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Board Gender Diversity: A Path to Achieving Substantive Equality in the United States

Kimberly A. Houser
University of North Texas, kimberly.houser@unt.edu

Jamillah Bowman Williams
Georgetown University Law Center, jamillah.williams@law.georgetown.edu

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

KIMBERLY A. HOUSER* & JAMILAH BOWMAN WILLIAMS**

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, 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.

*. Assistant Clinical Professor, University of North Texas. The authors wish to thank participants at the Fifth Conference of the French Academy of Legal Studies in Business, held at the Paris Campus of Emlyon Business School on June 20-21, 2019, for their suggestions.

**. Associate Professor, Georgetown University Law Center. Many thanks to my co-author 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.
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“Women belong in all places where decisions are being made.”
Ruth Bader Ginsburg, U.S. Supreme Court Justice

INTRODUCTION

While gender equality is a fundamental right in most industrialized nations, true substantive equality has not been attained in the United States. 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/ethnic minorities, and other subordinated groups. In 2020, the United States ranked 53rd out of 153 countries on the Global Gender Gap Index with 17 out of 27 European Union (EU) member states scoring higher and 7 of those in the top 10 in the world. 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.

The United States has been rapidly 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

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.... Gender equality requires equal enjoyment by women and men of socially-valued goods, opportunities, resources and rewards. Where gender inequality exists, it is generally women who are excluded or disadvantaged in relation to decision-making and access to economic and social resources.” U.N. POPULATION FUND, Frequently Asked Questions About Gender Equality (2005), https://www.unfpa.org/resources/frequently-asked-questions-about-gender-equality [https://perma.cc/JXM6-VDYQ].
groups. 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. Many argue that a limited pipeline of available talent is what explains the underrepresentation of women on boards and other leadership positions in the United States. 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.

The federal government has no national policy to address this deficiency nor does it have a constitutional requirement to do so according

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7. In this Article, we focus on gender diversity broadly speaking to include all individuals 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 and the Movement, 62 B.C. L. REV. (forthcoming 2021) (manuscript at 4-5), https://ssrn.com/abstract=3620439 [https://perma.cc/3ZXN-G68M]. Even when boards focus on increasing gender or racial diversity, Black women 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].

8. 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
to the U.S. Supreme Court. In fact, the previous administration attempted to roll-back women’s rights. While the European Union was founded on a set of values and fundamental rights, including equality, the founders of the United States did not consider women their equals, establishing their status as inferior to men. The U.S. Constitution created a legal system where women were not afforded citizenship, were prevented from owning property, did not have the right to vote, and were not protected under the law in the same way as men.

9. In fact, 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).


12. 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 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 does not use the terms “men” or “male,” in 1868, the Fourteenth Amendment did define “citizens” and “voters” as male. See id. at 18.


14. Jone Johnson Lewis, A Short History of Women’s Property Rights in the United States,
not have the right to vote,\textsuperscript{15} could not sit on a jury\textsuperscript{16} or practice law,\textsuperscript{17} and were considered dependents—and in some situations property—of white males.\textsuperscript{18}

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.\textsuperscript{19} Should things continue with business as usual in the United States, it will take 40-50 years for women to achieve parity on corporate boards, 80 years to achieve parity in CEO positions, and 100 years


\textsuperscript{16} Ginsburg, supra note 12, at 18.


\textsuperscript{18} Single women were considered dependents of their father and married women of their husbands. \textit{Women and the Law}, HARV. BUS. SCH. (2010), https://www.library.hbs.edu/he/wes/collections/women_law/ [https://perma.cc/3V6J-8H4G]. The law of coverture gave a husband complete control over his wife. \textit{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, \textit{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].

to achieve parity in Congress. An alarming finding of the World Economic Forum’s Global Gender Gap Report, which measures progress towards gender equality around the world, is that in 2018, the closing of the gap slowed down—significantly. 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.” While multiple reasons have been given for the slow-down, a major concern is the recent increase in world leaders publicly denigrating women.

In this Article, we examine the way in which laws and initiatives designed to increase the participation of women on corporate boards are reflective of how the EU and United States fundamentally differ in their view 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. While there are proponents and opponents of the revived Equal Rights Amendment (ERA), we agree with Ruth Bader Ginsburg’s


22. Whiting, supra note 5.

23. 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 have also seen 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-phumzile-violence against-women-during-pandemic [https://perma.cc/V997 FPS9]; Courtney Conley, 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].

pronouncement that “I would like to see a new beginning. I’d like it to start over.”

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. 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. More specifically, the anticlassification approach of the ERA would prevent use of laws that permit or require positive action. 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.

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. However, a growing body of research shows that the opposite is actually true. In many cases, women provide leadership that better serves the wellbeing of their constituents relative to men. 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; we may not have seen the foreclosure crisis of 2006 that sank the United States into a great recession; and the United States likely would not

27. See infra Part V.
have seen the major loss of life due to the failure of the individualistic style of leadership present with respect to COVID-19.\textsuperscript{34}

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.\textsuperscript{35} This heterogeneity leads to a smarter and better informed decision-making process, and also prevents problematic groupthink that contributes to unethical and destructive decisions.\textsuperscript{36} Thus, including more women in important decision-making roles is crucial not only for equity and moral reasons, but also will lead to better outcomes.\textsuperscript{37}

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.\textsuperscript{38} We use BGD as a proxy for economic decision-making power,

\textsuperscript{34}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].


\textsuperscript{36}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 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 Grouptihink, 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. & 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).

\textsuperscript{37}See Chris Bart & Gregory McQueen, Why Women Make Better Directors, 8 INT’L J. BUS. GOVERNANCE & ETHICS 93, 94-95 (2013).

\textsuperscript{38}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 384 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/SKAM-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
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 the United States. 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 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. 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.

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. Despite the availability of qualified female board

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.”

39. 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 9, at 662.

40. 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 25. 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 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.

41. See Rachel Feintzeig, Women’s Share of Board Seats Rises to 20%, WALL ST. J. (Sept.
candidates, few are selected using current selection methods, which predominantly feature the appointment of men known to men occupying current positions on boards. As of 2018, a staggering half of the companies on the R3000 had no women directors or only one woman on their boards. The R3000 is an index fund consisting of about 98 percent of all publicly held companies incorporated in the United States. Additionally, 80 percent of the top twenty-five initial public offerings in the United States in 2017 had no women directors or only one woman on their boards. Women are even more underrepresented in “the most influential board positions,” such as chairs of compensation, audit, and nominating committees.

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. 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. Some may make a
“pool” or “pipeline” argument that there is a lack of women qualified to serve as directors. However, this is a common misconception that is based on stereotypes and not supported by research. 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.” In fact, female executives and directors were more likely to have financial expertise in emerging markets.

Women also face perception biases in the workplace that make them more likely to be considered to “lack the qualities of effective leaders.” For example, gender stereotypes affect perceptions of competence, as well as perceptions of who deserves the attribution of traits like “intelligence, drive, and commitment.” 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. Informal social norms, such as the

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51. See id. at 17-18; Thomas, supra note 49, at 547-50.
52. Emelianova & Milhomen, supra note 50, at 17-18.
53. Id. at 18.
54. Id. See generally Linda H. Chen, Jeffrey Granlich & 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 respect to financial risk exposure.).
55. Thomas, supra note 49, 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).
56. See Rhode & Packel, supra note 47, at 405.
57. See Lin Bian, Sarah-Jane Leslie & Andrei Cimpian, Evidence of Bias Against Girls and
notion that 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.  
Research demonstrates that individuals will shift their definitions of
merit to prioritize the qualifications that men hold. 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. 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. This illustrates how much of evaluation and
the image of competence about who is “qualified” for positions of power are
clouded by gender stereotypes.
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. This type of discrimination remains
prevalent in American society.

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 most board and
executive positions, they serve as the gatekeepers to board entry. This is
especially troublesome, as affinity or “in-group” bias serves as a barrier to
women. Affinity bias is a preference for people like ourselves, and is
commonly unconscious or perceived as harmless because it is not overt and

Women in Contexts That Emphasize Intellectual Ability, 73 AM. PSYCH. 1139, 1139-40, 1149
(2018).
58. See Geeta Tewari, Emma DeCourcy & Shirley Ureña, The Ethics of Gender Narratives for
59. See Eric Luis Uhlmann & Geoffrey L. Cohen, Constructed Criteria: Redefining Merit to
60. See id. at 475.
61. See id. at 476.
62. See id. at 474.
63. See Michael Holmes, Why Are There So Few Women CEO’s?, WORLD ECON. F. (Sept.
[https://perma.cc/7MQL-289F].
64. See, e.g., id.
65. See supra notes 41-46 and accompanying text.
66. See Rhode & Packel, supra note 47, at 404-05.
malicious sexism. 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. In reality, nominating committees are simply not looking for women due to their preexisting biases. These unconscious biases cause board members to seek new directors who “look and sound like they do,” favoring those with similar traits and pedigrees over candidates who may not run in their social circles, and making diversity a near impossibility.

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. Thus, those with the power to choose board members are often unaware or unwilling to acknowledge they are making poor choices. Accordingly, these cognitive biases are likely to result in men being given positions even when less qualified. Men are chosen based on perceived potential, while women must go above and beyond to prove their worth through past experience. For example, it is estimated that 77 percent

67. See Houser, supra note 19, at 305 & n.82.
68. See Rhode & Packel, supra note 47, at 405-06.
69. See Houser, supra note 19, at 304-05.
70. See Thomas, supra note 49, at 559 (quoting U.S. GOVT ACCOUNTABILITY OFF., GAO-16-30, CORPORATE BOARDS: STRATEGIES TO ADDRESS REPRESENTATION OF WOMEN INCLUDE FEDERAL DISCLOSURE REQUIREMENTS 13 (2015)).
71. 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., Kahneman & Tversky, supra note 72, at 249.
74. 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 ACADEM. 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.

of male directors have no prior experience, compared with 68 percent of females. This is a double standard that reinforces the gender hierarchy and continues to perpetuate the exclusion of women from boards.

“[E]xposure to counter-stereotypical exemplars” has been shown to reduce these unconscious biases. As more women gain access to positions of power, the representative bias can be used to help dispel the unconscious association of “leaders” with “men.” 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. Based on this research, it is important to find strategies that expose male leaders to highly qualified women board members and 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.

The following is an example that illustrates this point. It was not until the early 1900s that women were allowed to attend some of the top law schools in the United States. Women were routinely kept out of the workforce as stereotyping and discrimination prevailed. 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. It was not until 2016 that women in law schools exceeded 76. 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].

77. 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.

78. See Tversky & Kahneman *supra* note 72, at 1124.


80. See *Kahneman, supra* note 72, at 59-60, 65-67 (explaining that repetition contributes to the positive feelings associated with “cognitive ease”).

81. See, e.g., Beaman et al., *supra* note 79, at 1530.


83. *Id.* at 4.

84. Asher Klein, *At Harvard Law School, Ruth Bader Ginsburg Displayed the Steel She’d*
the number of men.85 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.86

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.87

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.88 Both the narrowly defined candidate pool and network homophily are institutional factors that reinforce the individual biases discussed above.89

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.90 According to the rules of the New York Stock Exchange (NYSE), the N&G Committee should be composed of independent

References:

86. Kahneman, supra note 72, at 66-67 (discussing the exposure effect).
88. See supra Part I.
89. 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 7.
board directors alone. 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. The most visible and sought-after candidates are those who have previously held CEO positions and executive roles, and possess prior directorship experience. This serves as a limiting factor for women seeking access to corporate boards.

Based on this process, boards are ultimately recruiting from a select pool where women already hold few positions due to historical exclusion. 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. Yet, even when women make it to upper management, they are not typically considered because their positions are not perceived to be responsible for profit and loss. This places even greater emphasis on being CEO of a publicly held company and prior board experience. Although many women may have the desired industry experience, they have not gained access to this traditional pipeline to board service.

The first time a woman held the position of CEO at a Fortune 500 company was in 1972. 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. 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. This huge disparity is a core disadvantage to women interested in directorship opportunities.

In sum, the NYSE process has led boards to draw from a pool of

91. Id.
92. Id. at 244.
93. Id. at 249.
95. Rhode & Packel, supra note 47, at 403.
96. Id.
97. See id.
98. Id. at 402.
99. Carpenter, supra note 94.
101. EMELIANOVA & MILHOMEM, supra note 50, at 6.
candidates in which women are vastly underrepresented. The issue is not that women are not qualified, but rather that boards have to expand the scope of their candidate pool. 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. 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. Even beyond 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.”

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.” 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.” This homophily is perpetuated by “social structures that induce propinquity among similar others,” 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.” Some of these spaces specifically ban female members.

103. Id.
104. Id.
105. Id.
107. Trautman, supra note 90, at 251.
109. Id.
110. Id.
112. Elizabeth Segran, Social Clubs Died out in America. Now, Venture Capital Is Bringing
Because the nominating committees on boards tend to consist of older white males, network homophily causes a biased selection process that prevents women from gaining access. Arguing that board members are chosen by merit ignores forty years of social science research. The selection process is primarily driven by network structure, which relies on favoritism and convenience, not objective indicators of merit. 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. Thus, reliance on closed networks and highly subjective criteria can mask both explicit and unconscious bias. 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. A lack of mentorship can prevent women from accessing “informal networks” and other “female role models and sponsors to provide opportunities.” 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.”

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. 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.

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114. See Thomas, supra note 49, at 559.
115. See Houser, supra note 19, at 318-21.
116. See Rhode & Packel, supra note 47, at 404.
117. Id. at 402, 404-07.
118. Id. at 404-06.
119. Thomas, supra note 49, at 549.
120. Id.
121. Id.
123. Id.
C. Cultural Bias: The Way of Life

The representation of women on corporate boards is also influenced by a country’s culture.\textsuperscript{124} 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.\textsuperscript{125} 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.\textsuperscript{126} A detailed study published in 1984 by Geert Hofstede measured how values in the workplace are influenced by culture.\textsuperscript{127} He defines culture as “the collective programming of the mind distinguishing the members of one group or category of people from others.”\textsuperscript{128} The Hofstede Cultural Dimension Index was used to score each country researched in six categories.\textsuperscript{129} 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.”\textsuperscript{130} 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.\textsuperscript{131} This study finds 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.”\textsuperscript{132} High masculinity cultures are also focused on stricter gender roles.\textsuperscript{133} 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.\textsuperscript{134}

The *power distance* index represents the comfort a society has with

\begin{itemize}
\setlength\itemindent{0pt}
\item \textsuperscript{124} 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).
\item \textsuperscript{125} Dale Griffin, Kai Li & Ting Xu, Board Gender Diversity and Corporate Innovation: International Evidence, 56 J. FIN. & QUANTITATIVE ANALYSIS 123, 131 (2021).
\item \textsuperscript{126} See id.
\item \textsuperscript{127} See generally Geert Hofstede, Cultural Dimensions in Management and Planning, 1 ASIA PAC. J. MGMT. 81 (1984).
\item \textsuperscript{128} National Culture, HOFSTEDE INSIGHTS, https://hi.hofstede-insights.com/national-culture [https://perma.cc/W75N-5GCX] [hereinafter National Culture].
\item \textsuperscript{129} Id.
\item \textsuperscript{130} Id.
\item \textsuperscript{131} See id.
\item \textsuperscript{132} GEERT HOFSTEDE, CULTURE’S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS, AND ORGANIZATIONS ACROSS NATIONS 297 (2d ed. 2001).
\item \textsuperscript{133} See Hofstede, supra note 127, at 84.
\item \textsuperscript{134} Id.
\end{itemize}
gaps in hierarchical levels. A country with a high power distance score would indicate higher tolerance for inequality. Therefore, cultures with both high masculinity and high power distance scores would be less likely to value women in power. The uncertainty avoidance index indicates the extent to which the culture requires certainty. A culture with a higher score on uncertainty avoidance is more apt to create and follow legal mandates.

In examining the culture in the United States based on the Hofstede scale, 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” 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. The high masculinity score is evidenced by recent pushes to return to a “traditional family structure” and increasing limitations on the rights of women. With a low uncertainty avoidance score, legal rules are often eschewed as overly restrictive on free will, and loopholes and strategies

135. National Culture, supra note 128.
136. Id.
137. 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-Garcia et al., supra note 124, at 60.
139. See id.
141. The DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).
142. 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, 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].
to circumvent the law are commonplace.144

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.145 The United States additionally, in 2019, 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.146

In terms of strategies to increase BGD, the United States has relied on voluntary measures, which have failed miserably given this cultural context.147 In countries with high levels of masculinity like the United States,148 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, and higher uncertainty avoidance levels,149 rules setting voluntary targets or softer nudges may also 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,150 has been more successful at achieving BGD at least partly because of the broader cultural context and framing of board diversity laws as “advancing

144. See Country Comparison: United States, supra note 140.
145. Lowen, supra note 8.
146. 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.”).
humanity by ensuring that both halves are represented, rather than as advancing the particular rights or interests of women.”

Countries with lower masculinity scores value collaboration over competition. 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.

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. Women had no role in its creation and their voices were not considered. The United States was founded by free white males who created a system in which only they were considered equal. The EU, on the other hand, was created less than three decades ago and kept the value of equality in mind in its creation. In Part V, we more fully examine what this cultural context means in terms of necessary steps for the United States to achieve BGD.


154. See MacKinnon, Reflections on Sex Equality Under Law, 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/6T77-X8XX] (“’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].


157. See supra note 11 and accompanying text.
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, 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.158 BlackRock holds significant economic power as the world’s largest asset manager with $6.3 trillion in assets under management.159 Its 2018 Proxy Guidelines indicate that it “expects to see at least two women directors on every board.”160 Vanguard, with over $5 billion in assets, has also advocated for BGD but has not indicated any penalties for a noncompliant slate.161

State Street Global Advisors, which manages $2.78 trillion in assets, however, did vote against slates on 511 companies that did not comply with its gender diversity recommendations.162 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).163 In July 2018, the Midwest Investors Diversity Initiative, with $300 billion in assets, announced its attempt to

159. Id.
161. Id.
increase racial and gender diversity through model checklists and best practices.  

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, announced that it would only carry out Initial Public Offerings (IPOs) for companies that have at least two diverse board members. This is an attempt to address the 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.

Shifting the power to shareholders 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. Further, shareholders can place their own candidates on the ballot, creating a system in which boards are more


167. See Tewari et al., supra note 58, at 234-35.
responsive to shareholders.169 This can reshape boards from the outside by expanding the network to a broader range of candidates.170 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.171

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.172 This rule was approved by the SEC on August 6, 2021.173 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.174 The rule also requires Nasdaq-listed companies to annually publish statistical information regarding their directors.175 The rule aims to provide greater transparency to investors and more data to assess board diversity trends.176

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

169. See id.
170. See id.
175. Id.
176. See id.
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), for example, requires that companies disclose their board’s diversity policy.177 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.178 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.179 The powerful New York State Common Retirement Fund, responsible for managing $247.7 billion in assets, invested across more than 400 companies has also indicated that it would vote against any slate of directors up for re-election if there are no female directors on the board.180 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.181 Rhode Island is another state that has announced a proxy voting initiative that requires all companies benefitting from state pension fund investments to diversify their boards.182 The state warned that it would vote

181. See id.
182. See Proxy Voting Guidelines, R.I. OFF. GEN. TREASURER (Sept. 26, 2018),
against any slate of directors nominated by a company if it would result in a board where women or racial minorities hold any less than 30 percent of the seats.\footnote{183}

\textit{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.\footnote{184} 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.\footnote{185} 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.\footnote{186} With gender equality, white men would no longer hold such disproportionate wealth, power, and control over the U.S. economy and democracy.\footnote{187} They therefore commonly critique parity models as “social engineering” that forces women to be out of the house more and men into the house, challenging traditional societal norms.\footnote{188} 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

\url{https://perma.cc/RRB9-545S}.
\footnote{183. Id.}
\footnote{184. See supra Part I.C.}
\footnote{186. 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, \textit{The Unpaid Work Women Do Adds up to $10.8 Trillion per Year}, \textit{Motherly} (Jan. 21, 2020), \url{https://www.mother.ly/state-of-motherhood/the-value-of-unpaid-care-work-by-women-is-10-8-trillion} [https://perma.cc/4N7U-ZSRJ].}
\footnote{187. See infra notes 389-90 and accompanying text.}
\footnote{188. Rubio-Marín, supra note 186, at 121. In fact, many warn that women lost ground after the election of Donald Trump. See Emily Olson, \textit{How Two Years of Donald Trump Have Shaped Women’s Rights in the US}, ABC News (Jan. 18, 2019, 5:04 PM), \url{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, \textit{Rich White Men Rule America. How Much Longer Will We Tolerate That?}, \textit{Guardian} (May 20, 2019, 2:00 PM), \url{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.”).}
discussed further in Part III.C below.\textsuperscript{189}

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

Although no federal law or initiative has been formally proposed,\textsuperscript{190} some states have begun to take action. In 2018, California passed a law requiring increases in female representation on corporate boards headquartered in California.\textsuperscript{191} A number of states have also passed nonbinding initiatives to enhance diversity on boards.\textsuperscript{192}

\textit{A. California SB 826}

California became the first U.S. state to mandate BGD for corporate boards on September 30, 2018.\textsuperscript{193} California SB 826 reaches all public companies with headquarters in California, amounting to 12\% of all public U.S. firms and over $5 trillion in market share.\textsuperscript{194} The bill requires all companies within scope to have at least one female director by the end of 2019.\textsuperscript{195} 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.\textsuperscript{196}

California SB 826 was preceded by a 2013 regulation setting a voluntary goal of one woman on each board by 2016.\textsuperscript{197} This was the first nonbinding resolution passed by any state.\textsuperscript{198} It required 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 than five seats to have a minimum of one woman.\textsuperscript{199} No meaningful gains resulted from the voluntary

\textsuperscript{189}. See infra Part III.C.
\textsuperscript{190}. 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). However, the Act does not require firms to consider diversity, nor does it define what diversity means. See, e.g., \textit{id}.
\textsuperscript{192}. See infra Part III.B.
\textsuperscript{193}. Greene et al., \textit{supra} note 192, at 1.
\textsuperscript{194}. \textit{Id}. at 2.
\textsuperscript{195}. \textit{Id}. at 1.
\textsuperscript{196}. \textit{Id}.
\textsuperscript{198}. \textit{Id}.
measure by the end of the three-year time frame, leading to the firmer requirements in Senate Bill 826.

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 ($100,000) and three times that amount ($300,000) for each additional violation. There is also a $100,000 fine for failure to report to the California Secretary of State.

In 2019, 625 publicly held companies identified that their principal executive officers were located in California. 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. Of the 330 companies, 282 reported compliance, which was up from 173 in July 2019.

Since California passed the BGD legislation, 511 women have been added to corporate boards in the state. However, despite being the fastest-growing ethnic group in the state, Latinas are not proportionately represented in the new class of female board members.

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200. Id.
203. Cal. S.B. 826 (“For failure to timely file board member information with the Secretary of State ... $100,000[.].”)
205. Id.
members. Hispanics make up 39 percent of California, yet the data show that Latina women only gained seventeen seats, which is 3.3 percent of the newly appointed members. 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).

Despite criticism of SB 826, Massachusetts, Michigan, and New Jersey were also considering BGD legislation in 2019. 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. 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.

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 counter-argument to legislated quotas. Massachusetts, Illinois, and Pennsylvania have each passed nonbinding resolutions regarding gender diversity on corporate boards. However well-intentioned, these measures have not increased BGD, as acknowledged in the comments to California SB 826.

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.”).
213. Id.
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.” The resolution was adopted on April 28, 2017. The resolution noted that in 2016, women held “12.7% of executive positions in the largest 100 public companies headquarteried in Pennsylvania,” despite making up 47 percent of the U.S. workforce. In 2016, the City of Pittsburgh created a Gender Equity Commission, aimed at redressing gender discrimination. 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). CEDAW is also ratified in Pittsburg, Pa., Code of Ordinances tit. I, art. IX, ch. 177C (2019).

In 2014, New York City Comptroller Scott Stringer and the New York City Pensions Fund created the Boardroom Accountability Project (BAP). The project was aimed at “increasing investor involvement in determining the make-up of corporate boards.” 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.” BAP 2.0 discussed diversity as a “strategy for economic success.” To demand transparency, the project asked 151 publicly held companies to provide a board “matrix” identifying the gender and race/ethnicity of individual directors on the board In June 2018, over eighty-five of the BAP companies reported adopting “improved processes and increased transparency.” BAP also initiated a proxy access campaign that would give “large, long-term shareowners,” the ability to “nominate corporate board candidates on a company’s ballot.” In December 2018, New York City hosted the first public meeting of the Commission on Gender Equity to address issues of inequality and discrimination.

217. Tewari et al., supra note 58, at 232.
218. Id.
219. Id.
221. Tewari et al., supra note 58, at 235.
222. Id.
223. Id. at 233.
224. Id.
225. Id. at 233-34.
226. Id. at 234.
227. Id.
228. Id.
229. Id.
230. Id. at 235; see About the Commission on Gender Equity, N.Y.C. COMM’N ON GENDER
While resolutions are important symbols, they have not led to an increase in BGD in the United States. Additionally, these state-level measures do not provide any type of enforcement mechanism, which is the most effective means to accomplish change.

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. 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.”

Opponents of SB 826 also claim that the requirements are in violation of the internal affairs doctrine. Although California has codified the internal affairs doctrine, the bill analysis conducted for SB 826 points to past incidents where California courts “ignored the internal affairs doctrine in certain instances and, therefore, the rule is not absolute.” 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.”

In the United States, the accepted constitutional interpretation is that gender “quotas on the basis of sex violate formal equality and a gender neutral
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reading of the Equal Protection Clause.” 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. 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.” 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. Once you blow the smoke away from the mirror, the continuing historical, individual, institutional, and cultural subordination of women is glaringly clear.

A requirement to remain “gender-neutral” to preserve a fictitious equality is a mechanism to preserve the status quo of a male-dominated society.

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. For example, in 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. 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. Quotas have been upheld to permit a set percentage of government

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238. Rubio-Marín, supra note 186, at 121.
239. Id. at 122.
240. 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. (Fisher I), 570 U.S. 297, 303 (2013).
243. See id. at 1284, 1286.
244. 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].
245. Regents of 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. (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).
246. 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...
contracts being awarded to minority owned businesses. 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.

While race-based quotas are subject to strict scrutiny, gender-based quotas are subject to the lesser standard of intermediate scrutiny. The intermediate scrutiny standard was developed in Craig v. Boren. 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. 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. 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.”

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. 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


249. 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.”).


253. See id. at 197.

254. See 813 F.2d 922, 941-42 (9th Cir. 1987).
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. While it seems clear to some that increasing women in prominent decision-making roles is an important governmental objective, 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.

IV. ANALYSIS OF EU APPROACH TO IMPROVING BGD

Unlike the United States, the EU acknowledges both the business and social rationales for increasing BGD. While women in the United States currently hold only 23.1 percent of publicly held board seats, up from 20.9 percent the in 2019, the EU fares better at 30 percent overall. While the EU


256. See Rhode & Packel, supra note 47, at 378-79.


258. 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.”).


260. Gender Statistics Database: Largest Listed Companies: Presidents, Board Members and Employee Representatives, EUR. INST. FOR GENDER EQUAL. (Nov. 11, 2020),
has long encouraged voluntary measures to increase female participation on boards, a number of member states have also legally mandated BGD requirements.\footnote{261} Several recent studies have observed that corporate boards are more diverse in countries “with formal quotas, codes, and disclosure requirements promoting gender equity.”\footnote{262} 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.”\footnote{263} In 2019, most companies in the EU subject to legislated BGD requirements had actually exceeded those mandates.\footnote{264} Italy and France lead the way with the most companies actually exceeding the female director requirements among MSCI ACWI Index constituents.\footnote{265}

Voluntary targets have a weaker correlation to gender diversity in the EU.\footnote{266} 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.\footnote{267} 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.\footnote{268} As a result, women on boards in the EU increased from 11.9 percent in 2010 to 26.7 percent in 2018.\footnote{269} Today, women comprise 33 percent of board members of the STOXX Europe 600.\footnote{270}

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.\footnote{271} Prior to this paradigm shift, there was a “large gap between the proportion of women on boards among countries with and without gender quotas and disclosure requirements.”\footnote{272}
employed and well-educated women and those sitting on boards of EU companies” in EU member states. Now, numerous treaties in the EU promote equality between men and women. 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 promoting equality in decision-making. 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.

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. 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 which adopted BGD

273. See TFEU, supra note 11, arts. 8, 153, 157 (stating powers of EU institutions and rights of EU citizens); TEU, supra note 11, arts. 2-3 (establishing powers of EU institutions and rights of its citizens).
275. See infra Part IV.A.
276. 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/5FKK-KNJH]; Linda Senden, The Multiplicity of Regulatory Responses to Remedy the Gender Imbalance on Company Boards, 10 UTRLECHT 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-Garcia et al., supra note 124, 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.
mandates beyond just the masculinity and power distance scores, to also include uncertainty avoidance (cultural factors). 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 the extent to which positive action is permitted or required based on the language and judicial interpretation of that language. Appendix A 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. 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. The directive had stalled in the EU Council under previous leadership. Even though there is no national requirement to do so, a number of EU member states have enacted their own regulations. There are eight countries in the EU that have enacted BGD requirements. These include Austria, Belgium, France, Germany, Italy, the Netherlands, Portugal, and Spain. 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 legislation.

279. See id.
280. See id.
281. See infra Appendix A and accompanying notes.
282. See infra Appendix A and accompanying notes.
283. See infra Appendix A and accompanying notes.
France is also one of the few countries receiving top marks for its legal infrastructure on gender equality from the World Bank. 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. 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. The penalty for failure to comply includes an invalidation of the appointment and a loss of fees for directors on non-compliant boards.

Between 2011, the year the BGD quota was first enacted, and 2019, female representation rose from 21.6 percent to 45.3 percent. 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.”

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. Italy has the most severe of potential penalties, 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.”). Of the eight countries with a score of one hundred 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 WOMEN, BUSINESS AND THE LAW 2020, WORLD BANK GRP. 6 (2020), https://issuu.com/world.bank.publications/docs/9781464815324 [https://perma.cc/DUZ3-UEVB].


288. See id.

289. See infra Appendix A.


with fines and loss of director’s fees. 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. In 2019, legislation was introduced that required companies to ensure that no more than three-fifths of “board appointments from 2020 forward” were men. Between 2011 and 2019, BGD rose from 5.9 percent to 36.1 percent for Italian listed companies. 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.

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. In 2007, Spain instituted a 40 percent gender quota by 2015 for publicly held companies with more than 250 employees. Rather than using penalties for failure to comply, Spain offered incentives such as state contracts for those who did achieve this goal. In 2014, the Corporate Enterprises Act was amended to require both public and private corporations to set minimum targets for BGD. 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. Because there are no consequences for the failure to explain, some give no reason at all in their corporate governance reports.

See infra Appendix A.


See id.

See id. art. 34.

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


See id. at 9-10.
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.\textsuperscript{303}

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.\textsuperscript{304} 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.\textsuperscript{305} 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.

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.\textsuperscript{306} In support of the EU

\textsuperscript{303} See infra Appendix A. 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 Beatty, \textit{Betting on Anti-Feminism as a Winning Political Strategy}, \textit{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, \textit{The Left Will Govern Spain, but the Far-Right Is the Real Winner}, \textit{Foreign Policy} (Nov. 16, 2019, 6:36 AM), https://foreignpolicy.com/2019/11/16/spain-election-vox-far-right-socialists-winner/ [https://perma.cc/43RJ-T5QO].


\textsuperscript{305} German Law, supra note 307, at 656.

\textsuperscript{306} See Victor E. Sojo, Robert E. Wood, Sally A. Wood & Melissa A. Wheeler, \textit{Reporting Requirements, Targets, and Quotas for Women in Leadership}, 27 Leadership Q. 519, 525 (2016); Johanne Grosvold & Stephen Brammer, \textit{National Institutional Systems as Antecedents of Female Board Representation: An Empirical Study}, 19 \textit{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 infra Appendix A. The countries with the BGD mandates took one to eight years to achieve compliance with an average of four to five years. See infra Appendix A. The only country without a penalty was Spain. See infra Appendix A. 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
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.”

B. Cultural

As discussed above, culture plays a key role in the likelihood of women advancing to, and succeeding in, corporate leadership positions. 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 uncertainty avoidance, that influence whether the legislated BGD requirements are met. 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. This is evident by its famous welfare system (sécurité sociale), the 35-hour working week, five weeks of holidays per year, and the country’s focus on the quality of life. France has made infra Appendix A.


308. See supra Part I.C.

309. See Cabeza-Garcia et al., supra note 124, at 57.


311. Id. A lower score indicates less concern with competition and a stronger focus on the quality of life. See id. France scores 68 on power distance and 86 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.
significant strides in gender equality in government, boards, and every area surveyed by the European Institute of Gender Equality.\footnote{Id. The high score on uncertainty avoidance somewhat explains the amount of planning and discussion that went into creating laws that advance women. Id.} 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.\footnote{312. 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].} This is particularly true given France’s legislation has a clear penalty for failure to meet the BGD requirements and a clearly defined five year timeframe to comply.\footnote{313. See Country Comparison: France, supra note 150.}

Italy, on the other hand, has one of the largest gender gaps in Western Europe.\footnote{314. See Women in Economic Decision-Making in the EU: Progress Report, supra note 310, at 13-15.} The country scores very high on masculinity according to the Hofstede Index, ranking seventh highest of seventy-six countries.\footnote{315. WORLD ECON. F., supra note 4, at 197 (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).} Italy is divided on power distance tolerance, which measures how hierarchical the country is and its tolerance for inequality.\footnote{316. Marco Tavanti, The Cultural Dimensions of Italian Leadership: Power Distance, Uncertainty Avoidance and Masculinity from an American Perspective, 8 LEADERSHIP 287, 293 (2012).} While Northern Italy touts a more egalitarian society, Southern Italy accepts and endorses its hierarchy.\footnote{317. See Country Comparison: Italy, supra note 148.} However, Italian society in general “continues by and large to privilege men over women.”\footnote{318. Id.} Italy also scores high in uncertainty avoidance, preferring clear rules and shunning ambiguity.\footnote{319. Tavanti, supra note 319, at 294.} Despite the relative acceptance of inequality and traditional gender roles, Italy’s legislated board quota law has been successful.\footnote{320. Country Comparison: Italy, supra note 148.} This may be explained by the significant sanctions corporations face for failing to increase female representation.\footnote{321. See Maida & Weber, supra note 280, 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.”).} This suggests that in less egalitarian cultures like Italy, increases in diversity will not occur naturally without firm regulations.\footnote{322. See supra notes 294-95 and accompanying text.}
The Netherlands has a very low masculinity score and prefers compromise to winning. The Netherlands scores low on power distance and mid-range on uncertainty avoidance, which are all very low compared to other EU member states. The low power distance score represents a desire for equality in society. The uncertainty avoidance score indicates that firm rules are not as influential to change as they are in other countries. 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. The law was considered soft as there were no sanctions for failing to comply. This is not surprising given the relatively low uncertainty avoidance score, indicating that hard rules and penalties are not necessary to encourage compliance. 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. Between 2013 and 2019, BGD rose from 25.1 percent to 31.3 percent.

Spain scores low in masculinity, high in power distance, and high in uncertainty avoidance. The low masculinity score is consistent with Spain’s focus on consensus. Leaders prefer to consult with minority opinions and gain agreement before moving forward with new rules. Yet, hierarchy is accepted in society, which corresponds to the high power distance score. Spain also has a strong appreciation for rules, hence the high uncertainty avoidance. Although Spain generally accepts hierarchy, the low masculinity is likely why they set one of the most ambitious targets

325. Id.
326. Id.
327. Id.
329. Id.
330. See *Country Comparison: The Netherlands*, supra note 149.
332. See infra Appendix A.
334. Id.
335. See id.
336. Id.
337. Id.
for BGD at 40 percent.\textsuperscript{338} This cultural context has still allowed the country to experience gains in BGD, even with only incentives and no penalties.\textsuperscript{339} Nonetheless, the country has not yet met its more ambitious goal of 40 percent women on boards.\textsuperscript{340}

Germany scores high on the masculinity scale, with a society that values performance and status.\textsuperscript{341} It has a relatively low power distance score and a high score for uncertainty avoidance.\textsuperscript{342} The low power distance score represents a highly decentralized structure with low tolerance for hierarchies.\textsuperscript{343} The high score on uncertainty avoidance means that laws are well-thought out and contain a lot of detail to ensure certainty.\textsuperscript{344} Overall, Germany has exceeded its BGD requirement of 30 percent.\textsuperscript{345}

Previous research has found that cultural factors such as higher levels of masculinity and power distance are most associated with greater gender inequality.\textsuperscript{346} Contrary to what we expected, however, these cultural factors did not affect a country’s willingness to adopt BGD requirements.\textsuperscript{347} Instead, high uncertainty avoidance was more influential with countries that value certainty, preferring clear laws requiring action.\textsuperscript{348} 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.\textsuperscript{349} 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.

\textbf{C. Constitutional}

In 1982, when France first passed a political quota for women in municipal elections, it was struck down as being an unconstitutional

\begin{itemize}
  \item \textsuperscript{338} See id.
  \item \textsuperscript{340} See id.
  \item \textsuperscript{341} \textit{Country Comparison: Germany}, HOFSTEDE INSIGHTS, https://www.hofstede-insights.com/country-comparison/germany/ [https://perma.cc/YX57-DGN7].
  \item \textsuperscript{342} Id.
  \item \textsuperscript{343} See id.
  \item \textsuperscript{344} See id.
  \item \textsuperscript{345} See infra Appendix A.
  \item \textsuperscript{346} GEERT HOFSTEDE, GERT JAN HOFSTEDE & MICHAEL MINKOV, CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND 148, 152-53 (3d ed. 2010).
  \item \textsuperscript{347} See, e.g., EUR. COMM’N, supra note 310, at 14-15.
  \item \textsuperscript{348} See infra Appendix A.
  \item \textsuperscript{349} See infra Appendix A.
\end{itemize}
infringement on equality. After a series of laws to create equality for women were also struck down, 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.” 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.

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. 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. 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.

In Germany, like France, initial attempts to create equality for women through quotas were struck down as unconstitutional. 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.” These amendments serve to legitimize legislative measures, such as quotas, aimed at breaking down the wide ranging historical and present day barriers to women. A number of statutes promoting equality were enacted following the amendment. Germany’s national parliament now consists of 30 percent women and its corporations have achieved 35.6 percent female representation on their boards.

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. 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.

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. In other words, with the way courts have interpreted antidiscrimination constitutional provisions, quotas are likely to be struck down due to the gender classification, just as they were historically opposed in France and Germany. This distinction is critical to understand why the United States seems unable to address inequality and why the current anticlassification formulation of the ERA, rather than an anticlassification formulation, will not lead to the progress in gender equality that many of its advocates imagine.

358. GRUNDEGESETZ [GG], art. 3(2) (Ger.) (emphasis added).
360. See infra Appendix A.
361. See Gender Mainstreaming, supra note 362.
362. See, e.g., supra Part I.C.
363. See supra Part I.C.
364. See MacKinnon, Reflections on Sex Equality Under Law, supra note 3, at 1292.
V. PROPOSAL FOR SUBSTANTIVE EQUALITY IN THE UNITED STATES

We cannot expect systemic discrimination to be voluntarily fixed by individuals, institutions, and a culture so deeply tainted by sexism.\textsuperscript{366} 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 gender equality is 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 section, 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.\textsuperscript{367}

As indicated above, countries with BGD requirements fair better than those without—seven\textsuperscript{368} of the eight countries with BGD requirements have exceeded their quota, leaving only Spain falling short of its goal.\textsuperscript{369} France, Italy, Belgium, the Netherlands, and Germany all exceed 33.3 percent, demonstrating a critical mass.\textsuperscript{370} 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.\textsuperscript{371} In the United States, California is the only state that has enacted a BGD requirement.\textsuperscript{372} Although this 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.\textsuperscript{373} As such, a small but significant change must be made to the U.S. Constitution.

\begin{itemize}
\item \textsuperscript{366} See supra Part I.
\item \textsuperscript{367} 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.”).
\item \textsuperscript{368} Portugal has now met its 2018 mandate. See infra Appendix A.
\item \textsuperscript{369} Spain is unique in that it does not have a penalty provision and only provides incentives for meeting the quota. See infra Appendix A.
\item \textsuperscript{370} See infra Appendix A.
\item \textsuperscript{371} EUR. COMM’N, supra note 271, 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.
\item \textsuperscript{372} See supra Part III.A.
\item \textsuperscript{373} See supra Part I.C.
\end{itemize}
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. 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.

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. 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).

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. Thus, it is vital that a newly crafted Substantive Equality Amendment be adopted by the United States to require positive action to be taken to advance women’s equality. 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.

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, thirteen of them (Finland, Sweden, Ireland,

374. Cabeza-Garcia et al., supra note 124, at 64.
375. Houser, supra note 19, 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).
376. See infra Appendix A.
377. See infra Appendix A.
378. See Suk, supra note 358, at 391-93.
379. See id. at 393.
380. Schwartz, supra note 9, at 662-65.
381. France, Italy, Belgium, Germany, Portugal, and Austria have binding quotas, while
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. 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 the ERA was adopted by Congress in 1972, it failed to obtain full implementation. Proponents of the ERA list women’s underrepresentation in positions of power, like corporate boards, as one of the inequalities that the ERA could address. 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. However, scholar Julie Suk argues that the ERA must be conceptualized as a twenty-first century legal infrastructure of gender equality. 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


382. Suk, supra note 358, at 401-02.
384. Suk, supra note 358, at 391-93.
385. Id. at 391.
386. Id.
positions of economic and political power; and violence against women."

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. 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. 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. 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.”

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 action to advance women’s equality using several EU member states as models. 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, specifically on employment issues, including BGD. He also concludes that focusing on antidiscrimination is insufficient to advance women’s participation in leadership. He confirms that requiring positive action through a constitutional amendment to address inequality is necessary to enact laws that will not be invalidated under an antidiscrimination model.

In the United States, this is a prime concern. A constitutional provision (the Fourteenth Amendment’s Equal Protection Clause) and legislation (such as

387. Id. at 384-85.
388. Id. at 385.
389. See supra Part IV.C.
390. Suk, supra note 358, at 439.
391. Id. at 440.
392. McCrudden, supra note 359, at 2.
394. McCrudden, supra note 359, at 2.
395. See id. at 166-67.
396. See id. at 168-69.
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. 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. 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:

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 stricken down as violating the Equal Protection Clause of the Fourteenth Amendment of the Constitution.

This language goes beyond the wording in most of the Amendments we examined because of the insidious inequality that exists in the United States and the troubling retreat from progress here. Once there is a constitutional

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397. See, e.g., supra note 237 and accompanying text.
398. 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 358, at 444.
399. 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.
400. See Shipla 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
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.\textsuperscript{401}

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.\textsuperscript{402} This current antidiscrimination approach in both the 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.\textsuperscript{403} \textit{Wal-Mart 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.\textsuperscript{404}

Given the way the Supreme Court has interpreted the Fourteenth Amendment, the language of the 1972 ERA will not achieve what women

\begin{itemize}
\item 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.
\end{itemize}
expect because it is simply another antidiscrimination measure.\textsuperscript{405} As discussed earlier, another enormous obstacle is the 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.\textsuperscript{406} 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,\textsuperscript{407} 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.\textsuperscript{408} 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.\textsuperscript{409}

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\textsuperscript{405} 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, \textit{More than the Vote: The Nineteenth Amendment as Proxy for Gender Equality}, 15 STAN. J. C.R. & C.L. 349, 376 (2020); see, e.g., Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 735-36 (2014) (holding that an employer’s religious liberty may outweigh women’s rights to healthcare and birth control). Note that the Fourteenth Amendment specifically excluded women from the right to vote by guarantying it to “male inhabitants” and “male citizens.” U.S. CONST. amend. XIV, § 2. “[I]n \textit{Minor v. Happersett} ... [t]he Court held that while women were national citizens, entitled to the protection of the privileges and immunities clause, voting was not a federal right of citizenship, but rather was a right of state citizenship determined by each individual state.” Thomas, \textit{supra}, at 352. For a discussion on the history and results of equal protection cases, see Sessions v. Morales-Santana, 137 S. Ct. 1678, 1689-90 (2017).

\textsuperscript{406} See generally Schwartz, \textit{supra} note 9 (describing these so-called reverse discrimination cases).

\textsuperscript{407} See McCrudden, \textit{supra} note 359, at 19; Suk, \textit{supra} note 358, at 400.

\textsuperscript{408} Suk, \textit{supra} note 358, 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 post-industrial gender inequalities, we focus on BGD in this paper.

\textsuperscript{409} 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 anti-discrimination policy. \textit{Id.} at 394-95.
To implement a “positive measure” or “positive action” approach to gender equality, the first step is to identify the specific objectives to be achieved.\textsuperscript{410} In this case, we are focusing on improving female representation in important decision-making roles, such as on corporate boards. Second, positive measures must be identified and implemented.\textsuperscript{411} 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.\textsuperscript{412} 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.

\textsuperscript{410} McCrudden, supra note 359, at 11.
\textsuperscript{411} Id.
\textsuperscript{412} S.B. 826 § 2(a), (e)(1), 2018 Leg., Reg. Sess. (Cal. 2018).
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. 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. 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, 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 economics seats of power demonstrate 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.

413. Tewari et al., supra note 58, at 249.
414. Rhode & Packel, supra note 47, at 414.
415. Thomas, supra note 234, at 3.
## Analysis of EU and U.S. Board Gender Diversity

| Location   | Masculinity | Power Distance | Uncertainty Avoidance | BGD penalty for failing to meet quota | Const. | Political quota | % quota BGD | 2019 actual % BGD | Initial date BGD | Years given to comply BGD | Success BGD | Years to meet quota |
|------------|-------------|----------------|-----------------------|---------------------------------------|--------|----------------|-------------|----------------|---------------------|----------------------|-------------------------|-------------|----------------------|
| France     | 43          | 68             | 86                    | Open seat and loss of fees             | Pos.   | Leg.           | 40          | 45.3           | 2011 (21.6)        | 5 - 2016 (41.2)           | 5 - Met 2016       | 5 - Met 2016          |
| Italy      | 70          | 50             | 75                    | Severe fines and loss of fees          | Pos.   | Leg.           | 33          | 36.1           | 2011 (05.9)         | 4 - 2015 (28.6)           | 6 - Met 2017       | 8 - Met 2019          |
| Belgium    | 54          | 65             | 94                    | Open seat and loss of fees             | Pos.   | Leg.           | 33          | 35.9           | 2011 (10.9)         | 6 - 2017 (30.7)           | 8 - Met 2019       | 8 - Met 2019          |
| Netherlands| 14          | 38             | 53                    | Comply or explain*                    | Anti-disc | Vol.           | 30          | 34.2           | 2013 (25.1)         | 3 - 2016 (27.5)           | 5 - Met 2018       | 5 - Met 2018          |
| Germany    | 66          | 35             | 65                    | Open seat                             | Pos.   | Vol.           | 30          | 35.6           | 2015 (26.1)         | 1 - 2016 (29.5)           | 2 - Met 2017       | 2 - Met 2017          |
| Spain      | 42          | 57             | 86                    | Incentives only                       | Pos.   | Leg.           | 40          | 26.4           | 2007 (06.2)         | 8 - 2015 (14.2)           | Fail                 |                          |
| Portugal   | 31          | 63             | 99                    | Open seat (potential fine after 360 days) | Pos.   | Leg.           | 20/33.31 | 24.6           | 2017 (16.2)         | 2 - 2018/20 (21.6)        | 1 - 2018            | Met/Open (21.6)        |
| California |             | -              | -                     | Fines                                 | Anti-disc | None           | 1/2 or 312 # not % | 21.213       | 2018 (17.4%)14     | 1 - 2019 (21.2%)       | 1 - Met 201915         |                        |
| U.S.       | 62          | 40             | 46                    | None                                  | None    | Vol.16         | None        | 20.417         |                      |                      |                        |

Hofstede scores: $>50$ is relatively high (purple), $<50$ is relatively low (blue)

2. See generally id.

3. See generally id.


5. BGD percentage in year of enactment. Id. (choose the indicated year in the “Time Period” dropdown; then click “Apply”).

6. Id.

7. This was a temporary measure, expiring after three board renewals, but in 2018 the Corporate Governance Code was amended to maintain the improvements made. PAUL HASTINGS, BREAKING THE GLASS CEILING: WOMEN IN THE BOARDROOM 96-97 (2018).

8. Although the law expired in 2016, Parliament threatened to change the law to include sanctions if a 20 percent target was not met by 2019 and a 30 percent target was not met by 2023. 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, 188-89 (Cathrine Seierstad et al. eds., 2017).
9. Although the initial law expired in 2016, it was renewed through 2020. **Paul Hastings**, supra note 7, at 100.


11. Twenty percent by 2018 and 33.3 percent by 2020.

12. Unlike member states’ laws requiring a certain percentage, California requires one woman per board by December 31, 2019; two women must be on boards with five members or fewer, while three women must be on boards with six or more by December 31, 2021. S.B. 826, 2018 Leg., Reg. Sess. (Cal. 2018) (codified as Cal. Corp. Code §§ 301.3, 301.4, 2115.5 (West 2021)).


14. Id.


17. 2020 WOMEN ON BOARDS, supra note 13, at 6.