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**Gender Parity in the Boardroom: How States Can Crack the Glass Ceiling of the
Corporate Boardroom for More Women to Enter**

Olivia Pereira

I. INTRODUCTION

On a positive note, the progress of gender equality across most aspects of the professional world have improved dramatically. For example, in 2014, the percentage of women on corporate board of directors was a startling 19%.¹ Seven years later, that percentage jumped to 29% across U.S. corporate boards.² In comparison to the rest of the world, France currently leads the race to gender parity in corporate boards with 44% of board members being female in 2021.³ The U.S. has a long road ahead in order to catch up with France. The million-dollar question is: how can U.S. states most efficiently, quickly, and correctly enhance gender diversity on corporate boards while avoiding constitutional barriers? This paper proposes an answer to that question.

Another positive note to add is that there are currently no all-male board of directors in the Standard and Poor's 500 (S&P 500) in 2021.⁴ Approximately 30% of S&P 500 board of directors were female in 2020 which was a record rate.⁵ Even though this may seem positive on its face, the reality is that inside the boardroom at most companies, the representation of women remains strikingly low.⁶ Fortune 500 boards had an even lower percentage of women directors with only 26.5% of directors being women in 2020.⁷ Studies have shown that after looking at previous trends and rates, gender parity in U.S. corporate boardrooms can be reached as early as 2039 or as late as 2070.⁸ This is a stark difference of either twenty years from now, or at the

¹ BoardEx. 2021. *BoardEx Global Gender Balance Report 2021*. <https://www.boardex.com/2020-global-gender-diversity-analysis-women-on-boards/> (last visited Dec. 22, 2021).

² *Id.*

³ *Id.*

⁴ Women on Corporate Boards (Quick Take), Catalyst (2021), <https://www.catalyst.org/research/women-on-corporate-boards/> (last visited Dec 23, 2021).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Iman Ghosh, The boardroom still has a gender gap: Here's what it looks like - and how to fix it. World Economic Forum (2021), <https://www.weforum.org/agenda/2021/03/study-shows-the-state-of-female-representation-on-corporate-boards/> (last visited Dec 23, 2021).

latest, fifty years from now. Not only is there gender inequality with regard to the percentage of women directors on corporate boards, but there is even greater gender inequality in leadership on boards and the number of women on board subcommittees.⁹ While it is already difficult for women to break the glass ceiling to make it into the male-dominated corporate boardroom, cracking the glass even harder to get into leadership positions within the board is even more difficult.

Different countries have different approaches to addressing gender inequality in corporate boardrooms which consequently influences their rate of increase over time. In the United States, several states have proposed bills in an effort to increase and encourage gender parity in corporate boards while the federal government has not taken many steps.¹⁰ This comment will explore various approaches that have been taken in effort to combat gender inequality in corporate boardrooms and ultimately propose the most realistic and effective option that U.S. states should employ. Given the nature of the United States and the constitutional challenges at issue with regard to some of these approaches, this comment argues that the best and most realistic approach for states is to require corporations to file mandatory disclosures with the Secretary of State yearly that report diversity protocols and the gender composition of the board instead of quotas. In addition to the mandatory filings, the Secretary of State should draft model recommendations for companies to follow in diversifying their boards. If they do not comply with the recommendations, they will have to meet with the state and explain why which will also be disclosed to the public.

⁹ Joan Helwig, State Gender Diversity Legislation: Status Updates Cogency Global (2020), <https://www.cogencyglobal.com/blog/state-gender-diversity-legislation-status-updates> (last visited Dec 23, 2021).

¹⁰ *Id.*

One of the most controversial and recent approaches to mitigating gender inequality in corporate boardrooms is Senate Bill No. 826 (hereinafter SB 826), a California bill passed in 2018 that has been passed around California courts in light of constitutional challenges the past few years.¹¹ SB 826 requires public companies in the state of California to meet certain quota requirements each year to increase women representation on corporate board of directors.¹² Quota requirements have been used in other countries to increase women representation on corporate boards but legislative approaches like quota requirements pose constitutional challenges in the United States that other countries do not necessarily have to face.¹³ Countries that have employed mandatory quota laws similar to SB 826 have seen favorable outcomes in reaching gender parity. While this seems to be the most effective approach to reaching this goal, it may not be the most feasible in the U.S. due to constitutional challenges.

Several other states in the U.S. have proposed other legislation to increase transparency in gender inequality in hopes of increasing minority presence in corporate boards. For example, Illinois enacted House Bill 3394 (hereinafter HB 3394) in 2019 which requires all “publicly held corporations with principal executive offices in Illinois to begin including self-identified gender and minority demographic information for current board members and information relating to diversity factors for board evaluation, recruitment, and other policies and practices” in their annual reports by 2021.¹⁴ In addition to HB 3394, Illinois has also proposed new legislation, Senate Bill 3508 that is substantially similar to California’s SB 826 which has undergone constitutional scrutiny for board member quotas centered around gender composition.¹⁵ Fines

¹¹ Cal. Corp. Code § 301.3(c)-(d).

¹² *Id.*

¹³ Bettina C.K. Binder, et. al. *The Plight of Women in Positions of Corporate Leadership in the United States, the European Union, and Japan: Differing Laws and Cultures, Similar Issues*, 26 MICH. J. GENDER & L. 279, 291 (2019).

¹⁴ H.B. 3394, 101st General Assembly, (Ill. 2019).

¹⁵ *Id.*

will be imposed for violations including increased fines for repeated violations.¹⁶ In New Jersey, proposed legislation similar to the California bill has been pending in Assembly and Senate committees since January 2020.¹⁷ New Jersey Bill S798 and New Jersey Bill A1982 retain requirements for additional female board members, penalties for noncompliance, and annual reporting requirements.¹⁸

New York has taken a more restrictive approach with Senate Bill S4278 which amended Section 408 of the Business Corporation Law to require corporations to include the number of directors and how many of them are women in their biennial statement filings.¹⁹ The disclosure law in New York applies to all public and private for-profit business corporations that are authorized to do business in the state.²⁰ Each company is required to disclose the number of directors on its board and its gender composition with the Secretary of State which will publish its findings on its website.²¹ The website will also publish comparative reports that are filed every four years thereafter for the public to see.²²

Furthermore, Washington proposed Senate Bill 6037 which became effective in June 2020.²³ The bill requires public companies to have gender diverse boards beginning in 2022; gender-diverse means having a board that is comprised of 25% or more women for at least 270 days of the fiscal year before the annual shareholders meeting.²⁴ If a company does not comply,

¹⁶ *Id.*

¹⁷ S. 798/ A. 1982, 219th Leg., (N.J. 2020).

¹⁸ *Id.*

¹⁹ S.B. 4278 (N.Y. 2019).

²⁰ JD Supra, 2022. *New York's Disclosure Law and Other Laws and Regulatory Mandates Regarding Women on Corporate Boards* | JD Supra. <https://www.jdsupra.com/legalnews/new-york-s-disclosure-law-and-other-7815870/> (last visited February 18, 2022).

²¹ *Id.*

²² *Id.*

²³ S.B. 6037, 66th Leg., (Wash. 2020).

²⁴ *Id.*

it has to deliver a board diversity discussion and analysis to its shareholders and explain its approach to developing and maintaining diversity on the board.²⁵ The Washington bill has left open the question of an annual reporting requirement.²⁶ As displayed above, several states across the country are becoming forerunners in the race to gender parity. With outside pressure from shareholders, politicians, lobbyists, and the public in general, more and more states are proposing laws to enhance gender parity in the boardroom. The main hurdle is finding an approach that will not only survive constitutional scrutiny, but also one that will actually work. Mandatory disclosures with the secretary of state consisting of diversity protocols and board composition is the most feasible way for states to approach this lingering issue.

II. BACKGROUND: WHY GENDER PARITY IS CRUCIAL ON CORPORATE BOARDS

A. Board of Directors

Corporate board of directors are crucial to the decision-making process and power in a corporation. The board makes decisions as fiduciaries on behalf of shareholders and appoints the firm's officers who manage the day-to-day operations of the firm.²⁷ The board is also in charge of hiring decisions about senior directors, dividend policies, option policies, and executive compensation.²⁸ Corporate boards help set goals, support executive duties, and ensure company has well-managed resources.²⁹ Additionally, directors are active participants in business decisions like mergers, stock issuance, and the changing of company documents.³⁰ The board

²⁵ *Id.*

²⁶ *Id.*

²⁷ James Chen, Board of Directors (B of D) Investopedia (2021), <https://www.investopedia.com/terms/b/boardofdirectors.asp> (last visited Dec 23, 2021).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

also has a monitoring role— they are expected to represent the shareholders’ interest and adhere to their fiduciary duties.³¹

Most boards have specific board committees that are tasked with specific mandates which women are unsurprisingly largely underrepresented on.³² Members of the board are voted on by shareholders but the nominations before the vote are decided on by a nomination committee.³³ Furthermore, terms for directors are sometimes staggered so that only a few new directors are elected each year.³⁴ In other words, the director terms can be in “classes.”³⁵ The general rule is that shareholders are responsible for electing the board of directors at the annual meeting.³⁶

State law usually defines the board’s role in managing business affairs.³⁷ The Model Business Corporation Act specifies board responsibilities which include creating business plans, assessing risk, evaluating performance and senior officer's compensation, implementing policies and practices to foster compliance with law and ethical conduct, preparing the corporation's financial statements, assessing the effectiveness of the corporation's internal controls, and disseminating adequate and timely information to directors.³⁸ Before 2009, Congress and the Securities and Exchange Commission did not require boards in the U.S. to disclose information regarding their methods for nominating candidates, specifically concerning their diversity principles.³⁹ This resulted in even less diversity. The board of directors have the utmost power

³¹ *Id.*

³² James Chen, Board of Directors (B of D) Investopedia (2021), <https://www.investopedia.com/terms/b/boardofdirectors.asp> (last visited Dec 23, 2021).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Nicolena Farias-Eisner, *Gender Diversity in Corporate Boardrooms: Do Equal Seats Mean Equal Voices?*, 13 J. BUS. ENTREPRENEURSHIP & L.1 (2019).

³⁸ *Id.*

³⁹ *Id.*

to make all decisions on behalf of the corporation, including appointing the corporation's officers. Women being largely underrepresented in this powerful room is not a surprise.

B. Women Underrepresented Across the Boards

Women are still largely underrepresented in corporate jobs, especially in higher-paid positions. As of 2021, only 8.2% of Fortune 500 CEOs are women.⁴⁰ The large disparity in corporate roles is most prevalent in technological fields. For example, when Twitter and Facebook went public, they both had no women on their board of directors.⁴¹ One way to try to mitigate the gender gap is through state legislation as mentioned earlier. However, state regulation concerning this type of business decision is controversial on a variety of levels. For example, opponents of state regulation in response to increasing gender parity in corporate boardrooms view it as too much government overreach into business and the marketplace.⁴² Research shows that adding to the current state of gender inequality in corporate boardrooms are a combination of women having shorter tenures, women being less likely to hold leadership roles, and women being stretched more thinly than their male counterparts.⁴³ Women tend to have to “prove themselves” more than men do which includes taking on more responsibility, having more credentials and experience, and over-extending themselves. This shows that

⁴⁰ Women Business Collaborative, 8.2% of Fortune 500 CEOs are women, according to the 2021 women CEOs in America report Cision PR Newswire (2021), <https://www.prnewswire.com/news-releases/8-2-of-fortune-500-ceos-are-women-according-to-the-2021-women-ceos-in-america-report-301400856.html#:~:text=In%2DLanguage%20News-,8.2%25%20of%20Fortune%20500%20CEOs%20are%20Women%2C%20According%20to%20the,Women%20CEOs%20in%20America%20Report> (last visited Dec 23, 2021).

⁴¹ Article: Board Diversity by Term Limits?, 71 Ala. L. Rev. 212. (2019).

⁴² *Id.*

⁴³ *Id.*

women have a long way to go in reaching gender parity within corporate boards, despite rising numbers of women on boards in public companies across the U.S.⁴⁴

Specifically, the rate of increase in women being voted onto corporate board of directors has slowed in the past three to four years per a recent study.⁴⁵ 30% female representation on corporate boards is considered a crucial goal on the road to gender parity.⁴⁶ Across the world, Europe continues to lead with the highest representation of women on corporate boards. In the U.S., the publicly held corporation that currently has the largest percentage of women on its board is Citigroup (which is 50%).⁴⁷ A “wait and see” approach is not good enough and is not working to bridge the gap quick enough.

There are other contributing factors to the issue. Even with the existence of an increased numbers of women on boards, data reveals systemic differences in the tenure of women and men.⁴⁸ Men had average of 22-24% longer tenures than women directors on boards as of 2019.⁴⁹ Director tenure is positively correlated with the likelihood of having a leadership role which consequently leads to less women in leadership roles on boards.⁵⁰ Gender equality in management positions is doing better than in corporate boards with still some disparities such as higher percentages of women in managerial positions in women-dominated sectors such as human resources.⁵¹

⁴⁴ *Id.*

⁴⁵ Iman Ghosh, The boardroom still has a gender gap: Here's what it looks like - and how to fix it World Economic Forum (2021), <https://www.weforum.org/agenda/2021/03/study-shows-the-state-of-female-representation-on-corporate-boards> (last visited Dec 23, 2021).

⁴⁶ *Id.*

⁴⁷ Tasneem Hanfi Brögger, Bloomberg.com (2021), <https://www.bloomberg.com/news/articles/2021-10-15/stoxx-600-companies-push-ahead-of-s-p-500-on-gender-equality> (last visited Dec 23, 2021).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Farias-Eisner *supra* note 37.

Not surprisingly, there is even greater disparity in chair positions.⁵² The key influence in the boardroom is the chair of the board; The chair has control of the board's agenda and also has other formal and informal powers.⁵³ In 2015, men were six times as likely to serve as chair than women.⁵⁴ Other factors contribute to this disparity such as the strikingly low percentage of women CEOs. For example, in many companies the CEO also serves as the chair of the board which consequently leads to the higher number of men as chairs.⁵⁵ However, recent trends have shown the separation of these roles which can lead to mitigation of gender inequality in the chairman role.⁵⁶

C. Theories and Explanations for Disparities

There are a number of theories circulating as to why women have such trouble climbing the corporate ladder and/or why women are not as well-represented in higher-level corporate roles such as directors of corporate boards. For example, studies show that women face difficulty establishing credibility in workplace.⁵⁷ Stereotype research has shown that many women experience backlash for speaking up in the workplace.⁵⁸ "Masculine" behaviors are often recommended for women to climb ladders in the workplace, but then there is often backlash for these behaviors which makes it increasingly hard for women to reach higher, better-paid leadership positions.⁵⁹ Studies also show that women directors often need extra credibility to be

⁵² Farias-Eisner *supra* note 37 at 3.

⁵³ Farias-Eisner *supra* note 37 at 3.

⁵⁴ Farias-Eisner *supra* note 37 at 15.

⁵⁵ Farias-Eisner *supra* note 37 at 15.

⁵⁶ Farias-Eisner *supra* note 37 at 22.

⁵⁷ Farias-Eisner *supra* note 37 at 29.

⁵⁸ Bettina C.K. Binder, et. al. *The Plight of Women in Positions of Corporate Leadership in the United States, the European Union, and Japan: Differing Laws and Cultures, Similar Issues*, 26 MICH. J. GENDER & L. 279, 288 (2019).

⁵⁹ *Id.* at 299.

nominated and voted for such as specialized areas in human resources, marketing, or social responsibility that men do not usually need to get into these positions.⁶⁰

Most research focuses on the business reasons for business parity and not the constitutional / moral reasons. In other words, most research on gender parity in the corporate boardroom focuses on whether having more women on boards and in leadership positions contributes to financial success within companies. There was a growing focus on increasing gender diversity on corporate boards after the 2008 recession which resulted from pressure to enhance companies to financially recover.⁶¹ Gender diversity on boards has historically not been seen as a business imperative for corporations.⁶²

D. U.S. Constitutional Response

The U.S. implements mostly a soft regulatory approach which typically favors facially neutral policies as the fairest method of appointing directors.⁶³ Quotas for board members have been used in other countries but face legal hurdles in the U.S. as seen in *Meland v. Weber* which challenges the constitutionality of California's SB 826.⁶⁴ Affirmative action has been dominant in the U.S. as a way to combat gender inequality. In *Johnson v. Transportation Agency*, the court held that an affirmative action plan that considered being female a "plus" in hiring decisions was valid when there was a "manifest imbalance" in women's representation.⁶⁵ However, quotas have been routinely struck down since they are different from affirmative action plans.⁶⁶ For an affirmative action plan to be valid, the Supreme Court held there needs to

⁶⁰ *Id.* at 289.

⁶¹ *Id.* at 299.

⁶² Farias-Eisner *supra* note 37.

⁶³ Farias-Eisner *supra* note 37.

⁶⁴ *Meland v. Weber*, 2 F. 838 (9th Cir. 2021).

⁶⁵ Binder, *supra* note 58 at 305.

⁶⁶ Binder, *supra* note 58 at 305.

be: (1) evidence of a manifest imbalance or past discrimination; (2) an existing plan under which the woman was favored; (3) a temporary plan (lasting only until the imbalance was corrected); (4) only qualified people selected; (5) no unnecessary trammeling of the interests of the majority; and (6) **goals, not quotas**.⁶⁷ In addition to these factors, the court subjects public sector affirmative action plans to closer scrutiny than private sector plans in court decisions since public sector plans involve potential discrimination from the government (the Constitution's demand for equal treatment).⁶⁸

III. ANALYSIS: WHY QUOTAS ARE NOT THE BEST APPROACH FOR THE U.S.

A. *Meland v. Weber*

In *Meland v. Weber* the Ninth Circuit reviewed the constitutional standing of the plaintiff who challenged California Senate Bill 826.⁶⁹ The aspect of constitutional standing that was challenged in this case was whether the plaintiff suffered an “injury in fact” which must “affect the plaintiff in a personal and individual way.”⁷⁰ SB 826 requires all corporations who are headquartered in California to have a certain number of females on its board of directors.⁷¹ If corporations do not comply, they may be subject to monetary penalties.⁷² SB 826 added sections 301.3 and 2115.5 to the California Corporations Code.⁷³ Section 301.3 requires that no later than the end of 2019, a public corporation whose principal executive offices are located in California

⁶⁷ Binder, *supra* note 58 at 305.

⁶⁸ Binder, *supra* note 58 at 305.

⁶⁹ *Meland v. Weber*, 2 F. 838 (9th Cir. 2021).

⁷⁰ *Id.*

⁷¹ *Id.* at 840.

⁷² *Id.*

⁷³ Cal. Corp. Code § 301.3(c)-(d).

have at least one female on its board of directors.⁷⁴ It also allows a corporation to increase its number of board members to comply with this new requirement.⁷⁵

Subpart (b) requires more specific guidelines that no later than the end of 2021, a publicly held corporation in California must comply with.⁷⁶ If the number of directors is six or more, there must be at least three female board members.⁷⁷ If the total number is five members, there must be at least two females.⁷⁸ If the total number is four or less, there must be at least one female.⁷⁹ For a first-time violation, a corporation is subject to a fine of \$100,000.⁸⁰ The bill was a proactive approach to diversifying a publicly held corporation's board of directors.⁸¹ California has the fifth largest economy in the world and often sets an example for businesses across the globe.⁸² At the time the bill was enacted, 25% of public corporations in California had no women on its board of directors.⁸³ The state needed to take action in order for change to be made.

In this case, a shareholder of OSI Systems, Inc., Creighton Meland Jr. sued California's Secretary of State alleging that SB 826 discriminates on the basis of sex in violation of the Fourteenth Amendment's Equal Protection Clause.⁸⁴ Because OSI had a board of directors consisting of seven males, SB 826 required the company to have one female director by the end of 2019 and an additional two females by the end of 2021.⁸⁵ The district court held that Meland

⁷⁴ *Meland* 2 F.4th at 840.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Cal. Corp. Code § 301.3(c)-(d).

⁸⁰ *Id.*

⁸¹ *Meland* 2 F.4th at 843.

⁸² *Id.*

⁸³ *Id.* at 845.

⁸⁴ *Id.*

⁸⁵ *Id.*

did not suffer an injury in fact since the bill imposed penalties on corporations not individual shareholders, and therefore he lacked constitutional standing.⁸⁶ The court also held that the bill did not prevent him from voting for a male board member.⁸⁷ Additionally, the court reasoned that even if Meland established an individualized injury, his injury was not actual or imminent because the company was in compliance with the bill when the action was filed since it voted a female board member in 2019.⁸⁸ Lastly, the court held he did not have prudential standing because he did not suffer a direct injury separate from an injury to the company.⁸⁹

The Ninth Circuit relied on *Monterey Mechanical* where the court held that "[a] person required by the government to discriminate by ethnicity or sex against others has standing to challenge the validity of the requirement, even though the government does not discriminate against him."⁹⁰ In this case a contractor had the low bid on a construction job but did not get the job because if he was offered it, it would not comply with a state statute that required general contractors "to subcontract percentages of the work to minority, women, and disabled veteran owned subcontractors, or demonstrate good faith efforts to do so."⁹¹ The contractor sued the university's trustees alleging that the statute violated the Equal Protection Clause.⁹² The Ninth Circuit relied on *Monterey Mechanical* and reasoned that "A person who is required or encouraged to discriminate on the basis of a protected class 'even if the beneficiaries [of the discrimination] are members of groups whose fortunes we would like to advance,' has suffered a direct personal injury sufficient to confer standing."⁹³ The Ninth Circuit disagreed with

⁸⁶ *Meland* 2 F.4th at 848.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Meland*, 2 F. 4th at 847.

⁹¹ *Id.*

⁹² *Id.* at 849.

⁹³ *Id.*

California's argument because corporations, not their shareholders, are the objects of the bill and therefore Meland did not suffer a concrete, personal injury.⁹⁴ The court held that shareholders are one of the objects of the bill and therefore have standing to challenge it.⁹⁵ For the bill to have any effect at all in increasing gender parity, shareholders must be compelled to act and vote for women.⁹⁶ The court also reasoned that the bill necessarily requires or encourages individual shareholders to vote for female board members.⁹⁷

B. Impact of *Meland v. Weber*

While the constitutionality of SB 826 has been making its way through California courts, researchers have documented the bill's impact on corporate boards throughout the years since its implementation. The California Partners Project issued a report on women's representation on 650 corporate boards on corporations headquartered in California since 2018.⁹⁸ The report noted that since the 2018 bill, unsurprisingly, there was significant increase in gender diversity on corporate boards headquartered in California.⁹⁹ Before the bill in 2018, 29% of boards headquartered in California had no female director.¹⁰⁰ By 2020, that number decreased to only 2.3% of corporate boards without any female directors.¹⁰¹ Additionally, there was a 66.5% increase in the number of women on corporate boards throughout the state.¹⁰² Despite this significant progress, most companies still had a lot of work to do to comply with the 2021

⁹⁴ *Id.* at 848.

⁹⁵ *Id.*

⁹⁶ *Meland* 2 F.4th at 840.

⁹⁷ *Id.*

⁹⁸ JD Supra, 2020. *Report: California Sees Significant Increase in Female Directors After SB 826, but More Needed* | JD Supra. <https://www.jdsupra.com/legalnews/report-california-sees-significant-85194/> (last visited February 18, 2022).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

guidelines (at the time of the report, there still needed to be an additional 1,940 women directors elected to comply with the guidelines).¹⁰³ Furthermore, only 28% of companies were in compliance with the guidelines at time of report.¹⁰⁴

Not only do quotas face constitutional hurdles in the U.S. that other countries do not necessarily have to worry about, but they also are subject to a lot of criticism. Quotas run the risk of being “box-checking” mechanisms to increasing diversity rather than electing members due to their talent and expertise.¹⁰⁵ A direct approach like quotas face a slippery slope, which is why an indirect approach focusing on mandatory public disclosures needs to be employed by states first. Quotas are also potentially problematic because of issues that can arise with enforcement.

IV. HOW APPROACHES DIFFER ACROSS THE GLOBE

Europe

Across the continent, European countries widely resort to quotas to address gender inequality in corporate boardrooms. In Stoxx 600 companies¹⁰⁶ 37% of board seats are currently female and only four companies had zero female members.¹⁰⁷ In 2003, Norway became the first country to enact a law that required all delineated company boards to consist of at least 40%

¹⁰³ *Id.*

¹⁰⁴ JD Supra. 2020. *Report: California Sees Significant Increase in Female Directors After SB 826, but More Needed*

| JD Supra. <https://www.jdsupra.com/legalnews/report-california-sees-significant-85194/> (last visited February 18, 2022).

¹⁰⁵ IMD business school. 2022. *Why quotas are not enough to improve boardroom diversity* | IMD Article. <https://www.imd.org/research-knowledge/articles/why-quotas-are-not-enough-to-improve-boardroom-diversity/> (last visited February 18, 2022).

¹⁰⁶ Stoxx 600 companies are composed of the largest companies from European-developed countries; IMD *supra* note 119.

¹⁰⁷ Tasneem Hanfi Brögger, Bloomberg.com (2021), <https://www.bloomberg.com/news/articles/2021-10-15/stoxx-600-companies-push-ahead-of-s-p-500-on-gender-equality> (last visited Dec 23, 2021).

female directors and required full compliance by 2008, with Spain, Belgium, France, Italy, and the Netherlands adopting similar laws shortly after.¹⁰⁸ Firms in Norway risk dissolution if they do not comply with the 40% quota.¹⁰⁹ The European Commission has even proposed an EU-wide legislation that would mandate women make up 40% of companies' non-executive directors.¹¹⁰ Currently, the average in the EU of women non-executive directors is sitting at 26%. This legislation will not pass unless member states reach an agreement.¹¹¹

Every EU member state has a disclosure requirement about board diversity.¹¹² Majority of EU member states have employed gender diversity recommendations in corporate governance codes.¹¹³ Approximately one-third of member states have gender quota laws.¹¹⁴ Countries that have gender quotas differ largely in their approaches. For example, some countries like Austria, Germany, and Greece have a small requested increase in the percentage of women which ranges from a requirement of 25-30% of women on boards.¹¹⁵ In contrast, Spain's requested increase is drastic (40% target quota) which makes it more difficult for companies to comply, but also does not have any sanctions associated with noncompliance.¹¹⁶ In countries with a small requested increase in the percentage of women on boards, it is easier to comply, but there is less incentive to go beyond the required percentage and reach gender parity. On the other hand, in countries

¹⁰⁸ Farias-Eisner *supra* note 37.

¹⁰⁹ Europarl.europa.eu. 2022. *Women on Board Policies in Member States and the Effects on Corporate Governance* | Think Tank | European Parliament.

[https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2021\)700556](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2021)700556) (last visited February 18, 2022).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Europarl.europa.eu. 2022. *Women on Board Policies in Member States and the Effects on Corporate Governance* | Think Tank | European Parliament.

[https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2021\)700556](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2021)700556) (last visited February 18, 2022).

¹¹⁶ *Id.*

like Spain, it is very difficult to even reach the target quota and there is little incentive to do so since there are no sanctions associated with noncompliance.

Legally mandated disclosure requirements are widespread in EU countries. For example, the Non-Financial Reporting Directive requires that large public interest entities (companies that have securities listed on EU-regulated markets, banks and insurance companies) disclose diversity information.¹¹⁷ This indirect measure mitigates potential political and interest group resistance that may arise if direct measures were taken, such as mandatory quotas.¹¹⁸ This directly relates to why this route is the most feasible for U.S. states to take. With the continuing backlash, constitutional hurdles, and criticism the movement towards gender parity faces in the U.S., an indirect measure is the most appropriate middle-ground for states to take.

Australia

In early 2015, the Australian Council on Superannuation Investors established a dedication to obtain 30% female representation on ASX200 boards by 2017.¹¹⁹ This targeted companies with all men boards and conducted private meetings with company representatives as part of their strategy to encourage gender diversity.¹²⁰ If these companies failed to elect women, ACSI would suggest the members go against re-electing the same board members.¹²¹ As part of their recommendation process, ACSI followed guidelines for ASX200 boards with only one or zero women directors.¹²² The council would recommend a vote against at least one of the

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Farias-Eisner *supra* note 37 at 13.

¹²⁰ Farias-Eisner *supra* note 37 at 13.

¹²¹ Farias-Eisner *supra* note 37 at 13.

¹²² UQ News. 2022. *Australia one of three countries to exceed 30 per cent women on company boards*. <https://www.uq.edu.au/news/article/2021/07/australia-one-of-three-countries-exceed-30-cent-women-company-boards> (last visited February 18, 2022).

following: (1) the chair of the board; (2) the chair of the nomination committee; (3) a member of the nomination committee; or (4) the longest-serving director seeking re-election.¹²³ In situations where a board has no women directors, the council will also recommend a vote against any newly-appointed male directors.¹²⁴ The council also recommends companies to set a time frame for reaching gender balance on their board.¹²⁵

By 2016, every ASX 200 board consisted of 50% women and reached their goal of gender parity.¹²⁶ The University of Queensland professor Dr. Terry Fitzsimmons attributed this milestone goal to the council's disclosure approach: "Two significant outcomes emerged which underpinned progress for the next decade- the ASX Corporate Governance Council Recommendations in relation to reporting on diversity and the AICD's Chair's Mentoring Program."¹²⁷ Australia adopted a gender balance approach: 40:40:20.¹²⁸ There should be a minimum of 40% women, 40% men and 20% unallocated to allow for flexibility of board renewal on every corporate board.¹²⁹ As displayed by the positive outcomes in Australia, public disclosure and outside pressure on companies by the government to elect more women is effective.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Acsi.org.au. 2022. *Gender Diversity: ACSI*. <https://acsi.org.au/our-issues/gender-diversity/> (last visited Feb. 18, 2022).

¹²⁶ Nicolena Farias-Eisner, *Gender Diversity in Corporate Boardrooms: Do Equal Seats Mean Equal Voices?*, 13 J. BUS. ENTREPRENEURSHIP & L.1 (2019).

¹²⁷ UQ News. 2022. *Australia one of three countries to exceed 30 per cent women on company boards*. <https://www.uq.edu.au/news/article/2021/07/australia-one-of-three-countries-exceed-30-cent-women-company-boards> (last visited Feb. 18, 2022).

¹²⁸ *Id.*

¹²⁹ *Id.*

The United States

The United States has historically taken a soft regulatory approach to improving gender inequality.¹³⁰ The soft regulatory approach requires companies only to disclose whether they have a diversity policy in place and to provide a description of the policy to investors.¹³¹ This approach is a sharp contrast to a quota system.¹³² To begin with the history of the United States' response to gender inequality, Title VII was passed in 1964 which established protections for gender equality in the workplace.¹³³ It prohibited discrimination on the basis of sex (against employees) but made no mention of board of directors.¹³⁴ Additionally, Congress passed the Dodd Frank Wall Street Reform and Consumer Protection Act in an attempt to protect women. The act mandated that the SEC implements an Office of Minority and Women Inclusion to assess "the diversity policies and practices of entities regulated by the agency[,] the statute expressly d[id] not give the SEC authority to require diversity measures."¹³⁵

Overall, the U.S. continues to have a “soft regulatory” approach. Regulations mandate companies only to disclose the presence or absence of diversity at a company and disclose to the investors a brief description of the diversity policy.¹³⁶ Before 2009, Congress and the SEC did not require boards to even disclose information concerning their methods for nominating candidates nor their diversity principles.¹³⁷ This changed in 2009 when the SEC adopted Item 407(c) which required “disclosure of whether and if so how, a nominating committee considers

¹³⁰ Jaeger, *supra* note 128.

¹³¹ Jaeger, *supra* note 128.

¹³² Jaeger, *supra* note 128.

¹³³ Jaeger, *supra* note 128.

¹³⁴ Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq (1964).

¹³⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. § 78o).

¹³⁶ Farias-Eisner *supra* note 36.

¹³⁷ Farias-Eisner *supra* note 36.

diversity in identifying nominees for director.”¹³⁸ It also requires “if the nominating committee has a policy with regard to the consideration of diversity in identifying director nominees, disclosure would be required of how this policy is implemented, as well as how the nominating committee assesses the effectiveness of its policy.”¹³⁹ The SEC recently voted to approve new listing rules by Nasdaq to advance board diversity through a comply or disclose framework.¹⁴⁰

The framework includes: Board Diversity Disclosure Rule, Board Diversity Objective rule, and Board Recruiting Service Rule. However, this can still face constitutional legal hurdles. Also, in 2011 a national organization formed called the Thirty Percent Coalition which is aimed at increasing the percentage of women on boards in publicly traded corporations to 30%.¹⁴¹ The plan has a three-part prong: (1) its Institutional Investors Committee would work directly with companies to reform their corporate governance standards and to improve their methods for recruiting female directors; (2) its Public Sector Initiatives Committee would support legislative efforts at every government level and would require, through the SEC, enhanced disclosure requirements in order to urge gender diversity; and (3) its Corporate Leaders Committee would encourage executives to publicly and privately promote boardroom gender diversity.¹⁴²

There has been relatively slow progress with the Thirty Percent Coalition in comparison to other countries. The U.S. is lagging behind largely due to the absence of mandatory quotas

¹³⁸ Farias-Eisner *supra* note 36.

¹³⁹ Farias-Eisner *supra* note 36.

¹⁴⁰ SEC approves New Nasdaq Board Diversity Rules, Gibson Dunn (2021), <https://www.gibsondunn.com/sec-approves-new-nasdaq-board-diversity-rules/> (last visited Dec 23, 2021).

¹⁴¹ 30percentcoalition.org. 2022. *Who we are*, <https://www.30percentcoalition.org/who-we-are> (last visited April 1, 2022).

¹⁴² Farias-Eisner *supra* note 36.

which are prevalent in many European countries.¹⁴³ The U.S. has maintained its soft regulatory approach not only because of the constitutional hurdles quotas face, but also because stricter measures such as quotas are contrary to *laissez faire*.¹⁴⁴ Gradually, more studies have shown that an increased percentage of women on boards increases business results. The International Monetary Fund issued new research concluding that an additional woman in senior management or on the board of directors, while maintaining the size of the board, correlates with a three to eight percent higher return on assets.¹⁴⁵ Not only is the increased number of women on corporate boards necessary for increasing equality in the corporate world, but it can also lead to positive business outcomes.

Since the federal government poses a more difficult path to passing any sort of gender quota or mandatory disclosure law, the more efficient path is for states to legislate and state action first. As of 2020, only 12 states have begun to impose legislative board diversity requirements.¹⁴⁶ While the recently SEC-approved diversity disclosure rule for Nasdaq-listed companies is a major step in the right direction, more states need to take steps to mandate public disclosure for companies that do not fall within this narrow parameter.

Other companies in the U.S. are beginning to take a principles-based approach. For example, the SEC recently approved NASDAQ's principle-based approach which involves firms publicly disclosing their compliance with suggested best practice guidelines and if their practices

¹⁴³ Farias-Eisner *supra* note 36.

¹⁴⁴ Farias-Eisner *supra* note 36.

¹⁴⁵ Farias-Eisner *supra* note 36.

¹⁴⁶ JD Supra. 2022. *New York's Disclosure Law and Other Laws and Regulatory Mandates Regarding Women on Corporate Boards* | JD Supra. <https://www.jdsupra.com/legalnews/new-york-s-disclosure-law-and-other-7815870/> (last visited February 18, 2022).

depart from the guidelines, firms must explain the reasons for non-compliance.¹⁴⁷ The approach requires that firms must diversify or explain to shareholders why they have not. There is also a required number of diverse directors included in the approach.¹⁴⁸ Other countries have taken similar approaches and seen favorable outcomes. For example, Ontario passed a similar policy disclosure requirement in 2014 which had a positive impact on board representation: the amount of firms that added women to their boards nearly doubled and increased 7%.¹⁴⁹

Firms that are less susceptible to pressure from outside investors are less likely to indicate they employ a target quota for female directors and use less welcoming language regarding board diversity.¹⁵⁰ The principle based approach potentially mitigates some of the costs of complying with the rules based approaches and still achieves the same objective of increasing female representation.¹⁵¹ A critique to the principle-based approach is that flexibility means that not all firms will comply with the approach which may result in suboptimal compliance. A counter argument to opponents is that while comparing Canada data to the U.S., the ratio of female directors in Canada increased significantly more than the U.S. during the same time period, supporting the argument that a principles-based approach may be better and more effective.¹⁵² Additionally, market returns were positive after announcement of the regulation in Canada in

¹⁴⁷ Chelsa Gurkin, Strategies to increase representation of women and minorities-testimony before the Committee on Financial Services, House of Representatives The Harvard Law School Forum on Corporate Governance (2019), <https://corpgov.law.harvard.edu/2019/06/27/strategies-to-increase-representation-of-women-and-minorities-testimony-before-the-committee-on-financial-services-house-of-representatives/> (last visited Dec 23, 2021).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

contrast to negative market reaction in Norway and California regarding quota-based regulation.¹⁵³

Many large corporations within the U.S. have diversity and inclusion disclosures concerning nomination of directors for their shareholders and the public to view.¹⁵⁴ For example, BlackRock has noted in their commitment to board diversity that increased diversity contributes to more robust discussions, more innovative and resilient decisions, complex and fast-moving circumstances, and overall increased business success.¹⁵⁵ BlackRock also explained that another important role for the need of increased diversity is “setting the tone from the top.”¹⁵⁶ This means that the business should strive to reflect and resonate with its customers and community by appropriately nominating and voting diverse directors.¹⁵⁷ BlackRock noted that they encourage companies in the US, Canada, Latin America, and Europe to have at least two women on their boards.¹⁵⁸ This is problematic in two ways: (1) it is merely a recommendation and (2) on a board 18 directors (which is the total of BlackRock’s board), that means women account for only 11.1% of the board which is far away from gender parity.¹⁵⁹ BlackRock also explains that a “proactive approach” needs to be implemented with regard to diversity on corporate boards.¹⁶⁰ This seems contradictory though since diversity is already lagging behind

¹⁵³ Gurkin, *supra* note 147.

¹⁵⁴ Our approach to engagement on board diversity – BlackRock, <https://www.blackrock.com/corporate/literature/publication/blk-commentary-engaging-on-diversity.pdf> (last visited Dec 23, 2021).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Our approach to engagement on board diversity – BlackRock, <https://www.blackrock.com/corporate/literature/publication/blk-commentary-engaging-on-diversity.pdf> (last visited Dec 23, 2021).

other countries and in the current model gender parity on corporate boards will not be reached until the latest 2070.¹⁶¹

While public diversity and inclusion plans are a step in the right direction, they are not enough to reach gender parity. For example, a recent Harvard study on corporate board diversity revealed that three factors inhibited growth in diversity in corporate boards: (1) not prioritizing diversity in recruitment efforts; (2) limits of the traditional board candidate pipeline; and (3) low turnover of board seats.¹⁶² The study found that board directors usually relied on their personal networks to seek out potential board nominations.¹⁶³ Since most current board members are men, their network and potential candidates often end up being men.¹⁶⁴

The potential lack of female nominations to these boards does stem from underrepresentation of women in certain sectors.¹⁶⁵ For example, some bank representatives in the financial sector said that the pipeline of eligible women and minority board candidates remains small.¹⁶⁶ This all relates back to diversifying the recruiting process and opening opportunities for women to climb the corporate ladder.¹⁶⁷ Additionally, the small number of board seats that become vacant each year contributes to the lagging progress of reaching gender parity.¹⁶⁸ Long tenure of most board directors is common which is an additional barrier in women getting elected.¹⁶⁹ For example, a director on an FHLBank board said that new board

¹⁶¹ Gurkin, *supra* note 147.

¹⁶² Gurkin, *supra* note 147.

¹⁶³ Gurkin, *supra* note 147.

¹⁶⁴ Gurkin, *supra* note 147.

¹⁶⁵ Gurkin, *supra* note 147.

¹⁶⁶ Gurkin, *supra* note 147.

¹⁶⁷ Chelsa Gurkin, Strategies to increase representation of women and minorities-testimony before the Committee on Financial Services, House of Representatives The Harvard Law School Forum on Corporate Governance (2019), <https://corpgov.law.harvard.edu/2019/06/27/strategies-to-increase-representation-of-women-and-minorities-testimony-before-the-committee-on-financial-services-house-of-representatives/> (last visited Dec 23, 2021).

¹⁶⁸ Gurkin, *supra* note 147.

¹⁶⁹ Gurkin, *supra* note 147.

directors face a big learning curve which makes it take time for board members to be effective.¹⁷⁰ Therefore, the directors at some banks recruit new directors only after allowing incumbent directors to reach their maximum terms to maximize effectiveness.¹⁷¹ While long tenures and a smaller pool of experienced women in certain fields can add to the difficulty in increasing board diversity, mandatory disclosures will force companies to give reasons such as these, as to why they did not comply with the recommendations set forth by the state and how they are going to improve and create a plan to meet those recommendations. By doing this, companies will feel greater pressure by their shareholders, competing companies, and the public at large to increase diversity. When they are forced to get to the root of the problem and acknowledge and disclose it to the public, it will give these companies who are trailing behind an incentive and the tools to build up recruiting and career advancement programs to enhance diversity in more senior roles, leading to a better pathway for women to enter the boardroom.

V. CONCLUSION

Mandatory quotas with regard to gender composition of publicly traded corporations' board of directors are currently facing constitutional hurdles. California's stringent and progressive quota law is being passed around through the state's courts on equal protection challenges.¹⁷² Depending on the outcome of these challenges, there is a serious possibility that mandatory quotas in the form of state legislation will not be feasible in the United States. There needs to be a more feasible alternative route states In looking at different countries' approaches to increasing gender diversity on corporate board of directors, the most feasible approach for the US would be a principles-based approach such as the approaches Nasdaq is employing. Even though

¹⁷⁰ Gurkin, *supra* note 147.

¹⁷¹ Gurkin, *supra* note 147.

¹⁷² Meland v. Weber, 2 F. 838 (9th Cir. 2021).

statistically this approach takes more time than stricter measures such as quotas, mandatory disclosure is the most feasible and effective way for states to increase board diversity. If corporate boards are going to diversify quicker, some form of legislation needs to be passed by state governments that avoid the danger of equal protection clause challenges instead of merely adopting a “wait and see” approach.

To reach the long-term goal of gender parity on corporate boards, states need to do what they can in their power to encourage companies to diversify. If California’s quota law is struck down on constitutional grounds, the backup approach states should adopt should be modeled after New York’s disclosure law. In addition to the disclosure requirement, states should also adopt the portion of Washington’s bill that requires a company to deliver a board diversity discussion and analysis to shareholders and explain its approach to developing and maintaining diversity on its board. Through this combination of “indirect” approaches rather than direct approaches of a mandatory quota system, companies will feel pressure to comply and adopt recommendations, and if they do not, will have to face consequences.

Additionally, states should implement a “recommendation-based” program for companies to employ that recommends avenues companies can take for minorities and women to be on the “track” for career advancement in the corporate environment, so they have the requisite skills and experience to reach board nomination. This bottom-up approach would likely avoid severe constitutional hurdles faced by quotas and will address the root of the issue which stems to low numbers of women given opportunities to reach the nomination committee as well as breaking stereotypes. A realistic, effective approach needs to be taken by the states to combat the lack of gender diversity on corporate boards. A bottom-up recommendation-based approach, mandatory disclosure requirements accompanied with public-wide ramifications if boards do not comply

with these recommendations will be the most feasible approach state legislators can take if quota laws are struck down.