***	-0.0012***	-0.0032***
Year	0.0108***	0.0107***	0.0108***
More Than 30% of Board with Fewer Than Six Years of Tenure		0.0163***	
More Than 50% of Board with Fewer Than Six Years of Tenure			-0.0117***
Constant	0.1302***	0.1097***	0.1402***
N	9,416	9,416	9,416
R ²	0.0511	0.055	0.0528

While in this study we focus on one driver of sex diversity on boards—director tenure—it is important to underscore that the reasons leading companies and directors to board refreshment vary. They could stem from a push by investors for greater diversity, business struggles, activism events, or other reasons. These factors can help explain why directors may have longer tenure in some companies but not in others. We do, however, highlight the fact that when companies do add new directors to the boardroom, those additional directors tend to improve board diversity.

B. *The Impact of Tenure Shock on Sex Diversity*

This Part turns to the question of whether significant board turnover (whether through term limits or not) *is followed by* greater sex diversity. We define

161. See generally Nili, *supra* note 26.

162. The dependent variable is Female Board Percentage. Each column presents OLS results for Average Board Tenure, Year, and whether more than 30% or 50% of the board had fewer than six years of Tenure. The More than 30% and 50% variables are a null variable for whether that statement is true. Asterisks (***, **, *) indicate statistical significance (at 1%, 5%, 10%).

a tenure shock as a situation in which the board's aggregate average tenure has dropped by more than one full year. Since the tenure of each incumbent board member increases each year, a full-year drop reflects a departure of more than one director, or at the very least the departure of a very long-tenured director, who often carries significant clout in the boardroom. Given that, on average, only 5% of directors leave their positions in a given year,¹⁶³ the departure of multiple directors in the same year constitutes an uncommon event and therefore constitutes what we term a "tenure shock."

While we make no normative assumptions as to the reason firms experience a tenure shock, we do find that when boards lose more directors than they otherwise normally would, they subsequently experience improvement in their sex-diversity ratio. Although various reasons may cause the tenure shock, in general such firms prove more likely to improve their diversity compared to those who do not. While we do not endeavor to identify causality, we do add color to the finding of a negative correlation between tenure and diversity, showing that *following* a tenure shock, diversity improves.

Table 4 below explores the effect of decreasing the average tenure in a company by one year on the sex diversity in that same year and the following year. We find that this drop of tenure is positively associated with an increase in the average proportion of female board members in that company in the following two years.

Table 4. Tenure Shock Correlates with Greater Sex Diversity¹⁶⁴

	Diversity in 2015–2016 After a Tenure Shock ¹⁶⁵ in 2015	Diversity in 2014–2015 After a Tenure Shock in 2014	Diversity in 2013–2014 After a Tenure Shock in 2013	Diversity in 2012–2013 After a Tenure Shock in 2012	Diversity in 2011–2012 After a Tenure Shock in 2011
Improved Diversity	0.008*** (0.001)	0.005*** (0.001)	0.006*** (0.001)	0.004*** (0.001)	0.004*** (0.001)
Constant	0.021*** (0.002)	0.018*** (0.001)	0.016*** (0.001)	0.012*** (0.001)	0.010*** (0.001)

Note: *P<0.1; **P<0.05; ***P<0.01

163. 2017 BOARD INDEX, *supra* note 7, at 2; *see also infra* Part I.

164. OLS regressions of change in diversity on change in tenure. Positive coefficients suggest that a decrease in tenure is associated with an increase in diversity. Diversity is measured as a proportion (0–1). Here we are looking at one-year lags.

165. A tenure shock is defined as a drop of one year or more in the average tenure of the board in the following year.

Table 5 examines a longer horizon for the tenure shock and finds that even when the shock in tenure spans over two years, sex diversity improves similarly.

Table 5. *Tenure Drops Over Two-Year Periods Correlate with Greater Sex Diversity*¹⁶⁶

	Diversity in 2015–2016 After a Tenure Shock ¹⁶⁷ During 2013–2015	Diversity in 2014–2015 After a Tenure Shock During 2012–2014	Diversity in 2013–2014 After a Tenure Shock During 2011–2013	Diversity in 2012–2013 After a Tenure Shock During 2010–2012
Improved Diversity	0.005*** (0.001)	0.005*** (0.001)	0.003*** (0.001)	0.004*** (0.001)
Constant	0.032*** (0.002)	0.028*** (0.002)	0.022*** (0.002)	0.019*** (0.002)

Note: *P<0.1; **P<0.05; ***P<0.01

Taken together, Tables 4 and 5 demonstrate that boards that experienced a great deal of turnover added more women than boards lacking increased turnover.

C. *Qualitative Data on Term-Limit Firms*

1. *The Term-Limit Companies*

Qualitative data on the firms that have adopted term limits reveal the promise of these measures as well as their limitations. The provisions that firms adopt vary significantly, and this variation makes it even more challenging to draw conclusions as to the effectiveness of these arrangements. As Table 6 illustrates, such policies vary in term length, in effective dates, and in the ability of the board to override tenure limits—what we term “exemption clauses.”

166. OLS regressions of change in diversity on change in tenure. Positive coefficients suggest that a decrease in tenure is associated with an increase in diversity. Diversity is measured as a proportion (0–1). Here we are looking at one-year lags for tenure drop.

167. A tenure shock is defined as a drop of one year or more in the average tenure of the board in the following year.

Table 6. *Term-Limit Provisions*

Company	Term Limit Length	Age Limit	Year	Exemption Clauses
Alaska Air	15		2016	Only applies to directors nominated after 2012. Board retains right to waive this standard.
Allegion	10	70	2014	
AvalonBay Communities	12		2016	The exact timing will depend on the needs of the board. Only applies to nonemployee directors.
CBRE Group	12		2015	
Disney	15		2014	Board retains right to decide whether to accept director's letter of resignation at the end of their term. Tenure policy only applies to nonemployee directors.
Frontier	15		2006	The Board retains the right to renominate.
GE	15	75	2015	Board may renominate in "special circumstances."
Illumina	10		2015	Only applies to directors nominated in 2016 or later. Employee directors are exempt. Board may renominate under special circumstances.
Flavor & Fragrance Specialties	12	72	2011	Exemption for officers and any "grandfathered persons," whose age is equal to or exceeds seventy-five.
Juniper Networks	10	75	2008	
Mastercard	15	72	2016	No more than two directors shall retire pursuant to this provision at any one time. Board can extend under extenuating circumstances.
Patterson Companies	20	75	2013	Only applies to independent directors. Governance committee can grant exceptions.
Proctor & Gamble	18	72	2015	Board can grant exemptions.
Qorvo	15	75	2015	Only applies to nonemployee directors.
Signet Jewelers	15	75	2017	Board can grant exemptions.
Target	20		2014	Only applies to nonemployees. Board can grant exemptions.
Varian	15		2007	
Walmart	12	75	2015	Exemption for directors with particular skills until a suitable replacement is found.
Xcel Energy	15	72	2005	Only applies to nonemployee directors nominated after 2000.

As evidenced by the table, typical term limit lengths range from ten to eighteen years, with Target imposing the twenty-year outlier limit. Some firms, like General Electric (GE), Mastercard, and Proctor & Gamble, enforce a mandatory retirement age as well. The most common limits are seventy-two and seventy-five years, though Allegion kicks in retirement at seventy years.

Exemption clauses abound. For example, Target and Disney exempt all employee-directors, while GE only exempts the company CEO, provided that it may re-nominate directors in “special circumstances.” Mastercard’s policy more broadly allows the Board to extend a director’s term in “extenuating circumstances.”

Alaska Air’s policy represents a typical example of a large-cap firm, imposing a 15-year term limit for its board members that applies to directors who began in 2012 or later.¹⁶⁸ Per the policy, the board retains the right to waive the term limit at its discretion.¹⁶⁹ The limitations of this policy reveal how slowly typical term limits work—Alaska Air’s term would only affect directors after 2027 at the earliest. Even so, Alaska Air’s board has become much more diverse since the adoption of this provision.¹⁷⁰

Walmart implemented a similar policy, including a twelve-year term limit with exceptions to encourage “a mix of longer-tenured directors and newer directors with fresh perspectives.”¹⁷¹ Since adoption, Walmart’s board has gotten smaller and younger.¹⁷² The board’s median age dropped from sixty-five in 2015 to fifty-four in 2017, a significant, eleven-year difference.¹⁷³ This change reflects the potential for term limits to improve age and gender diversity.

168. See ALASKA AIR GRP., INC., CORPORATE GOVERNANCE GUIDELINES 4 (2018), <http://investor.alaskaair.com/static-files/5e331423-881f-4c65-b46d-3ddf762572fa> [hereinafter ALASKA AIR CORPORATE GOVERNANCE GUIDELINES]; 2017 BOARD INDEX, *supra* note 7, at 5.

169. ALASKA AIR CORPORATE GOVERNANCE GUIDELINES, *supra* note 168, at 4.

170. The board of directors for Alaska Air has gone from 30% female in 2011 to 50% female in 2018. See Alaska Air Group, Notice of Annual Meeting of Stockholders (Schedule 14A) 9–12 (2011), <http://investor.alaskaair.com/static-files/793c489e-36e7-450d-ac2c-12a9648ebba1> (listing ten candidates for the 2011 board of directors, three of which were women); Brad Tilden, *Leading the West Coast with 50% Women on Our Board*, ALASKA AIRLINES (Nov. 20, 2018), <https://blog.alaskaair.com/values/people/gender-diversity/>.

171. Walmart Stores, Inc., 2016 Notice of Annual Shareholders’ Meeting and Proxy Statement (Schedule 14A), at 30 (June 3, 2016).

172. See Reuters, *Why Walmart Is Shrinking Its Board of Directors*, FORTUNE (Apr. 21, 2016), <http://fortune.com/2016/04/21/walmart-board-directors/>; Kim Souza, *Median Age of Wal-Mart Stores Board of Directors Falls Below 55*, TALK BUS. & POL. (Apr. 25, 2017, 4:06 PM), <http://talkbusiness.net/2017/04/median-age-of-wal-mart-stores-board-of-directors-falls-below-55/>. Walmart’s changing board demographics support the utility of future research addressing the relationship between term limits and age diversity.

173. Souza, *supra* note 172. Regarding the simultaneous retirement of four board members, the Chairman of the Board of Directors Greg Penner says, “[W]e view this as a time to make our board more nimble, while maintaining its independence and further aligning on Walmart’s strategic priorities.” *Walmart Positions Board of Directors for the Future*, WALMART (Apr. 20, 2016), <http://news.walmart.com/2016/04/20/walmart-positions-board-of-directors-for-the-future>. These “strategic priorities” and “customer requirements” include a strong focus on technology and e-commerce. *Id.* Walmart demonstrates further commitment to new-age technological interests with the introduction of younger, more technologically inclined and already-involved directors like the president and CEO of Yahoo!, Inc. and the CEO and cofounder of Instagram. *Id.*

Importantly, firms enact tenure policies for various company-specific reasons—an aspect not reflected in Table 6. For example, GE adopted a fifteen-year term limit in September 2015 after shareholders led a two-year battle against the board.¹⁷⁴ The firm also adopted a retirement age and annual board evaluations—changes meant to force the Board to improve its governance.¹⁷⁵

On the other hand, Disney's tenure policy seeks "to balance the benefits of continuity with the benefits of fresh viewpoints and experience."¹⁷⁶ Disney Chairman and CEO Robert Iger, who led the firm through immense growth, discussed the negative effects of holding corporate power over a long term: "When your convictions prove to be right more than wrong, you get really confident. . . . You easily get more dismissive of other people's ideas and other people's convictions."¹⁷⁷ Iger's retirement in advance of his term's completion does not reflect the term limit's effect and reveals that often the departure of key talent has little to do with term-limit policies.¹⁷⁸ These examples demonstrate that term limits, as they currently exist, do not yet achieve the turnover that good governance demands.

174. *GE Announces Board Shakeup, Change in CEO Pay*, FOX BUS. (Mar. 14, 2016), <http://www.foxbusiness.com/markets/2016/03/14/ge-announces-board-shakeup-change-in-ceo-pay.html>. In a Q&A introductory portion of GE's 2016 proxy statement, lead director John J. Brennan discussed the fifteen-year director-term-limit policy enthusiastically, saying that it "came out of the Board's [own] self-evaluation process." Gen. Elec. Co., Notice of 2016 Annual Meeting & Proxy Statement (Schedule 14A), at 1 (Apr. 27, 2016) [hereinafter 2016 GE Proxy Statement]. Brennan believes that such a policy will allow for a more diverse board in terms of mixed ages and tenures. *Id.* GE's director qualifications' policy is geared towards creating "an experienced Board with expertise in areas relevant to GE." *Id.*; see also GEN. ELEC. CO., GOVERNANCE PRINCIPLES 3 (2017), https://www.ge.com/sites/default/files/GE_governance_principles.pdf. Because it makes sense that these relevant areas and the expertise about them will constantly evolve, the term-limit policy corresponds well with their future goals.

175. Cam C. Hoang, *Institutional Investors and Trends in Board Refreshment*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Apr. 8, 2016), <https://corpgov.law.harvard.edu/2016/04/08/institutional-investors-and-trends-in-board-refreshment/>.

176. THE WALT DISNEY CO., CORPORATE GOVERNANCE GUIDELINES 10 (2014), <https://ditm-twdc-us.storage.googleapis.com/Corporate-Governance-Guidelines.pdf>. An article dated December 2013 discusses board member Judith L. Estrin's tenure and her inability to stand for reelection due to her fifteen years of service, further implying that the term-limit implementation occurred before 2014. Jay Yarrow, *Twitter Cofounder Jack Dorsey Is Joining Disney's Board*, BUS. INSIDER (Dec. 23, 2013, 3:05 PM), <http://www.businessinsider.com/jack-dorsey-disney-board-2013-12>.

177. Brooks Barnes, *Robert Iger, Disney's C.E.O., Agrees to One-Year Extension*, N.Y. TIMES (Mar. 23, 2017), <https://www.nytimes.com/2017/03/23/business/media/robert-iger-disneys-ceo-agrees-to-one-year-extension.html>.

178. One imagines the rest of Disney's board finds changes like losing Iger at sixty-six years old with three years left in his term hard to digest, as his stepping down is neither the result of mandatory retirement or term-service tenure. Disney has struggled to find an adequate successor, as Iger's tenure brought Disney into major acquisitions like Pixar, Marvel Entertainment, and Lucasfilm, which led to Disney's 2016 \$7 billion box-office success. Tom Huddleston Jr., *Disney Extends CEO Bob Iger's Contract Through July 2019*, FORTUNE (Mar. 23, 2017), <http://fortune.com/2017/03/23/disney-extends-ceo-bob-iger-contract/>.

2. *Interview with Term-Limit-Company Executive*

We interviewed a corporate secretary for a large-cap, term-limit firm to ascertain the effects of the limit on the firm's governance. The corporate secretary reported that the term limit functions to guide the board in how to plan for succession:

We've jockeyed around who's going when. We may think a particular director is really important so we defer succession discussion and then move to focus on succession for another director. For example, we may be three-fourths of the way through a failed search for director A, and then quit and start to work on director B instead.¹⁷⁹

In this sense, the term limit provides a framework for considering how to adjust the board's composition.

This firm's board had a mindset that was generally progressive:

[T]he board is very progressively minded. That's their personality . . . Whoever chose these people to sit on the board, their profile is universally quite progressive. Not all the same person, and politics vary, but they're very aligned on certain topics. The board embraces warmly inclusion and diversity, but they'll tell you they're pragmatic—they'd be the last board to accept a quota; they don't believe in that, but they do believe in the diversity of experience at the table, and that implies diversity of other types—gender, race etc.¹⁸⁰

This mindset reflects the notion that sex diversity links in some circumstances with broader kinds of diversity. Inclusion of a term-limit provision can convey a desire for greater inclusion overall without explicitly mandating any gender-classification policies, such as a quota system.

The interview revealed a core truth as to why term limits prove essential to good governance:

Established companies will continue to fight as long as they can because it's difficult to change the game midstream. Few directors think they are subject to the rules. There's a reason they think the rules don't apply to them. They think they're special, and there's a reason—a real reason—that it's important for them to stay. It's asking them to be big and mature, and most people are not capable.¹⁸¹

In short, directors view their contributions to the firm as unique, and they view their membership on the board as one that cannot be duplicated. It is this faith in the uniqueness of their own contributions that creates a collective resistance to term limits and their implementation.

179. Telephone Interview with Corporate Secretary (July 14, 2017).

180. *Id.*

181. *Id.*

D. Discussion of the Main Findings

We analyzed the 1,500 largest firms in the United States to ascertain whether reduced tenure correlates to an increase in sex diversity on boards. The data confirms the significance of this correlation. To confirm this finding, we also examined firms with an outsized turnover—firms that have experienced what we call a tenure shock. These “tenure shock” firms see an improvement in sex diversity. We see that companies that go through unusual turnover (leading to a drop of more than one year in the average tenure of the board) improve their sex diversity in the subsequent years.

Before we interpret our data, the broader market’s shift toward more inclusion merits attention. This upward trend of inclusion with regard to sex now appears inexorable. Many of the world’s top firms reside in countries now subject to quotas for women on boards and their boards now include between one-third and one-half women. California brought quotas to the United States, and while we cannot ascertain whether its statute will survive a constitutionality challenge or whether other states will follow suit, state oversight has put firms on notice as to their inclusivity. The potential for legislation can only build more market pressure for inclusion.

As norms shift toward greater inclusion, firms with fewer women find themselves outside the norm. The first analysis, which reveals a correlation between turnover and increased sex diversity, makes perfect sense in the context of an overall market in which sex equality improves. Each instance of the replacement of a board position provides the firm with an opportunity for greater inclusion of women. In a context of rising equality, it makes sense that firms with more refreshment—more opportunities for equality—will include more women.

Interpreting our data with this background in mind, we credit this correlation to external and internal shifts. External forces include not only the overall market pressure but also the rise in investor and advocate activism. In the past, firms may have ignored activist investors, but now their response is a more receptive one. As sex diversity has grown over the last few years, companies have felt an increasing pressure to fill board seats that become vacant with sex-diverse nominees. Indeed, in that respect, the increased churn of board seats combined with the external pressure to fill these seats with women may substantially contribute to the correlation we identify.

Second, and perhaps more interesting, are the internal shifts taking place that may foster this higher level of inclusion. As boards reduce their tenure, they may also experience a positive culture jolt. As long-tenured male directors leave the board, the board includes a newer generation of directors. This generation will inevitably be more inclusive of women and may look outside the

old network that has mainly produced directors in the past.¹⁸² In that sense, the beginning of this transformation may unleash an *internal* pressure to diversify further. This internal pressure exists not only in any heightened-turnover situation but also when a tenure shock has occurred.

We must note that our findings show a correlation only. Our data set involves a broad group of the largest firms, but it covers the years after the 2008 financial crisis. After the crisis, several overlapping phenomena advanced a shift toward greater women's leadership. Studies revealed that some of the trading that took place pre-crisis resulted from excessively risky behavior engaged in by men. A variety of studies suggested a male propensity to engage in risk and female aversion to risk. Whether or not sex relates to risky decision-making, a broad swath of the market, including many management consultancies, spread this perception.

This phenomenon, simultaneous to the increased inclusion of women on boards, could partly explain the broader phenomenon of inclusion. Set against this broader context, we show that turnover intensifies diversity effects out in the marketplace by speeding up the frequency of board departure and entry. We cannot claim that heightened turnover would definitely have the same effect in every context, but in the current context of increased inclusion in response to the financial-crisis period, it does.

This Part has examined the relationship between tenure, turnover and board refreshment, and sex diversity. Board refreshment—under the current pressure from investors for better sex diversity—can improve sex diversity, and on its face, term limits may provide one route through which refreshment could be advanced. The next Part discusses these policy implications.

IV. POLICY IMPLICATIONS

Our findings suggest that policy—whether legislated or voluntary—should encourage reduced tenure to speed the integration of corporate leadership. Other jurisdictions have adopted hard or soft mandates for term limits. The United States, often reluctant to adopt state-driven solutions, may focus instead on private-sector efforts. Here, a variety of actors—from legislatures to activist investors—may consider efforts to foster board turnover. With our research, they may find more traction for term limits as a means to ensure good governance or as a channel to increase diversity on boards.¹⁸³

This Part explores the potential remedies available, starting with a summary of other countries' efforts, followed by a schematic assessment of the potential

182. See generally Rosenblum & Roithmayr, *supra* note 10. This article includes data from over two dozen interviews with current and former corporate board members from CAC-40 firms.

183. Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L.J. 145, 147–50 (2019).

remedies and a cost–benefit examination of the impact of these potential changes.

A. Countries with Term Limits

While some U.S. companies have adopted term limits for themselves, as a federal matter, neither the United States nor Canada mandates term limits. Yet “many other countries have either introduced limits on the length of time directors can serve or have added extra disclosure requirements to ensure companies have to explain why long-serving board members remain independent.”¹⁸⁴ The United Kingdom, for instance, imposes a nine-year limit on independent board members, after which directors constitute nonindependent members.¹⁸⁵ At the nine-year mark, a director must leave or become an insider; otherwise, the board must demonstrate why that individual’s tenure has not undermined independence.¹⁸⁶ This route permits boards to continue to benefit from experience while addressing the concerns of a decrease in the director’s independence. France has a similar requirement, mandating that directors lose their independent status after twelve years and thus not perform tasks that require independence, such as serving on the audit committee.¹⁸⁷

On the other hand, such limitations can interfere with the board’s business judgment and leave these experienced people with fewer tasks.¹⁸⁸ The critics of the United Kingdom’s term limits assert that the average tenure of the board, rather than the tenure of individual members, should be considered, bringing U.K. boards into line with the advocates for tenure diversity.¹⁸⁹ A focus on the tenure of the board as a whole would allow firms flexibility to keep certain board members longer, as long as the overall tenure meets certain requirements.¹⁹⁰

184. McFarland, *supra* note 40; *see also* Katz & McIntosh, *supra* note 54 (discussing comply-or-explain policies in firms).

185. Dou, Sahgal & Zhang, *supra* note 25, at 1. Six-year term limits have allowed the United Kingdom to gain more gender diversity on boards than the United States. Diane Brady, *To Get Women on Company Boards, Make Men Leave*, BLOOMBERG BUSINESSWEEK (Sept. 20, 2012, 5:06 AM), <http://www.businessweek.com/articles/2012-09-20/to-get-women-on-company-boards-make-men-leave#p1>.

186. Pozen, *supra* note 25. This rule only applies to companies that are publicly traded. *Id.*

187. McFarland, *supra* note 40.

188. *See* Pozen, *supra* note 25 (explaining how experienced board members add value to firms, as they are more likely to attend board meetings, become members of committees, and counterbalance chief executive authority); *see also* Vafeas, *supra* note 49, at 1044 (suggesting that term limits lead to wasting experienced directors’ talent and experience).

189. Katz & McIntosh, *supra* note 54. Na Li and Aida Sijam Wahid also note that “implementing term limits may result in better governance outcomes if [the limits] alter[] the mix of director tenure lengths.” Li & Wahid, *supra* note 26.

190. For example, the legitimacy of this policy draws on a broad sentiment against long board service in the United Kingdom, as two terms of three years is a typical board-membership duration. Sarah Frier, *J&J’s Mulcahy Says Term Limits May Add Women to Boards*, BLOOMBERG (Sept. 14, 2012), <http://www.bloomberg.com/news/2012-09-14/j-j-s-mulcahy-says-term-limits-may-add-women-to->

Other countries avoid such rigid term limits but suggest limiting a director's independence after a number of years. For example, Hong Kong requires a special board-wide resolution after a nine-year term—a hurdle companies tend to avoid.¹⁹¹ Spain recommends a twelve-year limit on independence.¹⁹² South Africa and Singapore both recommend a “rigorous review” of directors who serve more than nine years.¹⁹³ Additionally, Singapore requires that boards explain why the directors would be considered independent after nine years.¹⁹⁴ Norway suggests that boards reconsider a director's independence when the member “has served for a prolonged continuous period.”¹⁹⁵

Canada does not limit terms for board members. While federal provincial law limits the duration of individual terms to three years, no mandate exists regarding either an age or accumulation restriction.¹⁹⁶ The Canadian Securities Administrators—a collection of regulators from every province—have adopted a comply-or-explain policy for firms regarding the mechanism that they put into place for board renewal, including term limits.¹⁹⁷ Boards thus have to disclose the reasons for their noncompliance.

To that extent, some voluntary regulation of term limits occurs. Blakes, a leading Canadian corporate law firm, conducted an examination of 722 firms listed on the Toronto Stock Exchange.¹⁹⁸ “Only 19[%] disclosed that they have adopted director term limits and 56[%] disclosed that they have adopted a mechanism for board renewal other than director term limits. The most commonly disclosed mechanism for board renewal involved board assessments.”¹⁹⁹

boards.html (quoting an interview of Helena Morrissey, CEO of Newton Investment Management, in London).

191. *Id.*; see also WEIL, GOTSHAL & MANGES LLP, INTERNATIONAL COMPARISON OF SELECTED CORPORATE GOVERNANCE GUIDELINES AND CODES OF BEST PRACTICE: UNITED STATES, UNITED KINGDOM, FRANCE, GERMANY, OECD, NETHERLANDS, NORWAY, SWITZERLAND, AUSTRALIA, BRAZIL, CHINA, HONG KONG, INDIA, RUSSIA, UNITED ARAB EMIRATES 116 (2014).

192. McFarland, *supra* note 40.

193. *Id.*

194. *Id.*

195. *Id.*; WEIL, GOTSHAL & MANGES LLP, *supra* note 191, at 115.

196. See Canada Business Corporations Act, R.S.C. 1985, c. C-44; see also Business Corporations Act, R.S.Q., c S-31.1, art 110 (Can. Que).

197. See ONT. SEC. COMM'N, NATIONAL INSTRUMENT 58-101: DISCLOSURE OF CORPORATE GOVERNANCE PRACTICES, art. 10 (2016). The Canadian Securities Administrators has put into place an obligation to disclose the adoption of term limits for directors. *Id.* Article Ten of the NI 58-101 mandates that companies disclose:

whether or not the issuer has adopted term limits for the directors on its board or other mechanisms of board renewal and, if so, include a description of those director term limits or other mechanisms of board renewal. If the issuer has not adopted director term limits or other mechanisms of board renewal, disclose why it has not done so.

Id.

198. See John Tuzyk & Stefania Zilinskas, *Director Term Limits Not Common*, BLAKES (Oct. 9, 2015), <https://www.blakesbusinessclass.com/director-term-limits-not-common/>.

199. *Id.* (“Of the 137 issuers in the Sample Group that disclosed they have director term limits, just over half of that group disclosed they have director age limits in place. Twenty-four [percent] of that group

Larger firms, with a market capitalization of \$2 billion, were more likely to have limits, while smaller issuers had other mechanisms for board renewal.²⁰⁰

This range of legislation abroad grounds—but does not delimit—our understanding of available remedies, whether by legislative and private sector action.

B. Policy Options to Foster Turnover

Below, we present several potential policy paths. This Article presents data that may provide direction for policy. Rather than advocate for term limits, we seek to underscore the policy options which vary significantly in their scope and structure. We organize them from nonbinding and informal rules to those that impose mandates on firms, industries, or jurisdictions.

Expanding on the various options that firms and countries have adopted,²⁰¹ in Figure 4 we suggest a range of possible remedies that extend from the more flexible, privately chosen policies to the more fixed, state-regulated policies. Given the widespread reticence in the corporate sector to impose regulatory mandates, Figure 4²⁰² presents the variety of remedies possible: at the top appear remedies within firms,²⁰³ followed by industry-wide remedies,²⁰⁴ and at the bottom sit collective, regulatory measures. Each section contains a range of remedies that reveal more subtle variations.²⁰⁵ Some remedies on this chart currently exist within corporations or regulations, while we have suggested others based on current diversity remedies.

disclosed they have director tenure limits in place and the remaining 23[%] have both director term and age limits in place.”).

200. *Id.*

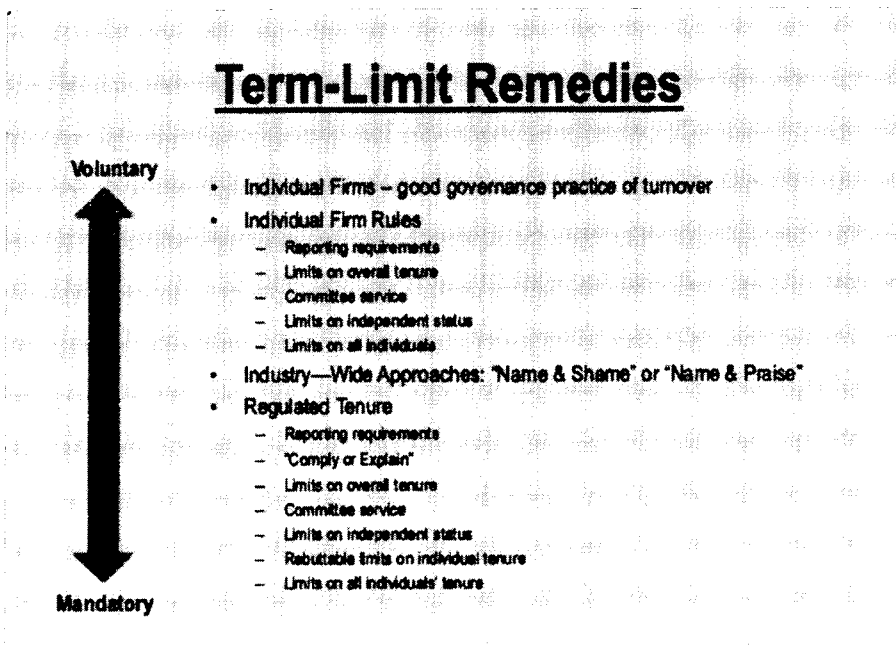
201. See *infra* Part III.C; Veltrop et al., *supra* note 40, at 446 (discussing how European and non-European regulators and firms in the United States “advocate to limit outside director tenure”); McFarland, *supra* note 40 (discussing how “[c]ountries around the world have introduced governance guidelines urging companies to adopt term limits for their boards”).

202. The structure of the chart draws on one by Jane Mansbridge in the context of political quotas for women. Jane Mansbridge, *The Descriptive Political Representation of Gender: An Anti-Essentialist Argument*, in *HAS LIBERALISM FAILED WOMEN?: ASSURING EQUAL REPRESENTATION IN EUROPE AND THE UNITED STATES* 19, 31 (Jytte Klausen & Charles S. Maier eds., 2001).

203. For example, remedies that General Electric uses to reduce tenure include a term limit, retirement-age requirements, and annual board evaluations. Hoang, *supra* note 175. Target similarly imposes both a term limit and an age requirement. TARGET, CORPORATE GOVERNANCE GUIDELINES 7 (2019), <https://investors.target.com/static-files/59b21ff6-d8a3-43b2-94a7-79d61e19bf05>.

204. Companies within the same industry can pressure each other to adopt similar arrangements due to competition between firms and to data networks. See Michael Barzuza & Quinn Curtis, *Board Interlocks and Corporate Governance*, 39 DEL. J. CORP. L. 669, 671–72 (2014) [hereinafter *Board Interlocks*]; Michal Barzuza & Quinn Curtis, *Interlocking Board Seats and Protection for Directors After Schoon*, 8 (Va. Law & Econ., Research Paper No. 2013-11, 2013), [<http://perma.cc/R9S8-8GFE>] [hereinafter *Interlocking Board Seats*].

205. See generally Nili, *supra* note 183.

Figure 4. *Term-Limit Remedies*

At the top level appear voluntary remedies that firms can adopt themselves, including voluntary reporting and disclosure rules; requiring an overall, averaged tenure limit; limiting service on certain committees after a certain period; limiting board members’ independent status; and having strict tenure limits on all individuals.²⁰⁶

The middle level, somewhat more rigid than an individual firm’s decision, would be industry-wide regulation, which could suggest or even mandate rules on tenure with regard to the different elements of tenure that regulation could encompass (average limit, committee service, independence, and blanket limits).

206. See Hoang, *supra* note 175; see also Katz & McIntosh, *supra* note 54 (describing term limits, limits of service on audit and compensation committees after a certain length of time, and mandatory director retirement ages as measures firms take to address tenure concerns).

This industry-wide “self-regulating” could be the product of proxy advisor demands²⁰⁷ or the development of industry best-practice guides, which often arise from competition among firms.²⁰⁸

Finally, at the bottom appear regulatory options. Any regulatory actor—local, state, or federal legislatures, as well as the judiciary—may choose to adopt these policies. Regulatory requirements can also vary from softer to harder rules.²⁰⁹ As with any remedy, even within firms, we need to account for the potential that particular boards may try to game their way out of enforcement of any particular provision. This proves more likely with state-imposed remedies than with remedies firms themselves adopt.

C. Firm Remedies

We may wonder why firms adopt term limits. Shareholder pressure may drive the effort, while others have boards interested in improving their governance. Based on the small sample of firms that have already adopted term limits, it seems that firms forced to do so did not necessarily benefit—notably GE. Firms whose boards chose term limits may experience greater benefits. This makes sense because the board has already expressed the will to refresh in adopting the limit, so implementation involves voluntary follow-through rather than shareholder-induced arm-twisting. If combined with other good governance efforts, term limits may prove still more effective. The number of firms with term limits grows—it has grown from nineteen to twenty-five from 2017 to 2018—providing an opportunity for future qualitative research.²¹⁰

Some firms—those without term-limit policies—have a general practice of keeping tenure relatively low, and this may be part of a broader good governance practice.²¹¹ Our data confirms this reality, since enough firms have lower

207. Remedies within firms could include utilizing “shareholder [proxies] as an effective tool for corporate governance changes.” Nili, *supra* note 183, at 197. Corporations have paid closer attention to non-binding shareholder proposals due to the increasing importance of proxy advisors and the threat of withhold campaigns against companies that ignore shareholder concerns. *Id.* at 197–98. Shareholders can submit diversity disclosure proposals to companies, which would be a “modest request . . . that falls within the core rights of shareholders.” *Id.* at 198. “[R]equiring [these] disclosure[s] would] produce . . . changes as companies attempt to appease shareholders.” *Id.*

208. See *Board Interlocks*, *supra* note 204, at 700.

209. For example, the United States has taken a softer approach, requiring companies to disclose only whether they have a diversity policy and a description of the policy. DHIR, *supra* note 97, at 82–83. European countries have taken a harder approach, some adopting quota legislation. See Clark, *supra* note 13.

210. Compare Ning Chiu, *Board Composition at the S&P 500 Companies*, DAVIS POLK (Dec. 2, 2016), <https://www.briefinggovernance.com/2016/12/board-composition-at-the-sp-500-companies/>, with Ning Chiu, *Benchmarking Against the Spencer Stuart S&P 500 Board Practices Report*, DAVIS POLK (Nov. 6, 2018), <https://www.briefinggovernance.com/2018/11/benchmarking-against-the-spencer-stuart-sp-500-board-practices-report/>.

211. Walmart hired a third-party consulting firm to help with its “Board Refreshment and Succession Planning.” Wal-Mart Stores, Inc., *supra* note 171, at 29. The board’s lead independent director James I. Cash Jr. spoke on behalf of the company saying, “We believe that board refreshment and succession planning are

tenure to drive the inclusion of women.²¹² Some of the firms that adopt term limits may be aware of the costs of overly long tenures. For that reason, at least some term-limit firms may show weaker numbers with regard to the subject of our study: high tenure and low diversity.²¹³ The long delay for implementation of term limits—combined with the fact that term-limit firms may initially have weaker numbers—may explain how firms without term limits boast better diversity numbers.²¹⁴ We expect this would prove a near-term phenomenon as term limits kick in.

Firms vary widely in how they adopt term limits. It may be a simple reporting requirement in which they shift their tenure statistics.²¹⁵ While this data is no secret, aggregating and reporting it draws attention to the issue without obligating the firm to act on the data.

Limits on overall tenure would be the next step. Such a policy would require a firm to have an average tenure ceiling—presumably sufficiently low to ensure substantive refreshment of boards. This would permit nominating committees to determine which board members should be encouraged to leave and which may stay.²¹⁶ This softer measure would not force firms to send a uniquely skilled expert board member away but rather would allow firms to make a choice—if some members stay longer, others will have to leave sooner in order to maintain the cumulative tenure below the limit.²¹⁷

Committee-service limitations provide another possible remedy. Certain committees play a central role in the management of the firm. While boards may have various committees, several key committees mandated for all publicly

critical and demonstrate good corporate governance practices.” *Walmart Positions Board of Directors for the Future*, *supra* note 173.

212. Average director tenure on S&P 500 boards is 8.2 years, having decreased from 5 years ago. 2017 BOARD INDEX, *supra* note 7, at 18. The median tenure has also declined from 8.4 years to 8 years. *Id.* Sixty-two percent of boards have an average independent director tenure range of 6 to 10 years. *Id.*

213. *See supra* Part III.

214. Alaska Air has implemented a fifteen-year term limit that will affect directors after 2012, meaning that the term limits would not be imposed until 2027. ALASKA AIR CORPORATE GOVERNANCE GUIDELINES, *supra* note 168, at 4. Despite this, diversity has remained high, perhaps due to the consistent inclusion in every proxy statement since 2004 of the comment that diversity factors into nominating board members. *See id.* at 3.

215. Firms could adopt a “Substantive Gender Diversity Disclosure” (SGDD) that “would require them to provide a clear table, similar to other disclosures such as director and executive compensation” that highlights measures such as the “ratio of women to men on the board” and “comparative breakdown of age and tenure.” Nili, *supra* note 183, at 196.

216. Li & Wahid, *supra* note 26 (noting that “implementing term limits may result in better governance outcomes if [the limits] alter[] the mix of director tenure lengths”).

217. *See* Katz & McIntosh, *supra* note 54 (suggesting that overall tenure considerations are “a more meaningful metric for evaluating board refreshment” than a focus only on long-tenured directors).

traded companies hold an outsized influence in governance.²¹⁸ These key committees are the audit committee,²¹⁹ the nominating and corporate governance committee,²²⁰ and the compensation committee.²²¹ Research shows that directors have a stronger, more direct impact on executive compensation, new director selection, and other important board actions if they serve on board committees that hold primary responsibility for these functions.²²² Some term-limit arrangements prevent long-standing board members from specific committee assignments.²²³ Such limitations require the core governance of the firm reflect the board's fresher perspectives.²²⁴ A similar issue surfaces with independence. Jurisdictions often limit the years of board service to qualify as independent.²²⁵ Where states do not regulate this, firms may decide to implement such policies as an internal matter.

Each of the internal term limits discussed above would prove less onerous for firms than adopting an individual term-limit restriction, which would apply to each board member. The lower imposition of softer term-limit arrangements may induce more firms to adopt them. Instituting a maximum period for each member constitutes the most stringent internal requirement. In this regard—as an alternative to term limits or in conjunction with term limits—mandatory retirement rules may have a similar effect by forcing senior members from continued service.²²⁶ Counterintuitively, more stringent term limits involve

218. Nili, *supra* note 183, at 154; *see also* David A. Carter et al., *The Gender and Ethnic Diversity of US Boards and Board Committees and Firm Financial Performance*, 18 CORP. GOVERNANCE 396, 400 (2010); Idalene F. Kesner, *Directors' Characteristics and Committee Membership: An Investigation of Type, Occupation, Tenure, and Gender*, 31 ACAD. MGMT. J. 66, 67 (1988); April Klein, *Firm Performance and Board Committee Structure*, 41 J.L. & ECON. 275, 277 (1998); 2017 BOARD INDEX, *supra* note 7, at 29–31.

219. The audit committee is charged with ensuring the quality and integrity of the company's financial statements and regulatory compliance. N.Y.S.E. LISTED COMPANY MANUAL § 303A.07, <http://nysemanual.nyse.com/lcm/> (last visited Sept. 15, 2019). Under NYSE listing rules, the committee must be comprised solely of independent directors. *Id.*

220. The nominating committee is in charge of nominating director candidates and often also selects new CEOs and peer directors to the other board committees. *See* Joseph V. Carcello et al., *CEO Involvement in Selecting Board Members, Audit Committee Effectiveness, and Restatements*, 28 CONTEMP. ACCT. RES. 396, 397 (2011).

221. The compensation committee is tasked with setting the compensation of senior executives and generally oversees the corporation's compensation policies. *See* N.Y.S.E. LISTED COMPANY MANUAL, *supra* note 219, § 303A.05. Under NYSE listing rules, the committee must be comprised solely of independent directors. *See id.*

222. *See* Klein, *supra* note 218, at 277–81.

223. *See* Katz & McIntosh, *supra* note 54 (discussing how term limits may be an “avenue to address concerns over director independence,” as independence is crucial for board committees such as audit and compensation committees).

224. Firms can achieve improved governance by diversifying new perspectives on the board. *See* Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Board of Directors*, 76 TUL. L. REV. 1363, 1391 (2002) (explaining that diversity generates “conflicting opinions, knowledge, and perspectives that result in . . . more thorough . . . interpretations, alternatives, and consequences”); *see also* Rosenblum & Roithmayr, *supra* note 10, at 889.

225. *See* Katz & McIntosh, *supra* note 54.

226. Several firms impose age limits on directors, such as General Electric, whose retirement policy indicates that directors retire when they are seventy-five years old. 2016 GE Proxy Statement, *supra* note 174,

potential lag time for implementation.²²⁷ A firm that adopts a term limit of fifteen years this year, but grandfathers current board members, will not impose the limit until 2034. By contrast, firms may impose the other softer requirements sooner with less disruption.

Last, firms can harden or soften their policies through either short limits on widespread grandfather clauses—to make term limits more binding—or opt-outs to keep exceptionally important board members.²²⁸ With these policy alterations, the board can explain to shareholders why they have not asked a term-limited member to leave. Such opt-out provisions also serve to soften requirements and mute the risk of losing an individual who proves essential to a firm's governance. These exceptions allow firms to avoid this consequence in exceptional circumstances.

D. Industry-Wide Remedies

As they do with some corporate social responsibility matters,²²⁹ industry organizations could set norms to encourage firms to self-regulate. Similarly, proxy advisors and institutional investors might direct their attention to specific industries, requiring enhanced arrangements in industries that tend to lack refreshment. Finally, when a firm within an industry adopts specific limits, similar companies may follow suit thanks to the natural competition between firms and data networks.²³⁰ Industries sometimes adopt rules deliberately to avoid state regulation. Even non-binding self-regulations push behavior toward a broader norm.

at 2. Similarly, Walmart has a policy where directors are not eligible for reelection after age seventy-five. Walmart Stores, Inc., *supra* note 171, at 30. Mastercard's term limit applies to directors after their fifteenth year or after their seventy-second birthday. MASTERCARD CORPORATE GOVERNANCE GUIDELINES, *supra* note 156, at 6; *see also* Mastercard Inc., Proxy Statement (Schedule 14A), at 9 (Apr. 29, 2016).

227. For example, Alaska Air's term limit only applies to directors elected after 2012, which means that the term would only affect directors after 2027 at the earliest. ALASKA AIR CORPORATE GOVERNANCE GUIDELINES, *supra* note 168, at 4.

228. *See* MASTERCARD CORPORATE GOVERNANCE GUIDELINES, *supra* note 156, at 6. Mastercard has a term limit of fifteen years; however, the board can determine that "due to unique or extenuating circumstances it is in the best interests of the Company and its stockholders to extend the director's service for an additional period of time." *Id.*

229. *See* Christopher P. Skroupa, *CSR—The Approach From The Inside-Out*, SKYTOP STRATEGIES (Jan. 31, 2018), <https://skyttopstrategies.com/csr-approach-inside/> (explaining that "[c]reating and nurturing a strong internal culture is a vital component in successfully delivering on a commitment to corporate responsibility" and how employee engagement committees have been established around the world to coordinate philanthropic activities throughout the year).

230. *See Board Interlocks*, *supra* note 204, at 672–73.

E. Regulation of Term Limits

As with firm regulation and industry regulation, states, federal regulators, and stock exchanges can adopt softer or firmer requirements. Borrowing from some of the remedies adopted to mandate sex diversity on corporate boards, regulators can impose reporting requirements.²³¹ While publicly available tenure data requires calculation to ascertain the average tenure of a board and each director's tenure, stronger reporting requirements would shed more light on how firms perform. On its own, a reporting requirement could valorize refreshment.

Above a reporting requirement sits a "comply-or-explain" provision.²³² Ontario has such a requirement with regard to sex diversity on corporate boards.²³³ Regulators could establish an average tenure requirement: firms would have to meet those terms or explain their noncompliance. In several jurisdictions that have adopted these remedies, firms thoroughly comply.²³⁴ The pressure of media attention motivates firms to step up and comply, even though the penalty is merely confessional.²³⁵

Regulators can also limit overall average tenure of the board. The advantage of such remedies for firms, as discussed above, is that it provides them flexibility with regard to any particular director as long as their overall numbers meet the mandated target. Deciding the specific threshold might prove challenging, however, and would suffer from one-size-fits-all concerns.

As at the firm level, regulations for committee service and independence could provide a softer target. Regulators can mandate refreshment in the most central parts of a firm's governance without imposing absolute mandates and without interfering in the structure of the board.

Legislative mandates of rebuttable limits on individual tenure provide the next level of mandate. Here, depending on how onerous firms view the exposure, they may comply in their entirety, or they may view the requirement as a purely hortatory one.²³⁶ The experience with voluntary quotas for board sex

231. Some regulators "have placed hard quotas on board composition, requiring either progressive representation by board size or . . . requiring some minimum number of female directors." Nili, *supra* note 183, at 193; *see also* DHIR, *supra* note 97, at 71–94.

232. *See* DHIR, *supra* note 97, at 240–48; Katz & McIntosh, *supra* note 54.

233. *Gender Diversity On Boards In Canada: Recommendations For Accelerating Progress*, CATALYST (June 7, 2016), <http://www.catalyst.org/gender-diversity-boards-canada-recommendations-accelerating-progress>.

234. *See* DHIR, *supra* note 97, at 71–94.

235. *See id.*

236. *Id.* Spain's law is softer—although it obliges an increase in board participation to 40%, there are no formal sanctions for failure. U.K. DEP'T FOR BUS. INNOVATION & SKILLS, WOMEN ON BOARDS 22 (2011). Spain's 2007 quota requires "public companies and IBEX 35-quoted firms with more than 250 employees to attain a minimum 40% share of each sex on their boards" by 2015, but "there are no formal sanctions" for companies that do not reach this quota. *Id.*

diversity reflects that compliance in these circumstances becomes a question not only of law but also of culture.²³⁷

The risk of this latter response—that firms may rebut the requirements—may provide motivation for clearer limits on all individuals' tenure.²³⁸ This would prove far more onerous than average limits because it would require the departure of some especially expert senior board members.²³⁹ Resistance to these regulatory changes may lead firms to come up with regulatory arbitrage strategies centering around term limits. The risk of such arbitrage may favor state mandates that only impose average tenure requirements.

As with other remedies, sunset provisions, which delineate a specific duration for a particular rule, may prove useful to encourage compliance while reassuring market actors that ineffective regulations will not continue forever.

This project's purpose is to assess the relationship between tenure and sex diversity. The general correlation between tenure and diversity prompts us to mention another idea—term limits only on men. Such a term limit would function more like a quota for sex equality rather than a term limit.²⁴⁰ While this may prove fruitful as a regulatory mechanism, it cuts against the foundational motivating idea of this study: whether a nonidentitarian, nonclassification remedy could promote diversity.

CONCLUSION

This Article charts a new course for diversity remedies. Instead of fixing sex diversity ratios for all boards, increasing the supply of board positions could better foster sex diversity. Higher turnover on boards, as we demonstrate, links to an improvement in board sex diversity.

Sex diversity realizes both social equality and good firm governance. While this goal garners near-universal assent, discord surfaces over *how* to achieve inclusion. Since Twitter's 2014 IPO, #MeToo shook the country, and California passed a quota. Despite this marked spike in attention to sex diversity on corporate boards, the United States falls short, especially in contrast to other developed nations.

How, then, should policy makers and investors improve board turnover? We explored the relatively seldom-used corporate governance mechanism of term limits.

237. See *Diversity and Women on Boards*, *supra* note 99.

238. See Nili, *supra* note 183, at 189.

239. It is argued that experienced directors add value in that long tenure “help[s] directors counterbalance chief executive authority.” Pozen, *supra* note 25; see also Li & Wahid, *supra* note 26. Additionally, it is argued that long-term directors have a higher level of commitment to the company. *Director Term Limits Come Up for Review*, *supra* note 52, at 19.

240. Murray, *supra* note 36, at 520 (explaining how quotas for men, addressing the issue of male overrepresentation, would raise the quality of representation for all).

We argue that the combination of effective and carefully designed term limits, with the increased attention to sex diversity, could lead to a more organic route to improving diversity on boards—one that sidesteps the complex questions embedded with a more direct and aggressive approach. Equally important, term limits hold the potential to realize still broader diversity, including with regard to race. In jurisdictions with seemingly intractable political divisions, consensus remedies for inclusion could point the way forward for public policy.