

NEW YORK UNIVERSITY
JOURNAL OF LAW & BUSINESS

VOLUME 16

FALL 2019

NUMBER 1

THE ETHICS OF GENDER NARRATIVES FOR
UNITED STATES CORPORATE BOARDS

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Across the globe, cities, states, and countries are moving towards improving gender diversity in corporate boardrooms. In 2003, Norway became the first developed country to institute a gender quota for corporate boards of directors, and other countries have followed suit. As the ratio of women to men residing in urban areas continues to rise, organizations like the United Nations have recognized women empowerment as a necessary goal. However, despite global efforts to increase gender equity, the United States still lags behind other countries in legislating to increase the number of women serving on its corporate boards. This Article argues that gender narratives are important in corporate boardrooms from the perspective of ethical and narrative inclusivity. It also proposes that increasing gender equity on corporate boards should not be viewed as a “quota” or “target” but rather as an “impact” that benefits corporations, their constituents, and society at large.

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INTRODUCTION

Within the United States, women make up approximately 59% of the workforce¹ but only occupy 21.7% of directorships.² Recent legislation passed by California requires publicly traded corporations to have at least one woman on their board of directors by the end of 2019.³ This quota mirrors other laws across the globe aimed to increase female representation in roles that are traditionally held by men, but this legislation is also expected to fail as a constitutional matter.⁴ Moreover, the approaches taken by different countries have arguably seen limited success.⁵ There are concerns that the best people for the job are the men who already have been placed in these positions, and there are insinuations that recruiting women will lead to mediocre candidates.⁶ But in reality, the lack of women on corporate boards may be more attributable to both internal and external barriers, including “companies’ corporate culture in supporting [women’s] career progressions.”⁷

Such criticisms ignore the positive benefits of having women on corporate boards, as studies have found that companies perform better with increased gender diversity. One argument presented is that “[w]omen are more aware of and in tune with risk.”⁸ Moreover, research suggests that individuals

1. *Labor Force Participation Rate by Sex, Race and Hispanic Ethnicity: 2016 Annual Averages and 2024 Projections*, U.S. DEP’T OF LABOR, <https://www.dol.gov/wb/stats/NEWSTATS/latest/laborforce.htm#LFPracesex>.

2. *Women on Corporate Boards: Quick Take*, CATALYST (Dec. 21, 2018), <https://www.catalyst.org/research/women-on-corporate-boards/>.

3. Emily Stewart, *California Just Passed a Law Requiring More Women on Boards. It Matters, Even If It Fails*, VOX (Oct. 3, 2018), <https://www.vox.com/2018/10/3/17924014/california-women-corporate-boards-jerry-brown>.

4. See Joseph A. Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California’s SB 826* (Stan. L. Sch. & Rock Ctr. for Corp. Governance, Working Paper No. 232, 2018).

5. Catherine M.A. McCauliff & Catherine A. Savio, *Gender Considerations on the Boards of European Union Companies: Lesson for U.S. Corporations or Cautionary Tale?*, 16 GEO. J. GENDER & L. 505, 517–18 (2015).

6. See *id.* at 542.

7. Viviane de Beaufort & Lucy Summers, *Women on Boards: Sharing a Rigorous Vision of the Functioning of Boards, Demanding a New Model of Corporate Governance*, 4 J. RES. GENDER STUD. 101, 109 (2014).

8. Douglas M. Branson, *Too Much Talk, Too Little Action: The Corporate Side of Gender Diversity Governance*, 30 HASTINGS WOMEN’S L.J. 27, 31 (2019).

are less likely to fall into the trap of groupthink⁹ when members are diverse rather than all male.¹⁰ In general, studies have found companies with higher ratios of women in the board of directors to demonstrate higher operating margins.¹¹

Despite the benefits of having increased gender parity on corporate boards, legislation has thus far been limited. Below, this Article outlines the benefits of gender parity on corporate boards, not only because it concerns an ethical duty, but also because of the positive externalities for the respective corporations. This Article ultimately proposes that the goal is not for a quota but rather for an impact: a meaningful impact on the progress of the corporation and the progress towards equitable and fair business practices. We hope that fostering a spirit of expectation that gendered narratives are required for the functioning and growth of the corporation will be cyclical, and that companies engaging in this culture will in turn influence other companies to do the same.

I.

UNITED STATES GOVERNMENTAL (IN)ACTION FOR GENDER EQUITY ON CORPORATE BOARDS

In the United States, initiatives which address the gender gap in business leadership have been introduced at various levels of government. This Part provides an overview of federal, state, and municipal efforts to improve gender equality on corporate boards and discusses the efficacy of such actions.

A. *Federal Action*

To date, the only federal action taken to mandate gender equality on corporate boards is the SEC Proxy Disclosure Enhancements Regulation. The Securities and Exchange Commission (“SEC”) is a federal agency that oversees and regulates

9. Groupthink is described as a situation “when a group of well-intentioned people make irrational or non-optimal decisions that are spurred by the urge to conform or the discouragement of dissent.” *Groupthink*, PSYCHOLOGY TODAY, <https://www.psychologytoday.com/us/basics/groupthink> (last visited Sep. 11, 2019).

10. Branson, *supra* note 8, at 32.

11. MCKINSEY & CO., DELIVERING THROUGH DIVERSITY 10 (2018), https://www.mckinsey.com/~media/McKinsey/Business%20Functions/Organization/Our%20Insights/Delivering%20through%20diversity/Delivering-through-diversity_full-report.ashx.

the American securities industry and enforces the federal securities laws enacted by Congress.¹² The mission of the SEC is “to protect investors; to sustain fair, orderly, and efficient capital markets; and to facilitate capital formation.”¹³ The federal securities laws impose a system of mandatory disclosure rules that help investors manage risk by “facilitating informed investment decisions.”¹⁴ Such disclosure rules require publicly traded companies to report information to the SEC regarding particular financial and governance matters quarterly and annually.¹⁵

In 2009, the SEC enacted the Proxy Disclosure Enhancements Regulation, which went into effect on February 28, 2010.¹⁶ The regulation requires disclosure of “whether, and if so how, a nominating committee considers diversity in identifying nominees for director.”¹⁷ Further, if the nominating committee *does* have a policy regarding the consideration of diversity, disclosure is required as to “how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy.”¹⁸ The regulation does not, however, mandate that companies have a diversity policy, only that the presence or absence of such a policy be disclosed to shareholders. Furthermore, the regulation does not define diversity, rather stating, “Companies should be allowed to define diversity in ways that they consider appropriate.”¹⁹

The Proxy Disclosure Enhancements Regulation has not, as of yet, spurred significant change with respect to marginalized group representation on corporate boards. For example, in 2009, before the SEC regulation went into effect, women held 15.2% of board seats at Fortune 500 Companies.²⁰ In

12. Angela R. Foster, *A Quest to Increase Women in Corporate Board Leadership: Comparing the Law in Norway and the U.S.*, 26 WASH. INT'L L.J. 381, 397 (2017).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 399.

17. Proxy Disclosure Enhancements, Release No. 9089 (Dec. 16, 2009).

18. *Id.*

19. *Id.*

20. Rachel Soares et al., *2010 Catalyst Census: Fortune 500 Women Board Directors*, CATALYST (2010), <https://www.catalyst.org/knowledge/2010-catalyst-census-fortune-500-women-board-directors>.

2012, two years after the regulation went into effect, the percent of women who held board seats at Fortune 500 companies had increased to 16.6%, or less than 2 percentage points.²¹

B. State Level Legislative Analysis

Research has shown that companies may perform better with increased gender diversity.²² Ultimately, as diversity increases at the senior level, the hope is that the diversification in leadership will cause a successful change in the makeup of the varied departments and levels within a corporation.

In 2018, California became the first state to pass legislation that imposes a quota for the number of women present on corporate boards. The law, which went into effect on January 1, 2019, requires that, by the end of the 2019 calendar year, publicly held corporations whose “principal executive offices” are located in California must have at least one woman on its board of directors. By the end of 2021, such corporations will be required to have a certain number of women on their board of directors proportional to the size of the

21. DELOITTE LLP & ALL. FOR BD. DIVERSITY, MISSING PIECES REPORT: THE 2018 BOARD DIVERSITY CENSUS OF WOMEN AND MINORITIES ON FORTUNE 500 BOARDS 17 (2018), https://www.catalyst.org/wp-content/uploads/2019/01/missing_pieces_report_01152019_final.pdf.

22. See, e.g., Tyler Winters & Madhuri Jacobs-Sharma, Gender Diversity on Corporate Boards: The Competing Perspectives in the U.S. and the EU (2016) (unpublished seminar paper) (Pa. L. Legal Scholarship Repository – Comparative Corporate Gov. and Fin. Regulation), http://scholarship.law.upenn.edu/fisch_2016/13; Barbara Black, *Stalled: Gender Diversity on Corporate Boards*, 37 U. DAYTON L. REV. 7, 19–20 (2011); Douglas M. Branson, *Initiatives to Place Women on Corporate Boards of Directors: A Global Snapshot*, 37 J. CORP. L. 793, 795–97 (2012); Seletha R Butler, *All on Board! Strategies for Constructing Diverse Boards of Directors*, 7 VA. L. & BUS. REV. 61, 74 (2012); Simona Comi et al., Where Women Make the Difference. The Effects of Corporate Board Gender Quotas on Firms’ Performance Across Europe 2–3 (Dep’t of Econ., Mgmt., and Statistics, University of Milan-Biocca, Working Paper No. 367, 2017), <https://www.ssrn.com/abstract=3001255>; Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795, 811 (2005); Alison M. Konrad et al., *Critical Mass: The Impact of Three or More Women on Corporate Boards*, 37 ORGANIZATIONAL DYNAMICS 145, 156–62 (2008); Mary Parmeter, *The Fiduciary Duty to Gender Diversity Within Corporate Boards: The Necessary Link Among Shareholder Primacy, the Director Nomination Process, and Higher Financial Return*, 32 WIS. J.L., GENDER & SOC’Y 85, 100–01 (2017).

board.²³ Corporations that do not comply with these quotas will be subject to fines up to \$100,000 for a first violation and up to \$300,000 for a second violation.²⁴

The legislative history of the law, then Senate Bill 826 (“SB 826”), reveals that the purpose of the law is to ensure “a greater role for women in corporate boardrooms and would make California the first in the nation to require the proactive change needed to fully realize gender equality throughout society.”²⁵ In a letter of support for SB 826, the National Association of Women Business Owners (“NAWBO”) California highlighted the fact that, as of 2018, one-quarter of California’s public companies did not have any women directors, and, as compared to Fortune 1000 companies, California companies had a lower percentage of female directors than the national average.²⁶ With respect to justification for the quota measure, the legislative findings and declarations for SB 826 cite to studies which demonstrate that “companies with a greater share of women serving on the board of directors tend to have higher profits and take fewer risks.”²⁷

Committee reports for SB 826 also raise numerous legal and policy arguments against the implementation of the quota.²⁸ For example, opponents of the bill raised concerns regarding the implementation of the law, as the manner in which “boards are elected or appointed are determined by the laws of the state of incorporation and by corporate by-laws, which in turn must be consistent with the laws of the state of incorporation.”²⁹ For companies incorporated in a state other than California, therefore, potential conflicts may arise where California laws regarding election, appointment, and replacement of board members conflict with such laws in the state of incorporation.³⁰

23. Cal. Corp. Code § 301.3(b)(1)–(3) (West 2018) (“If its number of directors is six or more, the corporation shall have a minimum of three female directors. If its number of directors is five, the corporation shall have a minimum of two female directors. If its number of directors is four or fewer, the corporation shall have a minimum of one female director.”).

24. *Id.* § 301.3(e)(1).

25. 2018 Cal. Legis. Serv. Ch. 954 (S.B. 826) (West).

26. *Id.* at 4.

27. *Id.* at 5.

28. *Id.*

29. *Id.*

30. *Id.*

Further, opponents of SB 826 argue that the bill is incompatible with the internal affairs doctrine, a “conflict of laws principle which recognizes that only one state should have the authority to regulate a corporation’s internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors and shareholders—because otherwise, a corporation could be faced with conflicting demands.”³¹ While California has codified the internal affairs doctrine,³² the bill analysis for SB 826 notes that California courts have ignored the internal affairs doctrine in certain instances and, therefore, the rule is not absolute.³³

Finally, opponents assert that SB 826 will be challenged under the Equal Protection Clause of the 14th Amendment of the U.S. Constitution and Article I, Section 7 of the California Constitution as the bill creates an express gender classification.³⁴ Supporters of the bill, however, argue that “if governments refrained from enacting laws because of the possibility that such laws might be deemed unconstitutional, constitutional law would never change because there would be no laws that tested constitutional boundaries or challenged constitutional orthodoxies.”³⁵

Below is a sampling of other states that have attempted to adopt gender quota requirements or “encouragements” as a way to improve gender balance in corporations. Unfortunately, no other state has been as valiant as California in this movement, but the efforts are in the right direction.

31. *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982).

32. CAL. CORP. CODE § 2116 (Deering 2019) (“The directors of a foreign corporation transacting intrastate business are liable to the corporation, its shareholders, creditors, receiver, liquidator or trustee in bankruptcy for the making of unauthorized dividends, purchase of shares or distribution of assets or false certificates, reports or public notices or other violation of official duty according to any applicable laws of the state or place of incorporation or organization, whether committed or done in this state or elsewhere.”).

33. 2018 Cal. Legis. Serv. Ch. 954 (S.B. 826) (West) (quoting 9 WITKIN, SUMMARY OF CALIFORNIA LAW (11th), *Corporations* § 239 (2005)) (“[T]he Witkin treatise notes that the internal affairs doctrine is sometimes ignored where, despite foreign . . . incorporation, a business’s books, records and principal operations are located in California.”).

34. 2018 Cal. Legis. Serv. Ch. 954 (S.B. 826) (West).

35. *Id.* at 8.

1. *Colorado*

On March 14, 2017, Colorado signed a Joint House Resolution 17-1017, to “Increase the Presence of Women on Corporate Boards” into law.³⁶ This resolution urges publicly held corporations with nine or more director seats to include at least three women on its board, for five to eight director seats to have a minimum of two women on its board, and for corporations with fewer than five seats to have at least one woman on the board.³⁷ While this is commendable, the terms of the resolution and the relatively weak language used, such as “encourage” and “urge,” reveal that no requirements or enforcement mechanisms are yet in place to ensure gender equality within the state.³⁸

2. *Illinois*

On April 30, 2015, Representative Michelle Mussman-D, of the 56th District of Illinois filed Bill HR0439 to foster “equitable and diverse gender representation on corporate boards of directors.”³⁹ On May 30, 2015 this resolution was adopted urging:

within the next 3 years [that]: (1) every publicly held corporation in Illinois with 9 or more seats on its board of directors have a minimum of 3 women on its board; (2) every publicly held corporation in Illinois with at least 5 but fewer than 9 seats on its board of directors have a minimum of 2 women on its board; and (3) every publicly held corporation in Illinois with fewer than 5 seats on its board of directors have a minimum of one woman on its board.⁴⁰

36. Colo Legis. Serv. 17-1017 (Colo. 2017).

37. *Id.* at 4.

38. See, e.g., Tracy A. Thomas, *Reconsidering the Remedy of Gender Quotas*, HARV. J.L. & GENDER ONLINE, 19 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795054 (“Voluntary actions are . . . devoid of enforcement mechanisms, which have proven to be the most effective means of establishing successful quota systems . . . Voluntary efforts are simply too little, too late.”).

39. H.R. Res. 0439, 99th Gen. Assemb., at 4 (Ill. 2015).

40. *Id.*

3. *Maryland*

On January 22, 2018 eight Maryland senators introduced Senate Joint Resolution 4 to increase gender equity on corporate boards, as it recognized that companies performed better where women were “strongly represented in top management.”⁴¹ The Senate Joint Resolution 4 “urge[s] that by December 31, 2021, all nonprofit, privately held, and publicly traded institutions and companies doing business in the State of Maryland have a minimum of 30% of women directors.”⁴²

4. *Massachusetts*

On April 15, 2015, the Democratic party of the Massachusetts Senate introduced Bill S1007: “Resolutions to encourage equitable and diverse gender representation on the boards of companies in the Commonwealth.” Supported by sixty-four senator sponsors, this resolution calls for companies with boards of nine or more directors to include at least three females by 2018. In the event that the board is smaller than nine, the resolution requires at least two women. The resolution supports this goal by citing a McKinsey quarterly article which notes that “[W]omen bring improved decision making at the top, more creativity and innovation, and better problem solving, stemming from greater cognitive diversity.”⁴³

Senator Michael Moore, a supporter of the resolution, stated, “I am hopeful that companies will actively pursue diversifying their leadership teams to ensure that women are provided opportunities to advance professionally.”⁴⁴ This sentiment of hope shines notice on the point that although the resolution passed, it is not considered binding law. Rather, it serves as an expression of the legislature’s opinion on this issue. In order to become binding, the resolution would have to become a bill signed by the governor.

41. S.J. Res. 4, 2018, Reg. Sess., at 1 (Md. 2018).

42. *Id.* at 3.

43. S. Res. 1007, 189th Gen. Ct. (Mass. 2015) (quoting Joanna Barsh, *Can Women Fix Capitalism?*, MCKINSEY Q. (2014)).

44. Michael D. Kane, *Massachusetts’ Legislature Wants More Women on Boards of Directors*, MASSLIVE (Oct. 22, 2015), https://www.masslive.com/news/worcester/index.ssf/2015/10/massachusetts_legislature_want.html.

5. *New York*

On March 7, 2016, New York Representative Carolyn Maloney introduced a bill in the House of Representatives titled the “Gender Diversity in Corporate Leadership Act of 2016.”⁴⁵ The purpose of this bill was to require the Securities and Exchange Commission to establish a Gender Diversity Advisory Group (the “Advisory Group”) to examine strategies and make recommendations to increase gender diversity among members of the board of directors of issuers. The Advisory Group would also work towards amending the Securities Exchange Act of 1934 so that issuers are required to provide shareholders with disclosure regarding gender diversity. The Gender Diversity in Corporate Leadership Act of 2016 was co-sponsored by six other representatives: five Democrats from Michigan, New York, Ohio, Virginia, and Wisconsin, and one Republican representative, Lynn Jenkins from Kansas.⁴⁶ The Gender Diversity in Corporate Leadership Act of 2016 demonstrates eagerness across party lines to support women’s advancement as leaders in U.S. corporate dealings.⁴⁷ Nevertheless, no progress has been made to date in order to approve this bill and make it become binding law.

6. *Ohio*

On February 20, 2018, Ohio House Concurrent Resolution 23 was introduced to “encourage equitable and diverse gender representation on. . .boards and in senior management of Ohio companies and institutions.”⁴⁸ This resolution received only 25% of support and died in chamber.⁴⁹ According to Gordon Gatién, the Director of External Relations at Ohio Public Employees Retirement System (OPERS), and Patti Brammer, the Interim Corporate Governance and Employer Services Officer at OPERS, the Ohio House Concurrent Resolution 23 likely failed due to “election year politics.” As

45. Gender Diversity in Corporate Leadership Act of 2016, H.R. 4718, 114th Cong. 2d Sess. (2015).

46. *Cosponsors: H.R.4718 — 114th Congress (2015–2016)*, LIBRARY OF CONG., <https://www.congress.gov/bill/114th-congress/house-bill/4718/cosponsors>.

47. *Id.*

48. H.R. Con. Res. 23, 132nd Gen. Assemb. Reg. Sess., at 1 (Ohio 2017).

49. *Ohio House Concurrent Resolution 23*, LEGISCAN, <https://legiscan.com/OH/bill/HCR23/2017>.

the resolution had bipartisan support, both individuals remain optimistic about its future.⁵⁰ However, they are currently looking for another politician to support them, as Representative Dorothy Pelandra was term-limited and moved on to become the director of the Ohio Department of Agriculture.⁵¹

7. *Pennsylvania*

On April 25, 2017, Pennsylvania House Resolution 273 was introduced to “[e]ncourag[e] equitable and diverse gender representation on . . . boards and in senior management of companies in Pennsylvania,” and it was adopted the following day.⁵² In emphasizing the importance of this policy, the resolution stated that while women “ma[k]e up 47% of the United States labor force . . . [in] Pennsylvania in 2016, women held . . . 12.7% of executive positions in the largest 100 public companies headquartered in Pennsylvania.”⁵³

C. *Municipal and Community Support for Diverse Corporate Boards*

The world is rapidly changing. In the early 1990s, approximately 42% of the world’s population lived in urban areas; by 2015 this number increased to 54%. In 2030, 60% of the world’s population will be urban dwellers, and by 2050 it will be 70%.⁵⁴ There are more women than men, statistically, residing in urban areas, as well as a higher concentration of women-headed households. For all of these reasons, the connection between gender equality and urban sustainable development has been acknowledged by the United Nations as a crucial area of focus.⁵⁵ The preamble for the 2030 Agenda for Sustainable Development states “the 17 Sustainable Development Goals and 169 targets seek to realize the human rights of all and to achieve gender equality and the empowerment of all

50. Telephone Interview with Gordon Gatién, Dir. of External Relations, OPERS, & Patti Brammer, Interim Corp. Governance and Emp’r Servs. Officer, OPERS (Feb. 22, 2019).

51. *Id.*

52. H.R. 273, 2017–2018 Gen. Assemb., Reg. Sess., at 1 (Pa. 2017).

53. *Id.*

54. U.N. WOMEN, GENDER EQUALITY AND THE NEW URBAN AGENDA 1 (2016), <http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2016/unwhabitat3brief-en.pdf?la=en&vs=1812>.

55. *Id.*

women and girls.”⁵⁶ Sustainable Development Goal 5: Gender Equality is directly related to the advancement of women and girls.

In October 2016, Habitat III, the United Nation’s Conference on Housing and Sustainable Development, met in Quito, Ecuador to adopt the New Urban Agenda (NUA), setting ambitious global goals for urban progress. This meeting provided a new opportunity for city government officials, policy leaders, scholars, and UN officials to hold an open discussion on urban challenges. The outcome of this conference was a written commitment by UN member states, known as the NUA, which they agreed will serve as a guideline for urban development for the next twenty years. It is clear that the United Nations has set women empowerment as a necessary goal, as the NUA document lists women at least fifteen times, girls ten times, and women’s empowerment four times, respectively.

Despite the goals set by the United Nations, very few U.S. cities had made strides to increase gender diversity in corporate boardrooms. Arguably, non-profit organizations appear to be working more closely within cities to help corporations establish greater gender equity. It is important for local government to be more involved in this initiative.

Below is a sampling of U.S. cities and non-profit organizations that have worked towards increasing gender diversity on corporate boards.

1. *New York City*

In 2014, New York City Comptroller Stringer (“Comptroller Stringer”), along with the New York City Pension Funds (“NYC Pensions”), developed the Boardroom Accountability Project (BAP) in hopes of increasing investor involvement in determining the make-up of corporate boards.⁵⁷ The second phase of this campaign, referred to as the Boardroom Accountability Project 2.0 (BAP 2.0), aimed to “ratchet up the pressure on some of the biggest companies in the world to make their boards more diverse, independent, and climate

56. *Id.*

57. *Boardroom Accountability Project 2.0*, N.Y.C. OFFICE OF THE COMPTROLLER, <https://comptroller.nyc.gov/services/financial-matters/boardroom-accountability-project/boardroom-accountability-project-2-0/>.

competent . . .”⁵⁸ According to the BAP website, movement towards increasing diversity and accountability in corporate boardrooms started in response to “costly corporate scandals” that included Enron and WorldCom, and “the excessive risk-taking that led to the financial crisis.”⁵⁹ Moreover, the BAP 2.0 also recognizes diversity as a “strategy for economic success.”⁶⁰

As part of this initiative, Comptroller Stringer and NYC Pensions wrote to 151 public companies requesting the disclosure of a board “matrix,” defined as, “a table describing the skills, gender and race/ethnicity of individual directors on the board; and engagement with independent directors regarding “refreshment” opportunities to bring new voices and viewpoints into the boardroom.”⁶¹ As of June 27, 2018, more than 85 companies “adopted improved processes and increased transparency.”⁶² In calling for transparency through the board “matrix,” the goal is to address some of the underlying issues causing the lack of diversity on corporate boards which BAP 2.0 identified as “the obscure nature of board nominations and elections” that “[lock] out women and people of color.”⁶³

In addition, BAP also started a proxy access campaign that would give “large, long-term shareowners” the power to “nominate corporate board candidates on a company’s ballot.”⁶⁴ The proxy access initiative challenges the status quo of companies as it allows shareholders to know the race and gender of the company’s present directors. It also allows shareholders to place their own candidates on the ballot.⁶⁵ Allowing for share-

58. *Id.*

59. *See id.*; *see also Enron Fast Facts*, CNN (Apr. 24, 2019), <https://www.cnn.com/2013/07/02/us/enron-fast-facts/index.html>.

60. *Boardroom Accountability Project 2.0*, *supra* note 57.

61. Press Release, N.Y.C. Office of the Comptroller, Comptroller Stringer, NYC Funds: Unprecedented Disclosure of Corporate Boardroom Diversity Following Groundbreaking Campaign (June 27, 2018), <https://comptroller.nyc.gov/newsroom/comptroller-stringer-nyc-funds-unprecedented-disclosure-of-corporate-boardroom-diversity-following-groundbreaking-campaign/>.

62. *Id.*

63. *Id.*

64. Press Release, N.Y.C. Office of the Comptroller, Comptroller Stringer, NYC Funds: After Three Years of Advocacy, “Proxy Access” Now Close to a Market Standard (Jan. 30, 2018), <https://comptroller.nyc.gov/newsroom/comptroller-stringer-nyc-funds-after-three-years-of-advocacy-proxy-access-now-close-to-a-market-standard/>.

65. *Boardroom Accountability Project 2.0*, *supra* note 57.

holders to include their own candidates serves the goal of “mak[ing] boards more responsive to shareholders.” It also encourages a reshaping of the board when it may be time for the board to be revived or when a shift in strategy is required.⁶⁶

2. *Chicago*

Initiated by Edward M. Burke, the City of Chicago adopted resolution R2018-1264 on the same day that it was introduced, serving as a “[c]all upon Illinois General Assembly to enact legislation requiring greater equitable representation.”⁶⁷ The status of this resolution and whether the Illinois General Assembly heeded it is unclear as no further information is publicly available.

3. *Gender Equity Commissions: Pittsburgh and New York*

Although there is not much legislation currently available on cities adopting either resolutions or regulations promoting gender equality, some cities, such as Pittsburgh⁶⁸ and New York,⁶⁹ have developed Gender Equity Commissions to gain a greater understanding of gender equity. New York City’s Gender Equity Commission hosted their first public meeting on December 13, 2018. Pittsburgh also created a Gender Equity Commission in 2016 through Pittsburgh, Pa., Ordinance No. 34-2016, § 1 (Dec. 13, 2016) (codified in Chapter 177C of the Pittsburgh Municipal Code).⁷⁰ Pittsburgh’s Gender Equity Commission was developed based on the principles of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).⁷¹ Moreover, the mission of the CEDAW is ratified in Pittsburgh, Pa., Municipal Code § 177C.02, which states in part, “[c]ountries that ratify CEDAW are mandated to condemn all forms of discrimination against women and girls and to ensure equality for women and girls in the civil, political, economic, social and cultural ar-

66. *Id.*

67. City of Chi., Res. R2018-1264 (2018).

68. *What is the Gender Equity Commission?*, CITY OF PITTSBURGH GENDER EQUITY COMM’N, <http://pittsburghpa.gov/gec/about-gec>.

69. N.Y.C. COMM’N ON GENDER EQUITY, <https://www1.nyc.gov/site/genderequity/index.page> (last visited Feb. 24, 2019).

70. PITTSBURGH, PA., CODE OF ORDINANCES tit. I, art. IX, ch. 177C (2019).

71. *What is the Gender Equity Commission?*, *supra* note 68.

eas.”⁷² In recognition of the need to address issues of gender discrimination, Pittsburgh’s Gender Equity Commission aims to study and monitor issues of gender discrimination and provide solutions to those problems.⁷³

4. *Other Initiatives Addressing Gender Equity on Corporate Boards*

There are numerous non-profits within cities aimed at providing corporate governance support to increase gender equity. One such example is 20% by 2020 Women on Boards (also known as “20 by 20” or “2020 Campaign”), a campaign aimed at “increasing the percentage of women on corporate boards to 20 percent by 2020.”⁷⁴ The campaign hosts events throughout different cities and works with different corporations to achieve greater diversity.⁷⁵ Additionally, YW Boston provides workshops on “Diversity, Equity, & Inclusion.”⁷⁶ YW Boston has a “Dialogues on Race and Ethnicity” program that helps “organizations create the necessary cultural shift that will support inclusive policies and practices.”⁷⁷ Given the lack of information about whether the city of Boston has formally proposed corporate governance initiatives related to gender equity, it may be possible that the expectation for action has been placed, at least in this case, on the community. The challenges this may raise—financially, strategically, and politically—are significant.

5. *Lack of City Adopted Legislation Supporting Gender Equity in Corporate Boardrooms*

Of the numerous cities researched, only New York City includes an exhaustive plan to approach increasing gender equality on corporate boards.⁷⁸ One possible theory for this is

72. tit. I, art. IX, § 177C.02.

73. *See id.*

74. *Vision and Mission*, 2020 WOMEN ON BDS., <https://www.2020wob.com/about/vision-and-mission>.

75. *Press Mentions*, 2020 WOMEN ON BDS., <https://www.2020wob.com/about/press/mentions>.

76. *Beyond the DE&I Acronym: What are Diversity, Equity, and Inclusion?*, YW BOS. (Mar. 26, 2019), <https://www.ywboston.org/2019/03/beyond-the-acronym-dei/>.

77. *Id.*

78. *See Boardroom Accountability Project 2.0*, *supra* note 57.

a concern of state law preemption and that, in the face of state and city law conflict, state law may preempt city law.⁷⁹ In general, in considering whether local ordinances are preempted by state law, courts have looked at (1) whether the local government has the authority to pass the ordinance; (2) whether the ordinance conflicts with the state constitution; and (3) whether state statutes explicitly or impliedly preempt the local ordinance.⁸⁰

Moreover, cities may also face the issue of whether regulating the composition of corporate boards extends beyond their police powers. Local police powers have often been described as the “power to regulate for health, safety, welfare, and morals.”⁸¹ The question remains as to whether increasing gender equality on corporate boards is likely to be seen as an overreach by local governments.⁸² Therefore, regardless of whether a city is interested in pursuing a local agenda that mirrors the demands of the community, state statutes and politics may inhibit such development.⁸³

II.

A COMPARATIVE PERSPECTIVE ON PROGRESS

This Part surveys international efforts to address gender disparities in the corporate boardroom, with a primary focus on legislation enacted in Norway and France, and discusses the effectiveness of such initiatives.

A. *An Overview of Developments Globally in the Past Ten Years*

In 1993, Israel became the first country to legislate gender diversity on corporate boards of directors by requiring that all publicly traded companies “include ‘appropriate representa-

79. Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469, 1472 (2018).

80. Jean C. O’Connor et al., *Preemption of Local Smoke-Free Air Ordinances: The Implications of Judicial Opinions for Meeting National Health Objectives*, 36 J.L. MED. & ETHICS 403, 404 (2008).

81. See Stephen R. Miller, *Community Rights and the Municipal Police Power*, 55 SANTA CLARA L. REV. 675, 677–78 (2015).

82. See *id.* at 676.

83. See *id.* at 677–78.

tion' of both sexes 'in so far as is possible.'⁸⁴ Israel later expanded the policy in 1999 with the enactment of a quota law requiring that "all publicly traded companies have at least one woman board director."⁸⁵ Despite Israel's early leadership, however, European countries have largely led the charge to enact gender quota legislation for corporate boards.⁸⁶ As of 2018, twelve European Union ("EU") member states have "adopted legal measures to promote women to corporate boards."⁸⁷

In 2012, The European Commission ("Commission"), the executive branch of the EU, expressed concern regarding the growing discrepancies in the efforts and progress made by EU member states to promote gender equality in economic decision-making.⁸⁸ While a number of countries had adopted regulations to increase gender equality in the corporate sphere, the methods of execution differed greatly country-by-country, with some jurisdictions adopting mandatory quota laws and others opting for a comply-and-explain model, where "companies not complying with a gender balance objective have to disclose the reasons for not doing so."⁸⁹ Further, amongst those countries with mandatory laws, some jurisdictions imposed sanctions for non-compliance while others did not. In an effort to establish a uniform approach to promoting gender equality in economic decision-making across the EU, the Com-

84. Melanie M. Hughes, Pamela Paxton & Mona Lena Krook, *Gender Quotas for Legislatures and Corporate Boards*, 43 ANN. REV. SOC. 331, 335–36 (2017).

85. *Id.* at 336.

86. *Id.* ("Outside Europe, only Israel and Kenya have corporate board quotas, although reforms have been proposed in both South Africa and Canada.")

87. Éléonore Lépinard & Ruth Rubio-Marín, *Completing the Unfinished Task? Gender Quotas and the Ongoing Struggle for Women's Empowerment in Europe*, in TRANSFORMING GENDER CITIZENSHIP: THE IRRESISTIBLE RISE OF GENDER QUOTAS IN EUROPE 8 (Éléonore Lépinard & Ruth Rubio-Marín eds., 2018).

88. *Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance Among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures*, at 3, COM (2012) 614 final (Nov. 14, 2012) ("The divergence or the absence of regulation at national level does not only lead to the discrepancies in the number of women among executive and non-executive directors and different rates of improvement across Member States, but also poses barriers to the internal market by imposing divergent corporate governance requirements on European listed companies.")

89. *Id.* at 2–3.

mission proposed a directive on “improving the gender balance among non-executive directors of companies listed on stock exchanges.”⁹⁰ The stated purpose of the directive was to “substantially increase the number of women on corporate boards throughout the EU by setting a minimum objective of 40% presence of the under-represented sex” for non-executive directors of stock-exchange listed companies and requiring companies to pre-establish neutral and unambiguous selection criteria for filling such board positions.⁹¹

The 2012 proposal, however, has not yet been implemented and has not been voted on since December 2015, when the Employment, Social Policy and Consumer Affairs Council failed to formally adopt the directive.⁹² While there remains broad support for the directive, a number of member countries “continue to prefer national measures (or non-binding measures at the EU level), whereas others support EU-wide legislation.”⁹³ Thus, a compromise is yet to be reached.⁹⁴

In examining the spread of gender quota legislation in Europe, the Norwegian law is of particular importance.⁹⁵ The French quota law, however, is highly relevant in a review of international quota initiatives for the purposes of predicting the future of gender quota legislation in the United States.

1. Norway

In 2003, Norway became the first developed country to enact a law instituting a gender quota for corporate boards of directors.⁹⁶ The law, which requires “33 to 50 percent repre-

90. *Id.* at 3.

91. *Id.* at 5.

92. Practical Law UK, *Gender Balance on Company Boards: Council Fails to Formally Adopt the Women on Company Boards Directives (2015)*, Westlaw 4-621-0250.

93. *Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance Among Directors of Companies Listed on Stock Exchanges and Related Measures - Progress Report*, at 5, (May 31, 2017), <http://data.consilium.europa.eu/doc/document/ST-9496-2017-INIT/en/pdf>.

94. *Id.*

95. See, e.g., Victor E. Sojo et al., *Reporting Requirements, Targets, and Quotas for Women in Leadership*, 27 *THE LEADERSHIP Q.* 519, 533 (2016) (“Norway is the most often cited case of gender quotas for boards of directors and is, therefore, worthy of further attention.”).

96. Hughes, Paxton & Krook, *supra* note 84, at 336; Darren Rosenblum & Daria Roithmayr, *More Than a Woman: Insights into Corporate Governance After*

sentation of the minority gender depending on the size of the board of directors,” took effect in three phases.⁹⁷ In its first phase, the gender quota applied only to state-owned businesses and was voluntary for a period of two years, with the possibility of remaining voluntary if businesses achieved 40% gender representation by the government’s stated deadline.⁹⁸ As only 16% of board members were women at the time the deadline passed in 2006, the initiative progressed to its second phase, in which the gender quota became mandatory for both state-owned and publicly traded companies.⁹⁹ From the date of enactment, public limited liability companies were given two years to comply with the law. In 2008, the quota law went into full effect and thus any company not in compliance now faced serious consequences, such as dissolution or forced relocation.¹⁰⁰

2. *France*

On January 27, 2011, France enacted Law 2011-103 entitled, “On the equal representation of men and women on boards of directors and supervisory boards and professional equality.”¹⁰¹ The legislation requires “supervisory boards of private companies or joint-stock companies of any size, listed and unlisted” to strive for equal gender representation.¹⁰² The French legislation granted two transition periods for compa-

the French Sex Quota, 48 IND. L. REV. 889, 897–98 n.50 (2015) (“Norway’s Companies Act, amended in 2003, now reads: § 6–11a. Requirement regarding the representation of both sexes on the board of Directors. On the board of directors of public . . . companies, both sexes shall be represented in the following manner: [1] If the board of directors has two or three members, both sexes shall be represented; [2] If the board of directors has four or five members, each sex shall be represented by at least two; [3] If the board of directors has six to eight members, each sex shall be represented by at least three; [4] If the board of directors has nine members, each sex shall be represented by at least four, and if the board of directors has more members, each sex shall be represented by at least 40 percent; [5] The rules in no. 1 to 4 apply correspondingly for elections of deputy directors.”).

97. Angela R. Foster, *A Quest to Increase Women in Corporate Board Leadership: Comparing the Law in Norway and the U.S.*, 26 WASH. INT’L L.J. 381, 405 (2017).

98. *Id.* at 404.

99. *Id.* at 403.

100. *Id.* at 405–06; *see also* Hughes, Paxton & Krook, *supra* note 84, at 334.

101. Rosenblum & Roithmayr, *supra* note 96, at 897.

102. *Id.* at 898.

nies to come into compliance with the quota requirements.¹⁰³ In 2006 and prior to the passage of Law 2011-103, a similar law was introduced and struck down because it was found to violate the French Constitution.¹⁰⁴ In 2008, however, the Constitution was amended with a new requirement that the law “promote equal access by men and women to professional and social responsibility.”¹⁰⁵ The 2008 amendment, then, laid the legal groundwork necessary for the passage of the aforementioned gender quota law in 2011.

B. *Conclusions to Draw from the Data*

Since 2014, MSCI ESG Research, whose mission is to enable investors to understand environmental, social, and governance related risks,¹⁰⁶ has produced annual reports detailing the state of female representation on corporate boards around the world.¹⁰⁷ A key metric used by MSCI to measure progress is the number of MSCI ACWI Index constituent companies¹⁰⁸ (“MSCI Index companies”) with at least three women on the board. According to a number of studies,¹⁰⁹ three is the number of board seats needed to achieve the tipping

103. *See id.* (“The French law required firms to comply with the quota in two stages: regulations mandated that firms have at least twenty percent women by January 1, 2014 and the full forty percent by January 1, 2017.”).

104. Ruth Rubio-Marín, *A New European Parity-Democracy Sex Equality Model and Why It Won't Fly in the United States*, 60 AM. J. COMP. L. 99, 111 (2012).

105. *Id.* at 111–12.

106. MSCI ESG RESEARCH, MSCI ESG RESEARCH BROCHURE 3, <https://www.msci.com/documents/1296102/1311232/ESG+ADV+2A+2017-03.pdf/49ba55aa-b739-428c-b32d-87580eb4aeea> (“MSCI ESG Research products and services are designed to provide in-depth research, ratings and analysis of environmental, social and governance-related (ESG) business practices of companies worldwide.”).

107. MORGAN ELLIS & MEGGIN THWING EASTMAN, WOMEN ON BOARDS: PROGRESS REPORT 2018 3 (2018).

108. MSCI, MSCI ACWI INDEX BROCHURE, <https://www.msci.com/documents/1296102/1362201/MSCI-MIS-ACWI-Dec2018-Brochure.pdf/00e62164-446b-fd5b-5233-f23cdc8a6b26> (“The MSCI ACWI Index, MSCI’s flagship global equity index, is designed to represent performance of the full opportunity set of large- and mid-cap stocks across twenty-three developed and twenty-four emerging markets. As of December 2018, it covered more than 2,700 constituents across 11 sectors and approximately 85% of the free float-adjusted market capitalization in each market.”).

109. *See, e.g.*, Mariateresa Torchia, Andrea Calabrò & Morten Huse, *Women Directors on Corporate Boards: From Tokenism to Critical Mass*, 102 J. BUS. ETHICS 299, 304 (2011); Alison M. Konrad, Vicki Kramer & Sumru Erkut, *Critical*

point required for female directors “to participate on a more equal footing and exert influence relative to male peers.”¹¹⁰ As of October 2018, Norway, France, and Italy were the only three countries with 100% of MSCI Index companies having at least three women on their boards.¹¹¹ Generally speaking, however, MSCI predicted that with the current rate of progress, “30% of directorships will not be held by women until at least 2029.”¹¹²

TABLE 1: BOARD QUOTAS FOR PUBLIC COMPANIES

Country	Introduced	Type	Quota	Penalties for Non-Compliance?
Belgium ¹¹³	2011	Mandatory	33%	Government may void appointment of directors or suspend director benefits. ¹¹⁴
Denmark ¹¹⁵	2013	Comply or Explain	40%	N/A

Mass: The Impact of Three or More Women on Corporate Boards, 37 ORGANIZATIONAL DYNAMICS 145, 146 (2008).

110. ELLIS & EASTMAN, *supra* note 107, at 4.

111. *Id.* at 6.

112. *Id.* at 3.

113. EDWARD KAMONJOH, GENDER DIVERSITY ON BOARDS: A REVIEW OF GLOBAL TRENDS 6 (2014) (“2011 law requires 33 percent gender diversity by the end of 2016. For listed companies with a free float of less than 50 percent, gender diversity will be required by the end of 2018.”).

114. Siri Terjesen, Ruth V. Aguilera & Ruth Lorenz, *Legislating a Woman’s Seat on the Board: Institutional Factors Driving Gender Quotas for Boards of Directors*, 128 J. BUS. ETHICS 233, 235 (2015); Petra Meier, *Gender Quotas in Belgium: Consolidating the Citizenship Model While Challenging the Competition of Gender Equality*, in TRANSFORMING GENDER CITIZENSHIP: THE IRRESISTIBLE RISE OF GENDER QUOTAS IN EUROPE 44 (Éléonore Lépinard & Ruth Rubio-Marín eds., 2018) (explaining that the legislation granted large public companies a five-year transition period before compliance became mandatory, a transition period of eight years for smaller public companies, while state-owned companies were required to comply immediately); Melissa Breuer, *Next Stop for Diversity Initiatives: Corporate Boardrooms*, 42 J. CORP. L. 223, 232 (2016) (discussing countries that “passed laws requiring public companies to allow women to represent 40% of board within five years or risk fines or potentially, dissolution for non-compliance”).

115. See ELLIS & EASTMAN, *supra* note 107, at 26.

Country	Introduced	Type	Quota	Penalties for Non-Compliance?
Finland ¹¹⁶	2008	Comply or Explain	At least one female	N/A
France ¹¹⁷	2011	Mandatory	40%	Government may cease payment of fees to directors. ¹¹⁸
Germany ¹¹⁹	2015	Mandatory	30%	Board seats must be left unfilled if qualified women cannot be found. ¹²⁰
Iceland ¹²¹	2009	Mandatory	40%	None
Italy ¹²²	2011	Mandatory	33%	Government may impose fines and remove directors from office. ¹²³

116. *Id.*

117. Men and women must each have at least 40% representation on corporate boards. See Rosenblum & Roithmayr, *supra* note 96, at 889 (2015); See also KAMONJOH, *supra* note 113, at 6 (“2011 law stipulated that, beginning in 2014, boards must comprise at least 20 percent female directors [interim quota], rising to 40 percent by 2017.”).

118. Terjesen, Aguilera & Lorenz, *supra* note 114, at 235.

119. ELLIS & EASTMAN, *supra* note 107, at 26.

120. Hughes, Paxton & Krook, *supra* note 84, at 334.

121. See Mari Teigen, *Chapter 4 Gender Quotas on Corporate Boards: On the Diffusion of a Distinct National Policy Reform*, in 29 FIRMS, BOARDS AND GENDER QUOTAS: COMPARATIVE PERSPECTIVES 115, 128 (Fredrik Engelstad & Mari Teigen eds., 2012), <http://www.emeraldinsight.com/doi/10.1108/S0195-6310%282012%290000029008> (last visited Apr 16, 2019) (stating that the regulation “requires all publicly listed companies and companies with more than 50 employees to have at least 40 per cent of each gender represented on their boards from 2013. No penalties for non-compliance have yet been established.”); see also LINDA-ELING LEE ET AL., GLOBAL TRENDS IN GENDER DIVERSITY ON CORPORATE BOARDS 24 (2015); ELLIS & EASTMAN, *supra* note 107, at 26.

122. KAMONJOH, *supra* note 113, at 6 (“2011 rules stipulate 33 percent gender diversity by 2015.”).

123. See Terjesen, Aguilera & Lorenz, *supra* note 114, at 235; see also Konstantina Govotsos, *Gender Diversity in Corporate Boards in France: An Analysis*, JOSEPH WHARTON RES. SCHOLARS, May 2017, at 11 (noting that the law instituted a “progressive warning system in the event of non-compliance that would eventually lead to the dissolution of the board”).

Country	Introduced	Type	Quota	Penalties for Non-Compliance?
Netherlands ¹²⁴	2013	Comply or Explain	30%	None ¹²⁵
Norway ¹²⁶	2003	Mandatory	40%	Government may refuse to register board, dissolve company, and impose fines ¹²⁷
Spain ¹²⁸	2007	Comply or Explain	40%	Lack of gender diversity will impact consideration for public subsidies and state contracts ¹²⁹

Moreover, according to MSCI, “the United States, the United Kingdom, France, and Canada together accounted for over half of the total number of women’s board seats,” but interestingly, the United States is also “one of two developed countries in the top 10 countries with all male boards (the other being Japan).”¹³⁰ The MSCI 2018 Progress Report found that many United States firms “have had all male boards for several years, further indicating their persistent laggard status.”¹³¹ As discussed below, the United States may in turn benefit from the route taken by the EU in pursuing the participatory model of gender equity.

124. ELLIS & EASTMAN, *supra* note 107, at 26.

125. *See* Teigen, *supra* note 121, at 129.

126. Angela R. Foster, *A Quest to Increase Women in Corporate Board Leadership: Comparing the Law in Norway and the U.S.*, 26 WASH. INT’L L.J. 381, 405 (2017) (“The law officially requires 33 to 50 percent representation of the minority gender depending on the size of the board of directors.”).

127. Terjesen, Aguilera, & Lorenz, *supra* note 114, at 235.

128. KAMONJOH, *supra* note 113, at 6 (“Boards have until 2015 to attain gender balance, generally interpreted by the market to constitute 40 percent representation by the less represented gender.”). *But see* Lépinard & Rubio-Marín, *supra* note 87, at 20 (“This legislation, which contains no sanction mechanism, has systematically been under enforced.”).

129. Terjesen, Aguilera, & Lorenz, *supra* note 114, at 235.

130. *See* ELLIS & EASTMAN, *supra* note 107, at 26.

131. *See id.*

III.

THE ETHICS OF GENDER EQUITY

The case for gender diversity on corporate boards appears to rest on two primary arguments.¹³² The first argument is that increased gender diversity is crucial for better corporate governance and may result in increased firm profitability.¹³³ For example, according to institutional investors, diverse boards of directors may increase shareholder value, “improve[] recruiting and retention of talented staff, or ha[ve] some other positive impact on corporate operations, finance, or governance.”¹³⁴ The second argument is that corporate boards should strive for gender diversity “out of fairness and equity concerns.”¹³⁵ Proponents of this approach assert that board diversity is important because it has the potential to “provid[e] equal opportunity to groups historically excluded from positions of power.”¹³⁶

Many empirical studies have attempted to test the first argument by examining whether gender diversity on corporate boards does, in fact, lead to improved firm performance.¹³⁷ Such studies have produced mixed results.¹³⁸ The absence of

132. Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377, 382 (2014). These arguments arise primarily in scholarship on corporate social responsibility, law, socioeconomics, “as well as a growing number of studies at the intersection of corporate law and critical race theory” Regina Burch, *Worldview Diversity in the Boardroom: A Law and Social Equity Rationale*, 42 LOY. U. CHI. L. J. 585, 591 (2011).

133. Burch, *supra* note 132, at 591.

134. *Id.* at 599.

135. *Id.* at 591.

136. See Rhode & Packel, *supra* note 132, at 382.

137. See, e.g., Fairfax, *supra* note 22.

138. See, e.g., Fairfax, *supra* note 22; Anne L. Alstott, *Gender Quotas for Corporate Boards: Options for Legal Design in the United States*, 26 PACE INT’L. L. REV. 38, 39 (2014). A number of studies have found neutral or negative relationships between women’s presence on boards and firm performance. See, e.g., Pat Bradshaw et al., *Women on Boards of Non-Profits: What Difference Do They Make?*, 6 NONPROFIT MGMT. & LEADERSHIP 241 (1996) (studying nonprofits in Canada and finding no effects of gender diversity on board effectiveness but positive effects on subjective satisfaction with the board’s performance); David A. Matsa & Amalia R. Miller, *A Female Style in Corporate Leadership? Evidence from Quotas*, AM. ECON. J. (2012) (finding that firms impacted by Norway’s 2006 mandate made fewer layoffs, increasing labor costs and reducing short-term profits). Other studies, however, have found that the presence of

conclusive data regarding increased corporate profitability does not, however, render the importance of gender diversity void—the necessity of gender diversity in the corporate board context can be sufficiently supported and understood exclusively through the lens of equity.

A. *The Movement Toward Gender Parity*

As described in Parts I and II, there has recently been movement, primarily in the EU, toward the establishment of gender parity in the corporate leadership sphere on both the international and the domestic front. In this context, gender parity refers to:

[P]articipatory conceptions of gender equality that seek participatory parity or equal participation and not just equal rights. The most common instrument to pursue this goal of equal participation has been that of gender quotas, of which one can find at least three types: minimum threshold quotas (e.g. 30 percent), gender balance quotas (no more than 40/60 percent disparity between the sexes), or strict parity quotas (50/50 percent). All three types can be described as tools to achieve the goal of equal participation, differing only in whether they focus on guaranteeing equal opportunities or on guaranteeing equal results.¹³⁹

These developments reflect a broader shift in our collective understanding of gender equality, or a so-called “participatory turn.”¹⁴⁰ Historically, gender equality has been recognized largely through the framework of equal rights and non-discrimination.¹⁴¹ Recently, however, the focus has shifted

female board members increases firm performance. See, e.g., Kevin Campbell & Antonio Minguez-Vera, *Gender Diversity in the Boardroom and Firm Financial Performance*, 83 J. BUS. ETHICS 435 (2008); Nina Smith et al., *Do Women in Top Management Affect Firm Performance? A Panel Study of 2500 Danish Firms*, INT'L J. OF PRODUCTIVITY AND PERFORMANCE MANAGEMENT 55, 569–93 (2006); Niclas L. Erhardt & James D. Werbel, *Board Director Diversity and Firm Financial Performance*, CORP. GOVERNANCE: AN INT'L REV., no. 11, Apr. 2003, at 102–11.

139. RUTH RUBIO-MARÍN & WILL KYMLICKA, *GENDER PARITY AND MULTICULTURAL FEMINISM: TOWARDS A NEW SYNTHESIS* 2 n.1 (2018).

140. *Id.* at 2.

141. *Id.*

to equal female participation, and “[w]omen’s absence from traditionally male domains of power and authority is increasingly seen to be in conflict with modern notions of gender equality”¹⁴² The participatory turn, then, reflects a growing demand for substantive, rather than formal, equality.¹⁴³

Some argue that while the participatory turn is expressed primarily in the context of women’s rights, the problems that the participatory turn aims to remedy are not limited to gender inequality. Rather, “it is the very legitimacy of democracy and the state itself that are compromised by the chronic under-representation of women. Participatory parity, per this view, is a requirement of democratic legitimacy, as well as a tool for gender equality.”¹⁴⁴ There are a number of attributes of participatory parity cited in support of the democratic legitimacy contention. For example, achieving participatory parity requires broadened “voice and diversity in representation.”¹⁴⁵ Generally speaking, steps taken, whether by governments or private organizations, to boost the female voice in representative positions are often justified “on the basis of a need to include the interests and views of marginalized groups, which in turn enhance the deliberative quality of the democratic dialogue.”¹⁴⁶

Most commonly, the gender parity model is applied through the adoption of mechanisms, such as gender quotas, with the hope that such mechanisms will “overcome women’s traditional underrepresentation in democratically elected institutions or publicly appointed bodies”¹⁴⁷ The adoption of such parity-focused mechanisms, however, has found success almost exclusively in the EU, where the legal framework for gender equality was first premised upon non-discrimination in the employment context, but has since evolved into a

142. *Id.*

143. *Id.* at 3. (“Given women’s historical discrimination and legacies of political disenfranchisement, merely formal guarantees of equal political rights (e.g. the equal right to vote or run for office) fail to ensure that women can enjoy effectively equal opportunities to access those positions of power and status that were once (and often remain) either *de facto* or *de jure* closed to them.”).

144. *Id.*

145. *Id.*

146. *Id.*

147. Rubio-Marín, *supra* note 104, at 103.

model that encompasses “women’s empowerment both in the public and private domain . . .” and identifies gender equality as a prerequisite for “genuine democracy.”¹⁴⁸ In the United States, by contrast, only one state has passed legislation imposing a gender quota for corporate boards.¹⁴⁹

B. *The Future of Participatory Parity in the United States*

There have been a number of explanations proffered for the geographic disparity in adoption of a participatory parity model. From a technical perspective, having been found to “violate formal equality and a gender-neutral reading of the Equal Protection Clause” by the U.S. Supreme Court, mandatory gender quotas have been deemed effectively incompatible with American law.¹⁵⁰ Beyond the case law, mandatory gender quotas fundamentally deviate from America’s popular legal conception of equality, in both the legal and the socio-political sphere.¹⁵¹ Where legal provisions that call for both equal treatment *and* substantive equality have been part of European jurisprudence and, by extension, European culture since 1976,¹⁵² the United States has adhered strictly to the formal equality mandate.¹⁵³ While the fate of California’s SB 826 is undetermined¹⁵⁴ the passage of the law will test whether the United States remains devoted to its pre-

148. *Id.* at 105–06.

149. *See supra* Section I.B.

150. Rubio-Marín, *supra* note 104, at 121.

151. *See generally id.* at 119–24 (explaining the social, legal, historical, and cultural factors that make parity citizenship, through gender quotas, unlikely to be seriously considered in the United States).

152. *Id.* at 104 (“It was the European Court Justice which in a ruling of April 1976 explicitly recognized the principle of sex equality in its double economic/social objective to ‘a founding principle of the EEC,’ opening the way to spillovers beyond the workplace. From then on, we observe an evolution of the treatment of equality between men and women from a limited, social, and mostly employment related issue (still at the core of the EU’s concerns), to a broader question of justice.”).

153. *Id.* at 113 (“[F]ormal equality is best characterized as a procedural rule shaped like a Kantian categorical imperative (‘treat equally or do not differentiate or classify on the grounds of sex’), the substantive equality mandate follows a consequential logic and asserts a substantive outcome, i.e., that of ensuring that there be no disadvantages attached to a person’s sex or that the existing ones be removed.”).

154. *See supra* Section I.B.

sent formal equality model, or whether we, too, will take a “participatory turn.”¹⁵⁵

C. *The Limitations of Participatory Parity*

Relative to the formal equality model, participatory parity appears to be a powerful tool in the pursuit of gender equity.¹⁵⁶ The approach, however, is not without its limitations. First, as discussed above, the “gender quota revolution” has yet to reach the United States, and American adoption of the participatory parity model appears unlikely.¹⁵⁷ Second, even under gender quotas instituted as part of participatory parity-driven initiatives, “both formal and informal institutional arrangements tend to maintain existing distributive patterns” nonetheless.¹⁵⁸ Quotas that mandate a certain percentage of corporate board seats be held by women address the problem of institutional hiring practices insofar as they require female representation. Such quotas do not, however, address the informal social norms and structural inequalities that result in the “exclusion of some citizens from some domains of participation.”¹⁵⁹

Informal social norms, such as those requiring that “women do most of the family work or take most of the part-time employment,” perpetuate existing gender roles and limit the pool of women who are selected to fill the designated board seats to those women who, say, have had the financial means to pay for child care throughout their careers.¹⁶⁰ In other words, while affirmative remedies such as gender quotas may address statistical representation disparities, they do not address the issue of social exclusion, a problem that likely created the statistical disparities in the first place. The socially excluded are those who are “effectively prevented from participating in the benefits of citizenship or membership of society owing to a combination of barriers,” which include poverty, poor educational opportunities, membership of a disfavored racial minor-

155. See RUBIO-MARÍN & KYMLICKA, *supra* note 139, at 2.

156. See generally *id.* at 7.

157. See *supra* Section II.B.

158. Rubio-Marín, *supra* note 104, at 115.

159. *Id.* at 115; see also Hugh Collins, *Discrimination, Equality and Social Inclusion*, 66 MOD. L. REV. 16, 37 (2003).

160. Rubio-Marín, *supra* note 104, at 116.

ity, and responsibility for family dependents.¹⁶¹ Arguably, gender quotas are deficient from a social inclusion perspective because they do not address the root *causes* of social exclusion—“If the cause of social exclusion is that the hours of work render it difficult for an excluded group to conform, the solution lies in a consideration of whether flexibility in hours could be introduced.”¹⁶²

Still, the gender quota remedy becomes less appealing when viewed through the lens of intersectionality. The term intersectionality refers to the “critical insight that race, class, gender, sexuality, ethnicity, nation, ability, and age operate not as unitary, mutually exclusive entities, but as reciprocally constructing phenomena that in turn shape complex social inequalities.”¹⁶³ Gender quotas largely serve to address only one marginalized identity, that of being female, and fail to account for important *intragroup* differences such as race, class, and sexual orientation. Moreover, gender quotas for corporate boards inherently focus on the most privileged members, with respect to race and class of groups, those who are considered “qualified” for corporate board positions, while marginalizing “those who are multiply-burdened.”¹⁶⁴

IV.

CLAIMING INCLUSIVITY: GENDER NARRATIVE IMPACT

The case for more women on corporate boards rests not only on arguments in support of ethical obligations but also on the premise that the presence of women and under-represented groups in corporate boardrooms fosters narrative inclusivity and impact.

In *Reconsidering the Remedy of Gender Quotas*, Tracy Thomas states, “‘Quota’ is a dirty word.”¹⁶⁵ She notes that in several European contexts the term “targets” has been adopted in-

161. Collins, *supra* note 159, at 22.

162. *Id.* at 37.

163. Patricia Hill Collins, *Intersectionality’s Definitional Dilemmas*, 41 ANN. REV. SOC. 1, 2 (2015).

164. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989).

165. Tracy Thomas, *Reconsidering the Remedy of Gender Quotas*, HARV. J.L. & GENDER, at 1 (Nov. 12, 2016), https://harvardjlg.com/wp-content/uploads/sites/19/2016/11/2016.11.12.Thomas.GenderParity.Final_.pdf.

instead of “quotas” as a more palatable way to advertise the requirement.¹⁶⁶ We propose that even the term “target” might be negatively portraying gendered narratives, as the definition of the word “target” according to the New Oxford American Dictionary is “a person, object, or place selected as the aim of an attack.”¹⁶⁷ The word “attack” inherently implies threat, placing an emphasis on the negative instead of the positive effect that inclusivity brings. We propose viewing gender quotas as a form of narrative impact. The New Oxford American Dictionary defines “impact” as “the effect or influence of one person, thing, or action, on another.”¹⁶⁸ We argue that use of the word “impact” is advantageous for all, as it is not simply the woman who is elected to serve on the board who benefits from the position, but also the corporation, its constituents, and society as a whole.¹⁶⁹ For example, in *Centros, California’s “Women on Boards” Statute and the Scope of Regulatory Competition*, Jill Fisch and Steven Solomon propose that gender quota laws such as California’s SB 826 “reflect[] a concern with broader societal goals such as [addressing] discrimination and sexual harassment . . .”¹⁷⁰

Thomas further notes that the idea of gender quotas culturally “evokes claims of unfairness, triggering fears of unqualified candidates and reverse discrimination against men.”¹⁷¹ However, as noted in a study by McKinsey, there is a “marked correlation between the presence of women in top management teams and the organizational performance of the company.”¹⁷² Following an analysis of 300 companies, McKinsey “found a difference in return on equity of 47 percent between

166. *Id.* at 8.

167. *Target*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010).

168. *Impact*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010).

169. This argument for narrative impact can and should be applied to other marginalized groups as well.

170. See Jill E. Fisch & Steven Davidoff Solomon, *Centros, California’s “Women on Boards” Statute and the Scope of Regulatory Competition*, U. PA. EUR. BUS. ORG. L. REV. (forthcoming 2019) (draft at 3).

171. Thomas, *supra* note 38, at 3.

172. MCKINSEY & CO., TIME TO ACCELERATE: TEN YEARS OF INSIGHTS INTO GENDER DIVERSITY 13 (Oct. 1, 2017), <https://www.mckinsey.com/~media/McKinsey/Featured%20Insights/Women%20matter/Women%20Matter%20Ten%20years%20of%20insights%20on%20the%20importance%20of%20gender%20diversity/Women-Matter-Time-to-accelerate-Ten-years-of-insights-into-gender-diversity.ashx>.

the companies with the most women on their executive committees and those with none, and a 55 percent difference in operating reports.”¹⁷³ The McKinsey report highlighted various facts for this improved performance, including diverse leadership styles¹⁷⁴ that were “also considered to be the most effective in addressing the global challenges of the future.”¹⁷⁵ Other studies have also hypothesized that improved performance tends to be based on “more intense mutual monitoring and more equal learning in gender diverse teams.”¹⁷⁶ Diversity in corporate boardrooms has also been shown to “enhance[] the quality of decision-making” as it causes members to “express their ideas more clearly and logically”¹⁷⁷ Women have demonstrated a propensity to “raise a new set of issues for board consideration that are based on their unique set of experiences” that often times relates to key constituencies and stakeholders.¹⁷⁸ The improved perspective diversity offers is essential to narrative impact theory.

Notably excluded from the discussion about corporations and their board members is the power that gender narratives can have, as seen in other fields. Female narratives have demonstrated that they have the power to change the status quo when given voice.¹⁷⁹ As noted by Lindsey Martin-Bowen, feminist storytellers used narratives to challenge the legal system’s status quo, for example, in the Supreme Court’s decision to hold Pennsylvania’s Abortion Control Act unconstitutional in *Thornburgh v. American College of Obstetricians and Gynecologists*.

173. *Id.* at 13.

174. *See id.* at 14 (finding that women used five of nine positive leadership behaviors more than men including people development, expressing expectations and rewarding success, role-modeling, inspiration, and participative decision-making).

175. *Id.* at 15.

176. Sander Hoogendorn et al., *The Impact of Gender Diversity on the Performance of Business Teams: Evidence from a Field Experiment* 22 (Feb. 5, 2011) (working paper), <http://www.economists.nl/files/20110205-teams2011feb.pdf>.

177. Alison M. Konrad, Vicki Kramer & Sumru Erkut, *The Impact of Three or More Women on Corporate Boards*, 37 *ORGANIZATIONAL DYNAMICS* 145, 156 (2008).

178. *Id.*

179. *See* Kathryn Abrams, *Hearing the Call of Stories*, 79 *CALIF. L. REV.* 971, 1030 (1991).

cologists.¹⁸⁰ Moreover, Martin-Bowen argues that by including more narratives in the courtroom, there is the potential to allow jurists to understand the “subjective reality of an oppressed class”¹⁸¹ Is there a reason why this same line of thinking should not apply to corporate boardrooms, where women only occupy 21.7% of directorships,¹⁸² although they represent almost half of the American workforce?¹⁸³

Narratives on women in domestic situations or in the criminal justice system are widely available,¹⁸⁴ but scholarship on the role female narratives play in boardrooms is limited. Further, the ones available are mostly narratives surrounding how *others* feel about having women in the boardroom.¹⁸⁵ However, those narratives were found to demonstrate embarrassment towards the subject and participants were hesitant to discuss racial or gender diversity and its role in performance.¹⁸⁶ As noted by Mae Kuykendall, narrative methods have long served an area of contention in the legal field but have found a place in “criminal law and the legal treatment of minorities.”¹⁸⁷ In sharp contrast to criminal law, corporate law cases were once found to be robust with “rhetoric of manhood

180. Lindsey Martin-Bowen, *Words From a Teller of Tales: Can Storytelling Play an Effective Role in Feminist Jurisprudence?*, 66 UMKC L. REV. 95, 105 (1997).

181. *Id.* at 109.

182. *Women on Corporate Boards*, *supra* note 2.

183. *Labor Force Participation Rate by Sex, Race and Hispanic Ethnicity: 2016 Annual Averages and 2024 Projections*, U.S. DEP'T LABOR, <https://www.dol.gov/wb/stats/NEWSTATS/latest/laborforce.htm#LFPracesex>.

184. *See, e.g.*, Cheryl Nelson Butler, *A Critical Race Feminist Perspective on Prostitution & Sex Trafficking in America*, 27 YALE J.L. & FEMINISM 95 (2016) (discussing the intersectionality of critical race theory and feminist narratives on prostitution and sex trafficking in America); Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75 (2008) (discussing the narratives of female domestic victims); Chimène I. Keitner, *Victim or Vamp? Images of Violent Women in the Criminal Justice System*, 11 COLUM. J. GENDER & L. 38 (2002) (discussing narratives of women in the criminal justice system).

185. *E.g.*, Lissa L. Broome, John M. Conley & Kimberly D. Krawiec, *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759 (2011).

186. *See id.* at 761.

187. *See* Mae Kuykendall, *No Imagination: The Marginal Role of Narrative in Corporate Law*, 55 BUFF. L. REV. 537, 538 (2007).

. . .”—a tool used by courts as a “firm basis for a holding or rationale.”¹⁸⁸

While corporate law has now moved into more gender-neutral language,¹⁸⁹ it arguably does not allow sufficient entry for diverse narratives and perspectives. As suggested by Margaret Moore Jackson, outsider narratives—the narratives from marginalized voices—may help counter any norms or stereotypes that prevent the law from providing access to justice.¹⁹⁰ This same reasoning should apply to women in corporate boardrooms, whose presence in the boardroom is slowly growing and is likely to have a large impact on the performance of the corporation.¹⁹¹ Although gender narratives have not been discussed to a great extent in the business field, they are arguably of significance in light of the important value that narratives provided in other fields.¹⁹² The impact and inclusion of female narratives not only supports the participatory parity theory, but has also been shown to increase economic growth within businesses.¹⁹³

CONCLUSION

Gender quotas for corporate boards, which find their roots in the participatory parity model, are a valuable tool for increasing gender diversity in corporate decision-making roles,

188. *See id.* at 581.

189. *See id.*

190. *See* Margaret Moore Jackson, *Confronting “Unwelcomeness” from the Outside: Using Case Theory to Tell the Stories of Sexually-Harassed Women*, 14 *CARDOZO J.L. & GENDER* 61 (2007).

191. *See* MCKINSEY & CO., *supra* note 172; Deborah E. Arfken, Stephanie L. Bellar, & Marilyn M. Helms, *The Ultimate Glass Ceiling Revisited: The Presence of Women on Corporate Boards*, 50 *J. BUS. ETHICS* 177, 183-84 (2004), <http://www.jstor.org/fls.idm.oclc.org/stable/25123205>; Francesca Lagerbeg, *The Value of Diversity*, GRANT THORNTON (Sept. 29, 2015), https://www.granthornton.global/globalassets/wib_value_of_diversity.pdf (finding that there is a significant opportunity cost to male only boards).

192. *See* Martin-Bowen, *supra* note 180.

193. That impact and inclusion of female narratives has been shown to increase economic growth within businesses was demonstrated by Erhardt & Werbel, Campbell & Miguez-Vera, and Smith et al. in Part III of this Article. These studies by Smith et al. and Erhardt & Werbel further indicate that an increase in board diversity tends to have a positive effect on firm performance. Also, see *supra* note 191 (providing additional research articles that support the notion that an increase in females on corporate boards has a positive impact on firms).

as evidenced by the growing adoption of such policies in the EU. However, their application in the United States is limited and controversial.¹⁹⁴ This article does not necessarily advocate for the wide-spread adoption of mandatory corporate board gender quotas in the United States but rather considers the value narrative impact offers as an alternative approach to achieving diverse female representation in positions of corporate decision-making power. This alternative approach prioritizes *impact* as an ethical reason for gender quotas and places narrative impact alongside numerical presence. As a result, it calls for policies that address the underlying causes of unequal gender representation through the inclusion of diverse narratives in positions of authority.

As noted by Rubio-Marín, “[I]t seems unlikely that one could press for a gender parity democracy model in the United States without integrating some conception of racial parity democracy. This makes the project more daunting and less viable both theoretically and politically, because the forces of racism and patriarchy would presumably join in opposing it.” We ask—is this statement a theory for hopelessness or a fact that we must factor into our strategic planning for equality, or both? And more so, as presented above, notions of gender equality rest not only on arguments in favor of an ethical model, but also in one that recognizes the positive impact of gender equality on corporate wealth maximization. Former Deputy Mayor of New York City Alicia Glen stated:

I’m sick of hearing that there should be more women on [company boards] and there should be a diversity committee. New York City should do everything it can to be not just hospitable [to women in their careers], but to provide capital, resources, legal protections, and a whole array of services for great, smart women—whether they’re already in New York or trying to decide where they want to go.¹⁹⁵

194. Rubio-Marín, *supra* note 104, at 120 (“[I]t seems unlikely that one could press for a gender parity democracy model in the United States without integrating some conception of racial parity democracy. This makes the project more daunting and less viable both theoretically and politically because the forces of racism and patriarchy would presumably join in opposing it.”).

195. Richard Florida, “You Can’t Just Show Up”: Alicia Glen on Amazon’s Queens Defeat, CITYLAB (May 17, 2019), <https://www.citylab.com/equity/>

As former Deputy Mayor Glen discusses, there are already a great deal of women on company boards capable of serving, but the question in turn relates to the opportunities available to women overall and whether they are granted the opportunity to be considered as viable candidates.¹⁹⁶ A participatory corporate board model recognizes the ethical support for gender equity and the significant benefits of narrative impact.

2019/05/alicia-glen-bill-de-blasio-nyc-housing-economic-development/589327/.

196. *See id.*