

BOARD GENDER DIVERSITY: A PATH TO ACHIEVING SUBSTANTIVE EQUALITY IN THE UNITED STATES

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ABSTRACT

While the European Union (EU) was founded on the concept of equality as a fundamental value in 1993, the United States was created at a time when women were considered legally inferior to men. This has had the lasting effect of preventing women in the United States from making inroads into positions of power. While legislated board gender diversity (BGD) mandates have been instituted in some EU countries, the United States has been loath to take that route, relying instead on the goodwill of corporate boards, with little progress. On September 30, 2018, however, California enacted a law that has stirred much controversy for requiring at least one woman to be on the boards of corporations headquartered in the state by 2020. Based on our analysis, the California bill and other similar legislative efforts will fail without parallel constitutional action and cultural change in the United States.

We begin by examining the individual, institutional, and cultural reasons why the United States lags so far behind the rest of the industrialized world. We then discuss recent activism by powerful institutions such as Nasdaq and Goldman Sachs that may signify broader cultural change and receptiveness to positive action. Next,

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** Associate Professor, Georgetown University Law Center. Many thanks to my coauthor for her patience as I juggled two babies and writing during the pandemic, to Hillary Sale and Lutie A. Lytle Black Women Law Faculty Workshop participants for feedback, and to Sofia Panero for research support. We dedicate this paper to the life and work of Ruth Bader Ginsburg.

we conduct an analysis of the legislative, cultural, and constitutional factors that have helped the EU succeed in increasing board diversity. We conclude by offering a normative solution that can pave the way to achieving gender equality in the United States. Learning from the EU model, the United States must let go of the Equal Rights Amendment and adopt a Substantive Equality Amendment to the Constitution requiring positive action to facilitate laws enabling gender equality. This solution will have broad cultural impact outside of the board context and will help change the lived experiences and outcomes for women in the United States for generations to come. It will change the course of history.

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“Women belong in all places where decisions are being made.”
*Ruth Bader Ginsburg, U.S. Supreme Court Justice*¹

INTRODUCTION

While gender equality is a fundamental right in most industrialized nations, true substantive equality has not been attained in the United States.² Our focus on *substantive equality* acknowledges that even with an antidiscrimination framework that establishes equality before the law, historical disadvantage continues to shape outcomes for women, racial and ethnic minorities, and other subordinated groups.³ In 2020, the United States ranked 53 out of 153 countries on the Global Gender Gap Index with 17 out of 27 European Union (EU) member states scoring higher and 5 of those in the top 10.⁴ As member states in the EU continue to make progress, women in the United States have failed to make substantial inroads in important decision-making roles in politics, business, and other seats of power.

1. Joan Biskupic, *Ginsburg: Court Needs Another Woman*, ABC NEWS (May 6, 2009, 1:25 AM), <https://abcnews.go.com/Politics/ginsburg-court-woman/story?id=7513795> [<https://perma.cc/Y62G-MCTX>].

2. Although the term gender equity is more commonly used in the United States, we choose gender equality as more representative of the goal of this paper. “Gender equity is the process of being fair to women and men,” while “[g]ender equality requires equal enjoyment by women and men of socially-valued goods, opportunities, resources and rewards.” *Frequently Asked Questions About Gender Equality*, U.N. POPULATION FUND (2005), <https://www.unfpa.org/resources/frequently-asked-questions-about-gender-equality> [<https://perma.cc/JXM6-VDYQ>].

3. See Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1, 11-12 (2011) [hereinafter MacKinnon, *Substantive Equality*]; Catherine Barnard & Bob Hepple, *Substantive Equality*, 59 CAMBRIDGE L.J. 562, 562 (2000); Sandra Fredman, *Substantive Equality Revisited*, 14 INT’L J. CONST. L. 712, 712-13 (2016); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1281-83 (1991) [hereinafter MacKinnon, *Reflections on Sex Equality*]; Catharine A. MacKinnon & Kimberlé W. Crenshaw, *Reconstituting the Future: The Equality Amendment*, 129 YALE L.J.F. 343, 346-47 (2019).

4. See WORLD ECON. F., GLOBAL GENDER GAP REPORT 2020 9 tbl.1 (2019). Additionally, the United States keeps moving further down the list, representing how it is falling behind other countries in terms of gender equality. See Saadia Zahidi, *America Is Falling Behind Other Countries in Gender Equality. The Next President Must Fix That*, WORLD ECON. F. (Oct. 27, 2016), <https://www.weforum.org/agenda/2016/10/global-gender-gap-2016-usa-saadia-zahidi/> [<https://perma.cc/YJ3P-YE72>].

The United States has rapidly been losing its status as a global power founded on democratic principles due to its leadership's active involvement in reducing the rights of women, Black people, and other marginalized groups.⁵ Women in the United States are still paid less than men for the same jobs, have little recourse when discriminated against, even when the discrimination is overt, and have been kept out of important economic and political decision-making roles for hundreds of years.⁶ Many argue that a limited pipeline of available talent explains the underrepresentation of women on boards and other leadership positions in the United States.⁷ In reality, a deeply ingrained culture of exclusion, along with continuing institutional- and individual-level bias, are the primary reasons women continue to be marginalized.⁸

5. See Richard Wike, Bruce Stokes, Jacob Poushter, Laura Silver, Janell Fetterolf & Kat Devlin, *America's International Image Continues to Suffer*, PEW RSCH. CTR. (Oct. 1, 2018), <https://www.pewresearch.org/global/2018/10/01/americas-international-image-continues-to-suffer/> [https://perma.cc/9HBK-JYUP]; Kate Whiting, *Female Leaders Warn About the Erosion of Women's Rights*, WORLD ECON. F. (Feb. 28, 2019), <https://www.weforum.org/agenda/2019/02/female-leaders-warn-about-the-erosion-of-women-s-rights/> [https://perma.cc/DK47-CY27]. This includes stacking federal judgeships with those receiving endorsements from conservative, anti-female organizations shockingly on the fringe. See Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html> [https://perma.cc/W5QF-7QUR]. Two-thirds of the fifty-one appellate court appointments (representing more than 25 percent of this branch of the government) were white males; two of President Trump's appointments to the Supreme Court were also conservative white males—one with a record of anti-female rhetoric and behavior. See *id.*; Kate Kelly & David Enrich, *Kavanaugh's Yearbook Page Is 'Horrible, Hurtful' to a Woman It Named*, N.Y. TIMES (Sept. 24, 2018), <https://www.nytimes.com/2018/09/24/business/brett-kavanaugh-yearbook-renate.html> [https://perma.cc/DVZ8-RR3J]. Although this Article focuses on gender, our arguments have broad implications for racial inequality and intersectionality. See Nina Banks, *Black Women's Labor Market History Reveals Deep-Seated Race and Gender Discrimination*, ECON. POL'Y INST. (Feb. 19, 2019, 2:11 PM), <https://www.epi.org/blog/black-womens-labor-market-history-reveals-deep-seated-race-and-gender-discrimination/> [https://perma.cc/NG5C-4GGM].

6. See Tom Spiggle, *The Gender Pay Gap: Why It's Still Here*, FORBES (May 25, 2021, 12:54 PM), <https://www.forbes.com/sites/tomspiggle/2021/05/25/the-gender-pay-gap-why-its-still-here/?sh=d46897baf6> [https://perma.cc/NA2Y-8LYU]; Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 546-47 (2018) (reviewing the troubling trend of courts failing to find explicit evidence of discrimination sufficient to support a claim of discrimination); *infra* Part I.

7. See Susan Chira, *Why Women Aren't C.E.O.s, According to Women Who Almost Were*, N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/2017/07/21/sunday-review/women-ceos-glass-ceiling.html> [https://perma.cc/C4EG-9C6A].

8. In this Article, we focus on gender diversity broadly speaking to include all individuals

The federal government has no national policy to address this deficiency⁹ nor does it have a constitutional requirement to do so according to the U.S. Supreme Court.¹⁰ In fact, the previous administration attempted to roll back women's rights.¹¹ While the European Union was founded on a set of values and fundamental rights, including gender equality,¹² the founders of the United States did not consider women their equals, establishing women's status as inferior to men.¹³ The U.S. Constitution created a legal

identifying as women; however, it should be noted that women of color and LGBTQ+ women face unique and heightened challenges. See, e.g., Lisa M. Fairfax, *Some Reflections on the Diversity of Corporate Boards: Women, People of Color, and the Unique Issues Associated with Women of Color*, 79 ST. JOHN'S L. REV. 1105, 1105-07 (2005); Jamillah Bowman Williams, *Maximizing #MeToo: Intersectionality & the Movement*, 62 B.C. L. REV. 1797, 1800-02, 1843-44 & n.254 (2021). Even when boards focus on increasing gender or racial diversity, women of color are left out; despite constituting 18 percent of the U.S. population, they make up only 4.6 percent of Fortune 500 board seats. See *Too Few Women of Color on Boards: Statistics and Solutions*, CATALYST (Jan. 31, 2020), <https://www.catalyst.org/research/women-minorities-corporate-boards/> [<https://perma.cc/DC3T-MJUE>].

9. Drafted in 1979, the Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, has 189 signatories but was never adopted by the United States. See Linda Lowen, *Why Won't the U.S. Ratify the CEDAW Human Rights Treaty?*, THOUGHTCO. (Jan. 3, 2020), <https://www.thoughtco.com/why-wont-u-s-ratify-cedaw-3533824> [<https://perma.cc/9P8L-VSUA>]; cf. *Gender Equality Strategy*, EUR. COMM'N, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/gender-equality-strategy_en [<https://perma.cc/7B5K-PNFN>] (“The EU Gender Equality Strategy delivers on the von der Leyen Commission’s commitment to achieving a Union of Equality. The Strategy presents policy objectives and actions to make significant progress by 2025 towards a gender-equal Europe.”).

10. There is a belief among some that gender balancing quotas are somehow discriminatory against men. See David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action, and Racial Balancing*, 2000 WIS. L. REV. 657, 662-63, 669-71 (2000) (describing “reverse discrimination” cases where white or male plaintiffs claim that preference given to non-whites or females is illegal).

11. See Colum Lynch & Robbie Gramer, *At the U.N., America Turns Back the Clock on Women’s Rights*, FOREIGN POL’Y (Mar. 14, 2019, 3:40 PM), <https://foreignpolicy.com/2019/03/14/at-united-nations-women-rights-gender-health-trump-diplomacy/> [<https://perma.cc/4688-P758>] (describing how the U.S. attempted to eliminate language providing protections for women’s health at the 2019 annual U.N. Commission on the Status of Women conference).

12. See Consolidated Version of the Treaty on European Union arts. 2-3, Oct. 26, 2012, 2012 O.J. (C 326) 13 [hereinafter TEU]; Consolidated Version of the Treaty on the Functioning of the European Union arts. 8, 10, 19, 157, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU]; Charter of Fundamental Rights of the European Union arts. 21, 23, Oct. 26, 2012, 2012 O.J. (C 326) 391; Martina Schonard, *Equality Between Men and Women*, EUR. PARLIAMENT (Nov. 2020), <https://www.europarl.europa.eu/factsheets/en/sheet/59/equality-10> [<https://perma.cc/9758-3AY9>].

13. Ruth Bader Ginsburg, *Remarks on Women Becoming Part of the Constitution*, 6 MINN. J.L. & INEQ. 17, 17 (1988) (“We have a 200-year-old Constitution, ... [however,] it left out the

system in which women were not afforded citizenship,¹⁴ were prevented from owning property,¹⁵ did not have the right to vote,¹⁶ could not sit on a jury¹⁷ or practice law,¹⁸ and were considered dependents—and in some situations property—of white males.¹⁹

Although women in the United States have made progress since the Constitution was written, the legal system continues to place obstacles in the way of true equality.²⁰ Should things continue with

majority of the adult population: slaves, debtors, paupers, Indians, and women. As framed in 1787, the Constitution was a document of governance for and by white, propertied adult males—a document for people who were free from dependence on others and therefore not susceptible to influence or control by masters, overlords, or superiors.”). Even though the Constitution did not originally use the terms “men” or “male,” in 1868, the Fourteenth Amendment defined “citizens” and “voters” as male. *See id.* at 18.

14. Women were not granted citizenship until the Cable Act of 1922, Pub. L. No. 67-346, 42 Stat. 1021, 1021-22. The Act is also known as the Married Women’s Independent Nationality Act. Tanya Ballard Brown, *That Time American Women Lost Their Citizenship Because They Married Foreigners*, NPR (Mar. 17, 2017, 9:54 AM), <https://www.npr.org/sections/codeswitch/2017/03/17/520517665/that-time-american-women-lost-their-citizenship-because-they-married-foreigners> [<https://perma.cc/KJZ2-U8PW>].

15. Jone Johnson Lewis, *A Short History of Women’s Property Rights in the United States*, THOUGHTCO. (July 13, 2019), <https://www.thoughtco.com/property-rights-of-women-3529578> [<https://perma.cc/86MF-XXCT>].

16. Ginsburg, *supra* note 13, at 18.

17. Joanna L. Grossman, Note, *Women’s Jury Service: Right of Citizenship or Privilege of Difference?*, 46 STAN. L. REV. 1115, 1129 (1994).

18. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 132-33 (1872) (“That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth. In view of these facts, we are certainly warranted in saying that when the legislature gave to this court the power of granting licenses to practice law, it was with not the slightest expectation that this privilege would be extended to women.”).

19. Single women were considered dependents of their father and married women dependents of their husbands. *Women and the Law*, HARV. BUS. SCH. (2010), https://www.library.hbs.edu/hc/wes/collections/women_law/ [<https://perma.cc/3V6J-8H4G>]. The law of coverture gave a husband complete control over his wife. *Id.* It was state law that began to open up certain rights to women; the first state to permit women to hold property in their own name, albeit with their husbands’ permission, was Mississippi in 1839. *See* Sandra Moncrief, *The Mississippi Married Women’s Property Act of 1839*, HANCOCK CNTY. HIST. SOC’Y (2008), <http://www.hancockcountyhistoricalsociety.com/vignettes/the-mississippi-married-womens-property-act-of-1839/> [<https://perma.cc/3CEE-QU2B>].

20. Women, on average, still make only seventy-eight cents for every dollar earned by men; furthermore, Black women make only sixty-four cents and Latinas only fifty-four cents for each dollar earned by white men. *Women’s Rights*, ACLU (2020), <https://www.aclu.org/issues/womens-rights> [<https://perma.cc/T8QE-UJ6L>]. Laws alleged to provide equal treatment for men and women in the workplace have created burdens of proof that are almost impossible to meet, resulting in few outcomes favorable to women who have been discriminated against. *See How the Laws of the United States Do Not Ensure Equal Participation in the Workforce*

business as usual in the United States, it will take thirty years for women to achieve parity on corporate boards, eighty years to achieve parity in CEO positions, and one hundred years to achieve parity in Congress.²¹ An alarming finding of the World Economic Forum's Global Gender Gap Report, which measures progress toward gender equality around the world, is that in 2018, the closing of the gap slowed down—significantly.²² The concern is great among women leaders, some of whom have written an open letter stating that it is of utmost importance to “reinvest in policies and in legal and social frameworks that will achieve gender equality and inclusion.”²³ While multiple reasons have been given for the slowdown, a major concern is the recent increase in world leaders publicly denigrating women.²⁴

for Women and Mothers, SPIGGLE L. FIRM, <https://www.spigglelaw.com/employment-blog/laws-united-states-not-ensure-equal-participation-workforce-women-mothers/> [<https://perma.cc/CJ5P-NHXU>]. Additionally, current U.S. law is insufficient to address nonobvious, unintentional discrimination. See, e.g., Kimberly A. Houser, *Can AI Solve the Diversity Problem in the Tech Industry? Mitigating Noise and Bias in Employment Decision-Making*, 22 STAN. TECH. L. REV. 290, 305-07 (2019); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1116-18 (2006); Danielle Root, Jake Faleschini & Grace Oyenubi, *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019, 8:15 AM), <https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/> [<https://perma.cc/R7ST-DUL7>] (explaining how the current lack of diversity in the composition of the judiciary was made worse under Trump).

21. Jessica Yun, *Women CEOs Will Have to Wait Another 80 Years for Parity with Men*, YAHOO FIN. (Feb. 28, 2019), <https://au.finance.yahoo.com/news/women-ceos-will-wait-another-80-years-parity-men-230510116.html> [<https://perma.cc/NED8-GXKJ>]; Christianna Silva, *Don't Hold Your Breath for Gender Parity in Congress—It Could Take Another 100 Years*, FIVETHIRTYEIGHT (Oct. 3, 2016, 12:36 PM), <https://fivethirtyeight.com/features/dont-hold-your-breath-for-gender-parity-in-congress-it-could-take-another-100-years/> [<https://perma.cc/NY78-WRAM>].

22. See WORLD ECON. F., GLOBAL GENDER GAP REPORT 2018 15 (2018).

23. Whiting, *supra* note 5.

24. A letter signed by twenty-six current and former female world leaders warned that in some countries ensuring the basic rights of women is seen as threatening the current power of men. See *id.* One of the authors, Susana Malcorra, the former Argentinian foreign minister, suggested that “the rise of populism in some countries had led to ‘a macho-type strongman’ leader who feel[s] threatened by women gaining respect.” *Id.* The recent elections of Donald Trump and Boris Johnson reflect this trend. See Gideon Rachman, *Boris Johnson's Britain Is a Test Case for Strongman Politics*, FIN. TIMES (Sept. 9, 2019), <https://www.ft.com/content/8895ad84-d2d8-11e9-a0bd-ab8ec6435630> [<https://perma.cc/HRL7-8UQK>]. In 2020, we also saw women leaving the workplace in droves, as well as an increase in violence against women. Phumzile Mlambo-Ngcuka, *Violence Against Women and Girls: The Shadow Pandemic*, UN WOMEN (Apr. 6, 2020), <https://www.unwomen.org/en/news/stories/2020/4/statement-ed->

In this Article, we examine the way in which laws and initiatives designed to increase the participation of women on corporate boards reflect how the EU and United States fundamentally differ in their views of gender equality. The dominant perspective in the United States is that women and men have an equal opportunity because the Equal Protection Clause of the Fourteenth Amendment and the Civil Rights Act of 1964 provide protection, even though substantive equality has never been achieved.²⁵ While there are proponents and opponents of the revived Equal Rights Amendment (ERA), we agree with Ruth Bader Ginsburg's pronouncement that "I would like to see a new beginning. I'd like it to start over."²⁶

One of the reasons women have been prevented from making inroads into important decision-making roles in the United States is that the U.S. Constitution, while riddled by a troubled history of discrimination, offers no support for substantive gender equality.²⁷ The ERA, as currently worded, will not achieve the substantive equality many of its proponents believe it will because it is based on an antidiscrimination framework that focuses on individualized harms rather than systemic change.²⁸ More specifically, the anti-classification approach of the ERA would prevent use of laws that permit or require positive action.²⁹ The need for *positive action* is based on an antisubordination model that places obligations on public and private bodies to address the disparities in their ranks.³⁰

phumzile-violence-against-women-during-pandemic [https://perma.cc/V997-FPS9]; Courtney Connley, *More Than 860,000 Women Dropped out of the Labor Force in September, According to New Report*, CNBC (Oct. 2, 2020, 2:45 PM), <https://www.cnbc.com/2020/10/02/865000-women-dropped-out-of-the-labor-force-in-september-2020.html> [https://perma.cc/7364-Y64S].

25. See Anita Raj, *Where Is Gender Equality in the United States?*, GEO. INST. FOR WOMEN, PEACE & SEC. (Nov. 5, 2020), <https://giwps.georgetown.edu/where-is-gender-equality-in-the-united-states/> [https://perma.cc/B4BH-Q7PY]; Fredman, *supra* note 3, at 712-13.

26. Russell Berman, *Ruth Bader Ginsburg Versus the Equal Rights Amendment*, ATLANTIC (Feb. 15, 2020), <https://amp.theatlantic.com/amp/article/606556/> [https://perma.cc/CUV6-EQFQ].

27. See MacKinnon, *Substantive Equality*, *supra* note 3, at 1-2, 11-12.

28. See *infra* Part V.

29. See Kim Forde-Mazrui, *Why the Equal Rights Amendment Would Endanger Women's Equality: Lessons from Colorblind Constitutionalism*, 16 DUKE J. CONST. L. & PUB. POL'Y 1, 4 (2021).

30. See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 9 (2003).

Those who fully buy into false notions of meritocracy and equal opportunity reject the idea of positive action and opine that men dominate leadership positions because they are more qualified and women simply lack the interest or required skill set.³¹ However, a growing body of research shows that the opposite is actually true. In many cases, women provide leadership that better serves the well-being of their constituents relative to men.³² For example, had women been at the helm of major corporations in the 1990s, we may not have seen the corporate greed and unethical behavior that caused trillions in lost investments and the passage of the Sarbanes-Oxley Act,³³ we may not have seen the foreclosure crisis of 2006 that sank the global economy into a great recession,³⁴ and the United States likely would not have seen the major loss of life due to the individualistic style of leadership present with respect to COVID-19.³⁵

Not only do women on boards bring a different perspective to decision-making, but research also suggests that their presence makes the men on their teams process information more thoroughly, so they are more reflective and open-minded.³⁶ This heterogeneity leads to a smarter and better informed decision-making process, and also prevents problematic groupthink that contributes to unethical and destructive decisions.³⁷ Thus, including more women in

31. See Courtney Connley, *Ambition Is Not the Problem: Women Want the Top Jobs—They Just Don't Get Them*, CNBC (Jan. 12, 2021, 8:50 AM), <https://www.cnbc.com/2020/03/05/why-women-are-locked-out-of-top-jobs-despite-having-high-ambition.html> [<https://perma.cc/U6UF-DWCR>].

32. See DAVID A.H. BROWN, DEBRA L. BROWN & VANESSA ANASTASOPOULOS, *WOMEN ON BOARDS: NOT JUST THE RIGHT THING ... BUT THE "BRIGHT" THING* 6 (2002).

33. See generally Steven A. Ramirez, *A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?*, 77 ST. JOHN'S L. REV. 837 (2003).

34. See Eur. Parl. Ass'n, *Women and the Economic and Financial Crisis*, Doc. No. 12195 (Apr. 8, 2010), <https://pace.coe.int/en/files/12394> [<https://perma.cc/4A6X-VRK3>] (click the PDF symbol right of the "Report" heading).

35. See Kate Maclean, *Women Leaders and Coronavirus: Look Beyond Stereotypes to Find the Secret to Their Success*, CONVERSATION (June 29, 2020, 9:50 AM), <http://theconversation.com/women-leaders-and-coronavirus-look-beyond-stereotypes-to-find-the-secret-to-their-success-141414> [<https://perma.cc/2WPK-RQ6J>].

36. See Katherine W. Phillips, *How Diversity Makes Us Smarter*, SCI. AM. (Oct. 1, 2014), <https://www.scientificamerican.com/article/how-diversity-makes-us-smarter/> [<https://perma.cc/462U-YQNY>].

37. See, e.g., IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES* 9 (2d ed. 1982) (discussing problems associated with "groupthink," which Janis

important decision-making roles is crucial not only for equity and moral reasons, but also will lead to better outcomes.³⁸

As used herein, the term Board Gender Diversity (BGD) means that the board of a publicly held company contains a certain minimum percentage of women.³⁹ We use BGD as a proxy for economic decision-making power, which we argue is fundamental for women to make inroads into economic equality while understanding that this is just a first step. In Part I, we provide an overview of board representation in the EU and United States and discuss the individual, institutional, and cultural forces that continue to keep women on the sidelines. In Part II, we discuss recent institutional activism that may be a sign of broader cultural change. In Part III, we examine U.S. legislative efforts, including California SB 826, the first and only law in the United States to require board diversity. In Part IV, we review the EU approach to increasing BGD by examining legislative, cultural, and constitutional factors. And in Part V, we

defines as “a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members’ strivings for unanimity override their motivation to realistically appraise alternative courses of actions”); Marleen A. O’Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1238-39 (2003); Kristin Johnson, Steven A. Ramirez & Cary Martin Shelby, *Diversifying to Mitigate Risk: Can Dodd-Frank Section 342 Help Stabilize the Financial Sector?*, 73 WASH. & LEE L. REV. 1795, 1806-10 (2016); Robert A. Peterson, Gerald Albaum, Dwight Merunka, Jose Luis Munuera & Scott M. Smith, *Effects of Nationality, Gender, and Religiosity on Business-Related Ethicality*, 96 J. BUS. ETHICS 573, 574, 582 (2010) (discussing evidence which suggests women make more ethical decisions in many contexts).

38. See Chris Bart & Gregory McQueen, *Why Women Make Better Directors*, 8 INT’L J. BUS. GOVERNANCE & ETHICS 93, 94-95 (2013).

39. While some define BGD as permitting just one woman to be added to a board, most initiatives look for a minimum percentage of each gender. See *infra* note 380 and accompanying text (noting several countries with binding minimum percentages). While 30 percent is usually considered to be the minimum, others strive for no less than 33.3 percent, and some political quotas strive for no less than 40 percent of each gender. See *Legislative Quotas Can Be Strong Drivers for Gender Balance in Boardrooms*, EUR. INST. FOR GENDER EQUAL. (June 28, 2019), <https://eige.europa.eu/gender-statistics/dgs/data-talks/legislative-quotas-can-be-strong-drivers-gender-balance-boardrooms> [<https://perma.cc/5KAM-WXVP>]. The 30 percent minimum most likely stems from research showing that it takes three women on a board of ten directors to achieve “critical mass.” See Carolyn Wiley & Mireia Monllor-Tormos, *Board Gender Diversity in the STEM & F Sectors: The Critical Mass Required to Drive Firm Performance*, 25 J. LEADERSHIP & ORGANIZATIONAL STUD. 290, 294-95 (2018). Because of the variation among EU member states and the United States regarding BGD requirements, we use both “BGD requirements” and “quotas” to mean legislated minimum gender representation requirements. When examining non-legislated gender goals, we use the terms “voluntary targets” or “voluntary quotas.”

build on our comparative analysis of the U.S. and EU models and propose that positive action is necessary to achieve meaningful and sustainable gender equality in the United States.

Our analysis reveals that BGD requirements have been used more effectively in the EU than in the United States because the EU member states have constitutional amendments that have paved the way for positive action.⁴⁰ Although calls for adopting the Equal Rights Amendment in the United States have resurfaced, we do not believe the language contained therein is sufficient, nor will it have the effect hoped for by those promoting it.⁴¹

I. WHY THE UNITED STATES LAGS BEHIND IN GENDER DIVERSITY

The percentage of women on boards in the Russell 3000 index (R3000), which includes many of the public companies in the United States, hovers around 20 percent.⁴² Despite the availability of qualified female board candidates, few are selected using current selection methods, which predominantly feature the appointment of men known to men occupying current positions on boards.⁴³ These

40. See *infra* Part IV.C. Voluntary measures become protected against reverse discrimination actions through specific exclusions in the constitutional amendment or legislation authorizing, but not requiring, such measures. See *infra* Part IV.C. This is especially important as the United States has permitted white men to successfully bring discrimination cases to stop companies from taking positive measures to diversify their workforce and management. See Schwartz, *supra* note 10, at 662.

41. With the renewed interest in passing an Equal Rights Amendment in the United States, it is important to understand what such an amendment can and cannot do. See Berman, *supra* note 26. This paper will build upon research by Julie C. Suk and Christopher McCrudden on the constitutional foundations of equality laws that do work. See *infra* Part V. We explain the reasons for the lack of progress by women in the United States in gaining leadership positions, the differences in legal strategies between the EU and the United States, and how quotas could be the answer if the Constitution is amended to mandate positive action to achieve gender equality, much like what has been done in the EU. See *infra* Parts III.C., IV, V.

42. See Rachel Feintzeig, *Women's Share of Board Seats Rises to 20%*, WALL ST. J. (Sept. 11, 2019, 6:23 PM), <https://www.wsj.com/articles/womens-share-of-board-seats-rises-to-20-11568194200> [<https://perma.cc/YUN3-MM2Q>]. In many industries, that figure is much lower; in tech companies, for example, only 15 percent of board members are female. See Jennifer S. Fan, *Innovating Inclusion: The Impact of Women on Private Company Boards*, 46 FLA. ST. U. L. REV. 345, 350 (2019).

43. See Jena McGregor, *The Boardroom Is Still an Old Boy's Club*, WASH. POST (Sept. 25, 2013, 2:30 PM), <https://www.washingtonpost.com/news/on-leadership/wp/2013/09/25/corporate-boardrooms-are-still-old-boys-clubs/> [<https://perma.cc/FS9T-5RS4>].

statistics demonstrate that the well-known reference to the “old [boys’] club” is alive and well.⁴⁴ As of 2018, a staggering half of the companies on the R3000 had no women directors or only one woman on their boards.⁴⁵ The R3000 is an index fund consisting of about 98 percent of all publicly held companies incorporated in the United States.⁴⁶ Additionally, 80 percent of the top twenty-five initial public offerings in the United States had no women directors or only one woman on their boards.⁴⁷ Women are even more underrepresented in “the most influential board positions,” such as “chairs of compensation, audit, and nominating committees.”⁴⁸

This failure to achieve gender parity is due to interrelated systems of bias including: (1) the individual cognitive biases of those in gatekeeping roles; (2) institutional bias, or the process through which board members are selected; and (3) cultural norms in the United States.⁴⁹ Without addressing these underlying barriers, women will continue to be excluded from positions of power and influence in society, including corporate boards.

A. *Individual Bias: The Brain*

1. *Stereotypes About Competence*

A society’s history and culture shape individual beliefs about who is perceived to be most competent in leadership roles.⁵⁰ Some may make a “pool” or “pipeline” argument that there is a lack of women

44. *See id.*

45. Press Release, 2020 Women on Boards, 2020 Women on Boards Reports Half of Russell 3000 Companies Lack Women Directors on Boards, IPOs Fare Worse (Nov. 8, 2018, 10:15 AM), <https://www.businesswire.com/news/home/20181108005102/en/2020-Women-Boards-Reports-Russell-3000-Companies> [<https://perma.cc/VK76-CBVZ>].

46. *See* James Chen, *Russell 3000 Index*, INVESTOPEDIA (Dec. 28, 2020), https://www.investopedia.com/terms/r/russell_3000.asp [<https://perma.cc/GGZ2-74CB>].

47. Press Release, 2020 Women on Boards, *supra* note 45.

48. *See* Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377, 381 & n.28 (2014).

49. *See infra* Parts I.A-C.

50. *See, e.g.*, Debbie A. Thomas, *Bias in the Boardroom: Implicit Bias in the Selection and Treatment of Women Directors*, 102 MARQ. L. REV. 539, 548-50 (2018); Cecilia L. Ridgeway & Shelley J. Correll, *Unpacking the Gender System: A Theoretical Perspective on Gender Beliefs and Social Relations*, 18 GENDER & SOC’Y 510, 522-24 (2004); CECILIA L. RIDGEWAY, FRAMED BY GENDER: HOW GENDER INEQUALITY PERSISTS IN THE MODERN WORLD 80-85 (2011).

qualified to serve as directors.⁵¹ However, this is a common misconception that is based on stereotypes and not supported by research.⁵² As of October 2019, data “for 99.9% of 29,015 individual directors and C-Suite executives at companies that were constituents of the MSCI ACWI Index” showed no “notable differences in financial expertise between male and female directors of companies domiciled in developed market countries.”⁵³ In fact, female executives and directors were more likely to have financial expertise in emerging markets.⁵⁴ In risk expertise, the data also showed “no significant expertise gap between the two genders across global companies.”⁵⁵

Women also face perception biases in the workplace that make them more likely to be considered to “lack the qualities of effective leaders.”⁵⁶ For example, gender stereotypes affect “perceptions of competence,” as well as perceptions of who deserves the attribution of traits like “intelligence, drive, and commitment.”⁵⁷ Although women earn higher grades and receive more advanced degrees than men, women are routinely passed over for positions requiring a high level of intelligence.⁵⁸ Informal social norms, such as the notion that

51. See OLGA EMELIANOVA & CHRISTINA MILHOMEM, MSCI, WOMEN ON BOARDS: 2019 PROGRESS REPORT 17 (2019), <https://www.msci.com/documents/10199/29f5bf79-cf87-71a5-ac26-b435d3b6fc08> [<https://perma.cc/Y8DD-U8LJ>].

52. See *id.* at 17-18; Thomas, *supra* note 50, at 547-50.

53. EMELIANOVA & MILHOMEM, *supra* note 51, at 17-18.

54. *Id.* at 18.

55. *Id.* See generally Linda H. Chen, Jeffrey Gramlich & Kimberly A. Houser, *The Effects of Board Gender Diversity on a Firm's Risk Strategies*, 59 ACCT. & FIN. 991 (2019) (concluding that a diverse board reduces a firm's exposure to reputational risk, which is associated with improved board monitoring and accountability, mitigating the tendency toward groupthink, incorporating a broader scope of perspectives into decision-making processes, and resulting in higher levels of complex moral reasoning by incorporating ethical, environmental, and societal responsibilities; but also demonstrating no difference between gender diverse boards and all-male boards with respect to financial risk exposure).

56. Thomas, *supra* note 50, at 549. Additionally, the “glass cliff” phenomenon may exacerbate this perception as women may be promoted to leadership positions only after the company is placed in a precarious position by a male leader. See Susanne Bruckmüller & Nyla R. Branscombe, *How Women End up on the “Glass Cliff”*, HARV. BUS. REV., Jan.-Feb. 2011, at 26, 26. This results in the women being blamed for their predecessors' mistakes. See *id.* (noting that “[o]nly if male leaders have maneuvered an organization into trouble is a switch to a female leader preferred,” indicating that female leaders may then have to absorb the blowback of their male predecessors' pitfalls).

57. See Rhode & Packel, *supra* note 48, at 405.

58. See Lin Bian, Sarah-Jane Leslie & Andrei Cimpian, *Evidence of Bias Against Girls and Women in Contexts That Emphasize Intellectual Ability*, 73 AM. PSYCH. 1139, 1139-40, 1149 (2018).

even high-powered women do the family work, further perpetuate gender roles that then limit the number of women *perceived* to be available and qualified for high status, decision-making roles.⁵⁹

Research demonstrates that individuals will shift their definitions of merit to prioritize the qualifications that men hold.⁶⁰ In one study, when the resume of a male applicant had more education than the woman, education was said to be more important after the man was chosen.⁶¹ However, when the qualifications on the resumes were switched and the man had more experience and less education, those choosing the male applicant stated experience was more valuable.⁶² This illustrates how much the evaluation of who is “qualified” for positions of power is clouded by gender stereotypes.⁶³

Even when women defeat the odds and rise to the prized rank of CEO, they continue to be plagued by bias. Some women will attend more prestigious schools with hopes of overcoming these stereotypes, but even women CEOs with the highest tier educational credentials are less likely than their male counterparts to be named chair of their companies’ boards, are paid less, and have shorter tenures as CEOs.⁶⁴ This type of discrimination remains prevalent in American society.⁶⁵

2. *Unconscious Biases*

While some stereotypes about women’s competence and leadership abilities may be consciously held, unconscious biases may also plague the decision-making of those in power. Because men hold

59. See Geeta Tewari, Emma DeCourcy & Shirley Ureña, *The Ethics of Gender Narratives for United States Corporate Boards*, 16 N.Y.U. J.L. & BUS. 221, 249 (2019).

60. See Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCH. SCI. 474, 474 (2005).

61. See *id.* at 475.

62. See *id.* at 476.

63. See *id.* at 474.

64. See Michael Holmes, *Why Are There So Few Women CEO’s?*, WORLD ECON. F. (Sept. 9, 2019), <https://www.weforum.org/agenda/2019/09/women-workforce-senior-level/> [https://perma.cc/7MQL-289F].

65. See, e.g., *id.*

most board and executive positions, they serve as the gatekeepers to board entry.⁶⁶ This is especially troublesome, as affinity or “in-group” bias serves as a barrier to women.⁶⁷ Affinity bias is a preference for people like ourselves and is commonly unconscious or perceived as harmless because it is not overt and malicious sexism.⁶⁸ However, this type of unconscious bias can be just as damaging because it contributes to the argument that not enough qualified women are available to hold prestigious board roles.⁶⁹ In reality, nominating committees are simply not looking for women due to their preexisting biases.⁷⁰ These unconscious biases cause board members to seek new directors who “look and sound like they do,”⁷¹ favoring those with similar traits and pedigrees over candidates who may not run in their social circles, and making diversity a near impossibility.⁷²

This affinity bias is compounded by the validity illusion. As Nobel Prize winner Daniel Kahneman has shown, humans are not only unaware of the reasons for their decisions, but they also place a false sense of belief in the accuracy of their own decisions, which are heavily influenced by these unconscious biases.⁷³ Thus, those with the power to choose board members are often unaware or unwilling to acknowledge they are making poor choices.⁷⁴ Accordingly, these

66. See *supra* notes 42-45 and accompanying text.

67. See Rhode & Packel, *supra* note 48, at 404-05.

68. See Houser, *supra* note 20, at 304 & n.82.

69. See Rhode & Packel, *supra* note 48, at 405-06.

70. See Houser, *supra* note 20, at 304-05.

71. See Thomas, *supra* note 50, at 559 (quoting U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-30, CORPORATE BOARDS: STRATEGIES TO ADDRESS REPRESENTATION OF WOMEN INCLUDE FEDERAL DISCLOSURE REQUIREMENTS 13 (2015)).

72. See *id.* (finding that recommendations for board members may come from CEOs who often “select their cultural and demographic clones”) (quoting Steven A. Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America's Boardrooms and What to Do About It*, 61 WASH. & LEE L. REV. 1583, 1591-92 (2004)).

73. See, e.g., Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 PSYCH. REV. 237, 249 (1973); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974); Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 49, 51-52 (Thomas Gilovich et al. eds., 2002); DANIEL KAHNEMAN, THINKING, FAST AND SLOW 20-22 (2011); Daniel Kahneman, Andrew M. Rosenfield, Linnea Gandhi & Tom Blaser, *NOISE: How to Overcome the High, Hidden Cost of Inconsistent Decision Making*, HARV. BUS. REV., Oct. 2016, at 38, 43.

74. See, e.g., Kahneman & Tversky, *supra* note 73, at 249.

cognitive biases are likely to result in men being given positions even when less qualified.⁷⁵ Men are chosen based on perceived potential, while women must go above and beyond to prove their worth through past experience.⁷⁶ For example, it is estimated that 77 percent of male directors have no prior experience, compared with 68 percent of females.⁷⁷ This is a double standard that reinforces the gender hierarchy and continues to perpetuate the exclusion of women from boards.

“[E]xposure to counterstereotypical exemplars” has been shown to reduce these unconscious biases.⁷⁸ As more women gain access to positions of power, the representative bias⁷⁹ can be used to help dispel the unconscious association of “leaders” with “men.”⁸⁰ This is consistent with Kahneman’s finding in *Thinking, Fast and Slow*, that the more we are exposed to something, the better we feel about it.⁸¹ Based on this research, it is important to find strategies that expose male leaders to highly qualified women board members and

75. See, e.g., Corinne A. Moss-Racusin, John F. Dovidio, Victoria L. Brescoll, Mark J. Graham & Jo Handelsman, *Science Faculty’s Subtle Gender Biases Favor Male Students*, 109 PROC. NAT’L ACAD. SCI. 16474, 16477 (2012) (“[F]emale student[s] [were judged] to be less competent and less worthy of being hired than ... identical male student[s], and also [were] offered ... a smaller starting salary and less career mentoring.”).

76. See Eileen Pollack, *Why Are There Still So Few Women in Science?*, N.Y. TIMES MAG. (Oct. 3, 2013), <https://www.nytimes.com/2013/10/06/magazine/why-are-there-still-so-few-women-in-science.html> [<https://perma.cc/5K3A-BCAN>]; Joan C. Williams, Katherine W. Phillips & Erika V. Hall, *Tools for Change: Boosting the Retention of Women in the STEM Pipeline*, 6 J. RSCH. GENDER STUD. 11, 11 (2016) (“Black women scientists were more likely than other women to report that they had to prove themselves more than their colleagues, ... Asian-American women scientists reported more pressure to behave in feminine ways (and more push-back if they didn’t), and Latina scientists were more likely to be called ‘angry’ or ‘too emotional’ if they behaved assertively.”).

77. See Laura Colby, *Men Join Corporate Boards with Less Experience than Women*, BLOOMBERG (June 27, 2017, 11:56 AM), <https://www.bloomberg.com/news/articles/2017-06-27/men-join-corporate-boards-with-less-experience-than-women-do> [<https://perma.cc/GKU8-2ZYR>].

78. See Chloë FitzGerald, Angela Martin, Delphine Berner & Samia Hurst, *Interventions Designed to Reduce Implicit Prejudices and Implicit Stereotypes in Real World Contexts: A Systematic Review*, 7 BMC PSYCH., no. 29, 2019, at 1, 7.

79. See Tversky & Kahneman *supra* note 73, at 1124.

80. See generally Lori Beaman, Raghavendra Chattopadhyay, Esther Duflo, Rohini Pande & Petia Topalova, *Powerful Women: Does Exposure Reduce Bias?*, 124 Q.J. ECON. 1497 (2009) (explaining that placing women in prominent leadership roles reduces the impact of representative bias).

81. See KAHNEMAN, *supra* note 73, at 59-60, 65-67 (explaining that repetition contributes to the positive feelings associated with “cognitive ease”).

candidates. This may reduce unconscious biases, help bring women more easily to mind when nominating board members for consideration, and eventually normalize women in leadership roles.⁸²

The following is an example that illustrates this point. Although a handful of women were permitted to attend law school in the late 1800s, many were barred from practicing law.⁸³ Women were routinely kept out of the workforce as stereotyping and discrimination prevailed.⁸⁴ While attending a dinner party, Ruth Bader Ginsburg was asked by the Dean of Harvard Law School, which she attended at the time, how she could take a law school seat away from a man.⁸⁵ However, by 2016 women exceeded the number of men in law schools.⁸⁶ Today, television, novels, and society in general more readily accept that a woman is just as likely to be an attorney as a man due to the exposure effect.⁸⁷

B. Institutional Bias: The Process

Institutional bias is

[a] tendency for the procedures and practices of particular institutions to operate in ways which result in certain social groups being advantaged or favoured and others being disadvantaged or devalued. This need not be the result of any conscious prejudice or discrimination but rather of the majority simply following existing rules or norms.⁸⁸

82. See, e.g., Beaman et al., *supra* note 80, at 1530.

83. See Cynthia M Wiseman, *The Legal Education of Women: From "Treason Against Nature" to Sounding a "Different Voice,"* 74 MARQ. L. REV. 325, 330 (1991).

84. *Id.* at 4.

85. Asher Klein, *At Harvard Law School, Ruth Bader Ginsburg Displayed the Steel She'd Be Famous for*, NBC BOS. (Sept. 19, 2020, 9:26 AM), <https://www.nbcboston.com/news/local/at-harvard-law-school-ruth-bader-ginsburg-displayed-the-steel-shed-be-famous-for/2197397/> [<https://perma.cc/G3EV-88E6>].

86. *Law School Rankings by Female Enrollment (2018)*, ENJURIS (Dec. 16, 2018), <https://www.enjuris.com/students/law-school-female-enrollment-2018.html> [<https://perma.cc/W5CV-BAGJ>].

87. See Kerriane Waters, *From Rags to Riches: How the Portrayal of Female Attorneys in the Media Has Evolved from Clothes and Fashion to Focus and Success*, CATALYST, May 2013, at 1, 1-2; KAHNEMAN, *supra* note 73, at 66-67 (discussing the exposure effect).

88. *Institutional Bias*, Oxford Reference: A Dictionary of Media and Communication, <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100005347> [<https://perma.cc/ULE4-TGE2>].

In addition to historical subordination of women, the current process through which board members are selected in the United States has continued to result in a lack of gender diversity on corporate boards.⁸⁹ Both the *narrowly defined candidate pool* and *network homophily* are institutional factors that reinforce the individual biases discussed above.⁹⁰

1. *Narrowly Defined Pool*

On a corporate board, the Nominating and Governance (N&G) Committee ultimately reviews and recommends nominees for the full board to approve and elect.⁹¹ According to the rules of the New York Stock Exchange (NYSE), the N&G Committee should be composed of independent board directors alone.⁹² The “best practice” for boards is that the entire board agrees on desired personal attributes that are provided as guidance for the N&G Committee.⁹³ The most visible and sought-after candidates are those who have previously held CEO positions and executive roles, and possess prior directorship experience.⁹⁴ This serves as a limiting factor for women seeking access to corporate boards.

Based on this process, boards ultimately recruit from a select pool in which women already hold few positions due to historical exclusion.⁹⁵ From the perspective of male directors, it is not bias, but lack of executive experience preventing an increase in the percentage of women on boards.⁹⁶ Yet, even when women make it to upper management, they are not typically considered because their

89. See *supra* Part I.

90. Although beyond the scope of this paper, the effects are amplified with respect to Black women. For a discussion on intersectionality and how the predominantly white male judiciary has failed Black women when it comes to discrimination, see generally Williams, *supra* note 8.

91. Lawrence J. Trautman, *Corporate Boardroom Diversity: Why Are We Still Talking About This?*, 17 SCHOLAR 219, 243 (2015).

92. *Id.*

93. *Id.* at 244.

94. *Id.* at 249.

95. See, e.g., DAVID F. LARCKER & BRIAN TAYAN, PIONEERING WOMEN ON BOARDS: PATHWAYS OF THE FIRST FEMALE DIRECTORS 1 (2013); Julia Carpenter, *Women in the Fortune 500: 64 CEOs in Half a Century*, CNN MONEY (Aug. 7, 2017), <https://money.cnn.com/interactive/pf/female-ceos-timeline/> [<https://perma.cc/EE8G-UR6L>].

96. Rhode & Packel, *supra* note 48, at 403.

positions are not perceived to be responsible for profit and loss.⁹⁷ This places even greater emphasis on being CEO of a publicly held company and prior board experience.⁹⁸ Although many women may have the desired industry experience, they have not gained access to this traditional pipeline to board service.⁹⁹

The first time a woman held the position of CEO at a Fortune 500 company was in 1972.¹⁰⁰ Despite the progress women have made in the workplace overall, holding almost 52 percent of all professional- and management-level jobs, women remain vastly underrepresented in CEO roles.¹⁰¹ Women represent just 5 percent of CEOs at Fortune 500 companies, with the percentage actually dropping between 2017 and 2019 from 5.1 percent to 4.9 percent.¹⁰² This huge disparity is a core disadvantage to women interested in directorship opportunities.¹⁰³

In sum, the NYSE process has led boards to draw from a pool of candidates in which women are vastly underrepresented.¹⁰⁴ The issue is not that women are not qualified, but rather that boards have to expand the scope of their candidate pool.¹⁰⁵ Importantly, firms are not bound by these traditional criteria that fail to include women. Rather than overly focusing on prior executive roles and prior board experience, boards are free to set their own flexible board qualification requirements.¹⁰⁶ To account for these persisting inequities, nominating committees must look outside of the traditional pipeline for the board of director candidates to the increasing number of women in other C-Suite roles, including chief financial officers, chief legal officers, chief diversity officers, and other executive officers who are often not selected to serve.¹⁰⁷ Even beyond

97. *Id.*

98. *See id.*

99. *Id.* at 402.

100. Carpenter, *supra* note 95.

101. *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU LAB. STAT. (2021), <https://www.bls.gov/cps/cpsaat11.htm> [<https://perma.cc/9P69-XHVV>]; *see* Carpenter, *supra* note 95.

102. EMELIANOVA & MILHOMEM, *supra* note 51, at 6.

103. Thomas, *supra* note 50, at 547-48.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 548; Celia Huber & Sara O'Rourke, *How to Accelerate Gender Diversity on Boards*, MCKINSEY Q. (Jan. 16, 2017), <https://www.mckinsey.com/featured-insights/leadership/>

these executive positions, the appointment pool can be expanded to include other highly “qualified professionals such as senior attorneys, academics, consultants, nonprofit executives, accountants and auditors.”¹⁰⁸

2. Network Homophily

Related to the cognitive affinity bias discussed above, homophily is based on the network principle that “contact between similar people occurs at a higher rate than among dissimilar people.”¹⁰⁹ Based on this principle, “any social entity that depends to a substantial degree on networks for its transmission will tend to be localized in social space.”¹¹⁰ This homophily is perpetuated by “social structures that induce propinquity among similar others,”¹¹¹ such as golf clubs, country clubs, sports clubs, board rooms, and other elite and male-dominated spaces where leaders are selected from closed networks, and often behind closed doors. In these secret spaces, men have access through income and assets, while women only “qualify as wives or inheriting daughters.”¹¹² Some of these spaces specifically ban female members.¹¹³

Because the nominating committees on boards tend to consist of older white males,¹¹⁴ network homophily causes a biased selection process that prevents women from gaining access.¹¹⁵ Arguing that board members are chosen by merit ignores forty years of social

how-to-accelerate-gender-diversity-on-boards [https://perma.cc/N8U9-HURQ].

108. Trautman, *supra* note 91, at 251.

109. Miller McPherson, Lynn Smith-Lovin & James M. Cook, *Birds of a Feather: Homophily in Social Networks*, 27 ANN. REV. SOCIO. 415, 416 (2001).

110. *Id.*

111. *Id.*

112. Brooke Cusmano, *Intersections of Race, Class and Gender in Country Clubs*, MEDIUM (May 19, 2017), https://medium.com/@brooke.cusmano/intersections-of-race-class-and-gender-in-country-clubs-60255cd462 [https://perma.cc/VU5G-JW9X].

113. Elizabeth Segran, *Social Clubs Died out in America. Now, Venture Capital Is Bringing Them Back*, FAST CO. (May 28, 2019), https://www.fastcompany.com/90350407/the-death-and-unlikely-rebirth-of-the-american-social-club [https://perma.cc/5LMU-7RGG].

114. Jena McGregor, *Corporate Boards Are Still Mostly White, Mostly Male—and Getting Even Older*, WASH. POST (Apr. 24, 2018, 11:39 AM), https://www.washingtonpost.com/news/on-leadership/wp/2018/04/24/corporate-boards-are-still-mostly-white-mostly-male-and-getting-even-older/ [https://perma.cc/X5EN-236C].

115. See Thomas, *supra* note 50, at 559.

science research.¹¹⁶ The selection process is primarily driven by network structure, which relies on favoritism and convenience, not objective indicators of merit.¹¹⁷ Since many boards do not have an objective list of criteria uniformly applied to each candidate, and because women may not be considered at all due to the nomination process, this leaves the door wide open to individual stereotypes and unconscious biases.¹¹⁸ Thus, reliance on closed networks and highly subjective criteria can mask both explicit and unconscious bias.¹¹⁹ Within these biased structures men are rarely going to be motivated to change their own biases or the very systems that have allowed them to maintain privilege and power for centuries.

A related institutional factor that limits BGD in the United States is that women do not enjoy equal mentoring and networking in the workplace relative to their male counterparts.¹²⁰ A lack of mentorship can prevent women from accessing “informal networks” and other “female role models and sponsors to provide opportunities.”¹²¹ This inadequate “mentorship and sponsorship can also deprive women of advocates who will support efforts to recruit and advance women as part of board agendas.”¹²²

While encouraging women to solve the representation gap by “leaning in” promotes the idea that women have “individualized autonomy” over the issue, it does not incentivize elite males to give up their control over access to corporate structures like boards.¹²³ Therefore, purely private and individualized remedies will not be able to tackle these institutional forces that have perpetuated male domination over the board selection process.¹²⁴

116. See Houser, *supra* note 20, at 318-21.

117. See Rhode & Packel, *supra* note 48, at 404.

118. *Id.* at 402, 404-07.

119. *Id.* at 404-06.

120. Thomas, *supra* note 50, at 549.

121. *Id.*

122. *Id.*

123. Darren Rosenblum, *California Dreaming?*, 99 B.U. L. REV. 1435, 1449-50 (2019).

124. *Id.*

C. Cultural Bias: The Way of Life

The representation of women on corporate boards is also influenced by a country's culture.¹²⁵ While boards have been found to be more diverse in countries with higher female labor market participation and countries with higher GDP per capita, this has not held true for the United States.¹²⁶ This is largely because the United States also has a larger gender gap and stronger norms of masculinity, which lead to lower female board participation.¹²⁷ A detailed study published in 1984 by Geert Hofstede measured how values in the workplace are influenced by culture.¹²⁸ He defined culture as "the collective programming of the mind distinguishing the members of one group or category of people from others."¹²⁹ The Hofstede Cultural Dimension Index was used to score each country researched in six categories.¹³⁰ We focus our analysis on three of these cultural factors related to gender equity: masculinity, power distance, and uncertainty avoidance.

The *masculinity* index indicates the extent to which a culture values traditionally masculine norms such as competition and being "tough."¹³¹ According to the index, a country with a high masculinity score focuses on individual achievement, while a lower score is associated with collaboration and collective wellbeing.¹³² This study found that in high masculinity societies, gender roles are more clearly distinct and men are expected to be "assertive, tough, and focused on material success," while women are expected to be "more modest, tender, and concerned with the quality of life."¹³³ High

125. Laura Cabeza-García, Esther B. Del Brio & Carlos Rueda, *Legal and Cultural Factors as Catalysts for Promoting Women in the Boardroom*, 22 BUS. RSCH. Q. 56, 57 (2019).

126. Dale Griffin, Kai Li & Ting Xu, *Board Gender Diversity and Corporate Innovation: International Evidence*, 56 J. FIN. & QUANTITATIVE ANALYSIS 123, 131 (2021).

127. *See id.*

128. *See generally* Geert Hofstede, *Cultural Dimensions in Management and Planning*, 1 ASIA PAC. J. MGMT. 81 (1984).

129. *National Culture*, HOFSTEDE INSIGHTS, <https://hi.hofstede-insights.com/national-culture> [https://perma.cc/W75N-5GCX].

130. *Id.*

131. *Id.*

132. *See id.*

133. GEERT HOFSTEDE, *CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS* 297 (2d ed. 2001).

masculinity cultures are also focused on stricter gender roles.¹³⁴ At the other end of the spectrum in societies low in masculinity, gender roles overlap and are more fluid, and both men and women are more collaborative and concerned with the quality of life.¹³⁵

The *power distance* index represents the comfort a society has with gaps in hierarchical levels.¹³⁶ A country with a high power distance score would indicate higher tolerance for inequality.¹³⁷ Therefore, cultures with both high masculinity and high power distance scores would be less likely to value women in power.¹³⁸

The *uncertainty avoidance* index indicates the extent to which the culture requires certainty.¹³⁹ A culture with a higher score on uncertainty avoidance is more apt to create and follow legal mandates.¹⁴⁰

In examining the culture in the United States based on the Hofstede scale,¹⁴¹ what becomes apparent is that its unique combination of a low power distance score, high masculinity score, and low uncertainty avoidance score has created a situation in which the phrase “all *men* are created equal”¹⁴² takes on special meaning. Overall, the United States is on the lower end of power distance, meaning that people generally want to at least *perceive* that there is equality.¹⁴³ The high masculinity score is evidenced by recent pushes to return to a “traditional” family structure and increase limitations on the rights of women.¹⁴⁴ With a low uncertainty

134. See Hofstede, *supra* note 128, at 84.

135. *Id.*

136. *National Culture*, *supra* note 129.

137. *Id.*

138. Masculinity and power distance “are two factors that are highly correlated with the assumption of gender roles in society. For this reason, such variables can be expected to have an influence on the presence of women in business in general and especially on boards.” Cabeza-García et al., *supra* note 125, at 60.

139. *National Culture*, *supra* note 129.

140. *See id.*

141. *Country Comparison: United States*, HOFSTEDE INSIGHTS, <https://www.hofstede-insights.com/country-comparison/the-usa/> [<https://perma.cc/HC6T-ASWY>].

142. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

143. *See Country Comparison: United States*, *supra* note 141. However, even when case law seems to support equality, without accompanying legislation mandating it, actual practices are not likely to change; therefore, this perception is largely a delusion. *See, e.g.*, Darren Rosenblum, *The Supreme Court’s Decision Won’t Cure Inequality—Quotas Will*, THE HILL (June 19, 2020, 5:30 PM), <https://thehill.com/opinion/civil-rights/503609-the-supreme-courts-decision-wont-cure-inequality-quotas-will> [<https://perma.cc/NGM3-7ELE>].

144. *See, e.g.*, Mary Emily O’Hara, *First 100 Days: How President Trump Has Impacted LGBTQ Rights*, NBC NEWS (Apr. 26, 2017, 10:19 AM), <https://www.nbcnews.com/feature/nbc->

avoidance score, legal rules are often eschewed as overly restrictive on free will, and loopholes and strategies to circumvent the law are commonplace.¹⁴⁵

Unlike the EU, which has committed to creating substantive equality for women, the United States has failed to ratify treaties such as the Convention on the Elimination on All Forms of Discrimination Against Women (CEDAW), which has been ratified by all of the members of the U.N. except Iran, Somalia, Sudan, and the United States.¹⁴⁶ In 2019, the United States additionally refused to reaffirm its commitment to the Beijing Declaration of Women's Rights previously agreed to at the 1995 Conference of Women's Rights held at the U.N., demonstrating the country's recent shift away from equality for women.¹⁴⁷

In terms of strategies to increase BGD, the United States has relied on voluntary measures, which have failed miserably given this cultural context.¹⁴⁸ In countries with high levels of masculinity like the United States,¹⁴⁹ it is difficult for women to make inroads into business and politics without legislative intervention. However, in countries with lower levels of masculinity and power distance,

out/first-100-days-how-president-trump-has-impacted-lgbtq-rights-n750191 [https://perma.cc/P87R-Q9SK]; Julie Moreau, *Adoption Agency Should Be Able to Reject Gay Couples, Trump Administration Argues*, NBC NEWS (June 4, 2020, 2:50 PM), <https://www.nbcnews.com/feature/nbc-out/adoption-agency-should-be-able-reject-gay-couples-trump-administration-n1224911> [https://perma.cc/A35L-DT4L]. America's reputation significantly declined abroad after then-President Trump took office. See Kristen Bialik, *How the World Views the U.S. and Its President in 2018 in 9 Charts*, PEW RSCH. CTR. (Oct. 9, 2018), <https://www.pewresearch.org/fact-tank/2018/10/09/how-the-world-views-the-u-s-and-its-president-in-9-charts/> [https://perma.cc/6R2K-XHFG]; Wike et al., *supra* note 5.

145. See *Country Comparison: United States*, *supra* note 141.

146. Lowen, *supra* note 9.

147. Liz Ford, *US Accused of Trying to Dilute Global Agreements on Women's Rights*, GUARDIAN (Mar. 18, 2019, 3:00 PM), <https://www.theguardian.com/global-development/2019/mar/18/us-accused-of-trying-to-dilute-international-agreements-un-commission-status-of-women> [https://perma.cc/AQ3U-6WJK] ("Under the Trump administration, US negotiators have found themselves more aligned with countries including Iran, Saudi Arabia and Russia than European nations. These countries consistently seek to undermine agreements on women's rights at the UN, specifically around reproductive health and rights.")

148. See Kimberly Gladman & Michelle Lamb, *Board Diversity: Can Voluntary Change Succeed?*, GUARDIAN (May 21, 2013, 3:30 PM), <https://www.theguardian.com/women-in-leadership/2013/may/21/can-voluntary-change-succeed> [https://perma.cc/QJ2T-Z3SN].

149. *Country Comparison: United States*, *supra* note 141. Italy is an example of another country with high levels of masculinity. See *Country Comparison: Italy*, HOFSTEDE INSIGHTS, <https://www.hofstede-insights.com/country-comparison/italy/> [https://perma.cc/Y9MG-E4V2].

and higher uncertainty avoidance levels,¹⁵⁰ rules setting voluntary targets or softer nudges may be successful because corporations in those countries are more amenable to the idea of gender equality and do not require strict rules to accomplish it.

Legislative efforts are both more likely and more effective in low masculinity cultures. For example, France, with a low masculinity score,¹⁵¹ has been more successful at achieving BGD at least partly because of the broader cultural context and framing of board diversity laws as “advancing humanity by ensuring that both halves are represented, rather than as advancing the particular rights or interests of women.”¹⁵² Countries with lower masculinity scores value collaboration over competition.¹⁵³ However, even in countries with high masculinity scores, like Italy, success can still be achieved because their higher uncertainty avoidance makes such countries more likely to comply with the law if BGD legislation is passed.¹⁵⁴

The lack of support for the advancement of women in the United States dates back to the culture at the time the U.S. government was founded in the 1700s.¹⁵⁵ Women had no role in its creation and

150. For example, the Netherlands. *Country Comparison: The Netherlands*, HOFSTEDE INSIGHTS, <https://www.hofstede-insights.com/country-comparison/the-netherlands/> [https://perma.cc/Z8WC-75YX].

151. *Country Comparison: France*, HOFSTEDE INSIGHTS, <https://www.hofstede-insights.com/country/france> [https://perma.cc/MAD5-WGQD].

152. Julie C. Suk, *Gender Parity and State Legitimacy: From Public Office to Corporate Boards*, 10 INT'L J. CONST. L. 449, 464 (2012) (questioning whether the same framing is possible in the United States due to the absence of a “recognition of social partnerships between public and private institutions”).

153. See *Country Comparison: France*, *supra* note 151.

154. See *Country Comparison: Italy*, *supra* note 149.

155. See MacKinnon, *Reflections on Sex Equality*, *supra* note 3, at 1281-82. Unfortunately, this culture still exists today. See *id.* at 1290-91. Although many argue that equal opportunity exists, this is simply not true. See *id.* at 1284. The current legal system in the United States not only allows but also enables white males to dominate when it comes to political and organizational seats of power. See *id.* We are only recently paying attention to how insufficient many men are when it comes to leadership as compared to women. See Emma Jacobs, *Why Do So Many Incompetent Men Win at Work?*, FIN. TIMES (Feb. 26, 2019, 11:00 PM), <https://www.ft.com/content/3641f914-3433-11e9-bb0c-42459962a812> [https://perma.cc/MK8J-BSTF] (“‘Women are better leaders,’ says Tomas Chamorro-Premuzic. ‘I am not neutral on this. I am sexist in favour of women. Women have better people skills, [are] more altruistic, [and are] better able to control their impulses. They outperform men in university at graduate and undergraduate levels.’”). For a full discussion on the superiority of women in leadership roles, see Tomas Chamorro-Premuzic, *Why Do So Many Incompetent Men Become Leaders?*, HARV. BUS. REV. (Aug. 22, 2013), <https://hbr.org/2013/08/why-do-so-many-incompetent-men> [https://perma.cc/ZDM9-VRC5].

their voices were not considered.¹⁵⁶ The United States was founded by free white males who created a system in which only they were considered equal.¹⁵⁷ The EU, on the other hand, was created less than three decades ago and kept the value of equality in mind in its creation.¹⁵⁸ In Part V, we more fully examine what this cultural context means in terms of necessary steps for the United States to achieve BGD.

II. INSTITUTIONAL ACTIVISM AS A SIGN OF CULTURAL CHANGE?

Given the lack of progress on BGD, a number of institutions holding economic power in the United States have taken action to improve diversity through measures such as shareholder initiatives, Initial Public Offering (IPO) pressure, exchange listing requirements, and state investment rules. This institutional activism may be a sign of broader cultural change, indicating shifting norms about how representation requirements are viewed.

A. Shareholder and Investor Initiatives

In 2018, BlackRock amended its proxy voting guidelines to add a recommendation for boards to include at least two women directors and indicated that it would consider withholding board approval for companies that do not comply.¹⁵⁹ BlackRock holds significant economic power as the world's largest asset manager with \$6.3 trillion in assets under management.¹⁶⁰ Its 2018 Proxy Guidelines indicate that it "expects to see at least two women directors on every board."¹⁶¹ Vanguard, with over \$5 billion in assets, has also

156. Mary Beth Norton, *The Constitutional Status of Women in 1787*, 6 MINN. J.L. & INEQ. 7, 7-8 (1988).

157. Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 465, 465, 471-73 (1995); Nikole Hannah-Jones, *Our Democracy's Founding Ideals Were False when They Were Written. Black Americans Have Fought to Make Them True.*, N.Y. TIMES MAG. (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/black-history-american-democracy.html> [<https://perma.cc/8T7G-PKR8>].

158. See *supra* note 12 and accompanying text.

159. Cydney Posner, *BlackRock Issues Proxy Voting Guidelines for 2018 Proxy Season*, COOLEY PUBCO (Feb. 13, 2018), <https://cooleypubco.com/2018/02/13/blackrock-issues-proxy-voting-guidelines-for-2018-proxy-season/> [<https://perma.cc/UL2N-UY6Z>].

160. *Id.*

161. Belinda Martinez Vega, *Why Businesses Are Adding Women to Their Boards*, MERGERS

advocated for BGD but has not indicated any penalties for a non-compliant slate.¹⁶²

However, State Street Global Advisors, which manages \$2.8 trillion in assets, did vote against slates on 511 companies that did not comply with its gender diversity recommendations.¹⁶³ In its recommendation, State Street noted that companies with a higher percentage of women board members achieved higher levels of return on equity (10.1 percent per year versus 7.4 percent for all other companies).¹⁶⁴ In July 2018, the Midwest Investors Diversity Initiative, with \$300 billion in assets, announced its attempt to increase racial and gender diversity through model checklists and best practices.¹⁶⁵

Another private solution to increasing board gender diversity is an investor-initiated requirement that private companies seeking to become publicly held must increase the number of women on their boards. In 2020, Goldman Sachs, a U.S. investment bank with more than \$1.8 trillion in assets under management,¹⁶⁶ announced that it would only carry out IPOs for companies that have at least two diverse board members.¹⁶⁷ This is an attempt to address the

& ACQUISITIONS (Feb. 4, 2020), <https://www.themiddlemarket.com/opinion/why-businesses-are-adding-women-to-their-boards> [<https://perma.cc/K8GK-5LZW>].

162. *Id.*

163. MIKE MAGSIG & JEANNE E. BRANTHOVER, DHR INT'L, BOARDROOM DIVERSITY: NOW IT'S MID-CAPS' TURN (2018), <https://www.dhrinternational.com/insights/board-diversity-now-its-turn-mid-caps/> [<https://perma.cc/S5LA-SUCF>].

164. Press Release, State Street, State Street Global Advisors Calls on 3,500 Companies Representing More Than \$30 Trillion in Market Capitalization to Increase Number of Women on Corporate Boards (Mar. 7, 2017), <https://newsroom.statestreet.com/press-releases/press-release-details/2017/State-Street-Global-Advisors-Calls-on-3500-Companies-Representing-More-Than-30-Trillion-in-Market-Capitalization-to-Increase-Number-of-Women-on-Corporate-Boards/default.aspx> [<https://perma.cc/XC6E-99RS>].

165. Press Release, Midwest Investors Diversity Initiative, Midwest Investor Diversity Initiative Reports 16 Companies Adopt Diverse Board Candidate Search Policies; Women, Minorities Appointed at 6 Companies (July 12, 2018), <https://www.globenewswire.com/news-release/2018/07/12/1536800/0/en/Midwest-Investor-Diversity-Initiative-Reports-16-Companies-Adopt-Diverse-Board-Candidate-Search-Policies-Women-Minorities-Appointed-at-6-Companies.html> [<https://perma.cc/S3Z2-4LD9>]. Glass Lewis, the leading independent provider of global governance services, has also indicated that the company considers BGD in its voting recommendations. GLASS LEWIS, APPROACH TO DIVERSITY DISCLOSURE RATINGS 3 (2020).

166. *Consumer and Wealth Management*, GOLDMAN SACHS, <https://www.goldmansachs.com/careers/divisions/consumer-and-wealth-management/index.html> [<https://perma.cc/YZ4D-3ZEN>].

167. *Goldman Sachs' Commitment to Board Diversity*, GOLDMAN SACHS (Feb. 4, 2020),

gender and racial disparities on boards of privately held companies, which are even more stark. A recent study found that of the most heavily funded private companies, only 7 percent of board seats are held by women and 60 percent of the companies do not have one single woman on the board.¹⁶⁸

Shifting the power to shareowners and investors could challenge the status quo at companies by requiring transparency as it relates to the gender and race of the board's current directors.¹⁶⁹ Further, shareholders can place their own candidates on the ballot, creating a system in which boards are more responsive to shareholders.¹⁷⁰ This can reshape boards from the outside by expanding the network to a broader range of candidates.¹⁷¹ While these measures may serve as a signal to companies that investors value BGD, these measures have not resulted in significant increases in women on boards.¹⁷²

B. Nasdaq Listing Requirements

On December 1, 2020, Nasdaq's female CEO Adena Friedman, proposed a rule to the SEC that would mandate certain BGD requirements for public companies listed under its exchange.¹⁷³ This

<https://www.goldmansachs.com/our-commitments/diversity-and-inclusion/launch-with-gs/pages/commitment-to-diversity.html> [<https://perma.cc/D7UT-MDTC>]. *But see* Katie Mehnert, *Why Goldman Sachs's Push for Diversity Is Unlikely to Drive Real Change*, HARV. BUS. REV. (Feb. 20, 2020), <https://hbr.org/2020/02/why-goldman-sachss-push-for-diversity-is-unlikely-to-drive-real-change> [<https://perma.cc/NW35-TYCT>]. According to a Goldman Sachs representative, a "diverse" director is one "from a traditionally underrepresented group[], including gender, race, ethnicity, sexual orientation, or gender identity." Jena McGregor, *Goldman Sachs CEO Says It Won't Take a Company Public Without Diversity on Its Board*, WASH. POST (Jan. 23, 2020), <https://www.washingtonpost.com/business/2020/01/23/goldman-sachs-ceo-says-it-wont-take-companies-public-without-diverse-board-member/> [<https://perma.cc/H39W-HKDW>].

168. Gené Teare, *2019 Study of Gender Diversity in Private Company Boardrooms*, CRUNCHBASE NEWS (Dec. 11, 2019), <https://news.crunchbase.com/news/2019-study-of-gender-diversity-in-private-company-boardrooms/> [<https://perma.cc/U3MX-Q2KD>].

169. *See* Tewari et al., *supra* note 59, at 234-35.

170. *See id.*

171. *See id.*

172. *See* Teresa L. Johnson & Amy Endicott, *United States: Institutional Investors' Role in Diversifying Boardrooms*, MONDAQ (Dec. 15, 2020), <https://www.mondaq.com/unitedstates/shareholders/1016848/institutional-investors39-role-in-diversifying-boardrooms?> [<https://perma.cc/F8BZ-5Z8W>].

173. Pippa Stevens, *Nasdaq Proposal Would Require Greater Diversity on Company Boards*, CNBC (Dec. 2, 2020, 4:25 PM), <https://www.cnbc.com/2020/12/01/nasdaq-proposal-would->

rule was approved by the SEC on August 6, 2021.¹⁷⁴ To comply with the rule, listed companies must either: (1) have at least one racial minority or LGBTQ+ board member *and* one female director; or (2) provide a sufficient explanation as to why the company has not met this requirement.¹⁷⁵ The rule also requires Nasdaq-listed companies to annually publish statistical information regarding their directors.¹⁷⁶ The rule aims to provide greater transparency to investors and more data to assess board diversity trends.¹⁷⁷

This is an example of an institution using its power to promote gender equity despite the lack of legislative and cultural support. It also illustrates the potential impact of women gaining access to leadership. Nasdaq's proposed rule would presumably have a broad impact, encouraging thousands of companies listed on its stock exchange to include women, racial minorities, and LGBTQ+ individuals on their boards. If successful, this bold move has the potential to normalize women, and particularly women of color, in these leadership roles, which could also promote broader cultural change.

C. State Investment Funds

A number of public and private state pension and retirement funds have also indicated that they will withhold votes for boards when they do not contain at least 30 percent women. California's Public Employees Retirement System (CalPERS) requires that

require-companies-to-have-greater-diversity-on-boards.html [https://perma.cc/4P6V-94PJ].

174. Order Approving Proposed Rule Changes to Adopt Listing Rules Related to Board Diversity and to Offer Certain Listed Companies Access to a Complimentary Board Recruiting Service, Exchange Act Release No. 92,590, 86 Fed. Reg. 44,424 (Aug. 12, 2021); *Nasdaq's Board Diversity Rule: What Nasdaq-Listed Companies Should Know*, NASDAQ LISTING CTR. (Aug. 17, 2021), <https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf> [https://perma.cc/S7QF-H5TA].

175. Stevens, *supra* note 173. Those self-identifying as "Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander or [t]wo or [m]ore [r]aces or [e]thnicities" are considered to be an "underrepresented minority." Press Release, Nasdaq, Nasdaq to Advance Diversity Through New Proposed Listing Requirements (Dec. 1, 2020), <https://www.nasdaq.com/press-release/nasdaq-to-advance-diversity-through-new-proposed-listing-requirements-2020-12-01> [https://perma.cc/49FW-8TZD].

176. *Id.*

177. *See id.*

companies disclose their board's diversity policy.¹⁷⁸ The California State Teachers' Retirement System (CalSTRS) threatened that it would publicly institute a shareholder initiative to address lack of diversity for 126 California corporations with all-male boards if they did not appoint at least one woman.¹⁷⁹

Pension funds in Massachusetts have also issued proxy guidelines that recommend voting against board slates if less than 35 percent of the board is diverse.¹⁸⁰ The powerful New York State Common Retirement Fund, responsible for managing \$247.7 billion in assets invested across more than four hundred companies, has also indicated that it would vote against any slate of directors up for re-election if there were no female directors on the company's board.¹⁸¹ For companies with only one woman on the board, the Fund indicated it would vote against any directors up for re-election to the governance committee.¹⁸² Rhode Island is another state that has announced a proxy voting initiative that requires companies benefiting from state pension fund investments to diversify their boards.¹⁸³ The state warned that it would vote against any slate of directors nominated by a company that would result in a board on which women or racial minorities hold any less than 30 percent of the seats.¹⁸⁴

178. CALPERS, CALPERS' GOVERNANCE & SUSTAINABILITY PRINCIPLES 16 (2019), <https://www.calpers.ca.gov/docs/forms-publications/governance-and-sustainability-principles.pdf> [<https://perma.cc/G9JF-GEP7>].

179. See Letter from John Chiang, Cal. State Treasurer, to Rob Feckner, Bd. President, CalPERS Bd. of Admin., & Harry Keiley, Chair, CalSTRS Tchrs. Ret. Bd. (Feb. 19, 2015), https://www.treasurer.ca.gov/news/releases/2015/20150219_letter.pdf [<https://perma.cc/9ZDD-2AUY>].

180. *Diversity & Inclusion*, MASS PRIM, <https://www.ai-cio.com/news/massachusetts-pension-fund-increases-corporate-diversity-standards/> [<https://perma.cc/3J3B-AVLW>].

181. See Press Release, Off. N.Y. State Comptroller, NY State Comptroller DiNapoli Calls on Corporate America to Address Lack of Diversity, Equity & Inclusion (Feb. 25, 2021), <https://www.osc.state.ny.us/press/releases/2021/02/ny-state-comptroller-dinapoli-calls-corporate-america-address-lack-diversity-equity-inclusion> [<https://perma.cc/WVW4-RAZ9>].

182. See *id.*

183. See *Proxy Voting Guidelines*, R.I. OFF. GEN. TREASURER (Sept. 26, 2018), https://d10k7k7mywg42z.cloudfront.net/assets/5c08053023f8124fa8129f50/Existing_Rhode_Island_Proxy_Policy_Matrix_2016_Proposed_Exec_Comp__version_2_.pdf [<https://perma.cc/RRB9-545S>].

184. *Id.*

D. Backlash to Activism

In the United States, these institutional efforts to ensure equality for women face immense resistance due to the cultural factors discussed in Part I.¹⁸⁵ For example, there is a consistent historical record of conservative forces mobilizing against affirmations of women's rights and equality as a threat to the family.¹⁸⁶ Initiatives to increase the representation of women in important decision-making roles are perceived as a threat to those who enjoy the privileges of an unequal system.¹⁸⁷ With gender equality, white men would no longer hold such disproportionate wealth, power, and control over the U.S. economy and democracy.¹⁸⁸ They therefore commonly critique parity models as "social engineering" that force women to be out of the house more and men into the house, challenging traditional societal norms.¹⁸⁹ Even when these BGD initiatives are actions of private organizations, they are often still challenged as unconstitutional, just as the legislative efforts are, which is discussed further in Part III.C below.¹⁹⁰

185. See *supra* Part I.C.

186. See Ruth Rubio-Marín, *A New European Parity-Democracy Sex Equality Model and Why It Won't Fly in the United States*, 60 AM. J. COMPAR. L. 99, 120 (2012); see also Kate Lyons, *Rise of the "Strongman": Dozens of Female World Leaders Warn Women's Rights Being Eroded*, GUARDIAN (Feb. 28, 2019, 1:58 AM), <https://www.theguardian.com/politics/2019/feb/28/rise-of-the-strongman-dozens-of-female-world-leaders-warn-womens-rights-being-eroded> [<https://perma.cc/F9W7-5JVQ>].

187. See Rubio-Marín, *supra* note 186, at 121-23. This is not a surprise given there are many men who have a vested interest in maintaining the status quo with women providing unpaid labor in service of men in both the home and workplace. See Heather Marcoux & Jamie Orsini, *The Unpaid Work Women Do Adds up to \$10.8 Trillion per Year*, MOTHERLY (Jan. 21, 2020), <https://www.mother.ly/state-of-motherhood/the-value-of-unpaid-care-work-by-women-is-10-8-trillion> [<https://perma.cc/4N7U-ZSRJ>].

188. See *infra* notes 385-86 and accompanying text.

189. Rubio-Marín, *supra* note 186, at 121. In fact, many warn that women lost ground after the election of Donald Trump. See Emily Olson, *How Two Years of Donald Trump Have Shaped Women's Rights in the US*, ABC NEWS (Jan. 18, 2019, 5:04 PM), <https://www.abc.net.au/news/2019-01-19/donald-trumps-presidency-two-years-shaped-womens-rights-us/10728882> [<https://perma.cc/7AP6-QWH5>]; see also Nathan Robinson, *Rich White Men Rule America. How Much Longer Will We Tolerate That?*, GUARDIAN (May 20, 2019, 2:00 AM), <https://www.theguardian.com/commentisfree/2019/may/20/rich-white-men-rule-america-minority-rule> [<https://perma.cc/MEN2-4273>] ("The core democratic principle is that people should have a meaningful say in political decisions that affect their lives. In Alabama, we've just seen what the opposite of democracy looks like: 25 white male Republicans in the state senate were able to ban almost all abortion in the state.")

190. See *infra* Part III.C.

III. U.S. LEGISLATIVE EFFORTS TO INCREASE BOARD DIVERSITY

Although no federal law or initiative has been formally proposed,¹⁹¹ some states have begun to take action. In 2018, California passed a law requiring increases in female representation on corporate boards headquartered in California.¹⁹² A number of states have also passed nonbinding initiatives to enhance diversity on boards.¹⁹³

A. California SB 826

California became the first U.S. state to mandate BGD for corporate boards on September 30, 2018.¹⁹⁴ California SB 826 reaches all public companies with headquarters in California, amounting to 12 percent of all public U.S. firms and over \$5 trillion in market share.¹⁹⁵ The bill requires all companies within scope to have at least one female director by the end of 2019.¹⁹⁶ By 2021, boards with five members must have at least two female directors and those with six or more members must have three female directors.¹⁹⁷

California SB 826 was preceded by a 2013 regulation setting a voluntary goal of one woman on each board by 2016.¹⁹⁸ This was the first nonbinding resolution passed by any state, requiring all public corporations in California with nine or more director seats to have at least three women on the board, firms with five to eight seats to have at least two women on the board, and corporations with fewer

191. Implementation of the Sarbanes-Oxley Act requires firms to explain whether and how they “consider[] diversity in identifying nominees for director.” See, e.g., 17 C.F.R. § 229.407(c)(2)(vi) (2010). However, the Act does not require firms to consider diversity, nor does it define what diversity means. See, e.g., *id.*

192. Daniel Greene, Vincent J. Intintoli & Kathleen M. Kahle, *Do Board Gender Quotas Affect Firm Value? Evidence from California Senate Bill No. 826*, 60 J. CORP. FIN., no. 101526, 2020, at 1.

193. See *infra* Part III.B.

194. Greene et al., *supra* note 192, at 1.

195. *Id.* at 2.

196. *Id.* at 1.

197. *Id.*

198. See S. Con. Res. 62, 2013-2014 Reg. Sess. (Cal. 2013).

than five seats to have a minimum of one woman.¹⁹⁹ No meaningful gains resulted from the voluntary measure by the end of the three-year time frame, leading to the firmer requirements in SB 826.²⁰⁰

Under SB 826, if a company headquartered in California fails to achieve these goals, the company will be fined an amount equal to the average cash compensation for directors for the first violation and three times that amount for each additional violation.²⁰¹ There is a fine of \$100,000 for a first violation and \$300,000 for a subsequent violation.²⁰² There are also fines for failure to report.²⁰³

In 2019, 625 publicly held companies identified that their principal executive officers were located in California.²⁰⁴ However, only 330 of those companies filed a 2019 California Publicly Traded Corporate Disclosure Statement, which would indicate whether or not they were in compliance with the BGD regulation.²⁰⁵ Of the 330 companies, 282 reported compliance, which was up from 173 in July 2019.²⁰⁶ Since California passed the BGD legislation, 511 women have been added to corporate boards in the state.²⁰⁷ However,

199. *Id.*

200. S.B. 826, 2018 Leg., Reg. Sess. (Cal. 2018) (codified as CAL. CORP. CODE §§ 301.3, 301.4, 2115.5 (West 2021)).

201. Pamela M. Harper, *Corporate Board Diversity: Gaining Traction Through Investor Stewardship*, BUS. L. TODAY (July 16, 2018), <https://businesslawtoday.org/2018/07/corporate-board-diversity-gaining-traction-investor-stewardship/> [https://perma.cc/B9UJ-JVYT].

202. Cal. S.B. 826. The law requires public companies with boards of six or more directors to have at least three women directors. *New California Law Requires Representation of Women on Public Company Boards*, FENWICK (Oct. 2, 2018), <https://www.fenwick.com/insights/publications/new-california-law-requires-representation-of-women-on-public-company-boards> [https://perma.cc/GS2B-UFXS]. Because “[e]ach required director seat not held by a requisite woman shall count as a separate violation,” an all-male board of this size could face three violations per year, amounting to a fine between \$700,000 and \$900,000. *Id.*

203. Cal. S.B. 826 (“For failure to timely file board member information with the Secretary of State ... \$100,000.”).

204. ALEX PADILLA, CAL. SEC’Y OF STATE, *WOMEN ON BOARDS: MARCH 2020 REPORT* (2020), <https://bpd.cdn.sos.ca.gov/women-on-boards/wob-report-2020.pdf> [https://perma.cc/HES5-CVWV].

205. *Id.*

206. *Id.*; see also Lily Jamali, *A Push to Get More Women on Corporate Boards Gains Momentum*, NPR (Mar. 5, 2020, 5:06 AM), <https://www.npr.org/2020/03/05/811192459/a-push-to-get-more-women-on-corporate-boards-gains-momentum> [https://perma.cc/4U2T-V4DR].

207. Jeff Green, *California Law Adds Women to Boards but Leaves Latinas Behind*, BLOOMBERG (Mar. 2, 2020, 2:00 AM), <https://www.bloomberg.com/news/articles/2020-03-02/california-law-adds-women-to-boards-but-leaves-latinas-behind> [https://perma.cc/X5BK-N3QE].

despite being the fastest-growing ethnic group in the state, Latinas are not proportionately represented in the new class of female board members.²⁰⁸ Hispanics make up 39 percent of California's population, yet the data show that Latina women only gained 17 seats, which is 3.3 percent of the newly appointed members.²⁰⁹ White women gained 398 seats (78 percent), Asian women were selected for 59 seats (11.5 percent), and Black women were appointed to 27 new seats (5.3 percent).²¹⁰

Despite criticism of SB 826, Massachusetts, Michigan, and New Jersey were also considering BGD legislation in 2019.²¹¹ In August 2019, Illinois Governor J.B. Pritzker signed a law that requires companies based in Illinois to report the number of women and racial minorities on their boards and indicate plans to increase diversity.²¹² An original version of the bill required every company headquartered in Illinois to have at least one woman, Black, and Latino board member, but that did not make it to the final bill.²¹³

B. Nonbinding State Resolutions

In the United States, while no state except California has enacted a BGD quota, a number of states have encouraged companies to enhance board diversity. One strategy that has been recommended is setting "voluntary targets," which is a common counterargument to legislated quotas.²¹⁴ Massachusetts, Illinois, and Pennsylvania

208. *Id.*

209. *Id.*

210. *Id.*

211. See Jessica Guynn, *#MeToo for the Boardroom: California Gender Diversity Law Could Lead to More Women Quotas Nationally*, USA TODAY (July 9, 2020, 6:28 PM), <https://www.usatoday.com/story/money/2019/12/30/california-gender-diversity-law-could-lead-more-women-quotas/2753270001/> [<https://perma.cc/YXH3-WNJQ>]; see, e.g., S.B. 115, 100th Leg., Reg. Sess. (Mich. 2019) ("[A] publicly held domestic corporation or foreign corporation whose principal executive offices, according to the corporation's SEC 10-K form, are located in this state must have a minimum of 1 female director on its board.").

212. Mary Ellen Podmolik & Dan Petrella, *Pritzker Signs Stripped-Down Corporate Diversity Bill, Calls It a 'Big First Step'*, CHI. TRIB. (Aug. 27, 2019), <https://www.chicagotribune.com/business/ct-biz-corporate-board-diversity-law-20190827-q73cqjxmcrtfjwfcrlx4upgny-story.html> [<https://perma.cc/3AXD-99UE>].

213. *Id.*

214. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-30, CORPORATE BOARDS: STRATEGIES TO ADDRESS REPRESENTATION OF WOMEN INCLUDE FEDERAL DISCLOSURE REQUIREMENTS 21 (2015).

have each passed nonbinding resolutions regarding gender diversity on corporate boards.²¹⁵ However well-intentioned, these measures have not increased BGD, as acknowledged in the comments to California SB 826.²¹⁶

For example, in April 2017, the Pennsylvania House introduced House Resolution 273 with the intention of encouraging “equitable and diverse gender representation on ... boards and in senior management of companies in Pennsylvania.”²¹⁷ The resolution noted that in 2016, women held “12.7% of executive positions in the largest 100 public companies headquartered in Pennsylvania,” despite making up 47 percent of the U.S. workforce.²¹⁸ In 2016, the City of Pittsburgh created a Gender Equity Commission, aimed at redressing gender discrimination.²¹⁹ Pittsburgh based its Gender Equity Commission on the principles of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).²²⁰ CEDAW is also ratified in the Pittsburgh Code.²²¹

In 2014, New York City Comptroller Scott Stringer and the New York City Pensions Fund created the Boardroom Accountability Project (BAP).²²² The project was aimed at “increasing investor involvement in determining the make-up of corporate boards.”²²³ The BAP entered a second phase, BAP 2.0, which focused on increasing the pressure on companies to make their boards “diverse, independent, and climate competent.”²²⁴ BAP 2.0 discussed diversity as a “strategy for economic success.”²²⁵ To demand transparency, the project asked 151 publicly held companies to provide a board “matrix” identifying “the gender and race/ethnicity of individual

215. *Diversity Considerations*, CLEARY GOTTLIEB (Jan. 16, 2019), <https://www.clearygottlieb.com/news-and-insights/publication-listing/diversity-considerations-bod-2019>[<https://perma.cc/6MFS-CDSY>].

216. S. RULES COMM., CORPORATIONS: BOARD OF DIRECTORS, S.B. 826, at 4 (Cal. 2018).

217. Tewari et al., *supra* note 59, at 232.

218. *Id.*

219. *Id.* at 235; *see* Pittsburgh, Pa., Ordinance No. 34-2016, § 1 (Dec. 13, 2016) (codified in PITTSBURGH, PA., CODE OF ORDINANCES tit. I, art. IX, ch. 177c (2019)).

220. Tewari et al., *supra* note 59, at 235.

221. *Id.*; PITTSBURGH, PA., CODE OF ORDINANCES tit. I, art. IX, ch. 177C (2019).

222. Tewari et al., *supra* note 59, at 233.

223. *Id.*

224. *Id.* at 233-34.

225. *Id.* at 234.

directors on the board.”²²⁶ In June 2018, over eighty-five of the BAP companies reported “adopt[ing] improved processes and increased transparency.”²²⁷ BAP also initiated “a proxy access campaign that would give ‘large, long-term shareowners,’ the power to ‘nominate corporate board candidates on a company’s ballot.”²²⁸ In December 2018, New York City hosted the first public meeting of the Commission on Gender Equity to address issues of inequality and discrimination.²²⁹

While resolutions are important symbols, they have not led to an increase in BGD in the United States.²³⁰ Additionally, these state-level measures do not provide any type of enforcement mechanism, which is the most effective means to accomplish change.²³¹

C. Backlash to Legislation

As discussed in Part I.C, U.S. culture is low on uncertainty avoidance, so rules are many times resisted and perceived as overly restrictive on free will.²³² This explains why lawsuits were immediately filed to invalidate California’s BGD requirement. One of the plaintiff’s suits alleged that the statute discriminates against men and serves no important government interest because “[s]ex-based balancing is not an important government interest that can sustain a sex-based classification under the Equal Protection Clause.”²³³

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 235; see *About the Commission on Gender Equity*, N.Y.C. COMM’N ON GENDER EQUITY, <https://www1.nyc.gov/site/genderequity/about/about.page> [https://perma.cc/4TVG-LYCV].

230. See Tracy A. Thomas, *Reconsidering the Remedy of Gender Quotas*, HARV. J.L. & GENDER ONLINE 13 (2016), <https://harvardjlg.com/2016/11/reconsidering-the-remedy-of-gender-quotas/> [https://perma.cc/RNF5-69F3].

231. *See id.*

232. *See supra* Part I.C.

233. See Cydney Posner, *Federal District Court Dismisses a Challenge to California Board Gender Diversity Statute*, COOLEY PUBCO (Apr. 21, 2020), <https://cooleypubco.com/2020/04/21/court-dismisses-challenge-to-sb-826/> [https://perma.cc/BL6N-UNTW] (discussing *Melanda v. Padilla*, which was filed by a conservative legal group seeking to strike down the California quota law). Essentially, the plaintiff argued that requiring one woman to be named to the board of a corporation of which he is a shareholder infringed on his right to vote for an all-male board. *See id.*

Opponents of SB 826 also claim that the requirements are in violation of the internal affairs doctrine.²³⁴ Although “California has codified the internal affairs doctrine, the bill analysis for SB 826” points to past incidents in which California courts “ignored the internal affairs doctrine in certain instances and, therefore, the rule is not absolute.”²³⁵ Opponents have also argued that the California legislation violates the Equal Protection Clause of the 14th Amendment of the U.S. Constitution, as well as the corresponding provision of the California Constitution, because “the bill creates an express gender classification.”²³⁶

In the United States, the accepted constitutional interpretation is that gender “quotas on the basis of sex violate formal equality and a gender neutral reading of the Equal Protection Clause.”²³⁷ The resistance to formal requirements and legislation that would enhance women’s power can be traced to the individualist culture in the United States discussed in Part I.C.²³⁸ This tradition is rooted in “autonomy and meritocracy as expressed through the free functioning of the market and of social forces, including capital and political parties, that constitutional provisions such as First Amendment associational rights of political parties help to protect.”²³⁹ This interpretation of the Equal Protection Clause does not acknowledge the reality that “formal equality” is an illusion that masks failures to achieve substantive equality.²⁴⁰ Once you blow the smoke away from the mirror, the continuing historical, individual, institutional, and cultural subordination of women is glaringly clear.²⁴¹ A requirement to remain “gender-neutral” to preserve a fictitious equality is a mechanism to preserve the status quo of a male-dominated society.²⁴²

234. Tewari et al., *supra* note 59, at 228.

235. *Id.*

236. *Id.* The Court dismissed *Meland v. Padilla* because the conservative organization that brought the suit lacked standing. See Posner, *supra* note 233.

237. Rubio-Marín, *supra* note 186, at 121.

238. *Id.* at 122.

239. *Id.* Although affirmative action programs were initially considered appropriate to address historical discrimination, more recent cases have limited these programs’ applicability. See, e.g., *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 303 (2013).

240. MacKinnon, *Substantive Equality*, *supra* note 3, at 6-7.

241. MacKinnon, *Reflections on Sex Equality*, *supra* note 3, at 1286.

242. See *id.* at 1284, 1286.

Although BGD requirements are the most promising path to gender equality as further discussed *infra*, there remains the likelihood of a constitutional objection based on this resistance to legally required gender mandates.²⁴³ For example, in *Regents of the University of California v. Bakke*, decided in 1978 with respect to college admissions quotas, the Court invalidated the quotas for the stated reason that increasing racial minorities in the medical profession was not a legitimate state purpose.²⁴⁴ Later cases, however, have indicated that minority status can be considered in college admission, as long as the consideration is “narrowly tailored” to further a “compelling governmental interest” and quotas are not used.²⁴⁵ Quotas have been upheld to permit a set percentage of government contracts being awarded to minority-owned businesses.²⁴⁶ The Department of Labor requires federal contractors to take affirmative steps to strive for specific targets or goals in hiring women, people of color, individuals with disabilities, and covered veterans.²⁴⁷

While race-based quotas are subject to strict scrutiny, gender-based quotas are subject to the lesser standard of intermediate

243. For a discussion on the constitutionality of the California law, see Vikram David Amar & Jason Mazzone, *Is California's Mandate That Public Companies Include Women on Their Boards of Directors Constitutional?*, VERDICT (Oct. 5, 2018), <https://verdict.justia.com/2018/10/05/is-californias-mandate-that-public-companies-include-women-on-their-boards-of-directors-constitutional> [<https://perma.cc/DHU3-JRPS>].

244. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (holding that the use of racial quotas in admissions decisions at a public university was unconstitutional); *see also* *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2208 (2016) (holding that race is subject to a standard of strict scrutiny requiring that the specific policy be necessary to achieve the benefits of diversity and that no race-neutral option would achieve the same benefits).

245. *See* *Grutter v. Bollinger*, 539 U.S. 306, 327, 334 (2003) (noting that strict scrutiny is required for affirmative action cases, but that considering diversity as a factor is not unconstitutional because fostering diversity in higher education is a compelling governmental interest).

246. *See, e.g.*, *Fullilove v. Klutznick*, 448 U.S. 448, 453, 492 (1980) (upholding 10 percent quota for minority contractors); *see also* *Minority Business Development: State MBE Certification Programs*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 2016), <https://www.ncsl.org/research/labor-and-employment/minority-business-development.aspx> [<https://perma.cc/N2DQ-TSMJ>]. *But see* *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 507, 511 (1989) (overturning a 30 percent minority contractor law because it was not narrowly tailored to remedying past discrimination).

247. *See Affirmative Action*, U.S. DEP'T OF LAB., <https://www.dol.gov/general/topic/hiring/affirmativeact> [<https://perma.cc/FTM3-YHX2>].

scrutiny.²⁴⁸ The intermediate scrutiny standard was developed in *Craig v. Boren*.²⁴⁹ This was one of the cases that Ruth Bader Ginsburg, while still an attorney, curated to address gender discrimination by choosing male plaintiffs to cater to an audience of male Justices.²⁵⁰ *Craig* challenged an Oklahoma law which prohibited males under the age of twenty-one from purchasing 3.2 percent beer but permitted females over the age of eighteen to do so.²⁵¹ The Court invalidated the statute under the Equal Protection Clause because the state was unable to prove that the law “serve[d] important governmental objectives and [was] substantially related to [the] achievement of those objectives.”²⁵²

With respect to California SB 826, the Ninth Circuit could rely on *Associated General Contractors of California, Inc. v. City and County of San Francisco* to support the quota as serving the important governmental objective of correcting past discrimination on corporate boards.²⁵³ However, the Supreme Court has yet to rule on the exact standard to be applied and will more likely rely on the Equal Protection Clause to rule that women may not be given preferential treatment under any circumstances, even when there is a long history of discrimination against women and the differences in numbers cannot be justified by merit.²⁵⁴ While it seems clear to some that increasing the number of women in prominent decision-making

248. See Anisa A. Somani, Note, *The Use of Gender Quotas in America: Are Voluntary Party Quotas the Way to Go?*, 54 WM. & MARY L. REV. 1451, 1474 (2013) (“For example, the Ninth Circuit, in *Associated General Contractors of California, Inc. v. City and County of San Francisco*, upheld an affirmative action program for women by applying intermediate scrutiny and struck down a similar program for members of minority races by applying strict scrutiny.”).

249. 429 U.S. 190, 197 (1976).

250. Stephanie Buck, *The On the Basis of Sex Story Wasn't the Only Time Ruth Bader Ginsburg Used Cases About Men to Argue for Women's Equality*, TIME (Dec. 24, 2018, 12:00 PM), <https://time.com/5481422/rbg-movie-male-plaintiff-history/> [<https://perma.cc/RH6H-R99J>].

251. See 429 U.S. at 191-92.

252. *Id.* at 197.

253. See 813 F.2d 922, 941-42 (9th Cir. 1987).

254. This is especially likely to be true given the current composition of the Supreme Court. See Laura Bronner & Elena Mejía, *The Supreme Court's Conservative Supermajority Is Just Beginning to Flex Its Muscles*, FIVETHIRTYEIGHT (July 2, 2021), <https://fivethirtyeight.com/features/the-supreme-courts-conservative-supermajority-is-just-beginning-to-flex-its-muscles/> [<https://perma.cc/L5BW-QATS>].

roles is an important governmental objective,²⁵⁵ there are those, including members of the Supreme Court, who would prefer to keep women in background roles in the home and workplace to support men who have the ultimate decision-making power.²⁵⁶

IV. ANALYSIS OF EU APPROACH TO IMPROVING BOARD DIVERSITY

Unlike the United States, the EU acknowledges both the business and social rationales for increasing BGD.²⁵⁷ While women in the United States currently hold only 23.1 percent of publicly held board seats,²⁵⁸ the EU fares better at 30 percent overall.²⁵⁹ While the EU has long encouraged voluntary measures to increase female participation on boards, a number of member states have also legally mandated BGD requirements.²⁶⁰ Several recent studies have observed that corporate boards are more diverse in countries “with formal quotas, codes, and disclosure requirements promoting gender

255. See Rhode & Packel, *supra* note 48, at 378-79.

256. See Jason Sattler, *Don't Reward Republicans for Brett Kavanaugh and the Politics of Personal Annihilation*, USA TODAY (Oct. 7, 2018, 7:06 PM), <https://www.usatoday.com/story/opinion/2018/10/07/brett-kavanaugh-help-supreme-court-shrink-womens-rights-column/1551654002/> [<https://perma.cc/KFW9-3BZP>]; cf. Amy Matsui & Sarah Lipton-Lubet, *Judge Neil Gorsuch's Record on Women's Legal Rights*, NAT'L WOMEN'S L. CTR. (Mar. 29, 2017), <https://nwlc.org/blog/judge-neil-gorsuchs-record-on-womens-legal-rights/> [<https://perma.cc/98MU-D3HY>].

257. See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Union of Equality: Gender Equality Strategy 2020-2025*, at 15, COM (2020) 152 final (Mar. 5, 2020) (“The inclusion of a gender perspective in all EU policies and processes is essential to reach the goal of gender equality. Gender mainstreaming ensures that policies and programmes maximise the potential of all—women and men, girls and boys, in all their diversity. The aim is to redistribute power, influence and resources in a fair and gender-equal way, tackling inequality, promoting fairness, and creating opportunity.”).

258. See Erin Lehr, *Q3 2020 Gender Diversity Index*, EQUILAR (Nov. 20, 2020), <https://www.equilar.com/reports/76-q3-2020-equilar-gender-diversity-index.html> [<https://perma.cc/35MY-AFMZ>]. This figure demonstrates only a small increase from the 17.7 percent figure representing decades of stagnation. 2020 WOMEN ON BDS., GENDER DIVERSITY INDEX: 2018 PROGRESS OF WOMEN CORPORATE DIRECTORS BY COMPANY SIZE, STATE AND INDUSTRY SECTOR 2 (2018), https://2020wob.com/wp-content/uploads/2019/09/2020WOB_GDI_Report_2018_FINAL.pdf [<https://perma.cc/SEV2-PK85>].

259. *Largest Listed Companies: Presidents, Board Members and Employee Representatives*, EUR. INST. FOR GENDER EQUAL (Nov. 11, 2020), https://eige.europa.eu/gender-statistics/dgs/indicator/wmidm_bus_bus_wmid_comp_compbm [<https://perma.cc/5FKU-27YV>].

260. See *infra* Part IV.A.

equity.”²⁶¹ For example, a global study of women on boards found that firms located in countries with “compulsory quotas attained greater overall gender diversity at the board level, with 71.8% having at least 30% female directors as of October 31, 2019.”²⁶² In 2019, most companies in the EU subject to legislated BGD requirements had actually exceeded those mandates.²⁶³ Italy and France led the way with the most companies actually exceeding the female director requirements among MSCI ACWI Index constituents.²⁶⁴

Voluntary targets have a weaker correlation to gender diversity in the EU.²⁶⁵ Of the companies listed in the MSCI ACWI Index that are located in countries without any elective or compulsory gender requirements, 23.0 percent had all-male boards and only 20.3 percent had reached a female director threshold of 30 percent.²⁶⁶ In Western Europe, more specifically, a number of regulatory measures were enacted in 2010 and 2011 (with Spain in 2007) to address the lack of female representation in seats of power in business.²⁶⁷ As a result, women on boards in the EU increased from 11.9 percent in 2010 to 26.7 percent in 2018.²⁶⁸ Today, women comprise 33 percent of board members of the STOXX Europe 600.²⁶⁹

Because voluntary measures have not improved BGD significantly, governments have enacted treaties and legislation that promote the placement of women on boards with the goal to increase opportunities for women.²⁷⁰ Prior to this paradigm shift, there was a “large gap between the proportion of employed and well-educated women and those sitting on boards of EU companies” in EU member states.²⁷¹ Now, numerous treaties in the EU promote equality

261. See Griffin et al., *supra* note 126, at 134.

262. See EMELIANOVA & MILHOMEM, *supra* note 51, at 8 (footnote omitted).

263. Just over 57 percent exceeded requirements by October 31, 2019. See *id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. See EUR. COMM’N, 2019 REPORT ON EQUALITY BETWEEN WOMEN AND MEN IN THE EU 26-27 (2019), <https://op.europa.eu/en/publication-detail/-/publication/f3dd1274-7788-11e9-9f05-01aa75ed71a1> [https://perma.cc/SD2H-3YTS].

268. See *id.*

269. EUR. WOMEN ON BDS., EUROPEAN WOMEN ON BOARDS GENDER DIVERSITY INDEX 2019 4 (2020), <https://europeanwomenonboards.eu/portfolio/gdi-2019/> [https://perma.cc/A3LB-PFFX].

270. See *infra* Part IV.A.

271. See Tyler Winters & Madhuri Jacobs-Sharma, Gender Diversity on Corporate Boards:

between men and women.²⁷² The European Institute for Gender Equality has established a number of objectives involving the gender pay gap, female labor market participation, combating gender violence, and “[p]romoting equality in decision-making.”²⁷³ Growing legislation in the EU also acknowledges that increasing the representation of women in important decision-making roles in both politics and economics is key to achieving gender equality.²⁷⁴

Our analysis builds on previous studies by examining the EU approach to BGD to analyze three categories of information relevant to successfully increasing women’s representation on corporate boards: legislative, cultural, and constitutional factors.²⁷⁵ First, we review components of the laws mandating BGD and assess how they relate to achieving their mandate (*legislative factors*). The specific legislative factors we account for include what type of BGD requirement was used, how many years companies had to comply, and the penalty for failure to meet the requirement. Second, we identify the cultural dimensions of the countries that adopted BGD mandates beyond just the masculinity and power distance scores, to also

The Competing Perspectives in the U.S. and the EU 22 (Apr. 27, 2016) (unpublished manuscript) (on file with the University of Pennsylvania), https://scholarship.law.upenn.edu/fisch_2016/13/ [<https://perma.cc/GDY8-473B>].

272. See TFEU, *supra* note 12, arts. 8, 153, 157 (stating powers of EU institutions and rights of EU citizens); TEU, *supra* note 12, arts. 2-3 (establishing powers of EU institutions and rights of its citizens).

273. See *Gender Statistics Database: EU Policies and Strategies*, EUR. INST. FOR GENDER EQUAL. (2021), <https://eige.europa.eu/gender-statistics/dgs/browse/eustrat> [<https://perma.cc/3BZ3-9R8Q>].

274. See *infra* Part IV.A.

275. See generally Heike Mensi-Klarbach & Cathrine Seierstad, *Gender Quotas on Corporate Boards: Similarities and Differences in Quota Scenarios*, 17 EUR. MGMT. REV. 615 (2020); Giulia Ferrari, Valeria Ferraro, Paola Profeta & Chiara Pronzato, *Do Board Gender Quotas Matter? Selection, Performance and Stock Market Effects* (IZA Inst. of Lab. Econ., Discussion Paper No. 11462, 2018), <http://ftp.iza.org/dp11462.pdf> [<https://perma.cc/5FXK-KNJH>]; Linda Senden, *The Multiplicity of Regulatory Responses to Remedy the Gender Imbalance on Company Boards*, 10 UTRECHT L. REV. 51 (2014); Rohini Pande & Deanna Ford, *Gender Quotas and Female Leadership*, WORLD DEV. REP. 1 (2012), <https://openknowledge.worldbank.org/handle/10986/9120> [<https://perma.cc/EM5X-V8QB>]. In a study conducted by Laura Cabeza-García and her colleagues, the authors examined differences among countries whose BGD legislation included a penalty for failing to meet BGD requirements and concluded that the best results were found in countries with lower levels of masculinity and power distance. See Cabeza-García et al., *supra* note 125, at 57 (examining BGD laws in Norway, Spain, France, Germany, Sweden, and the UK). The work of Julie C. Suk and Christopher McCrudden, who discovered the connection between constitutional language and positive measures to increase BGD, is discussed and built upon in Part V.

include uncertainty avoidance (*cultural factors*).²⁷⁶ Third, and as it turns out, most critically, we investigate the extent to which positive action is constitutionally authorized by examining the wording of the equality amendments to these countries' constitutions (*constitutional factors*). The factors relating to the constitutional dimension are (1) the extent to which positive action is permitted or required based on the language and (2) judicial interpretation of that language. The Appendix summarizes these legislative, cultural, and constitutional factors for the eight EU countries with legislated BGD requirements.

A. Legislative

In 2019, Ursula von der Leyen, President of the European Commission, outlined her new political objective to promote gender equality.²⁷⁷ As part of this strategy, she called for the adoption of the EU Directive, which sought to establish a BGD requirement for all member states.²⁷⁸ The directive had stalled in the EU Council under previous leadership.²⁷⁹ Even though there is no national requirement to do so, a number of EU member states have enacted their own regulations.²⁸⁰ There are eight countries in the EU that have enacted BGD requirements.²⁸¹ These include Austria, Belgium, France, Germany, Italy, the Netherlands, Portugal, and Spain.²⁸² Below we analyze the efficacy of these regulations based on multiple legislative features.

France has embraced egalitarianism and sought to increase the participation of women in decision-making roles through legisla-

276. See Agata Maida & Andrea Weber, *Female Leadership and Gender Gap Within Firms: Evidence from an Italian Board Reform* (IZA Inst. Lab. Econ., Discussion Paper No. 12099, 2019), <http://ftp.iza.org/dp12099.pdf> [<https://perma.cc/FV8S-N5C6>].

277. See Press Release, Eur. Comm'n, Questions and Answers: Gender Equality Strategy 2020-2025 (Mar. 5, 2020), https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_357 [<https://perma.cc/ZF44-QTL5>].

278. See *id.*

279. See *id.*

280. Kimberly A. Houser & Jamillah Bowman Williams, Appendix, <https://wmlawreview.org/appendix-board-gender-diversity-path-achieving-substantive-equality-united-states> [<https://perma.cc/HA45-8UG9>].

281. *Id.*

282. *Id.*

tion.²⁸³ France is also one of the few countries receiving top marks for its legal infrastructure on gender equality from the World Bank.²⁸⁴ In addition to establishing quotas in many areas, France has also increased legal remedies for women encountering obstacles to advancement, broadened the definition of sexual harassment, and increased penalties and remedies.²⁸⁵ As of 2017, France required 40 percent representation of women on boards of all publicly traded companies, all companies with more than five hundred employees (250 after 2020), and companies with net sales or total assets of at least €50 million.²⁸⁶ The penalty for failure to comply includes an invalidation of the appointment and a loss of fees for directors on noncompliant boards.²⁸⁷ Between 2011, the year the BGD quota was first enacted, and 2019, female representation rose from 21.6 percent to 45.3 percent.²⁸⁸ The increase in female participation on boards in France provided “an improvement in the stability of director-firm matches and a consequent reduction in the female directors’ turnover, due to the change in the directors’ selection process triggered by the quota.”²⁸⁹

283. See Eléonore Lépinard, *The Adoption and Diffusion of Gender Quotas in France (1982-2014)* 1 (Eur. U. Inst. Dep’t of L., Working Paper No. 2015/19, 2015), https://cadmus.eui.eu/bitstream/handle/1814/35579/LAW_2015_19.pdf [<https://perma.cc/73A2-DEHA>] (“Once a country allergic to any policy that would look like affirmative action for women or any other social group, let alone quotas with fixed targets, France has transformed in less than a decade (2006-2014) in the land of gender quotas [in] ... corporate boards of medium and large firms, supervisory boards of public institutions, professional organizations, sports federations, regional socio-economic councils and, last but not least, most of elected political bodies.”).

284. Of the eight countries with a score of 100 in gender equity, seven—Belgium, Denmark, France, Iceland, Latvia, Luxembourg, and Sweden—are part of the EU and European Economic Area (EEA), “meaning that women are on an equal legal standing with men across all eight indicators.” See WORLD BANK GRP., WOMEN, BUSINESS AND THE LAW 2020, 6 (2020), <https://issuu.com/world.bank.publications/docs/9781464815324> [<https://perma.cc/DUZ3-UEVB>].

285. See L. Camille Hébert, *Dignity and Discrimination in Sexual Harassment Law: A French Case Study*, 25 WASH. & LEE J.C.R. & SOC. JUST. 3, 15-22, 33 (2018).

286. See Loi 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d’administration et de surveillance et à l’égalité professionnelle [Law 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Boards of Directors, Supervisory Boards, and Professional Equality], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 28, 2011, p. 1680.

287. See *id.*

288. See Houser & Williams, *supra* note 280.

289. See G.S.F. Bruno, A. Ciavarella & N. Linciano, *Boardroom Gender Diversity and Performance of Listed Companies in Italy* 9 (Commissione Nazionale per le Società e la Borsa,

In 2011, Italy instituted a law mandating that for the first board election after August 2012, at least 20 percent of the seats would be held by the lesser-represented gender and that 33 percent would be achieved during the following two terms.²⁹⁰ Italy has the most severe potential penalties, with fines and loss of director's fees.²⁹¹ The penalty for listed companies' failure to comply range from €100,000 to €1,000,000, with potential dissolution for failure to comply after warnings.²⁹² In 2019, legislation was introduced that required companies to ensure that no more than three-fifths of "board appointments from 2020 forward" were men.²⁹³ Between 2011 and 2019, BGD rose from 5.9 percent to 36.1 percent for Italian listed companies.²⁹⁴ Not only did the BGD law with penalties vastly increase female representation on publicly held boards, but research also demonstrates that the quality of boards was also improved. Boards in Italy have more degree-holding members, greater age diversity, increased board attendance rates, and an increase in measures of corporate profitability when women board representation increases beyond 17-20 percent.²⁹⁵

Although Spain implemented a board gender diversity law earlier than many other member states, it is nonbinding and imposes no consequences for failure to comply.²⁹⁶ In 2007, Spain instituted a 40 percent gender quota by 2015 for publicly held companies with more than 250 employees.²⁹⁷ Rather than using penalties for failure to comply, Spain offered incentives such as state contracts for those who did achieve this goal.²⁹⁸ In 2014, the Corporate Enterprises Act was amended to require both public and private corporations to set

Working Paper No. 87, 2018), <https://www.consob.it/documents/46180/46181/wp87.pdf/d733b58a-44b4-42de-98c7-3c89a82a0182> [<https://perma.cc/VQR5-KTHB>].

290. See Legge 12 luglio 2011, n.120, G.U. July 28, 2011, n.174 (It.) (amending the text relating to financial intermediation).

291. See *id.*

292. See *id.*

293. See *More Women in Italian Boardrooms, but Fewer Female CEOs*, REUTERS (Apr. 6, 2021, 1:54 PM), <https://www.reuters.com/article/us-italy-companies-gender/more-women-in-italian-boardrooms-but-fewer-female-ceos-idUSKBN2BT2GU> [<https://perma.cc/4SZN-CWNF>].

294. See Houser & Williams, *supra* note 280.

295. See Bruno et al., *supra* note 289, at 10, 26, 37.

296. See Law for the Effective Equality of Women and Men art. 75 (B.O.E. 2007, 71) (Spain) (electing quota legislation on corporate boards in Spain).

297. See *id.*

298. See *id.* art. 34.

minimum targets for BGD.²⁹⁹ In 2015, the Good Corporate Governance Code of Listed Companies set forth a goal of 30 percent BGD by 2020 on a “comply or explain” basis and required board composition to be reported in companies’ annual reports.³⁰⁰ Because there are no consequences for the failure to explain, some give no reason at all in their corporate governance reports.³⁰¹ Between 2007 and 2019 female representation on corporate boards increased from 6.2 percent to 26.2 percent, which was a substantial increase, yet never came close to meeting the 40 percent requirement.³⁰²

In 2015, Germany instituted a 30 percent quota for both men and women on the supervisory board of publicly held corporations effective January 1, 2016.³⁰³ This rule requires that companies with less than 30 percent women on their board fill the next available open seat with a woman or leave the seat open until it can be filled with a woman.³⁰⁴ Despite the very short time periods, Germany was able to meet the BGD mandate, perhaps due to the clarity of its laws and cultural preference for certainty, discussed below.

299. See Law Modifying the Corporate Enterprises Act to Improve Corporate Governance art. 251 (B.O.E. 2014, 293) (Spain).

300. See COMISIÓN NACIONAL DEL MERCADO DE VALORES, GOOD GOVERNANCE CODE OF LISTED COMPANIES 823 (2015), https://www.cnmv.es/DocPortal/Publicaciones/CodigoGov/Good_Governanceen.pdf [<https://perma.cc/4FLA-Q9U3>].

301. See *id.* at 9-10.

302. See Houser & Williams, *supra* note 280. Spain’s lack of success may be attributed to the lack of cohesion in the government. While Spanish Prime Minister Pedro Sanchez is considered a progressive, a new right-wing party has gained momentum in the nation’s parliament. See Meaghan Beatley, *Betting on Anti-Feminism as a Winning Political Strategy*, ATLANTIC (Apr. 24, 2019), <https://www.theatlantic.com/international/archive/2019/04/spain-vox-feminism/587824/> [<https://perma.cc/Z9X9-ZRU9>] (explaining the anti-feminist policies of the Vox party). The influence of this right-wing party may be another factor explaining why Spain has been unable to meet its BGD target. For a discussion on the political unrest resulting from the multiple left parties failing to coordinate and the independence movement of Catalan, see Sohail Jannessari, *The Left Will Govern Spain, but the Far-Right Is the Real Winner*, FOREIGN POLY (Nov. 16, 2019, 6:36 AM), <https://foreignpolicy.com/2019/11/16/spain-election-vox-far-right-socialists-winner/> [<https://perma.cc/43RJ-T5QQ>].

303. See Gesetz für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst [Law for the Equal Participation of Women and Men in Management Positions in the Private and Public Sectors], Apr. 24, 2015, BUNDESGESETZBLATT, Teil I [BGBl I] at 655-56 (Ger.) [hereinafter German Law]. This requirement did not apply to the management board, whose female numbers remain unchanged. See Alexandra Fedorets, Anna Gibert & Norma Burow, *Gender Quotas in the Boardroom: New Evidence from Germany* 10, 12, 21 (DIW Berlin, Discussion Paper No. 1810, 2019), <https://ssrn.com/abstract=3423868> [<https://perma.cc/S4AW-BDUX>].

304. German Law, *supra* note 303, at 656.

Overall, countries with legally required BGD have more than doubled the percentages of women on boards, which is promising compared to the minimal progress in countries without such mandates.³⁰⁵ In support of the EU Directive, after reviewing the statistics from member states with and without BGD legislation, the EU Commission concluded “that legal instruments to enforce quotas are an effective and fast means of achieving change.”³⁰⁶

B. Cultural

As discussed above, culture plays a key role in the likelihood of women advancing to, and succeeding in, corporate leadership positions.³⁰⁷ In this Section, we examine the culture of EU member states based on the Hofstede Cultural Dimension Index and analyze the cultural factors, such as *masculinity*, *power distance*, and

305. See Victor E. Sojo, Robert E. Wood, Sally A. Wood & Melissa A. Wheeler, *Reporting Requirements, Targets, and Quotas for Women in Leadership*, 27 LEADERSHIP Q. 519, 525 (2016); Johanne Grosvold & Stephen Brammer, *National Institutional Systems as Antecedents of Female Board Representation: An Empirical Study*, 19 CORP. GOVERNANCE INT'L REV. 116, 125, 132 (2011). In terms of the specific provisions in the BGD legislation that are effective, we conclude that the more time companies are given to comply, the more likely they are to achieve the targeted BGD. See Houser & Williams, *supra* note 280. The countries with the BGD mandates took one to eight years to achieve compliance with an average of four to five years. See *id.* The only country without a penalty was Spain. See *id.* Spain was also the only country that did not meet its mandate, indicating the importance of consequences to successful implementation of these BGD requirements. See *id.*

306. JO ARMSTRONG & SYLVIA WALBY, EUR. PARLIAMENT, GENDER QUOTAS IN MANAGEMENT BOARDS 4 (2012), [https://www.europarl.europa.eu/RegData/etudes/note/join/2012/462429/IPOL-FEMM_NT\(2012\)462429_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/note/join/2012/462429/IPOL-FEMM_NT(2012)462429_EN.pdf) [<https://perma.cc/CC3B-FHNJ>]. Although not analyzed in this report, there are a number of other EU member states that have Corporate Governance Codes addressing BGD, including Austria, Denmark, Finland, Ireland, Luxembourg, Poland, Slovenia, Sweden, and the UK. See EUR. COMM'N, WOMEN IN ECONOMIC DECISION-MAKING IN THE EU: PROGRESS REPORT 13-14 (2012), <https://op.europa.eu/en/publication-detail/-/publication/8832ea16-e2e6-4095-b1eb-cc72a22e28df/language-en#> [<https://perma.cc/9CSQ-373J>]. Comply or explain codes were introduced in these countries with a strong aversion to legislated mandates. See *supra* notes 298-304 and accompanying text. Theoretically, requiring companies to publicly explain their failure to meet their BGD requirements could be sufficient external pressure to create more opportunities for women on boards because of greater transparency in the decision-making process. Martha Foschi, *Double Standards in the Evaluation of Men and Women*, 59 SOC. PSYCH. Q. 237, 252 (1996). Current levels of BGD in these countries, however, do not bear this theory out. See, EUR. COMM'N, *supra*, at 5, 13-15 (concluding that legal BGD mandates have been more successful than voluntary measures).

307. See *supra* Part I.C.

uncertainty avoidance, that influence whether the legislated BGD requirements are met.³⁰⁸ We find that culture not only shapes whether BGD legislation is adopted, but it also influences the extent to which the laws will actually broaden access for women.

France has lower scores on the Hofstede masculinity scale than most other countries, meaning that collaboration and collective wellbeing are valued and gender roles are less rigid.³⁰⁹ This is evident “by its famous welfare system (*securité sociale*), the 35-hour working week, five weeks of holidays per year, and [the country’s] focus on the quality of life.”³¹⁰ France has made significant strides in gender equality in government, boards, and every area surveyed by the European Institute of Gender Equality.³¹¹ This cultural context paved a clear path for BGD legislation. France is also high in uncertainty avoidance, indicating a preference for clear rules, which will make BGD laws more effective.³¹² This is particularly true given that France’s legislation has a clear penalty for failure to meet the BGD requirements and a clearly defined five-year timeframe to comply.³¹³

Italy, on the other hand, has one of the largest gender gaps in Western Europe.³¹⁴ The country scores very high on masculinity according to the Hofstede Index, ranking seventh highest of seventy-six countries.³¹⁵ Italy is divided on power distance tolerance, which

308. See Cabeza-García et al., *supra* note 125, at 57.

309. See *Country Comparison: France*, *supra* note 151.

310. *Id.* A lower score indicates less concern with competition and a stronger focus on the quality of life. See *id.* France scores sixty-eight on power distance and eighty-six on uncertainty avoidance. *Id.* The high score on power distance represents acceptance of inequality, but in this case the acceptance is with those in positions of power, rather than preference for men over women. *Id.* The high score on uncertainty avoidance somewhat explains the amount of planning and discussion that went into creating laws that advance women. *Id.*

311. France scores a 74.6 on the Equality Index, the third highest out of all European countries. *Gender Equality Index: Index Score for France for the 2019 Edition*, EUR. INST. FOR GENDER EQUAL. (2019), <https://eige.europa.eu/gender-equality-index/2019/FR> [<https://perma.cc/5YMK-5559>].

312. See *Country Comparison: France*, *supra* note 151.

313. See EUR. COMM’N, *supra* note 306, at 13-15.

314. WORLD ECON. F., *supra* note 4, at 197 (showing that Italy ranked 117th out of 153 countries for economic participation and opportunity, 55th in educational attainment, 118th for health and survival, and 44th for political empowerment).

315. Marco Tavanti, *The Cultural Dimensions of Italian Leadership: Power Distance, Uncertainty Avoidance and Masculinity from an American Perspective*, 8 LEADERSHIP 287, 293 (2012).

measures how hierarchical the country is and its tolerance for inequality.³¹⁶ While Northern Italy touts a more egalitarian society, Southern Italy accepts and endorses its hierarchy.³¹⁷ However, Italian society in general “continues by and large to privilege men over women.”³¹⁸ Italy also scores high in uncertainty avoidance, preferring clear rules and shunning ambiguity.³¹⁹ Despite the relative acceptance of inequality and traditional gender roles, Italy’s legislated board quota law has been successful.³²⁰ This may be explained by the significant sanctions corporations face for failing to increase female representation.³²¹ This suggests that in less egalitarian cultures like Italy, increases in diversity will not occur naturally without firm regulations.³²²

The Netherlands has a very low masculinity score and prefers compromise to winning.³²³ The Netherlands scores low on power distance and mid-range on uncertainty avoidance, which are all very low compared to other EU member states.³²⁴ The low power distance score represents a desire for equality in society.³²⁵ The uncertainty avoidance score indicates that firm rules are not as influential to change as they are in other countries.³²⁶ In 2013, the Netherlands enacted a gender quota requirement of 30 percent for both listed companies and the majority of state-owned enterprises to be achieved by the end of 2016.³²⁷ The law was considered soft as there were no sanctions for failing to comply.³²⁸ This is not surprising given the relatively low uncertainty avoidance score, indicating that hard rules and penalties are not necessary to encourage

316. See *Country Comparison: Italy*, *supra* note 149.

317. *Id.*

318. Tavanti, *supra* note 315, at 294.

319. *Country Comparison: Italy*, *supra* note 149.

320. See Maida & Weber, *supra* note 276, at 16 (“As in other countries, Italian listed companies complied swiftly with the gender quota once the law was implemented. From 2011 to 2017 the number of board seats taken by women increased four-fold.”).

321. See *supra* notes 290-92 and accompanying text.

322. See Maida & Weber, *supra* note 276, at 17.

323. *Country Comparison: The Netherlands*, *supra* note 150.

324. *Id.*

325. *Id.*

326. *Id.*

327. Sonja A. Kruisinga & Linda Senden, *Gender Diversity on Corporate Boards in the Netherlands: Waiting on the World to Change*, in *GENDER DIVERSITY IN THE BOARDROOM* 177, 177 (Cathrine Seierstad et al. eds., 2017).

328. *Id.*

compliance.³²⁹ In December 2019, the Netherlands passed a new law requiring listed companies to have at least 30 percent of supervisory board seats held by women or risk having their appointment nullified.³³⁰ Between 2013 and 2019, BGD rose from 25.1 percent to 31.3 percent.³³¹

Spain scores low in masculinity, high in power distance, and high in uncertainty avoidance.³³² The low masculinity score is consistent with Spain's focus on consensus.³³³ Leaders prefer to consult with minority opinions and gain agreement before moving forward with new rules.³³⁴ Yet, hierarchy is accepted in society, which corresponds to the high power distance score.³³⁵ Spain also has a strong appreciation for rules, hence the high uncertainty avoidance.³³⁶ Although Spain generally accepts hierarchy, the low masculinity is likely why it set one of the most ambitious targets for BGD at 40 percent.³³⁷ This cultural context has still allowed the country to experience gains in BGD, even with only incentives and no penalties.³³⁸ Nonetheless, the country has not yet met its more ambitious goal of 40 percent of board seats being held by women.³³⁹

Germany scores high on the masculinity scale, with a society that values performance and status.³⁴⁰ It has a relatively low power distance score and a high score for uncertainty avoidance.³⁴¹ The low power distance score represents a highly decentralized structure

329. See *Country Comparison: The Netherlands*, *supra* note 150.

330. Merle Weghoeft, *The Netherlands Introduces New Legislation to Improve Gender Diversity on Corporate Boards*, SEUSS+ (Feb. 24, 2020), <https://perma.cc/3KBT-5ALE>.

331. See Houser & Williams, *supra* note 280.

332. *Country Comparison: Spain*, HOFSTED INSIGHTS, <https://www.hofstede-insights.com/country-comparison/spain/> [<https://perma.cc/FLJ2-8Y5N>].

333. *Id.*

334. *See id.*

335. *Id.*

336. *Id.*

337. *See id.*

338. In Spain, female representation on boards rose from 6.8 percent to 11.6 percent between 2005 and 2014. See Siri Terjesen, *Why Some Board Gender Quotas Don't Work*, CATALYST (Feb. 12, 2019), <https://www.catalyst.org/2019/02/12/why-some-board-gender-quotas-dont-work/> [<https://perma.cc/34TX-M7X4>].

339. *See id.*

340. *Country Comparison: Germany*, HOFSTED INSIGHTS, <https://www.hofstede-insights.com/country-comparison/germany/> [<https://perma.cc/YX57-DGN7>].

341. *Id.*

with low tolerance for hierarchies.³⁴² The high score on uncertainty avoidance means that laws are well-thought-out and contain a lot of detail to ensure certainty.³⁴³ Overall, Germany has exceeded its BGD requirement of 30 percent.³⁴⁴

Previous research has found that cultural factors such as higher levels of masculinity and power distance are most associated with greater gender inequality.³⁴⁵ Contrary to what we expected, however, these cultural factors did not affect a country's willingness to adopt BGD requirements.³⁴⁶ Instead, high uncertainty avoidance was more influential with countries that value certainty, preferring clear laws requiring action.³⁴⁷ Further, some countries that scored high in masculinity and/or power distance have still been successful at increasing BGD, provided monetary penalties were incorporated for failing to meet legislated requirements.³⁴⁸ While the details of the legislation and the cultural context are key in analyzing the effectiveness of BGD requirements, constitutional factors also significantly influence outcomes.

C. Constitutional

In 1982, when France first passed a political quota for women in municipal elections, it was struck down as being an unconstitutional infringement on equality.³⁴⁹ After a series of laws to create equality for women were also struck down,³⁵⁰ the Constitution was amended in 2008 to add the following language: "*statutes shall promote equal access by women and men to elective offices and posts as well as to position[s] of professional and social responsibility.*"³⁵¹

342. *See id.*

343. *See id.*

344. *See* Houser & Williams, *supra* note 280.

345. GEERT HOFSTEDE, GERT JAN HOFSTEDE & MICHAEL MINKOV, CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND 148, 152-53 (3d ed. 2010).

346. *See, e.g.*, EUR. COMM'N, *supra* note 306, at 14-15.

347. *See* Houser & Williams, *supra* note 280.

348. *See id.*

349. Conseil constitutionnel [CC] [Constitutional Court] decision No. 82-146DC, Nov. 18, 1982, J.O. 3475 (Fr.).

350. The 2006 BGD quota law was also struck down as unconstitutional. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2006-533DC, Mar. 16, 2006, J.O. 4446 (Fr.).

351. 1958 CONST. art. I (Fr.) (emphasis added).

What is important to note is that the legislative measures in France addressing BGD did not take place until *after* its constitution was amended in 2008; it was not until after the amendment that France passed the Law for the Real Equality Between Women and Men, which addressed persistent inequality in both the public and private sectors.³⁵²

Although referred to as “substantive equality” or “real equality,” what France did is indicative of the other countries that have successfully passed legislated quota requirements.³⁵³ The 2011 BGD law in France was almost identical to the 2006 law but was ruled permissible because the Constitution now required positive action to take place to achieve real equality between men and women.³⁵⁴ The high court in France has identified the requirement of positive action as permitting a difference in treatment between men and women to remedy inequalities that primarily impact women.³⁵⁵

In Germany, like France, initial attempts to create equality for women through quotas were struck down as unconstitutional.³⁵⁶ This did not change until an amendment to the German Constitution in 1994: “*The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.*”³⁵⁷ These amendments serve to legitimize legislative measures, such as quotas, aimed at breaking

352. Loi 2014-873 du 4 août 2014 pour l'égalité réelle entre les femmes et les hommes [Law 2014-873 of August 4, 2014 for the Real Equality Between Women and Men], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Aug. 5, 2014, p. 12949.

353. The Italian Constitution provides that all citizens are equal before the law without regard to sex. Art. 3 COSTITUZIONE [COST.] (It.). It further states that:

It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country.

Id. Meanwhile, the Belgian Constitution guarantees equality between men and women. 1994 CONST. (Belg.) art. 10.

354. Julie C. Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home*, 28 YALE J.L. & FEMINISM 381, 421-22 (2017).

355. Christopher McCrudden, *Gender-Based Positive Action in Employment in Europe: A Comparative Analysis of Legal and Policy Approaches in the EU and EEA* 155 (Oct. 8, 2019) (unpublished manuscript), <https://papers.ssrn.com/abstract=3524238> [<https://perma.cc/4EZ6-CYYW>].

356. *Id.* at 153.

357. GRUNDGESETZ [GG], art. 3(2) (Ger.) (emphasis added).

down the wide ranging historical and present-day barriers to women. A number of statutes promoting equality were enacted following the amendment.³⁵⁸ Germany's national parliament now consists of 30 percent women and its corporations have achieved 35.6 percent female representation on their boards.³⁵⁹

These constitutional amendments move away from an antidiscrimination model that revolves around individual causes of action and create an obligation on the government to create substantive equality.³⁶⁰ While the purported goal of the antidiscrimination model is to address discrimination and break down historical patterns of exclusion, it has been increasingly used to strike down laws designed to remedy inequities by allowing men to sue for discrimination in response to equalizing measures.³⁶¹

What results in the United States is that legislation requiring positive action to achieve a certain minimum percentage of both sexes is argued to violate the Equal Protection Clause of the Constitution.³⁶² In other words, with the way courts have interpreted antidiscrimination constitutional provisions, quotas are likely to be struck down due to the gender classification,³⁶³ just as they were historically opposed in France and Germany. This distinction is critical to understanding why the United States seems unable to address inequality and why the current anticlassification formulation of the ERA, rather than an antisubordination formulation, will not lead to the progress in gender equality that many of its advocates imagine.³⁶⁴

358. See Allgemeines Gleichbehandlungsgesetz [AGG] [General Act on Equal Treatment], Apr. 3, 2013, BGBl. I at 1897 (Ger.); Gesetz über die Mitwirkung des Bundes an der Besetzung von Gremien [BGremBG] [Federal Act on Appointment to Bodies], Apr. 24, 2015, BGBl. I at 642; Gesetz für die Gleichstellung von Frauen und Männern in der Bundesverwaltung und in den Unternehmen und Gerichten des Bundes [BGleiG] [Federal Act on Gender Equality], Apr. 24, 2015, BGBl. I at 642, 643. See generally *Gender Mainstreaming: Germany*, EUR. INST. FOR GENDER EQUAL. (Nov. 2019), <https://eige.europa.eu/gender-mainstreaming/countries/germany> [<https://perma.cc/F73N-9GT2>].

359. See Houser & Williams, *supra* note 280.

360. See *Gender Mainstreaming*, *supra* note 358.

361. See, e.g., *supra* Part I.C.

362. See *supra* Part I.C.

363. See MacKinnon, *Reflections on Sex Equality*, *supra* note 3, at 1292.

364. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1473 (2004).

V. PROPOSAL FOR SUBSTANTIVE EQUALITY IN THE UNITED STATES

We cannot expect individuals, institutions, and a culture so deeply tainted by sexism to voluntarily fix systemic discrimination.³⁶⁵ For meaningful substantive change, strong legal intervention is needed, including a legislated BGD requirement. After examining what has worked in the EU, we conclude that the prospects for gender equality are not promising in the United States under the current legal structure, given the cultural context in which the system operates and the legal obstacles present. In this Part, we use our investigation of what has been most effective in the EU to propose a normative solution to increase the number of women in U.S. board seats, which will pave the way for additional action to increase equality.³⁶⁶

As indicated above, countries with BGD requirements fare better than those without—seven³⁶⁷ of the eight countries with BGD requirements have exceeded their quota, leaving only Spain falling short of its goal.³⁶⁸ France, Italy, Belgium, the Netherlands, and Germany all exceed 33.3 percent, demonstrating a critical mass.³⁶⁹ Even countries in the EU that have instituted “soft measures” have had success in increasing BGD beyond what the United States has been able to accomplish.³⁷⁰ In the United States, California is the only state that has enacted a BGD requirement.³⁷¹ Although this

365. *See supra* Part I.

366. The goal is to move from a vicious cycle of discrimination to a virtuous cycle of women improving conditions for other women. *See* Sue Duke, *The Key to Closing the Gender Gap? Putting More Women in Charge*, WORLD ECON. F. (Nov. 2, 2017), <https://www.weforum.org/agenda/2017/11/women-leaders-key-to-workplace-equality/> [<https://perma.cc/PH74-YXML>] (“Our data shows that when women are better represented in leadership roles, more women are hired across the board.... Additionally, prior World Economic Forum research indicates that female CEOs actually pay their high-earning women more than male CEOs do, which may create a financial incentive for women to join such companies.... Our analysis found a strong correlation between the representation of women in leadership positions in a given industry and hiring rates for additional women leaders.”).

367. Portugal has now met its 2018 mandate. *See* Houser & Williams, *supra* note 280.

368. Spain is unique in that it does not have a penalty provision and only provides incentives for meeting the quota. *See id.*

369. *See id.*

370. EUR. COMM’N, *supra* note 267, at 27. Countries with hard quotas averaged a BGD of 37.5 percent, those with soft quotas 25.6 percent, and those with neither 14.3 percent. *Id.*

371. *See supra* Part III.A.

law is an important signal to corporations, it may not achieve its aims due to challenges looming in the broader cultural and legal landscape in the United States.³⁷² As such, a small but significant change must be made to the U.S. Constitution.

As we explore *infra*, positive law is necessary to overcome the biases discussed in Part I and to pave the way for greater substantive equality that changes the lived experiences of women. This will impact the outcomes for both those women who aspire to sit on boards and those who end up serving on boards, who will be navigating a traditionally male-dominated environment.³⁷³ Although a BGD requirement will not eliminate all of the unconscious biases held by gatekeepers, this structural change will limit the impact of these biases on decision-making because it will result in more women being added to boards, which in turn will eventually shift group dynamics and help normalize women in leadership positions.³⁷⁴

What can the United States learn from the EU? Although seven of the eight countries with BGD requirements met their quotas, we find that the three most successful countries (France, Italy, and Belgium), based on the highest three percentages of women on boards (45.3 percent, 36.1 percent, and 35.9 percent, respectively), had the most in common with each other.³⁷⁵ We identify the following characteristics as being correlated with success. The top three countries had: (1) constitutional amendments authorizing positive action to achieve substantive equality between women and men; (2) BGD legislation, which included sanctions for failure to comply; and (3) a significant enough time period to comply with the mandate (five years).³⁷⁶

As such, we conclude that a legal foundation must be created prior to enacting BGD requirements to overcome the current interpretation of the U.S. Constitution, which was not designed, amended, or interpreted to create true equality for women.³⁷⁷ Thus, it is vital that the United States adopt a newly crafted Substantive

372. See *supra* Part I.C.

373. Cabeza-García et al., *supra* note 125, at 64.

374. Houser, *supra* note 20, at 319-20 (explaining how Kahneman and Tversky's System 1 and System 2 thinking categories lead to erroneous judgments that become deep-rooted beliefs).

375. See Houser & Williams, *supra* note 280.

376. See *id.*

377. See Suk, *supra* note 354, at 391-93.

Equality Amendment to require that positive action be taken to advance women's equality.³⁷⁸ The current anticlassification language in the ERA will limit meaningful change and in fact could lead to more "reverse-discrimination" claims brought by white men to strike down laws designed to remove barriers to women's participation in the economy, politics, and other spheres of influence.³⁷⁹

It is instructive that among the seventeen EU countries that have taken measures to increase BGD, even without a EU Directive or Regulation requiring them to do so,³⁸⁰ thirteen of them (Finland, Sweden, Ireland, Switzerland, Germany, France, Belgium, Portugal, Italy, Belgium, Spain, Luxembourg, and Austria) had previously amended their Constitutions to either permit or require positive action (such as quota laws or other measures) to achieve gender equality.³⁸¹ Permitting positive action means that laws promoting the advancement of women cannot be stuck down as discriminatory. This is the missing piece to achieving substantive equality in the United States.

Although Congress adopted the ERA in 1972, the Amendment was not fully implemented.³⁸² Proponents of the ERA list women's

378. *See id.* at 393.

379. Schwartz, *supra* note 10, at 662-65.

380. France, Italy, Belgium, Germany, Portugal, and Austria have binding quotas, while Denmark, Ireland, Greece, Spain, Luxembourg, the Netherlands, Poland, Slovenia, Finland, and Sweden have soft quota laws. *Gender Statistics Database: Legislative Quotas Can Be Strong Drivers for Gender Balance in Boardrooms*, EUR. INST. FOR GENDER EQUAL. (June 28, 2019), <https://eige.europa.eu/gender-statistics/dgs/data-talks/legislative-quotas-can-be-strong-drivers-gender-balance-boardrooms> [<https://perma.cc/G82W-6VPW>]. Soft quota laws either only apply to state-owned entities or are applied without sanctions. *Id.* Switzerland approved such a law in 2019. *See Parliament Approves Quotas for Women on Company Boards*, SWISS INFO (June 19, 2019, 5:20 PM), https://www.swissinfo.ch/eng/minimumrepresentation_parliament-approves-quotas-for-women-on-companyboards/45042736 [<https://perma.cc/P74B-REAR>].

381. Suk, *supra* note 354, at 401-02.

382. The originally proposed language was streamlined in 1943: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." Russell Berman, *The Equal Rights Amendment Is an Artifact No More*, ATLANTIC (Nov. 8, 2019), <https://www.theatlantic.com/politics/archive/2019/11/virginia-equal-rights-amendment-women-constitution/601609/> [<https://perma.cc/9WYN-383E>]. Although the Attorney General's Office of the United States has opined that the amendment's time for ratification has expired, several other scholars have argued that it is still viable. *See* Ratification of the Equal Rights Amendment, 44 Op. O.L.C. 1, 1-3 (2020); Gerard N. Magliocca, *Buried Alive: The Reboot of the Equal Rights Amendment*, 71 RUTGERS U. L. REV. 633, 637-38 (2019). *See generally* John Vlahoplus, *Ratification of the Equal Rights Amendment: Lessons from Special Elections to the House of Representatives in 1837*, 95 IND. L.J. SUPP. 79 (2020).

underrepresentation in positions of power, like corporate boards, as one of the inequalities that the ERA could address.³⁸³ Representative Carolyn Maloney (D-NY), who has reintroduced the ERA over the past few years, directly linked her support for the Amendment to the underrepresentation of women in government and business.³⁸⁴ However, scholar Julie Suk argues that the ERA must be conceptualized as a twenty-first century legal infrastructure of gender equality.³⁸⁵ Her analysis suggests that a modern reimagined version of the ERA could disrupt the current status quo of gender inequality “such as pay inequity; women’s economic disadvantages related to pregnancy, maternity, and caregiving; women’s underrepresentation in positions of economic and political power; and violence against women.”³⁸⁶

We also feel that the current iteration of the amendment is insufficient to effect change. A new version must go beyond intermediate scrutiny, disparate impact, and other traditional antidiscrimination tools.³⁸⁷ An antidiscrimination constitutional approach is insufficient, as demonstrated by persistent gender inequality despite the numerous court cases filed in the United States. This insufficiency is also demonstrated by the failure of BGD requirements to pass constitutional scrutiny in various EU member states until their constitutions were amended.³⁸⁸ Suk concludes that the place to begin is with state constitutional amendments requiring positive action, noting that there is already precedent, such as the right to education, which is absent from the federal Constitution.³⁸⁹ She explains how a state constitutional right could require the Supreme Court to stop striking down legislation that attempts to promote equality because equal rights would be a “compelling state interest.”³⁹⁰

Scholar Christopher McCrudden’s work analyzing positive action in employment in Europe also makes the connection between constitutional language and the permissibility of positive legislative

383. Suk, *supra* note 354, at 391-93.

384. *Id.* at 391.

385. *Id.*

386. *Id.* at 384-85.

387. *Id.* at 385.

388. *See supra* Part IV.C.

389. Suk, *supra* note 354, at 439.

390. *Id.* at 440.

action to advance women's equality using several EU member states as models.³⁹¹ Although Suk focused on state constitutions in the United States, and covered a variety of progressive issues, such as pregnancy rights, McCrudden focuses on the differences in the laws of the member states in the EU and EEA,³⁹² specifically on employment issues, including BGD.³⁹³ He also concludes that focusing on antidiscrimination is insufficient to advance women's participation in leadership.³⁹⁴ He confirms that a constitutional amendment requiring positive action to address inequality is necessary to enact laws that will not be invalidated under an antidiscrimination model.³⁹⁵ In the United States, this is a prime concern. A constitutional provision (the Fourteenth Amendment's Equal Protection Clause) and legislation (such as Title VII) that should in theory be used to improve the conditions for women and underrepresented minorities are instead repeatedly used to strike down laws and policies designed to combat institutional and individual biases.³⁹⁶ As such, an amendment requiring positive action to reduce inequality and advance substantive equality must be adopted.

Building on the established work of both Suk and McCrudden, we conclude that the United States must first move away from an anticlassification, antidiscrimination model to one of social reproduction.³⁹⁷ After examining the factors behind the success that certain member states in the EU have had in increasing the number of women in important decision-making positions, and given how far the United States lags behind the industrialized world in terms of equality, we propose a new equal rights amendment (the "Ruth Bader Ginsburg Substantive Equality Amendment") to the U.S. Constitution:

391. McCrudden, *supra* note 355, at 2.

392. The EEA consists of the member states of the EU and three countries of the European Free Trade Association (EFTA) (Iceland, Liechtenstein, and Norway; excluding Switzerland). *EEA Agreement*, EFTA, <https://www.efta.int/eea/eea-agreement> [<https://perma.cc/8C9A-3KND>]. The Agreement on the EEA entered into force on January 1, 1994. *Id.*

393. McCrudden, *supra* note 355, at 2.

394. *See id.* at 166-67.

395. *See id.* at 168-69.

396. *See, e.g., supra* note 233 and accompanying text.

397. Although Suk does not envision quotas as being a necessary outcome of a new ERA, our research supports the extension of her argument to the U.S. Constitution. *See Suk, supra* note 354, at 444.

In order to address centuries of inequality, the United States government shall promote the substantive equality of women in both the public and private sector. No law designed to correct the lesser status of women shall be struck down as violating the Equal Protection Clause of the Fourteenth Amendment of the Constitution.

This language goes beyond the wording in most of the Amendments³⁹⁸ we examined because of the insidious inequality that exists in the United States and the troubling retreat from progress here.³⁹⁹ Once there is a constitutional foundation for equality laws that work, legislative BGD requirements like California SB 826 will be needed and will be more likely to pass constitutional scrutiny.⁴⁰⁰

The problem with relying on the Fourteenth Amendment and current equality legislation in the United States is not only the anticlassification framing, but also the reliance on an antiquated antidiscrimination model that seeks to punish the “bad actor,” ignoring the history of deeply entrenched systemic sexism and racism that pervades U.S. legal, family, religious, and business structures.⁴⁰¹ This current antidiscrimination approach in both the

398. For example, Article 116(2) of Greece’s Constitution reads: “Adoption of positive measures for promoting equality between men and women does not constitute discrimination on grounds of sex. The State shall take measures for the elimination of inequalities actually existing, in particular to the detriment of women.” 1975 SYNTAGMA [SYN.] [CONSTITUTION] 116(2). We feel that it must be made clear that the intent of this new amendment is to remedy the inequality that women face. The amendment is not intended to create a right of “reverse-discrimination” by men.

399. See Shilpa Phadke & Alexandra Schmitt, *Protecting and Promoting Women’s Rights Is Key to Defeating the Coronavirus at Home and Abroad*, CTR. FOR AM. PROGRESS (May 29, 2020, 9:03 AM), <https://www.americanprogress.org/issues/women/news/2020/05/29/485606/protecting-promoting-womens-rights-key-defeating-coronavirus-home-abroad/> [https://perma.cc/Y6X9-9SYM] (“Unfortunately, the Trump administration’s failure to lead and its continued attacks on women’s rights during this crisis have impeded the U.S. recovery from COVID-19 and squandered the opportunity for global leadership. Instead of following the guidance of health experts and government officials, President Donald Trump and other anti-choice policymakers are undermining women’s economic security and restricting fundamental reproductive rights at home and abroad at a time when the well-being of women and families is critical to long-term recovery.”).

400. “Instead of using the constitutional right to sex equality as a shield against sexist government action,” as it is currently conceptualized, Suk “proposes that a constitutional guarantee of sex equality be approached as a foundation for federal and state governmental initiatives to build gender-equal infrastructures.” Suk, *supra* note 354, at 384.

401. “Laws directed at malevolent individual bad actors miss the picture,” because they “fail to redress the more complex and embedded systemic bias, structural impediments, and

Constitution and statutes like Title VII of the Civil Rights Act of 1964 only seeks to put out a single campfire here and there, while ignoring the raging inferno of structural inequality that exists in the United States.⁴⁰²

Wal-Mart Stores, Inc. v. Dukes is a prime example of how the current antidiscrimination framing of local, state, and federal legislation in the United States is entirely insufficient to remedy mass gender discrimination.⁴⁰³ In *Wal-Mart*, some 1.5 million female Wal-Mart employees alleged that the company discriminated against them in violation of Title VII by denying women equal pay and promotions due to the lack of objective criteria for promotions and allowing store-level discretion in employment matters.⁴⁰⁴ Despite the Ninth Circuit upholding class certification three times, the Supreme Court, in a five-four decision, reversed by rejecting expert testimony showing how local decision-making implicates unconscious bias which resulted in women receiving lower pay and fewer promotions.⁴⁰⁵

Given the way the Supreme Court has interpreted the Fourteenth Amendment, the language of the 1972 ERA will not achieve what women expect because it is simply another antidiscrimination measure.⁴⁰⁶ As discussed earlier, another enormous obstacle is the

gendered norms that continue to fuel gender inequality.” Thomas, *supra* note 230, at 2-3 (citing MARTHA CHAMMALLAS & JENNIFER WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER AND TORT LAW* 125-26 (2010); Anne L. Alstott, *Gender Quotas for Corporate Boards: Options for Legal Design in the United States*, 26 *PACE INT’L L. REV.* 38, 38-39 (2014); Nicole E. Negowetti, *Implicit Bias and the Legal Profession’s “Diversity Crisis”: A Call for Self-Reflection*, 15 *NEV. L.J.* 930, 953 (2015)).

402. *Id.* at 3 (“Two hundred years of harm, and more than fifty years of modern feminist legal reform are more than enough to dispel the notion that the status quo is sufficient or that more basic measures like general prohibitions of discrimination or good-faith efforts must first be exhausted.”).

403. *See* 564 U.S. 338 (2011).

404. *Id.* at 342-45.

405. *See id.* at 340, 347-48, 353-57, 367.

406. Supporters of the 1972 ERA argue that adding gender to the Constitution would elevate it to “the same status and scrutiny as race and symbolically would establish a constitutional commitment to gender equality.” Tracy A. Thomas, *More than the Vote: The Nineteenth Amendment as Proxy for Gender Equality*, 15 *STAN. J. C.R. & C.L.* 349, 376 (2020). They assert that this would make it more difficult for courts to undermine gender equality in relation to other protected rights, such as religious liberty. *See id.* (citing *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 735-36 (2014)). *But see* Suk, *supra* note 354, at 394-95 (discussing how the wording of the ERA is similar to the language in the Equal Protection Clause and that the ERA would likely be construed as another antidiscrimination measure).

use of the Equal Protection Clause by white men to strike down laws that seek to remedy historic discrimination as somehow being violative of their rights.⁴⁰⁷ Using clear language, such as that in our proposed constitutional amendment, will follow the direction of numerous EU member states and disallow these cases that are simply a deflection from the true problem of our history riddled with subordination of women. By indicating that no law passed in accordance with the goal of increasing equality for women can be struck down as violating the Equal Protection Clause, the United States will have set in place the much-needed and much-delayed foundation for equality between men and women.

Looking to the European model of advocating positive measures to advance women's equality,⁴⁰⁸ legislation must then be enacted to provide women the right of access to egalitarian institutions, rather than just a right to not be discriminated against.⁴⁰⁹ Including language similar to that found in the constitutional amendments of several European countries guaranteeing equality for women and requiring the government, and in some cases businesses, to create gender-equal infrastructures, would significantly shorten the time by which women in the United States can achieve parity with men in important decision-making arenas.⁴¹⁰

To implement a "positive measure" or "positive action" approach to gender equality, the first step is to identify the specific objectives to be achieved.⁴¹¹ In this case, we focus on improving female representation in important decision-making roles, such as on corporate boards. Second, positive measures must be identified and

For a discussion on the history and results of equal protection cases, see *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689-90 (2017).

407. See Schwartz, *supra* note 10, at 662 (describing these so-called reverse discrimination cases).

408. See McCrudden, *supra* note 355, at 19; Suk, *supra* note 354, at 400.

409. Suk, *supra* note 354, at 384. While Suk focuses on how a new ERA could address pay inequity, unfair treatment of pregnant workers and mothers, violence against women, women's underrepresentation in leadership, and other postindustrial gender inequalities, we focus on BGD in this paper.

410. See *id.* Suk explains how the language in the current ERA matches the language in the Equal Protection Clause and does not require strict scrutiny for sex classifications in the law, invalidate government practices that have a disparate impact on women, nor expand Congress's authority to take proactive measures, but most likely would be interpreted as another antidiscrimination policy. *Id.* at 394-95.

411. McCrudden, *supra* note 355, at 11.

implemented.⁴¹² This is important, as currently the focus is on eliminating the negative (that is, antidiscrimination) rather than promoting the positive (that is, positive action). If equality is truly a goal, the paradigm must shift to enact laws promoting this goal by increasing the number of women in decision-making roles.

This positive action approach to the Constitution and legislation would pave the way for more laws like California SB 826 and increase the effectiveness of these laws. In addition to the constitutional amendment, there are several other adjustments we would propose for states that wish to emulate California's BGD law to improve outcomes. While SB 826 does contain sanctions for failure to comply, it lacks two of the three requirements described above that resulted in success for EU member states. For example, while California does have monetary penalties for noncompliance, it only gives corporations one year to comply.⁴¹³ Additionally, the U.S. Constitution does not contain positive language. We found each to be important to a BGD requirement's success. While constitutional challenges are pending under both the United States and California constitutions, the mere existence of such a law may nevertheless increase BGD in California. However, federal legislation is preferred for a more systematic approach to end gender exclusion nationwide.

Thus, we propose the following federal legislation to increase the participation of women on corporate boards:

Companies regulated by the SEC will add a sufficient number of women on their boards of directors to reach a balanced presence of women and men within five years of the effective date of this Act. The provisions of the preceding sentence will be taken into account when making appointments to both a company's executive and nonexecutive boards. For the intents and purposes of this Act, balanced membership will be understood to mean the presence of women and men in a manner such that neither sex accounts for more than 60 nor less than 40 percent of the total.

412. *Id.*

413. S.B. 826 § 2(a), (e)(1), 2018 Leg., Reg. Sess. (Cal. 2018).

CONCLUSION

Because of the stubborn existence of institutional and individual biases that severely inhibit the advancement of women into economic seats of power, action must be taken at a national level to remove the obstacles to gender equality. The time for substantive equality is now. While quotas can formally require institutions to hire female directors, such laws cannot address all problems of the informal social structures that exclude female participation.⁴¹⁴ Some opponents of a gender quota approach claim that quotas fail to address the real problem and policymakers' focus should instead be on eliminating the obstacles women and racial minorities face when seeking leadership positions.⁴¹⁵ Although we acknowledge that this proposal is only one step, and broader cultural change is also necessary for full equality, this approach is a good starting point towards normalizing women in important decision-making roles.

While California's attempt to address women's inequality is admirable, it is of doubtful constitutional validity and may not contain all of the factors needed to accomplish its goal. Although quotas are an "effective, systemic, and long-lasting remed[y]" to address systemic discrimination,⁴¹⁶ in order for BGD requirements to pass constitutional scrutiny, it is necessary to first amend the U.S. Constitution to not only permit, but also to require, the government and private business to take positive measures to most quickly and effectively reduce these barriers. Next, federal legislation requiring gender parity must be passed to make meaningful strides toward substantive equality. The success seen in the EU by member states that have implemented measures in important economic seats of power demonstrates the efficacy of these legislated BGD requirements with the proper constitutional foundation. Because the United States is profoundly behind the EU, as well as the rest of the industrialized world, in gender equality, taking immediate positive action is a national imperative.

414. Tewari et al., *supra* note 59, at 249.

415. Rhode & Packel, *supra* note 48, at 414.

416. Thomas, *supra* note 230, at 3.