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DIVERSITY IN CORPORATE BOARDROOMS

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ABSTRACT

Gender diversity on corporate board is a topic that has largely been discussed in the past decade.

Before recent years not many solutions were taken to implement and improve gender diversity in boardrooms**.**

Beginning in California, the first country in the US considering passing a law about gender diversity and going through Europe, the decision to mandate laws about gender diversity are being spread through various states, even if unfortunately, despite these laws the achievement of a fully integrated concept of gender diversity is still a long way.

Lot of proofs have been analyzed about the way in which gender diversity improves firm performances but universally not many solutions besides laws and agreements, have been found.

Boardrooms' diversity surely brings lot of advantages among the boardroom and for the corporation 'well-being' at financial, managerial, and business level. There are many theories supporting such ideas that this dissertation will analyze and discuss.

The relationship between board diversity and initial public offering is also a great method to perceive in which way gender diversity affects the performance of a corporation, at the moment when the corporations want to go public.

Although the presence of many proofs regarding the benefits of gender diversity on corporate board, there also are evidence against it, several scholars and commentators do in fact believe that the correlation between the firm performance and the gender diversity on the boardroom is so small that it results statistically irrelevant. Moreover, where statistically relevant results are found, they are not enough to show that a correlational relationship proves causality, so to sum up they do not constitute a fair proof.

It is universally known that there exists obvious difference between a male and a female approach to an issue or to a general topic. The problem-solving process might be very different between the two and this may be due to different previous knowledge, age, culture, studies, or general life background.

However, many CEOs today are getting on board with the idea of a more diverse board that can include all types of possible directors without basing their hiring decision on sex or even on previous experiences.

Many solutions to solve these issues are also suggested so that in the future, the acceleration of inclusion in boardrooms, can be justified for those who do not believe or still are skeptical on the positive impact of gender diversity in boardrooms.

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The discussion on the gender diversity on corporate board does not strictly regard the ratio of men to women on a board, but also the implications that such topic stress. In particular, the first chapter of this dissertation will analyze many aspects about the subject: the efficiency prospective, meaning in which way the gender diversity might improve or undermine the efficiency of the corporation itself, which ones are the advantages of having a diversified board, how this diversification might lead to an upgrade in the management of a corporation and if a female representation might actually improve the firm performance.

On the other hand, it is also going to be analyzed which ones are the downsides of a diversification, how having a high percentage of diversification might affect the decision-making process of the corporate board explaining in which way diversity, differences in point of view, and different cultural backgrounds might create communication difficulties, along with the relationship between diversity and the Initial Public Offering (IPO), namely how the IPO is affected with respect to the ratio of men to women on the corporate board; IPOs are an appropriate venue to study the effect of shareholder preferences on gender diversity because IPOs are a type of corporate transaction where investors are able to express their opinions about the valuation of a company. Mainly, there are two hypothesis that highlight in which ways IPO shares underpricing and gender diversity are connected.

Furthermore, the second and the last part of this dissertation will go in depth about the Senate Bill 826, the Assembly Bill 979, and the various opinions that arose from the bills, which are both for and against what is trying to be mandated.

[1] Stephanie Sonnabend et al., *2020 Women on Boards Gender Diversity Index,* 2020 WOMEN ON BOARDS, (2020)
[2] Mali Gero & Stephanie Sonnabend, *Gender Diversity Index,* GDI REPORT, (May, 2016)
[3] Vell Executive Search Inc., *Women Board Members in Tech Companies,* VELL REPORT, (Mar. 2017).

II. GENERAL OVERVIEW

The acknowledgement of the importance of the gender diversity on corporate board has been a major turning point for the assessment of the corporation performances.

Gender representation on corporate boards of directors refers to the proportion of men and women who occupy board member positions. To measure gender diversity on corporate boards, studies often use the percentage of women holding corporate board seats and the percentage of companies with at least one woman on their board. According to data from 2018, women held 20.8% of the board seats on Russel 1000 companies[4], in 2015 women occupied up from 17.9% board seats. [5][6] Moreover, most percentages for gender representation on corporate boards refer only to public company boards, in fact private companies are not required to disclose information on their board of directors, so the data is less available.

The discussion on the gender diversity on corporate board does not strictly regard the ratio of men to women on a board, but also the implications that such topic stress. In particular, this dissertation will analyze many aspects about the subject: the efficiency prospective, meaning in which way the gender diversity might improve or undermine the efficiency of the corporation itself, which ones are the advantages of having a diversified board, how this diversification might lead to an upgrade in the management of a corporation and if a female representation might actually improve the firm performance. On the other hand, this it will also be analyzed which ones are the downsides of a diversification, how having a high percentage of diversification might affect the decision-making process of the corporate board explaining in which way diversity, differences in point of view, and different cultural backgrounds might create communication difficulties.

Furthermore, the current state of gender diversity will be highlighted, analyzing data and the amendments in different countries and how the diverse legislatures are acting towards the diversity; the relationship between diversity and the Initial Public Offering (IPO), namely how the IPO is affected with respect to the ratio of men to women on the corporate board; IPOs are an appropriate venue to study the effect of shareholder preferences on gender diversity because IPOs are a type of corporate transaction where investors are able to express their opinions about the valuation of a company. Mainly, there are two hypothesis that highlight in which ways IPO shares underpricing and gender diversity are connected. The first is defined as the superior firm hypothesis and it explains how a large percentage of gender diversity is actually a positive note on the firm especially for the presence of women. For instance, having in the same board a more risk-seeking men and a risk-averse woman, the latter may reduce the negative impact of male overconfidence that might be represented by excessive risk-taking or over-investment. Moreover, a more gender-diverse board, is more resistant to groupthink meaning they will improve their ability to monitor and advise management.[7]

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[4] *Supra* note 1.
[5] *Supra* note 2.
[6] *Supra* note 3.
[7] Jason Sandivk, et al., *Are Women Underpriced? Board Diversity and IPO Performance,* HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE, (2021).

Furthermore, a highly diverse leadership will appear to be a positive note about the firm's ability to attract and retain a diverse group of employees. The second is called investor demand hypothesis which states that diversity is a demand placed on firms by investors for reasons that goes beyond the future performance of a corporation. In the last ten years, "Corporate Social Responsibility (CSR) ratings, became important considerations for institutional investors portfolio holdings". If investors when forming portfolio holdings feel overstretched to include CSR criteria it is possible that the demand for firms with gender-diverse board will increase.[8]

Lastly, which ones are the corporate motivation to take action to implement and change the situation and make board rooms more diverse, and in cases where a full diverse corporate board still has not been achieved, how to reach this result providing few solutions to drive to an ideally diverse board.

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[8] *Supra* note 4.

A. *Definition of Diversity on Boardrooms and Current State*

The definition of diversity on corporate board does not universally exist. There are ways and factors that make a board less homogeneous, such as age, gender, race, educational background, and professional qualifications. Sometimes also fewer tangible factors are taken into consideration as personal attitudes and life experience.[9] The aim of board diversity is creating a spectrum that contains different characteristics and demographic attributes in the boardroom. The simpler and most common measure to create heterogeneity is to include women on the board.[10]

According to an article from Deloitte Africa Center for Corporate Governance on board diversity, diversity takes various forms in a boardroom and can be broadly categorized into the following elements: age, gender, ethnicity, geography, independence, skills expertise, and experience.[11]

The first characteristic to analyze would be age. Board members generally tend to be older; this happens because many boards find links between age and experience. Certainly, having more mature directors might be efficient in terms of knowledge, but having younger directors might give a fresher prospective into the boardroom.

Second would be gender. This element is the one considered the most as a form of diversity. Historically corporate boards of directors have been widely composed by male directors. Only recently, shareholders and boards noticed the advantages and benefits of a more gender-balanced boardroom. Report[12] found that basically, 18% of the 250 US public companies surveyed had increased the number of women on their boards in the last year. Increasingly, females are sitting with males in boardrooms, introducing a new prospective and a new style of management.

Third would be ethnicity. Ethnicity diversity concerns having a broad mix of individuals with various cultural, racial, and religious backgrounds. The mix should be a representation of the operational area of the corporation.

Proceeding, geography. Geographic diversity concerns having a mix of individuals with various geographic locations. As the ethnicity mix should be a representation of the operational area of the corporation, also the geographic mix should be a representation of the areas that the corporation operates in. Because of the rising of globalization and the increasingly global workspace, it would be very counterproductive not to take into consideration this aspect especially for a multi-national

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[9] Eric YW Leung, *Diversifying the Board – A Step Towards Better Governance,* ACCA GLOBAL, (Aug 17, 2015).
[10] *Supra* note 6.
[11] Johan Erasmus, et al., *Diversity in the Boardroom Article 1, What is board diversity?,* DELOITTE, [hereinafter Erasmus, *Diversity*].

[12] Darla C. Stuckey & Maureen P. Bujno, *Board Practices Report: A Transparent Look at The Work of The Board,* SOCIETY FOR CORPORATE GOVERNANCE, (2017).

company. According to recent studies, in European boards, almost 90% of them include at least one director from a country other than the one the company is incorporated in.

Furthermore, independence must be considered. What does it mean that a director is independent? "A director is independent if he can base his decision on the corporate merits of the subject before the board rather than extraneous considerations or influences".[13] According to the European Confederation of Directors' Association (ecoDa) Principles, the board should determine the independence in judgement and character after considering the pertinent factors for instance individual relationship or close family ties with the corporation.

The last aspects to take into consideration are skills, expertise, and experience. Having the perfect mix of the skills, expertise and experience is very important to give the board of directors all the instrument needed to guide the strategies and business of the company.

According to Deloitte Board Practices Report from 2014, one of the top three requested board skills and experiences in US public companies, is C-suite experience.[14] "C-suite experience refers to the executive-level managers within a company. Common c-suite executives include chief executive officer (CEO), chief financial officer (CFO), chief operating officer (COO), and chief information officer (CIO)"[15]. Other non-C-suite executives for instance academics, entrepreneurs or business unit heads can create a more disparate pool of individuals that could bring wider and insightful perspectives into the boardroom.[16]

To further diversify boardrooms, it is interesting to take a look at directors with a narrower expertise creating a niched environment, for example few directors more specialized in the technological field in the increasingly digital environment are proved to be an added value for the company.[17] Another example, since one of the most valuable assets of a company is their workforce, an individual in the boardroom having human capital management expertise would be very valuable. According to a US survey, only one out of five board had an expert member in human capital management.[18]

In September 2018, California became the first U.S. state to pass the Senate Bill 826, a law mandating that all public companies with executive offices in the state must have at least one woman on their boards by December 2019. No later than 2021 the bill would increase the required minimum number to at least two female directors out of a total of five, or three female directors out of a total of six or more directors. [19]

Since 2001, DiversityInc, has been annually announcing the results of its competition called 'Top 50 companies for Diversity'. According to their results, comparing scores of the top companies for

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[13] Stephen M. Bainbridge, *Corporate Law,* 2015, p.142, Foundation Press.
[14] See Erasmus, *Diversity,* supra note 8.
[15] Andrew Bloomenthal & Somer Anderson, *C-Suite,* INVESTOPEDIA, (2021).
[16] Deborah De Haas & Byron Spruell, *Changing Course on Boardroom Composition,* NACD DIRECTORSHIP, (2015).
[17] Johan Erasmus et al., *Diversity in the Boardroom Article 1, What is board diversity?, DELOITTE*, (2015).
[18] Edward E. Lawer III, *Boards as Overseers of Human Capital,* BOARDS & DIRECTORS, 33(3), at 56-59, (2009),
[19] Cal. Legis. Serv. Ch. 954 (S.B. 826) (current version at CAL CORP CODE § 301. 3), (2018).

board of directors in the EEDI (Employee Engagement, Diversity, and Inclusion) category, data have shown that companies with no women on their boards do perform worst. [20]

1. Europe VS. California

For more than a decade, diversity laws that mandate female board representation have been around. The first country to mandate a law requesting women in the boardroom was Norway, in particular, the law mandated that at least 40% of the board seats of publicly listed companies need to be occupied by females. A Deloitte report shows that Norway is at the top of the ranking having a 41% of board seats held by women, followed by France (37.2%) and Sweden (33.3%).[21] Almost 15 years later California was the first to mandate a board diversity law in the US followed by the state of Illinois in 2019 and further Washington. Other states are currently drafting similar laws for the upcoming years.

Unfortunately, although these laws are promoting boardroom diversity, they are not enough to ensure parity is achieved, to do that companies need to change the current traditional mindset and get into the perspective that the current social environment and economy require a broader view due to new risks and the more diverse demand, which to be answered need a solution that a key asset as board diversity is, could give.[22]

As previously discussed, California's Senate Bill 826, mandate that all public companies with executive offices in the state must have at least one woman on their boards by December 2019.[23] This first phase has currently been concluded, even though 47% (48 out of the 330 companies that submitted a report) of the companies did not disclose their diversity data as per law. California will however publish an annual report stating reputational damage, financial fines, and a list of the compliant and non-compliant companies.

California's State Bill 826 proceeds mandating that no later than 2021 the bill would increase the required minimum number to at least two female directors out of a total of five, or three female directors out of a total of six or more directors. This second phase has a deadline of December 2021.[24] Companies who were unaffected by the 'phase 1' must now adjust their composition of the board to avoid reputational damage.

2. European Legislation on Diversity on Corporate Board

In Europe, the situation had to be controlled better in order to make the diversity growth start.

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[20] Richa Joshi, *Board Diversity: No Longer Optional,* HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE, (2020), [Hereinafter Joshi, TruevalueLabs, *Board Diversity].*
[21] Dan Konisburg, *Deloitte Global's latest Women in the Boardroom report highlights slow progress for gender diversity,* DELOITTE GLOBAL, (Oct. 30, 2019).
[22] See Joshi, TruevalueLabs, *Board Diversity, supra* note 17.
[23] *Supra* note 19.
[24] *Supra* note, 20.

According to data from April 2016, in the EU-28 member states, the average share of women on the boards of the largest publicly listed companies, reached 23.3% which correspond to a rise of 0.6 percentage points since October 2015 when the last data were collected.[25] In only ten countries women account for at least a quarter of board members, these are: France, Sweden, Finland, Italy, Latvia, Germany, Netherlands, UK, Belgium, and Denmark.[26]

Despite the laws from the European Commission, the percentage growth of women on boards was not enough. Therefore, in November 2012 the European Commission put a forward law to accelerate the process. Results were seen from 2010 to 2016 when the shares had risen of 11.4 percentage points in five years and a half, and subsequently an average of 2.1 percentage points/years which was more than four times the previous rate.[27]

As of today, in general women are underrepresented in top position in almost any sector. In the EU in particular, they make up 36% of the managers whilst women on boards of the largest listed companies[28] in the EU account for 28.8%.[29] Although since 2010 a certain rate of progress has been seen, it only concentrated in few countries where governments took legislative action.

Which is the current situation? Commissioner Dalli in 2012 proposed a Directive called "women on boards" but the proposal was blocked in the Council in 2013.[30] It aimed to address inequality and required that women should have made up a minimum of 40% of company boards by 2020 for private companies and 2018 for public companies.[31] As of today, the percentage of women on boards still remains very low. However, a little progress has been seen due to the advent of the Covid-19 pandemic, and the recent racial injustice protests. These events require companies to up their game with regard to workplace diversity. Spotlight Events captured since May 2020 an increase in female representation not only at managerial level but also inside boardrooms.

Unfortunately, a directive on gender balance it is not enough, and will not be effective if not going hand in hand with "a series of substantial and integrated implementation policies"[32] able to hamper the obstacles for women to reach top positions.

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[25] Vera Jourova, *Report on equality between women and men in the EU,* EUROPEAN COMMISSION, (2019).
[26] *Only 1 manager out of 3 in the EU is a woman…even less in senior management positions,,* EUROSTAT NEWSRELEASE, (Mar. 6, 2020).
[27] *Supra* note, 23.
[28] Publicly listed means that the shares of the company are traded on the stock exchange. Only companies registered in the country concerned (according to the ISIN code) are taken into account.
[29] European Union, *2021 report on gender equality in the EU,* EUROPEAN COMMISSION, (2021).
[30] Jòzsef Antall, *Joint JURI-FEMM hearing "Women on Boards",* COMMISSIONS EUROPEAN PARLIAMENT, (Sept. 21, 2020).
[31] European Trade Union Confederation, *Enhancing gender balance in company boardrooms,* ETUC, (Sept. 23, 2020).
[32] *Supra* note, 28.

III. HOW DOES GENDER DIVERSITY ON CORPORATE BOARD IMPROVES FIRM PERFORMANCE?

The question to be answered is: how does gender diversity on corporate boards improve firm performance, and what are the main reasons to study gender diversity in leading positions?

A. *Tangible and Intangible Implications of Female Representation*

The implications at managerial level are various. Some studies shows that women improve management abilities, innovation, and decision-making processes. Moreover, women in general tend to be more people-oriented and more inclined to personal relations.[33] Overall, they give a new and fresh point of view in analyzing corporate decision and in understanding the environment in a different way. Gender diversity is related to improvements in problem solving, creativity, learning, flexibility, and variety of capabilities which can increase the probability of introducing new products or services in the organization.[34]

Female representation in top management improves firm performance only to the extent that a firm's strategy is focused on innovation.[35] Besides, having a more gender diverse board is important for the reflection that a company gives of itself, it shows competitiveness, more meritocratic recruitment, and promotion process.[36]

When top management teams are more diverse, the innovation ideas will translate into a so called 'dominant management logic', this kind of logic incorporates women's perspective which translates into more creativity in decision-making, a more participatory climate, and different configurations of resources.[37]

B. *Relationship Between Female Representation and Firm Performance*

There exists an empirical relationship between female representation at the top of corporate hierarchy and firm performance.[38] According to Terjesen, Sealy and Singh, at the individual level

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[33] Anna Gòrska, *Gender Differences in Leadership,* RESEARCHGATE, (Jan. 2016).
[34] Jenny Marìa Ruiz-Jiménez & Maria del Mar Fuentes-Fuentes, *Management capabilities, innovation and gender diversity in the top management team,* Vol. 19 Issue 2, BRQ BUS. RES. Q., at 107-121 (Apr-June 2016). [Hereinafter Marìa-Ruiz & Mar Fuentes-Fuentes, *Management*].
[35] Christian L. Dezso & David Gaddis Ross, *Does Female Representation in Top Management Improve Firm Performance? A Panel Data Investigation,* STRATEG. MANAG. J., Vol 33(9), at 1072-1089, (2011). [Hereinafter Dezso & Ross, *Does Female*].
[36] *Supra* note, 32.
[37] See Marìa-Ruiz & Mar Fuentes-Fuentes, *Management,* supra *note,* 31.
[38] Siri Terjesen et al., *Women Directors on Corporate Boards: A Review and Research Agenda,* Vol.19 Issue 3, CORP. GOV., at 320-337, (June 7, 2019).

prospective the theory tends to focus on characteristics such as human capital, status, and social capital of women.[39]

The human capital theory examines the role of education, skills, and experience of an individual. According to Tharenou, Latimer and Conroy women compared to men normally made fewer investments in education and this reflects in lower pay and promotion.[40] Gatekeepers (mostly male) do not offer women the same rewards that could be training or development, however Sigh Terjesen and Vinnicombe[41] in their study of multiple human capital of new directors of the FTSE 100 firms in the UK, argue that women are more likely to have international experience and MBA degrees. However, compared to male female directors are less likely to have CEO/COO experience.

For what concerns status characteristics, being women a low-status group, to be perceived as being high ability, they must provide more evidence than men, indeed a study from Hillman, Cannella and Harris[42] find that women directors are more likely to have advance degree with respect to males.

C. Gender Social Identity Theory

The gender Social Identity theory[43] explores how individuals try to surround themselves with other individuals with similar perspectives, values, and demographic profiles, indeed according to Tajfel and Turner individuals tend to identify themselves according to the group they belong in that can comprehend race, gender, occupation, or class.[44] Since individuals consider themselves as in members in the group or out of the group, in the group members tend to give and perceive higher evaluation of others member 'in the group', meaning they make it more difficult for members 'out of the group' to join. This explanation applies to the case of boardrooms being mainly composed of males which are 'in the group' members, making it harder for women 'out of the group members' to join.[45]

At the firm level, the women's representation on boards is directly connected to the industry type, the size, the connection with other female directors on other boards and the diversification strategy.[46]

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[39] *Supra* note, 35.
[40] Phyllis Tharenou, et al., *How do you make it to the top? An examination of influences on women's and men's managerial advancement,* Vol. 37 Issue 4, ACAD. MANAGE J., at 899-931, (Aug. 1994).
[41] Siri Terjesen et al., *Newly appointed directors in the boardroom: how do women and men differ?* Vol. 26 Issue 1, EUR MANAG J., at 48-58, (Feb. 2008).
[42] Amy J. Hillman et al., *Women and Racial Minorities in the Boardroom: How Do Directors Differ?,* Vol. 28 issue 6, J. MANAGE, at 747-763, (2002).
[43] Travis Dixon, *What is Social Identity Theory?,* IB PSYCHOLOGY, (Oct. 24, 2016).
[44] Campbell Leaper, *More Similarities than Differences in contemporary theories of social development?,* SCIENCE DIRECT, (2011).
[45] *Supra* note, 41.
[46] Amy J. Hillman et al., *Organizational Predictors of Women on Corporate Boards,* Vol. 50 Issue 4, ACAD. MANAGE. J., at 941-952 (Aug. 2007).

In general, top management teams are consistently composed of men. When a woman joins a top management team, the latter becomes more diverse. The presence of a woman gives a different social categorization and gives different information. The improvement in the information processing and decision-making of the team can be seen first, by the diversity in life experience that a woman has, thus they might add strategic questions for female consumers, additional insights, employees, and trading partners.[47]

D. *The Effects of Heterogeneity*

When more heterogeneous groups are formed, new knowledge and new points of view came up. New solutions might be given, and new debates arisen. Studies based on female leaders' interviews suggest that women in leadership positions, emphasizes inclusion, they encourage participation and keep open communications channel with their subordinates, hence creating rather than a hierarchical environment more of a cooperative environment.[48] Accordingly, gender diversity gives expectation of improving team's task performance. Better task performance leads directly to better firm performance. The presence of a women in corporate boards indicates a 'healthy growth environment' for women in lower-level managerial position, meaning that the presence of a women in top management indicates that the culture of the firm is friendly to women and committed to the advancement of women at all levels. [49][50]

IV. RELATIONSHIP BETWEEN BOARD DIVERSITY AND INITIAL PUBLIC OFFERING (IPO) PERFORMANCE

A. IPO Definition

The Initial Public Offering (IPO) refers to the process of offering shares of a private corporation to the public in a new stock issuance.[51]

Over the past two decades studies have shown evidence that in general gender diversity on corporate board has a positive impact on the value of the company for various reasons. Other have found that overall, the average effect of gender diversity on corporate board has a negative impact on firm performance.

In January 2020, the Security Exchange Commission required through the adoption of the Rule 5605(f) 'Diverse Board Representation', that all Nasdaq-listed companies, have (A) at least one director who self-identifies as a female and (B) at least one director who self-identifies as a Black or African American, Hispanic or Latin, Native American, Alaska native, Asian, Pacific Islander,

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[47] Catherine M. Daily et al., *A decade of corporate women: some progress in the boardroom, non in the executive suite,* Vol. 20 Issue 1, SMJ, at 93-100, (Feb. 5, 1999).
[48] See Dezso & Ross, *Does Female,* supra *note*, 32.
[49] Diana Bilimoria & Jane V. Wheeler, *Women Corporate Directors: Current Research and Future Directions,* in Women in Management Current Research Issues, Vol. II, 138-163, Marilyn J. Davidson, Ronald J. Burke, Chapman publishers, (Jan. 2000).
[50] Dan R. Dalton & Catherine M. Daily, *Women in the boardroom: a business imperative,* Vol. 24 Issue 5, J BUS STRATEGY, (Oct. 2003).
[51] Jason Fernando, *Initial Public Offering (IPO),* INVESTOPEDIA, (Mar. 1, 2021).

Native Hawaiian, two or more race or ethnicities or as LGBTQ+ , or (C) to explain why the company does not have at least two directors on the board who identifies as the category listed above.[52]

B. How is IPO the Appropriate Unit of Measure?

The main reasons why IPOs are an appropriate value to study the effect of shareholder preferences for gender diversity is that it is the only type of transaction through which investors can express their opinion about the valuation of a company.[53] It is not clear whether diversity causes performance, it is very much clear that it is impossible that the underpricing during the process going public causes firms to put women on board. In fact, a firm being underpriced does not necessarily means it is a better firm.

There are two hypotheses whether gender diversity might be related to IPO underpricing. The first hypothesis called 'value added hypothesis' states that just by being on the board, women add value. This happens because in a wholly male composed boardroom, assuming that all men are risk-seeking, having one woman that might be risk-averse would reduce possible negative consequences that might be: excessive risk taking, or over-investment. Furthermore, gender-diversity drastically reduce groupthink and send positive signals about the firm. It represents the firm's ability to retain and attract a diverse pool of employees and customers. Finally, this hypothesis also assumes that these possible benefits of gender diversity might not be incorporated in the offer price by investment banks.[54]

The second hypothesis is called 'investor demand hypothesis', according to it diversity is a form of demand placed by investors on firms, for reason other than the future expected firm performance. This argument is against the 'value added' hypothesis which gives a positive effect on performance. Instead, what happens is that the value of the firm rises, not because profitability increases but because cost of capital falls. Although accordingly to the 'value added' hypothesis boards with a higher rate of gender diversity should have higher performance however stock performance predictions are ambiguous on that point.[55]

The investor demand hypothesis argues that investors are willing to pay a premium, hence they increase the demand for newly issued stock of firms with diverse boardrooms.

The prediction of IPO-returns from the investor demand hypothesis are ambiguous because the shares market price on the first day, does not mean that in the long-run investors will earn high returns just because they have invested in a firm with a gender-diverse board.[56]

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[52] Securities and Exchange Commission, Release NO. 34-90574, File No. SR-NASDAQ-2020-081, (Dec. 4, 2020).
[53] P. Raghavendra Rau et al., *Are women underpriced? Board Diversity and IPO Performance,* INSEAD, European Corporate Governance Institute, (Feb. 26, 2021), [hereinafter Rau, Sandvik & Vermaelen, *Are women*]
[54] Chen et al., *Why female board representation matters: the role of female directors in reducing male CEO overconfidence,* Vol.53, J. EMPIR. FINANCE, at 70-90, (2019).
[55] See Rau, Sandvik & Vermaelen, *Are women,* supra *note* 50.
[56] *Supra* note 52.

However statistically in a sample of over 1,100 US IPOs from 2000-2018[57], results shows that gender diversity is related positively to underpricing on the issue date. Furthermore, gender-diverse board IPOs approximately leave $28 million more IPO profits on the table, compared to all male boardrooms IPOs.

C. *Latest Yearn and Long Run Results*

In the last ten years the amount of pressure from institution to increase diversity made the effect of board gender diversity greater than previous time periods. The number and the work experience of non-executive female directors increased in the last years. Investors have access to private information that are not fully disclosed in the IPO firms' offer prices, hence this leads to increased underpricing among gender-diverse boardrooms.

It remains unclear whether gender-diversity are actually more effective but investors do place a premium on diversity. Because of several factors as the Nasdaq proposal on diversity, and the Goldman Sachs rule, for small firms and those considering an IPO it would become necessary to diversify their board in order to be able to receive more investments hence growing opportunities in the future.

To conclude, in the long-run there are no empirical results that a more gender-diverse board leads to a bigger profitability for the firm. But the results that came up from the study of the IPO underpricing are very positive. Underpricing occurs when the issue price is above the initial price range. Results have shown that firms with a greater diversity in their boardrooms experience a 9.0 percentage point larger level of underpricing then those without a gender-diverse boards, and on average leave on the table $28 million more.[58]

V. THE EVIDENCE AGAINST THE GENDER DIVERSITY ON CORPORATE BOARDS

Many commentators suggest that gender diversity on corporate boards boosts and improve the firm's performance. However, seversl academic research show a totally different point of view on the subject. Many studies suggest that the relationship between company performance and gender-diversity is non-existent or very weakly positive.[59]

A. The 'Downsides', Research and Results

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[57] *Supra* note 53.
[58] *Supra* note 54.
[59] Wharton University of Pennsylvania, *Research Review: Does Gender Diversity on Boards Really Boost Company Performance?,* WHARTON SOCIAL IMPACT INITIATIVE, (June 1, 2017). [hereinafter Wharton, *Research Review*]

To discuss the 'downside' of the gender-diversity on corporate board there will be references to two meta-analyses that reached very similar conclusions: Post and Byron (2015)[60] and Pletzer, Nikolova,Kedzior and Voelpel (2015).[61] The former analyzes findings from 140 studies on gender-diversity in boardrooms from more than 30 countries, while the latter conducted a smaller set of study, 20, which tested the relationship between financial performance and board gender diversity.

The results of these two studies, suggested that there is nearly zero evidence that the presence or the addiction of a women on the board causes a change in the firm performance. Furthermore, according to them, females must be appointed for gender equality reasons and not because their presence leads to an improvement in the company performance. [62]

Post and Byron found that the correlation between firm accounting performance and board gender diversity was 0.47, meaning that firms with more female in the boardrooms have slightly better 'accounting returns.[63] This relationship was statistically significant, but then they proceed to analyze the relationship between firm market performance and board gender diversity which turned out to be statistically insignificant. According to Platezer, Nikolova, Kedzior and Voelpel it resulted to be .0.1.[64]

B. Rebutting the Thesis in Favor of Diversity on Corporate Board

The argument that gender-diversity improves firm performance is based on the fact that female might bring a different or broader point of view since they might have different knowledge, values and experiences compared to their male counterparts, hence increasing the board's 'cognitive variety' meaning that more if more options are brought to the table, it is most likely that a bigger debate on these options will arise, leading to a more thoughtful decision.

Despite being this logic very effective it might not be necessarily true. The women in the corporate boards may not differ much in their knowledge, values and experiences compared to man who already are on these boards. Hence, they might not bring the 'cognitive variety' that would lead to a better firm performance. Research most certainly indicates that there is a difference among individuals in these characteristics, but there is no evidence that such differences are proper of the individual's gender.[65]

Pretending that the female nominated in the corporate board actually differs in characteristics from the other males in the boardroom, it is not proved for sure that this woman will speak up and influence the board of directors' decisions. It is not proved for sure that even if she does speak up

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[60] Corinne Post & Kris Byron, *Women on Boards and Firm Financial Performance: A Meta-Analysis,* Vol. 58 Issue 5, ACAD.MANAGE J., (Nov. 7, 2014). [hereinafter Post & Byron, *Women on Boards*].
[61] Jan Luca Pletzer et al., *Does Gender Matter? Female Representation on Corporate Boards and Firm Financial Performance – A Meta – Analysis*, Vol.10 Issue 6, PLOS ONE, (June 18, 2015). [hereinafter Pletzer et al., *Does Gender Matter?*].
[62] Marek Gruszczynski, *Women on Boards and Firm Performance: A Microeconometric Search for a Connection,* Vol. 13 Issue 9, J. RISK FINANCIAL MANAG., 218, (Sept. 19, 2020).
[63] See Post & Byron, *Women on Boards, supra* note 57.
[64] See Pletzer et al., *Does Gender Matter? supra* note 58.
[65] See Wharton, *Research Review, supra* note 56.

her intervention is consistently positive. According to Chen, Crossland and Huang, (2016)[66], gender-diverse boards make fewer acquisitions than all male-boards.

If the addiction of women does add 'cognitive variety' to the corporate board, companies might see only positive outcomes in their accounting performance, but not in their market returns. This is what is shown in Post and Byron's analyses, and still this relationship was very tiny.[67]

Furthermore, even if a statistically significant result is shown, it is important to consider the fact that correlational relationship does not prove causality. In order to establish causal effects, there is the need to conduct randomize control trials, which is impossible.

The best evidence comes from a meta-analysis from Jeong and Harrison (2017),[68] which shows the relationship between long-term company performance and the CEO gender. The average correlation between the two is .007 which is very tiny. Similarly, it analyzes the relationship between company performance and top management team (TMT), being statistically significant but still very tiny, the correlation found is in fact .03.

A recent study by Professors Isabelle Solal and Kaisa Snellman from Institut Europèen d'Administration des Affaires (INSEAD), states that the increase of gender diversity led to a drop in stock prices.[69]

The debate on whether gender diversity is positive or negative for the corporation is not clear, meaning there is no clear business case absolutely and empirically for or against it. Despite it, gender diversity is necessary for the fairness of it.

VI. EFFICIENCY OF GENDER DIVERSITY ON CORPORATE BOARDS

One may ask, why it is so difficult form women to enter corporate boards, or to arrive at top management position?

A. *The Old Boys' Club*

Kristof-Brown (2000) argues that access to corporate top position tends to be restricted to those with elite social and educational credential. Some managers have in fact a tendency to recruit the

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66 Guoli Chen et al., *Female board representation and corporate acquisition intensity,* SMJ, (Aug. 6, 2014).
67 See Post & Byron, *Women on Boards,* supra *note* 57.
68 Seung-Hwan Jeong & David A. Harrison, Glass Breaking, *Strategy Making and Value Creating: Meta-Analytic Outcomes of Women as CEOs and TMT members*, Vol. 60 Issue 4, ACAD. MANAGE J., (May 31, 2016).
69 Jessle Tu, *Investor bias is real & it's bad news for women,* Women Agenda, (Dec. 2, 2019).

individual based on its own – the manager – image.[70] This is defined as the self-categorization theory (Tajfel and Turner, 1986)[71] or the similarity-attraction theory (Byrne, 1971).[72]

Some argue that women are at disadvantage when they are trying to obtain positions in large corporations' boardrooms because of the hardly penetrable nature of corporate elites, moreover their inability to fit in 'old-boys' high-powered network.[73] The old boy network, or old boys' club, refers to social and business connections among former students of male-only elite schools.[74]

It is very similar to an alumni association. In the US in particular, the 'Old boys Network' is not much about the education, then it is about connections with powerful individuals through work, organization, school, and private clubs.[75] This whole network would make it very difficult for women outside of it to build the trust and the relationship they need to gain the position that they want.

B. *Theories on the efficiency*

Following, it will be discussed the idea that gender diversity, affects business performance, supporting the arguments with a range of theories and the explanation of how the influence of women on corporate boards is assessed.

The most common theoretical foundation used to assess board gender diversity is the agency theory, which states that the more a board is heterogeneous the more it is independent, hence being the control proportionally greater the cost associated with agency problems will be accordingly lower.[76]

Studies conducted by Farrel and Hersh[77], Bonn and Yoshikawa[78], Hillman and Shropshire[79], through the resource dependence theory underline how gender diversity on corporate boards, gives a source of competitive advantage by enabling access to key factors as better network contacts

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[70] Maelia Bianchi & George Iatridis, *Board Gender Diversity and Corporate Financial Performance: Evidence From CAC40,* Vol. 11 Issue 4, INVEST. MANAG. FINANCIAL. INNOV., (Oct. 31, 2014).
[71] *Supra* note*,* 67.
[72] *Supra* note*,* 68.
[73] Elise Perrault, *Why Does Board Gender Diversity Matter and How Do We Get There? The Role of Shareholder Activism in Deinstitutionalizing Old Boys' Network,* Vol 128 Issue 1, J. BUS. ETHICS., (Apr. 2014).
[74] Wikipedia, the free encyclopedia, *Old boy network,* WIKIPEDIA FOUNDATION, INC, (Apr. 23, 2021).
[75] *Supra* note*,* 71.
[76] Sabri Boubaker et al., *Does board gender diversity improve the performance of French listed firms?,* Vol. 31, CAIRN.INFO, at 259-269, (2014).
[77] Farrel, K.A. & Hersh, P.L. *Additions to corporate boards: The effect of gender,* Vol.11, J. CORP. FINANC., at 85-106, (2005).
[78] Bonn I, Yoshikawa T., Phan, *P.H. Effects of board structure on firm performance: A comparison between Japan and Australia,* Vol.3, ASIAN BUS. MANAG., at 105-125, (2004).
[79] Hillman A.J. et al., *Organizational predictors of women on corporate boards,* Vol. 50, ACAD. MANAG. J., at 941-952, (2007).

which boosts the value of the firm, being the board the main link and intermediary between the firm itself and the outside world.[80]

Other studies instead, have focused on the different characteristics between men and women. The distinction includes certain values for instance expected behaviors. Among women characteristics as universality and benevolence are more common, this is shown in the women predisposition in making more stakeholder-oriented decision, they also tend to adopt a more participatory and less authoritative management. Men on the other side, display a higher risk-seeking behavior, they are more 'self-sufficient', are more likely to issue debts and make greater corporate acquisitions.

In an international setting for the period from 2000 to 2013 studies from Hanousek and Shamshur[81] shows that in 14 countries of Central and Eastern Europe, the gender of executive directors influences the corporation's efficiency. Moreover, other findings have shown that women executive directors in corrupted contexts behave differently from men.

It is shown that the presence of women on boards improves the efficiency and the independence of boardrooms themselves, because female directors offer closer monitoring and greater insights, are more predisposed to ask questions that may not be asked by males, and they are more active on corporate boards.[82] Thus, a positive relationship between technical efficiency and women on boards is predictable. [83]

Furthermore, theories from economics psychology and sociology recognizes difference between males and females. Mostly behavior differences: they show that the presence of women on boards could influence the dynamic of boardrooms discussions, females provide innovative perspectives to fix complicated issues, they also exhibit less over-confidence, meaning that they might be more averse to risky investments and they ensure higher ethical standards in their decision making; women are universally more benevolent, less power oriented and more universally concerned.[84] These attributes should show a link with technical efficiency, but the connection is not clear. Other studies shows that when the participation of women is boosted, domestic or independent boards produces positive effect on bank efficiency.

C. *CEO's Opinions*

To convince the skeptical many CEOs had given their opinions on the benefits of gender diversity.

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[80] J.S. Pfeffer & G.R. Salancik, *The External Control of Organizations: A Resource Dependence Perspective,* STANFORD UNIVERSITY PRESS, (1978).
[81] Hanousek, J. et al., *Firm efficiency, foreign ownership and CEO gender in corrupt environments,* Vol. 59, J. CORP. FINANC. at 344-360, (2019).
[82] David Abad et al., *Does gender diversity on corporate boards reduce information asymmetry in equity markets?,* Vol. 20 Issue 3, BRQ, at 192-205, (2017).
[83] Siri Terjesen et al., *Does the presence of independent and female directors impact firm performance? A multi-country study of board diversity,* Vol. 20 Issue 3, J. MANAGE. GOV., at 447-483, (2016).
[84] Michael Adusei, *Board gender diverisity and the technical efficiency of microfinance institutions: Does size matter?* Vol. 64, INT. REV. ECON. FINANCE, at 393-411, (2019).

Tiger Tyagarajan CEO of Genpact explains that in order to win over the best talent to work for your company it is necessary to appeal to the total, meaning the 100 percent of the top talent, this includes women that could be strong role models.[85]

For retailers, it is very important to note that women represent more than the half of global purchaser, meaning that board diversity would simply be better for business since boards that have a good representation of their customer base can have better intuitions.[86]

According to Scott Anderson, CEO of Patterson companies, when a more diverse group is present in a boardroom the quality of the discussion goes up dramatically. This is important, also as reported by Rodney McMullen, CEO of Kroger, because it avoids blind spots by giving perspective that were not though of before.[87]

To conclude, while the number of women continues to increase, the women rate on board remains significantly underrepresented, or not represented at all, even if many countries by implementing regulations have addressed the inequalities. The findings show that boardrooms are more effective when made up of people with diverse contributions, and that women are more likely than men to bring unique skills to the board.[88]

Looking forward in the future to accelerate gender diversity on corporate boards, according to a series of interviews with the CEOs and board members from a number of oxford standout companies, there are several ways in which the gender diversity might be improved or implemented.

The first solution that arises is to change the mindset. According to Fabrizio Freda, CEO of Estée Lauder, what is often missing is the sense pf urgency: "people believe we are going to get there eventually. But this is not enough; it is too slow. The real obstacle is the lack of urgency". As reported by Freda in fact, meaningful changes will only come when fewer excuses are made, and more action will be taken. What is really needed is a set of motivational goals that will help establish a target number of board positions for females. [89]

Mary Dillon, CEO of Ulta, affirms: "to maintain or expand diversity on our board, we continue to make an active effort to make sure that the slate is diverse. Just the act of being cognizant and having it top of mind that every slate must have diversity, will drive action". Leaders of both Microsoft and Genpact underlined how important flexibility is, recalling how they were searching one individual to fill one board seat, and how their research leaded to the finding of two highly qualified women, so they just hired both of them. [90]

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[85]Celia Huber & Sara O'Rourke, *How to accelerate gender diversity on boards,* MCKINSEY & COMPANY, (Jan. 16, 2017). [hereinafter Huber & O'Rourke, *how to*].
[86] *Supra* note, 82.
[87] Id.
[88] Daehyun Kim & Laura T. Starks, *Gender Diversity on Corporate Boards: Do Women Contribute Unique Skills?,* Vol. 106 Issue 5, AM. ECON. REV., at 267-271, (2016).
[89] See Huber & O'Rourke, *how to, supra* note, 82.
[90] *Supra* note, 86.

The second solution proposed is to expand the criteria. Despite their efforts, some companies are continuously adding specific criteria for areas of expertise narrowing even further the field of action.

To overcome the issue of inequality, openness to a creative solution is required. To begin, one solution would be to stop looking for executives with prior experience. As reported by Dan McCarthy, CEO of Frontier Communications, many of the women on his board were new to their job and did not have any prior expertise in board participation: "we were willing to take risks on individuals – we look for someone who has the ability to move from the tactical to the strategic – and it has turned out to be great". This particular approach, that not everyone takes into consideration, might be helpful for small companies that are having struggle to compete with higher profile candidates. According to Tiger Tyagarajan, CEO of Genpact: "some people may prefer to join the board of a mid-cap company, where they can actually be more engaged and have an impact on the company strategy, versus a large company where more time might be spent on general governance issues".[91]

Other leaders also agree on looking for candidates even in other spheres, for instance academia, social sector, or law. The last suggestion is to find an area of expertise that cannot be negotiable such as finance or digital expertise and then seeing what is flexible to deliver on gender-diversity.

The third suggestion would be to maintain an active pipeline. Effectively the most important element of a successful board-inclusion effort would be to create an active pipeline of female candidates, which would mean to rely on both personal networks and search firms to identify candidates. Relying only on personal network, especially in primarily male boards, presents a risk of perpetuating the candidates from the 'old boys' network. While relying only on search firms can lead to a threshold of highly qualified candidates, but not suited for the internal dynamics of the board. Michael Roth, CEO of IPG, told that his reputation as 'male champion' for diversity led search firms to send him qualified female candidates even though he did not initiate a search engagement for them.[92]

Another way in which gender diversity can be implemented is through a recruitment process that can be more inclusive such as gender-blind hiring, a process through which candidates' applications are evaluated only based on experiences and skills without letting unconscious biases influence their decision.

Flexible working would be another incentive to make a board more inclusive. Especially for women with children, flexible working options can be implemented also for man, so that it would make it easier for men to take on domestic commitment and be more present in their children lives, while for women it would help alleviate the impact of domestic commitment and children care and help in their career development.[93]

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[91] *Supra* note 87.
[92] *Supra* note 90.
[93] Marie Froehlicher et al., *Gender equality in the workplace: going beyond women on the board,* S&P GLOBAL, (Feb. 5, 2021).

Another course of action would be to create a culture that embraces diversity. Gender diversity in fact, is not one individual's responsibility but should be a matter that the whole companies engage in. The first to embrace this culture should be the ones in the top management team and board of directors, so that they could being a positive change at all corporation levels.

According to the article written by Jennifer S. Fan,[94] to pave the way for progress on boards a combination of legal and business reforms must be taken. The changes are focused within three groups: founders, investors, and independent board members. The first reform would be to create agreements between limited partners who invest in the company and venture capital firms, that could include provision mandating that the latter have more diversity in their ranks, especially among those who serves on the boardrooms as representatives of the venture capital firm. The second reform would be for venture capital financing documents to specify that women will be considered for certain job positions, and finally that the creation of nonprofit organization focused on diversity that would help investors to choose through a large pool of candidates outside of their networks.

The important thing is to start early, because achieving gender diversity after a company goes public is very difficult since the company culture is ossified.[95]

VII. SENATE BILL 826 UNAVOIDABLE DEFEAT

In America's business boardrooms, there are far too few women. Ethnic minorities are also underrepresented.

SB 826, awaiting Governor Brown's signature, is a well-intentioned attempt to fix that problem. The bill would impose financial penalties on publicly held firms with a California headquarters that do not meet the deadline by the end of 2019. Corporations with five directors must have at least two self-identified women directors by December 31, 2021, while corporations with six or more directors must have at least three women directors. "Publicly held corporations" are defined as corporations "with outstanding shares listed on a major United States stock exchange."[96] The legislation does not address under-representation of ethnic minorities.

A cure can be worse than the disease, and SB 826 is, unfortunately, a case in point. Because of the internal affairs doctrine,[97] SB 826 is unconstitutional in its application to all but 72 publicly listed California firms. These companies account for only 1.59 percent of all publicly traded companies in the United States. A closer look at the implications of SB 826 reveals that it would only boost

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94 Jennifer S. Fan, *Innovating Inclusion: The impact of Women on private Company Boards,* Vol.46 Issue 2, FLA. ST. U. L. REV., at 345-413, (2019).

95 *Supra* note, 91.

96 SB 826, § 2, adding §301.3(f)(2) to the Corporations Code. The legislation does not identify exchanges that would be considered "major" or describe criteria for making that determination.

97 The following section will explain the doctrine

the number of women directors on the Fortune 500 by one. That's around 18 one hundredths of one percent of all Fortune 500 director jobs.

The internal affairs concept would likely apply to just around 12 of the 117 firms in the Russell 3000 that are headquartered in California and have no women directors. If SB 826 improves the number of women directors at those corporations by a total of 24, it will increase the number of women directors in the United States by nearly 9%.

In the most aggressive scenario, assuming that SB 826 drives every California chartered and based corporation to add the maximum number of directors required by the statute by 2021, the net impact would be the addition of 208 additional women directors in three years. This is an increase of 82 hundredths of a percent, which equates to a three-year annualized rate of change of 27 hundredths of a percent. Given the limits imposed by the internal affairs doctrine, this is the maximum potential effect of SB 826, and there is reason to believe that this estimate is greatly exaggerated.

SB 826's minor gains, on the other hand, would put the evolution of all gender-based and race-based affirmative action programs at jeopardy across the country. According to the state's own legislative analysis, "SB 862 would likely be challenged on equal protection grounds and the means that the bill uses, which is essentially a quota, could be difficult to defend."[98] This equal protection litigation over the bill's implementation would almost definitely take several years. It will also encourage opponents of the law to come up with a litany of horror stories about various types of quotas or quota-like government interventions into the private sector that would plausibly become legal if SB 862 is upheld. SB 826 will have no effect if equal protection challenges are successful.

Shareholder activism, fueled by California's clout in the nation's capital markets, on the other hand, may produce far more variety at a much faster pace across a far wider spectrum of companies. It can attain these greater results without jeopardizing the progress of affirmative action law.

As a result, SB 826 is a poor bargain for the goal of boardroom diversity.

A. The Unconstitutionality of SB-826 as Applied to Non-California Corporations

SB 826 is in violation of the Commerce Clause of the US Constitution because it purports to apply to firms headquartered in California but chartered elsewhere. The internal affairs of a corporation, such as laws governing the makeup of its board of directors and shareholder elections, are governed by the organization's state of incorporation, not the state in which it is headquartered, as the United States Supreme Court explained.

In *Edgar v. Mite Corp.*[99] the Supreme Court explained that "the internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs – matters peculiar to the relationships among or between the corporation and its current officers, directors and shareholders – because otherwise a corporation

[98] Thomas Clarke & Sandra Nakagawa, Assembly Committee on Judiciary, Staff Report on SB 826, (June 26, 2018). [hereafter cited as "Assembly Judiciary Committee Staff Report"].

[99] Edgar v. Mite Corp., 457 U.S. 624 (1982).

could be faced with conflicting demands." [100]The composition a corporation's board of directors is a classic example of a matter "among or between the corporation and its current ... directors" that must be governed by a single jurisdiction "lest a corporation be faced with conflicting demands."[101]

The Supreme Court reiterated that point in *CTS Corp. v. Dynamics Corp. of America*,[102]again explaining that the Commerce Clause requires that corporate internal affairs be governed by "one uniform system, or plan of regulation."[103] "So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State."[104] Accordingly, "the law of the incorporating State generally should "determine the right of a shareholder to participate in the administration of the affairs of the corporation"."[105]

A board's gender diversity is a matter of internal corporate governance, as is shareholder voting, and SB 826 interferes with both. SB 826 would establish the first and only demographic test for board membership. It thereby constrains a board's ability to designate directors in the event of a vacancy and interferes with the shareholder franchise by imposing a financial penalty if shareholders refuse to elect the minimum number of women directors mandated by SB 826.

As a result, California cannot impose a minimum number of women directors on corporations headquartered in California but chartered in Delaware, while Delaware allows its chartered corporations to have any number of women directors that is consistent with the board's business judgment, subject to shareholder approval and the constraints imposed by the corporation's charter and bylaws. There is a clear disagreement between California and Delaware law. SB 826, as the first and only mandated board diversity provision in the United States, presents a conflict between California's chartering rules and those of every other state in the country.

The law specifies how this dispute shall be settled. Both Edgar v. Mite and CTS Corp. v. Dynamics Corp. of America explain that in a competition between California, which has a statute requiring Delaware chartered corporations with headquarters in California to pay penalties unless they have a certain number of women directors, and Delaware (or any other state in the country), which has a statute allowing any number of women directors consistent with the board's judgment, corporate charter, bylaws, and shareholder vote, Delaware wins. California is defeated. This concludes the narrative.

The bill's sponsor seeks to avoid this conclusion by observing that "although the US Supreme Court has taken a broad view of the internal affairs doctrine… California Corporations Code Section 2115 applies a full laundry list of California statutes to out-of-state corporations notwithstanding the law applicable in their state of incorporation."[106] This argument has an obvious problem. Section 2115 is a statute. It cannot override the constitutional dimension of the

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[100] Citing Restatement (Second) of Conflict of Laws §302 cmt. b, pp. 307-308 (1971)

[101] *Supra* note 97.
[102] CTS Corp. V. Dynamics Corp. Of America, 481 U.S. 69 (1986).
[103] See quoting Cooley v. Board of Wardens, 12 How. 299 (1852), *supra* note 89.
[104] Id.
[105] Id.
[106] Assembly Judiciary Committee Staff Report, at 7.

internal affairs concept. As a result, section 2115 is unlawful to the degree that it interferes with the internal operations of a corporation chartered outside of California.

This proposition has been challenged and found to be unconstitutional in California. Section 2115 violates "Delaware's well-established choice of law standards and the federal constitution," according to the Delaware Supreme Court. Despite Section 2115, a California Court of Appeals recognized in dicta that internal governance is governed by the rules of the state of incorporation, not by California law. As a result of the litigation over SB 826, elements of Section 2115 that apply to corporations chartered outside of California will be nullified.

Given the constraints imposed by the internal affairs doctrine, SB 826 would implicate board composition at only 72 publicly traded corporations.[107] Even this conservative estimate overstates the bill's potential impact because many California-chartered businesses already follow the bill's requirements.

Board composition among the Fortune 500 proves the point. Fifty of the Fortune 500 are publicly traded corporations with California headquarters.[108]
Only three of the 50 are based in California. Only Apple, out of the three, is not already fully compliant with SB 826's criteria by December 31, 2021. By the deadline, Apple will have added a single female director to its board of directors. The bill will therefore, at most, cause the addition of a single woman director at the Fortune 500.[109]

B. Shareholder's activism: A better option

Major institutional investors' shareholder action is considerably more likely than SB 826 to raise the number of women directors on boards of publicly traded companies. Shareholder activism has the potential to achieve this goal on a national scale, rather than being limited to the small number of firms located and chartered in California. Furthermore, shareholder activism can achieve those benefits rapidly, with no collateral damage to affirmative action jurisprudence or litigation-induced delays.

The dramatic decline in the incidence of classified boards[110] at publicly traded corporations highlight the potential for shareholder activism campaigns with broad support and clearly stated goals to be effective. In 2005, 52 percent of the S&P 500's boards of directors were classified. Only 11% of such boards had been classified by the end of 2013.

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[107] These percentages are calculated on a national basis, relative to the Russel 3000, rather than relative to a base of California corporations because: (a) the adverse collateral consequences to affirmative action are potentially national in scope, and (b) the comparable effects of a shareholder activism are also national in scope. Measuring the effects of SB 826 on a national scale therefore provides a more accurate basis for comparison.
[108] Makeda Easter, *The New Fortune 500 List is Out. These California Companies Made the Cut,* L.A. Times, (June 7, 2017).
[109] The calculations assume a static supply of board seats, i.e., corporations do not expand board size to accommodate additional woman directors.
[110] Typically, in a classified board, one third of the board stands for election every third year, rather than having every director stand for election every year.

That dramatic and rapid decline was “spearheaded by institutional investors and their proxy advisory firms”.[111] Shareholder activism aimed at increasing boardroom diversity can have similar, if not superior, effects.

To implement a shareholder activism strategy that would increase the number of women and minorities on corporate boards of directors, the state of California can use its significant capital market clout to demand that institutional investors, such as CalPERS and CalSTRS, immediately launch activist campaigns opposing the re-election of directors of publicly traded corporations who do not meet specified numerical diversity targets. If the State so desires, these diversity objectives can be stated in direct relation to the SB 826 criteria.

The key step in this strategy is to insist that institutional investors impose precisely defined numerical objectives as part of their voting guidelines. The New York State Common Retirement Fund already does so. It “plans to vote against all board directors standing for re-election at companies that have no women on their boards. In situations where a company has just one woman on its board, the Fund will vote against a members of the board’s governance committee standing for re-election.”[112] Similarly, Massachusetts’ Pension Reserve Investment Management has announced that it will “vote [against]… all board nominees if less than 30% of the board is diverse in terms of gender and race.[113] Rhode Island's Treasury has also stated that “any time a company nominates a slate of directors that would cause fewer than 30 percent of its directors to be women or racial minorities, the State of Rhode Island will vote no."[114]

The largest institutional investors, on the other hand, adhere to more vague criteria that never obligate them to vote for director elections based on any numerical diversity standard. Neither CalPERS[115] nor CalSTRS[116] has a formal policy that would withhold support for the re-election of directors at corporations with an insufficient number of women or minority directors.

Finally, shareholder activism has the potential to be significantly more effective than SB 826. Shareholder activism is not confined to California-based companies. It will not be bound by the internal affairs doctrine, which is a constitutional obligation. It will not be hampered by or subjected to lawsuits alleging violations of the US and California Constitutions' equal protection guarantees. It will not pose any further hazards to the future development of affirmative action

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[111] Fried Frank, *A New Approach to Classified Corporate Boards,* LAW 360, (Apr. 14, 2014).
[112] Press Release, *Office of the New York State Comptroller, DiNapoli: State Pension Fund Will Vote Against Board Members at Corporations with no Women Directors,* (Mar. 21, 2018),
[113] *Pension Reserves Investment Management Board, Proxy Voting Guidelines* – 2018, at 19-20 (Feb. 15, 2018).
[114] Press Release, *Treasurer Maganizer Announces Proxy Voting Initiative to Hold Corporate America Responsible for Increasing Board Diversity,* (April 20, 2016).
[115] Board diversity should be thought of in terms of skill sets, gender, age, nationality, race, sexual orientation, gender identity, and historically under-represented groups. Consideration should go beyond the traditional notion of effective board leadership.
[116] Board diversity should be considered by the board nominating committee. The director nomination process and policy should consider a diverse mix of skills, background, experience, age, gender, sexual, orientation and identification, cultural and ethnic composition that are most appropriate to the company’s long-term business needs. CalSTRS will hold members of the board’s nominating and governance committee and if necessary, the entire board accountable if, after engagement about the lack of board diversity, sufficient progress has not been made in this regard.”

law. Shareholder action can produce faster results than any change brought about by SB 826, which will be mired in litigation for years, regardless of how the lawsuits are settled. Despite its noble intentions, SB 826 is not the best approach to improve corporate boardroom diversity.

C. New Rules in California

Assembly Bill 979 was signed into law on September 30, 2020 by California Governor Gavin Newsom, Assembly Bill 979 states that publicly held[117], domestic, and foreign corporations headquartered in California[118] are requires to appoint at least one director from an underrepresented community on their boards by the close of the 2021 calendar year.[119] By saying "director from an underrepresented community" AB-979 defines an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self- identifies as gay, lesbian, bisexual, or transgender.[120]

Before AB-979 was signed, another bill was signed into law, which was Senate Bill 8626, the latter, required California-based corporation to disclose and specified minimum number of female[121] directors on their boards within the established timeframes,[122]. Both AB-979 and SB-826 (together known to as the "California Board Diversity Bills") have gotten a lot of praise and a lot of flak.[123]

Even opponents of the California Board Diversity Bills admit that there are demographic gaps in corporate boardrooms.[124] Critics, on the other hand, see these bills as arbitrarily favoring females over males and transgender women and women of color over other women.[125] Supporters see this

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[117] Under AB.979, "publicly held corporation" means "a corporation with outstanding shares listed on a major United States stock exchange". CAL. CORP. CODE section 301.4(e)(2).
[118] The location of a corporation's headquarters will be determined according to its Form 10-K. Id. CAL. CORP. CODE Section 301.4(a)-(b). Domestic and foreign corporations that are publicly held and headquartered in California will be herein referred to as "California-based corporations".
[119] By the end of the 2022 calenda year, California-based corporations with more than four but fewer than nine directors will be required to have at least two directors from an underrepresented community on their boards, and those with nine or more directors will be required to have at least three such directors. Id. CAL. CORP. CODE § 301.4(b)(1)-(2).
[120] Id. CAL. CORP. CODE § 301.4(e)(1)
[121] Under SB-826, "female" means "an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth" CAL. CORP. CODE, Senate Bill no.826 § 301.3(f)(1).
[122] Id. § 301.3 (a)(b).
[123] Compare California Chamber of Commerce, et. Al., Letter of Opposition, SB 826 *(Jackson) Corporations: Board of Directors Oppose – As Amended May 25, 2018,* 2-3, (2018). Claiming SB-826 would violate state and federal constitutions and conflict with existing civil right laws.
[124] Chase DiFeliciantonio, *Bill Requiring Diverse Boards in California could have Broader Impact,* S.F. CHRONICLE (Sept. 6, 2020).
[125] Keith Paul Bishop, *California Legislature Passes Corporate Board Racial/Ethnic/Gender Quota Bill,* NAT'L L. REV. (Aug. 31, 2020).

legislation as a practical way to bring a more diverse set of people onto California company boards, which had previously been dominated by white men.[126]

While the adoption of a quota is brutal and not without its own set of negative repercussions it is an efficient way of ensuring better equality of results within set time frames. Notably, since SB-826 was signed, the number of women on the Russell 3000 board of directors has nearly doubled, from 480 to 964.[127] While it would be unrealistic to expect that a quota could solve the problem of lack of diversity on corporate boards in the long run, it does allow for more different viewpoints to be heard as companies negotiate and implement more long-term and sustainable solutions.

By the end of each of the calendar years 2021 and 2022, AB-979 requires that a specified minimum number of board seats of a California-based corporation be filled by members who self-identify as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identify as gay, lesbian, bisexual, or transgender.[128]
AB-979 empowers the Secretary of State of California to levy fines of $100,000 for first-time violations and $300,000 for successive violations for violations of the law's provisions.[129] The fines collected must be used to carry out the provisions of AB-979.[130] AB-979 also demand that the California Secretary of State issues reports on its website detailing (i) the number (but not the names) of corporations that are in conformance with AB-979's provisions, (ii) the amount of publicly held corporations that relocated their U.S. head offices from California to another state, (iii) the number of publicly held corporations that relocated their U.S. headquarters from another state to California, and (iv) the number of publicly traded companies that were subject to AB-979's rules in the previous year but are no longer publicly traded.[131]

D. California Board Diversity Bills: Legal Challenges

Both AB-979 and SB-826 already encountered a series of legal challenges in court, with more on the way.[132]

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[126] In introducing AB-979, California Assembly member Chris Holden stated that people of color "need to have the same access as those who have benefitted for so long, and the time is now". Elizabeth Castillo, *Mandate Diversity?, California Bill Would Ban All-White Corporate Boards,* CALMATTERS (Aug. 4, 2020).
[127] Matthew Listi, *Boardroom Diversity: The Impacts of Legislation in the New Decade,* EQUILAR, (June 30, 2020).
[128] CAL. CORP. CODE §§ 301.4(a)-(b), (d)(2).
[129] Id. § 301.4(d)(1).
[130] Id. § 301.4(d)(3).
[131] Id. § 301.4(c).
[132] In *Crest I,* three California taxpayers sought to enjoin the California Secretary of State from expending taxpayer funds and resources to enforce SB-826 on the basis that the law's express gender classification is illegal under the California Constitution. Complaint for Declaratory and Injunctive Relief, Crest v. Padilla, No. 19STCV27561, 2019 WL37711990.

1. Internal affairs doctrine

The internal affairs doctrine was already mentioned in the previous section, while talking about California SB-826, and in this next section I will explain it further.

The internal affairs doctrine, states that the state of incorporation should control a corporation's internal affairs.[133] The California Board Diversity Bills are being challenged on the grounds that they violate the internal affairs doctrine by extending its reach to multinational firms with headquarters in California.[134] The internal affairs doctrine, on the other hand, is not a constitutional norm[135] and the scope of "internal affairs" is not fixed.[136]

While the internal affairs concept has many advantages, such as uniformity and predictability, and a strong place in corporation law, it is also vital to acknowledge its limitations. Indeed, the nature and the extent of internal affairs should change as circumstances change.[137] Jill Fisch and Steven Davidoff Solomon have recently advocated that internal affair be restricted to laws aimed at increasing company economic value, eliminating social issues like board diversity.[138]

Additionally, the internal affairs doctrine must be balanced against governments' broad authority to control both local and international businesses conducting business within their borders.[139] Moreover, Notably, if a foreign corporation violates the laws that apply to domestic companies, the state has the authority to prohibit the corporation from trading within the state's boundaries.[140]

As a matter of fact, the California Board Diversity Bills derive from the state's constitution, which stated that "no corporation organized outside the limits of this State shall be allowed to transact business within this State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State."[141]

While the United States Constitution's Full Faith and Credit Clause requires a state to respect a corporation's home state's corporations' statute, the same clause also requires a state to respect the corporation's statute of a host state to the extent that the host state has a legitimate interest in regulating that corporation's activity.[142] The California Board Diversity Bills further the state's goal of correcting persistent inequities on the boards of firms with California headquarters.

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[133] CTS Corp. V. Dynamics Corp. Of Am., 481 US. 69,91 (1987) ("It is thus an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares".).

[134] Pamela S. Palmer et.al., *Legal or Not, it's Working: Mandatory Board Diversity for Publicly Held Companies Headquartered in the Golden State,* WESTLAW TODAY, (Apr. 7. 2021).

[135] Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. at 588, 597, (2003) (describing the internal affairs doctrine as "an understanding, not a crisp constitutional rule").

[136] Sung Eun Kim, *Corporate Long Arms,* 50 ARIZ ST. L.J. at 1067, 1077-78, (2018), claiming that the scope of internal affairs shifts overtime.

[137] Id.

[138] Jill E. Fisch & Steven Davidoff Solomon, Centros, *California's "Women on Boards" Statute and the Scope of Regulatory Competition,* 20 EUR. BUS. ORG. L. REV. at 493,495 (2019), arguing that SB-826 falls outside the scope of the internal affairs doctrine.

[139] Stanley A. Kaplan, *Foreign Corporations and Local Corporate Policy,* 21 VAND. L. REV. at 433,442 N.22 (1968), (referring to the four cardinal principles that apply to foreign corporations).

[140] Id.

[141] CAL. CONST. Art. XII, § 301.4(a), offering no different treatment to domestic and foreign corporations.

[142] G. Henderson, THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTION LAW, Ch. VII (1918).

Furthermore, the laws place equal responsibilities on local and international firms with a California headquarters.[143]

2. Clause 1: Dormant commerce

Another argument leveled against the California Board Diversity Bills is that they violate the Dormant Trade Clause, which stipulates those states cannot use their legislative power to discriminate against or unfairly restrict interstate commerce in the absence of federal action.[144]

Adding a new board member to a company's board can be costly and time-consuming.,[145] According to recent studies, the regulatory burden is particularly expensive for smaller businesses and those with inadequate governance.[146] Others also pointed to the California Board Diversity Bills' unfavorable market impact. [147] as proof of their economic strain on California-based corporations.

Several long-term research have demonstrated the financial benefits of having diverse company boards. According to a 2018 McKinsey & Company report, organizations in the top quartile for gender diversity and the top quartile for racial and ethnic diversity had 21 percent and 33 percent better financial returns, respectively. According to research by Dalberg Global Development Advisors, the high-tech industry could earn an extra $370 billion per year if the diversity in the workplace of IT businesses mirrored the variety of the underpinning talented employees.

Investors are often aiming at a monetary profit, which is why depending solely on markets or self-regulation will not result in more board diversity[148]. This short-term approach tends to favor the immediate expenses of hiring diverse board members above the long-term advantages of increased diversity on company boards. The California Board Diversity Bills, as well as other analogous laws and regulations measures, aim to remedy this short-term bias by giving greater weight to a company's long-term and social goals.

It's also worth noting that California Board Diversity Bills are intended to be minimally disruptive. First, they offer businesses fifteen months to meet with all their requirements. Furthermore, California-based corporations that are as of now in violation of the statutes have several alternatives, which include raising or lowering the overall number of board positions to meet the bills' prerequisites, paying a fine, or relocating their U.S. head office outside of California, thus

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[143] CAL. CORP. CODE § 301.4(a), offering no different treatment to domestic and foreign corporations.
[144] *Dormant Commerce Power: Overview,* CONSTITUTION ANNOTATED.
[145] Alisha Haridasani Gupta, *California Companies Are Rushing to Find Female Board Members,* N.Y. TIMES (Jan 14, 2020).
[146] Lisa M. Fairfax, Symposium, *All on Board? Board Diversity Trends Reflect Signs of Promise and Concern,* 87 GEO. WASH. L. REV. at 1031,1055 (2019).
[147] The statistical findings of market return for California-based firms following the introduction of SB-826 have varied, although the currently available research usually pointed to SB-826 having a negative market impact in the short term.
[148] Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance, 37* J. CORP. L. at 265,267 (2012).

further avoiding the California Board Diversity Bills' reach.[149] Lastly, the California Secretary of State will only be obligated to record the number of firms that are in conformity with the terms of AB-979 and SB-826, not the identities of such businesses.[150] The peculiarities of the disclosure rules imply that they are designed as a method for inventorying rather than a means of naming and shaming noncompliant businesses.

3. Clause 2: Equal protection

The most objectionable component of the California Board Diversity Bills, according to many detractors, is that it discriminates on the grounds of ethnicity, gender identification, or sexual preference.[151] Recently, the Ninth Circuit Court of Appeals found that a plaintiff-stockholder plausibly alleged that SB-826 required or encouraged discrimination based on sex.[152] The main question on appeal will be whether the gender-based regulation in SB-826 meets constitutional muster.[153] Former California commissioner of companies Keith Bishop has been an outspoken opponent of the California Board Diversity Bills.[154] Bishop argued during the hearing for AB-979 regarding the bill's negative impact on male and nonbinary people in boardrooms, stating that it unjustly favors females from. Underrepresented population over males from the same communities and transgender women over other females.[155]
The Pacific Legal Foundation (PLF) has been a strong opponent of AB-979, arguing that one's color of skin, sex, or sexual preference should not affect one's work possibilities.[156]

The structure of boardrooms, on the other hand, reveals that one's color of skin, sex, or sexual orientation has typically been a restricting factor when it comes to serving on corporate boards.[157]Moreover, the California Board Diversity Bills nonetheless allow for several board positions to be filled by group members Bishop and others worry may face retaliation. As previously stated, firms have the option of relocating their headquarters to another state or continuing to operate with a board that would not meet with the California Board Diversity Bills, suffering all economic and social implications.[158]

SB-826's rigorous design considerations, according to Christopher Riley, keep it inside the confines of the California Constitution.[159] The same logic may be used to AB-979 as well. To recap Riley's positions, corporate board nominations are not subject to state intervention, and only state action is constrained by restriction on state affirmative action arrangements; furthermore, the California Board Diversity Bills extend to corporate board positions, which are not prevalent

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[149] Casey Leins, *Report: Some California Corporations Ignore Law Requiring Females on Boards,* U.S. NEWS (Mar. 4, 2020).
[150] CAL. CORP. CODE §§ 301.3(d)(1), 301.4(c)(1).
[151] Keith Paul Bishop, *Will AB 979 Expose Corporations To Section 1983 Liability?* NAT'L L. REV. (Sept. 15, 2020).
[152] Meland v. Weber, 2 F.4th 838,846 (9th Cir. 2021).
[153] Id.
[154] Keith Bishop, *Hearing on A.B. 979 Before the Assemb. Comm. On Banking & Fin. 3,* (2020).
[155] See McGreevy, *supra* note 122.
[156] Anastasia Boden & Daniel Ortner, *Racial Quotas Have an Ugly Pedigree. California Shouldn't Try to Bring them Back,* S.F. CHRON. (Sept. 16, 2020).
[157] *Supra* note 143.
[158] *Supra* note 146.
[159] Christopher J. Riley, *An Equal Protection Defense of SB 826,* CALIF. L. REV. ONLINE, (July 2020).

occupations, and only prevalent occupations are shielded by the right to pursue employment; and final, California has a persuasive interest in developing a diverse workforce.[160]

Minorities and women have historically been outnumbered and marginalized on corporate boards and in executive roles[161], particularly in the technology sector;[162] the California Board Diversity Bills aims at readdressing these inequalities.

4. Clause 3: Mandate Board Diversity

The California Board Diversity bills also have matched with and inspired comparable actions in the stock exchange[163], at the industry[164], and international levels.[165]
The California Board Diversity Bills undoubtedly have some limits. For starters, the legislation only applies to publicly listed firms with a California headquarters.[166]
Furthermore, even if they have major property, employment, or income interests in California, the measures do not apply to private businesses or firms located outside of the state. Whereas a corporation's headquarters in California becomes a proxy for California's interests, it is insufficient. Furthermore, the legislation relies on potential board members' self-identification[167], which might lead to candidates making unwelcome disclosures.[168]
Other states can step in and fill the gaps left by these restrictions. The overall effect of the California Board Diversity Bills should indeed be examined not just in terms of how they affect California-based firms, but also in terms of how they influence other states and players to introduce more efficient and creative approaches to increase diversity on corporate boards. The federalist structure of company law in the United States benefits from this disseminating effect.

On April 1, 2022, California Superior Court Judge Terry Green awarded verdict in favor of plaintiffs who had contested AB 979, one of California's two board diversity legislation, as being unconstitutional. Crest v. Padilla was brought in 2020 by three California taxpayers who wanted to prevent the California Secretary of State from enforcing or guaranteeing compliance with AB

[160] Id.
[161] *Supra* note 143.
[162] The EEOC's Diversity in High Tech study, based on data collected in 2014, demonstrates that Whites are overrepresented in the executive category, with fewer than 1% of Silicon Valley executives and managers being African American. U.S. EQUAL EMP. OPPORTUNITY COMM'N SPECIAL REPORT, DIVERSITY IN HIGH TECH (2016), see also Jennifer S. Fan, *Innovating Inclusion: The impact of Women on Private Company Boards,* 46 FLA. ST. U.L. REV. at 345 (2019).
[163] The Securities and Market Commission has authorized Nasdaq Stock Market LLC's (Nasdaq) Board Diversity proposal, which mandates businesses registered on Nasdaq's US exchange to publicly report board composition data and, where relevant, to explain why their boards are not diverse. SEC. & EXCH. COMM'N, RELEASE NO. 34-92590.
[164] Goldman Sachs, for example has stated that it will only take a company public if it has at least one diverse board member. *Goldman Sacks' Commitment to Board Diversity,* GOLDMAN SACKS, (Feb. 4, 2020).
[165] Article 165-20 of Korea's Financial Investment Services and Capital Markets Act was recently approved, prohibiting company boards from being composed wholly of the same gender, with a two-year grace period. Enforcement Law No. 16958, *adding art* 165-20, (Aug. 5, 2020).
[166] CAL. CORP. CODE §§ 301.3(a)(b), 301.4(a)(b).
[167] Id. §§ 301.3(f)(1), 301.4(e)(1).
[168] Laura Weiss, *California Board Diversity Mandate Fuel Debate in Other States Congress,* CONG. Q. ROLL CALL, Westlaw, (2019).

979 with taxpayer monies. The California Secretary of State has yet to say whether or if it would appeal the Court's decision. Regardless of the outcome of the court action to AB 979 and a parallel challenge to SB 826, California's board gender diversity act, board diversity remains a priority for the state.[169]

AB 979, which went into effect on September 30, 2020, demands publicly held California and foreign corporations with principal executive offices in California to have a minimum number of directors from "underrepresented communities", which encompasses LGBTQ+ people and racial minorities. The companies involved with more than four, but less than nine directors must have a minimum of two directors among underrepresented groups by the end of 2022, while organizations with nine or more directors must have at least three directors belonging to the mentioned underrepresented communities.[170]

In their move for summary judgement, the plaintiffs asserted that AB 979 used questionable categorization based on ethnicity, race, transgender status, or sexual orientation, and thereby violated California Constitution's equal protection clause, Article I, section 7(a).[171] Furthermore, the plaintiffs claimed that AB 979 breached Article I, Section 31(a) of the California Constitution[172], which restricts the state of California from discriminating against or giving special treatment to groups or individuals based on color, race, national origins, or ethnicity. The Court's ruling allowing the plaintiff's move for summary judgement did not state the Court's reasons, but it has been stated that throughout the debate on the litigants' application for summary judgement, the Court observed that the selection of the plaintiffs' expert witnesses was "inexcusable".

Crest v. Padilla[173], a parallel complaint involving the same three plaintiffs but proceeding before a different judge in the California Superior Court, raises identical constitutional concerns about SB 826. In February 2022, a bench trial in that matter finished, and the case has been presented for determination. SB 826 mandates a specific minimum number of female directors on the boards of directors of publicly held domestic corporations and publicly held international corporations with major executive offices in California. If the board has five directors, the current need is two female directors, or three female directors if the board includes six or more directors.[174]

Regardless of the outcome of the ruling invalidating AB 979 and the upcoming appeal to SB 826, diversity in corporate boardrooms will remain a priority. The importance of board diversity has been acknowledged by a number of institutional investors. According to a recent survey of S&P

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[169] Patrick S. Brown et al., *Sullivan & Cromwell Discusses court Decision Invalidating California Board Diversity Law,* CLS BLUE SKY BLOG, (APR. 6, 2022).
[170] Sullivan & Cromwell LLP, *California Expands Board Diversity Requirements,* SULLIVAN & CROMWELL LLP, (Oct. 2020).
[171] CA CONSTITUTION art I § 7.
[172] Id. Art I § 31(a).
[173] Crest v. Padilla, LA Super. Ct. Case No. 20STCV37513
[174] Sullivan & Cromwell, *California Enacts Female Gender Quotas for Public Companies Headquartered in the State,* SULLIVAN & CROMWELL LLP, (Oct. 2018).

500 directors, in 2021, 47 percent of new independent directors will be ethnically diverse, and 43 percent will be female.[175]

	2021	2020	2016	2011	5-Yr % change	10-Yr % change
New directors	**456**	413	345	294	32%	55%
% women	**43%** ▼	47%	32%	21%	34%	105%
% Black/African American, Asian, Hispanic/Latino/a, American Indian/ Alaska native, or two or more races	**47%** ▲	22%	15%	14%	213%	235%
% female	***18%*** ▲	*10%*	*5%*	*4%*	*260%*	*350%*
% male	***29%*** ▲	*12%*	*10%*	*10%*	*200%*	*200%*
Percentage of new directors from historically underrepresented groups: Women from all backgrounds and Black/African American, Asian, Hispanic/ Latino, American Indian/Alaska native or multiracial men	**72%** ▲	**59%**	**42%**	**31%**	**71%**	**132%**

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If a company's nominating committee (and potentially other directors) lacks gender or racial/ethnic diversity, Institutional Shareholder Services (ISS), one of the leading proxy advisory firms, will generally advise shareholders of companies in the Russell 3000 or S&P 1500 indices to vote against their election. Many significant institutional investors, such as BlackRock and State Street, have developed proxy voting criteria that may result in votes against board members where diversity is lacking.[177]

Furthermore, the "Nasdaq Board Diversity Rule" mandates a disclosure requirement intended to promote board diversity. All firms listed on the Nasdaq exchange in the United States must comply with the regulation, which requires them to: (1) publicly report their board-level diversity data; and (2) have, or explain why they do not have, at least two diverse directors. In addition, states other than California, such as Maryland and New York, have approved legislation forcing corporations to provide board diversity numbers.

VIII. COURT STRIKES DOWN ASSEMBLY BILL 979

A. *Board Diversity and Nasdaq Rule*

Nasdaq has urged the Securities and Exchange Commission (SEC) to implement a new boardroom diversity regulation in December 2020.[178]

Most Nasdaq-listed businesses should have at least one female director and another who identifies as a member of an underrepresented group or LGBTQ+. The regulation does not mandate listed

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[175] Spencer Stuart, *2021 S&P 500 Board Diversity Snapshot,* (May 2021).
[176] Id. 172.
[177] David A. Bell et al., *California Court Finds California Board Diversity Law Unconstitutional,* HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE, (Apr. 23, 2022).
[178] Nasdaq Proposed Diversity Rule, 85 Fed. Reg. 80, 472 (Dec. 4, 2020).

companies to have such (minimally) diverse boards; rather, it requires companies to either comply with this expectation or explain why they have not in their public disclosure reports. Foreign and smaller enterprises will have more flexibility in meeting these criteria by having two female directors.[179]

According on the listed category, Nasdaq set different dates for satisfying the necessary diversity requirements. Within two years following the SEC's adoption of Nasdaq's regulation, all businesses will be required to have at least one diverse director. Firms listed on the Nasdaq Global Select Market and Nasdaq Global Market must have two diverse directors within four years, while companies listed on the Nasdaq Capital Market must have two diverse directors within five years. Companies who fail to achieve these standards but offer an explanation in their securities filings will not be delisted.[180]

Nasdaq isn't the only company that values diversity. Congress mandated federal financial-services regulators to establish their own office buildings of minority and women inclusion and set standards for "assessing the diversity policies and practices of entities regulated by the agency" in Section 342 of the Dodd-Frank Act of 2010, which was passed eleven years ago.[181]

Professor Jesse Fried of Harvard Law School published an eight-page paper[182] shortly after Nasdaq announced its amended regulation, harshly condemning it and accused Nasdaq of distorting empirical research of the influence of board diversity on business value to justify its proposed rule. Fried specifically states: "While Nasdaq claims these rules will benefit investors, the empirical evidence provides little support for the claim that gender or ethnic diversity in the boardroom increases shareholder value. In fact, rigorous scholarship – much of it by leading female economists – suggests that increasing board diversity can actually lead to lower share prices. Adoption of Nasdaq's proposed rules would thus generate substantial risks for investors."[183]

Fried in his paper exposes his thought, stating that diversity on corporate boardrooms could harm shareholders. According to him, Nasdaq proposal will "generate collateral damage" and that "a close look at these studies as well as studies that Nasdaq fails to cite, suggests that increasing board diversity may well reduce investors' return".

The paper of Professor Jesse Fried will be further discussed in the next section.

Nasdaq believes that boosting board diversity will enhance shareholder value among other things[184], whilst professor Fried does not agrees.

Statistical studies are unlikely to show a positive or negative influence of board diversity on stock price.

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[179] Richard W. Painter, *Why Board Diversity and the Nasdaq Rule Requiring It Make Sense,* CLS BLUE SKY BLOG, (Apr. 26, 2021).
[180] Id.
[181] 12 U.S. Code § 5452 – Office of Minority and Women Inclusion, CORNELL LAW SCHOOL, (July 21, 2010).
[182] Jesse M. Fried, *Will Nasdaq's Diversity Rules Harm Investors?,* HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE, (Mar.31, 2021).
[183] Id. 178.
[184] Nasdaq, *Nasdaq to Advance Diversity through New Proposed Listing Requirements,* NASDAQ, (Dec. 1, 2020).

Corporations that actively add women and minorities to their boards of directors are more likely to be headquartered in some parts of the country than in others.[185] Diversity may be used by certain firms to compensate for other issues with corporate governance and management. Some firms may appoint a diverse board of directors who are more inclined to back managers who are not maximizing shareholder value efficiently. All these aspects must be taken into account in studies that look at the influence of board diversity on stock price. It's understandable that determining the influence of board diversity on stock price is challenging.

Fried quotes only one study that shows gender diversity on corporate boards had a minor negative influence on stock price.[186] This analysis relies on a two-decade-old data collection that excludes the 2008 financial crisis. Women on boards are more successful at monitoring management, according to the same study. The study's authors ascribed the somewhat negative impact of board gender diversity on stock price to a variety of issues, the most important of which is that excessive board member supervision of management may reduce shareholder value. If the data set had included stock price performance in the aftermath of the financial crisis in 2008 and 2009, the results would have been different, given the lack of risk management at the time. Another important thing to note is that many academics have pushed for more corporate directors to monitor management, including Harvard's shareholder rights project, which vigorously campaigned for annual director elections,[187] only to see at least some of them balk at the board monitoring function when the directors are women.

Professor Fried's other statistical research include stock market price reactions to regulations requiring gender diversity on company boards. Norway passed the first of these laws in 2003, and California passed the second in 2018. (California in 2020 enacted another law requiring representation of under-represented minorities on corporate boards). As Professor Fried shows out, the stock market reacted negatively in both cases. And considering the circumstances, this is understandable. According to Norwegian legislation, business boards must have 40% female representation. In Norway in 2003, there may have been a supply and demand issue with firms all wanting to locate many female directors at the very same time. In 2011 France passed a similar law however studies on whether this affect negatively the stock market are not present.
The California legislation is more recent and contentious, not because of gender diversity, but because it requires firms based in California to follow this corporate governance standard, even if they are established in another state. In a second study, academics Steven Davidoff Solomon and Jill Fisch[188] argue that California's legislation differs from the internal affairs theory in the United States, which states that the law of the state of incorporation affects topics like director election and fiduciary obligations to shareholders.

If additional nations follow suit and expand this trend into other areas of corporate governance, impacted firms will be pushed toward the European Union's corporate governance model. Member

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[185] Troy Segal, *Evaluating the Board of Directors,* INVESTOPEDIA, (Dec. 29, 2021).
[186] Renee B. Adams & Daniel Ferreira, *Women in the Boardroom and Their impact on Governance and Performance,* SSRN, (26 Mar. 2008, last revised 31 Oct. 2018).
[187] Shareholder Rights Project, *121 Companies Agreed to Move towards Annual Elections,* HARVARD EDU., (2014).
[188] Jill E. Fisch & David Solomon, *California's 'Women on Boards' Statute and the Scope of Regulatory Competition,* EBOR, Vol.20, p.493, (2019), U of Penn, Inst for Law, and Econ Research Paper No. 19-23, ECGI – Law Working Paper No. 454/2019, (2019).

states are obligated to accept company charters from other member states, but they also maintain the power to control the internal affairs of firms based inside their borders under the "seat theory" of corporate governance. When seen in this light, the negative market reaction to Professor Fried's California bill is reasonable. It is most likely unrelated to the presence of women on corporate boards, but rather to the basic question of which governments should oversee corporate governance.[189]

Most importantly, rather than being a hard requirement, the Nasdaq rule is a "comply or explain" regulation. While studies on the impact of boardroom diversity on firm performance are not uniform in their conclusions, Nasdaq carefully chose the more flexible "comply or explain" option, knowing that boardroom diversity is important to some investors, especially institutional investors, and that disclosure of this information to investors is critical. Unlike the California government, Nasdaq is primarily concerned with shareholder value. Finally, the Nasdaq regulation may deter California and other states from prying more into the internal affairs of firms based in their jurisdiction but incorporated abroad.[190]

Nasdaq cites multiple academic and institutional investor studies to back the new changes, claiming that boardroom diversity enhances corporate performance and the integrity of public securities filings. These and other research are cited in my study. Women directors, for example, were shown to be helpful in reducing securities fraud in one research.[191] Another study revealed that women directors sometimes broaden a board's viewpoint, assist objectify conversation, and function as mediators, based on interviews with directors.[192] The influence of racial diversity on corporate boards, as well as diversity for sexual orientation and gender identity (LGBTQ+ directors), has received less empirical attention. The sample size has probably been too small because boards are just now beginning to diversity, but that may alter shortly.

However, the conceptual reasons in favor of board diversity are compelling. Groupthink is a severe hindrance to excellent decision making, according to psychology and management economics.[193] Even more dangerous is "affinity fraud,"[194], in which certain people, particularly corporate executives who conceal wrongdoing from their boards of directors, effectively deceive those who want to believe people who are similar to them. Diverse boards of directors should also aid in improving interactions with other stakeholders including as regulators, workers, suppliers, consumers, and the media. This should result in increased earnings. Furthermore, the Nasdaq requirement is effectively a transparency law, forcing corporations with a diverse board of directors to explain why they don't have one.

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[189] Richard W. Painter, *Why Board Diversity and the Nasdaq Rule Requiring It Make Sense,* CLS BLUE SKY BLOG, (Apr. 26, 2021).
[190] Id.
[191] Douglas J. Cumming et al., *Gender Diversity and Securities Fraud,* ACAD. MANAG. J. Vol. 58(5), (July 24, 2014).
[192] Jasmin Joecks et al., *Women Directors' Roles on Corporate Boards: Insights from a Qualitative Study,* SAGE JOURNAL, (May 4, 2017).
[193] IRVING L. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES, (Houghton Mifflin, 1982).
[194] Lisa M. Fairfax, '*With Friends Like These…': Toward a More Efficacious Response to Affinity-Based Securities and Investment Fraud,* GA. L. REV. Vol.36, p.63, (2001).

There are larger concerns at play here. More institutional investors are realizing that the value of their whole portfolio is based on asset values in the economy, and that addressing environmental and social issues has an impact on the economy's worth. According to Professor Madison Condon, institutional investors' support for climate change mitigation is compatible with portfolio value maximization.[195]The same is likely to be true in addressing the current dilemma in the United States over racial injustice and the significance of better matching corporate wealth and power with our country's demographics.

There are also philosophical and political considerations to ponder. The public impression that corporate prosperity is linked to a history of racism and gender discrimination has long-term detrimental implications. More regulation and taxes might come from a political reaction. To summarize, maximizing shareholder money alone will not solve societal problems in the long run. Diversified boards of directors are not a panacea for injustice and inequality, but they are a smart way for businesses to contribute.[196]

As a result, it's not surprise that many asset managers back the proposed Nasdaq regulation. These include private asset managers like Vanguard as well as state pension funds. Fried sees this pro-rule sentiment as self-serving, claiming that fund managers participate in social justice activism to draw assets from socially aware investors and collect fees. However, it's difficult to understand how this translates into asset managers supporting Nasdaq's regulation, which supplants asset manager activism in part. If the regulation is implemented, asset managers will have to exert pressure on firms to have more diverse directors than the Nasdaq guideline to attract assets through their own activism on board diversity. This is barely a reason for managers to endorse the regulations just to earn increased fees.[197]

Corporate boardroom diversification is expected to boost shareholder value, especially for diversified investors with a stake in the entire economy. Diverse boardrooms do not reduce shareholder wealth. The Nasdaq's comply-or-disclose regulation is a practical and flexible tool to encourage listed firms to improve their practices. Finally, achieving gender and racial diversity on corporate boards is the proper thing to do.[198]

B. *Professor Jesse Fried's perspective*

In the introduction of his paper Professor Jesse Fried's talks about the recent events that hit the world during the year 2020, starting from COVID-19 until the death of George Floyd which have underlined the importance of important issues affecting especially American society, but also present in the Western world in general such as systematic racism and sexism.

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[195] Madison Condon, *Externalities and the Common Owner,* WASH. LAW REV., (2020).
[196] Richard W. Painter, *Why Board Diversity and the Nasdaq Rule Requiring It Make Sense,* CLS BLUE SKY BLOG, (Apr. 26, 2021).
[197] Id.
[198] Id.

According to Fried, however, although the effort of solving these issues are well intentioned they could in some cases generate collateral damage, in particular the paper is going to focus on the downsides of Nasdaq's proposed diversity rules. [199]

As previously said, Nasdaq requested the Securities Exchange Act Commission (SEC) to approve new diversity guidelines in December 2020.[200]
The aim is indeed, for Nasdaq's listed companies to include at least one female director and another who identifies as an underrepresented minority or part of the LGBTQ+ community[201]. To avoid being delisted, a company must "diversify or explain": either have to directors who are diverse or explain why it does not[202]. Nasdaq also wants companies to reveal every director's ethnicity, gender, and LGBTQ+ status.[203]

Nasdaq revised their proposal in February 2021[204], softening it in several areas. Boards with five or fewer members now just require one diverse member or explain why they don't have two;[205]newly listed businesses have a longer phase-in time;[206] and firms that lose a diverse director suddenly are allowed a grace period before being judged noncompliant.[207]

However, Nasdaq's knows that it is not enough in general to appeal to social justice, in fact the proposed rule by Nasdaq's gets justified by asserting that it will indeed benefit the investors, CEO Adena Friedman states: "there are many studies that indicate that having a more diverse board… improves the financial performance of a company."[208] Such studies have been previously mentioned in chapter 1. Along with this statement also Nasdaq's submission to the SEC includes several research to back up this allegation.[209]
However, according to Fried's opinion both such studies and Nasdaq's studies do not mention that increasing board diversity may also reduce investor' returns.
Nasdaq cites research that suggest there is no evidence to support the assumption that gender or racial diversity in the boardroom boosts shareholder value. Part II illustrates how Nasdaq strangely ignores significant scholarship—much of it by top female economists—that suggests that boosting board diversity might actually depress share prices.[210]

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199 *Supra* note
200 Exchange Act Release No. 34-90571, 85 Fed. Reg. 80-,472 (Dec. 4, 2020), Notice of Filing of Proposed Rule Change to Adopt Listing Rule IM-5900-9 to Offer Certain Listed Companies Access to a Complimentary Board Recruiting Solution to Help Advance Diversity on Company Boards. [Hereinafter, "Nasdaq Proposal"].
201 Id.
202 Id.
203 Id.
204 Response to Comments and Notice of Filing of Amendment No.1 of Proposed Rule Change to Adopt listing Rules Related to Board Diversity (File No. SR-NASDAQ-2020-081), (Feb. 26, 2021). [Hereinafter, "Nasdaq Response"].
205 Id., at 5.
206 Id., at 6.
207 Id.
208 Alexander Osipovich, Nasdaq CEO Pushes Corporate Board to Diversify, WALL ST. J. (Dec. 1, 2020).
209 Nasdaq Stock Mkt. LLC, Filing with respect to proposed rule changes by self-regulatory organizations (Form 19b-4) (Dec. 1, 2020) [Hereinafter, Nasdaq Filing].
210 See Renee Adams & Daniel Ferreira, *Women in the boardroom and their impact on governance and performance,* 94 J. FIN. ECON. 291 (2009); Kenneth Ahern & Amy Dittmar, *The Changing of The Board: The Impact on Firm Valuation of Mandated Female Board Representation,* 127 Q.J. ECON. at 137 (2012); Daniel Greene

Of course, no academic research (or series of studies) can show beyond a reasonable doubt whether Nasdaq's new regulations would benefit or hurt shareholders. Nobody has ever conducted such a precise experiment; economists will not be able to determine the consequences of these laws unless they are implemented. However, a careful examination of the facts reveals that Nasdaq's approach poses substantial adverse risks to investors—risks that Nasdaq fails to acknowledge. As a result, Nasdaq's pursuit of social justice goals might potentially harm investors.[211]

1. Nasdaq's Provided Evidence

Fried argues that Nasdaq nearly solely depends on reports created by consulting and financial firms for marketing purposes that claim to discover a relationship between diverse boards and stock returns as evidence between the two.[212]

He follows by explaining that it is important to see the relationship between correlation and causation, indeed correlation does not imply causation. Higher returns and a more diverse board might be explained by other factors such as business size or industry. Certain sectors, for example, may have a greater pool of eligible diverse director candidates, and those industries may also outperform (for other reasons). As Deborah Rhode and Amanda Packel highlighted, more successful companies may be more capable of attracting female and minority board members, who are in great demand.[213] To establish causality, complex statistical approaches are required to account for missing factors.

Nasdaq acknowledges just three sources that go beyond mere correlation when it comes to the relationship between diversity and shareholder value. The first is a brief assertion made in marketing brochures by the Carlyle Group.[214] The assertion cannot be reviewed or relied upon since the data and methodology are not revealed, and the analysis is not subject to scholarly peer review. The second is a 2003 academic paper[215] that was later criticized in a renowned financial publication for failing to sufficiently adjust for omitted variables.[216] The third is high-quality research (one that may be published in a prestigious finance or economics journal) that demonstrates that board diversity improves shareholder value.[217] However, this high-quality study

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et al., *Do board gender quotas affect firm value? Evidence from California Senate Bill No.* 826, 60 J. CORP. FIN. (Feb. 2020).

[211] *Supra* note 196.

[212] See, Credit Suisse, *The CS Gender 3000: Women in Senior Management 16* (Sept. 2014), McKinsey &Company, *Diversity wins: How inclusion matters,* (May 2020).

[213] Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?,* DEL. J. CORP. L. at 377, 387, (2014).

[214] Carlyle Group, *From Impact Investing to Investing for Impact,* (Feb. 24, 2020). ("Over the past three full years, the average earnings growth of Carlyle portfolio companies with two or more diverse board members has been nearly 12% per year greater than the average of companies that lack diversity. After controlling for industry, fund, and vintage year, companies with diverse boards generate earnings growth that's five times faster, on average, with each diverse board member associated with a 5% increase in annualized earnings growth."

[215] David A. Cartel et al., *Corporate Governance, Board Diversity, and Firm Value,* FIN. REV. (2003).

[216] See Adam & Ferreira *Supra* note 207.

[217] Gennaro Bernile et al., *Board diversity, firm risk and corporate policies*, FIN. ECON. (2018).

looks at diversity as a single variable that combines six different factors: ethnicity, gender, college attended, age, financial expertise, other board experiences. In general, the results generated from these studies hold even though one of the components gets omitted[218], however the paper cannot show whether the gender or ethnicity of the board improves financial performance.

What Nasdaq does is, citing a number of studies that suggest that diverse boards are linked to (or may cause) stronger corporate governance indicators including higher board participation and quality of financial reporting.[219] Furthermore, even if diversity in boardrooms may result in improved corporate governance, investors care about these impacts if and only if they reflect into better competitive results: higher stock prices.

Consider an investor deciding between (1) a company that earns a 12% return but has poor board attendance and (2) a company that earns a 10% return but has superior board attendance. Obviously, the investor will select the first over the second. Greater board attendance or other desirable company governance outcomes (such as enhanced financial reporting quality) will not fund one's retirement on their own. Returns are what matter to investors at the end of the day.[220]

2. Nasdaq's Ignored Evidence

Because there hasn't been high-quality research indicating that boardroom gender or ethnic diversity enhances returns, Nasdaq can't identify one.[221] In fact, a large body of scholarly research suggests that diversifying boards might hurt financial success. Nasdaq, however, refuses to interact with — or even disclose — this information.
Jesse Fried goes on by highlighting the evidence that board diversity impairs firm performance, the evidence that pressuring boards to diversify harms investors, and how these are applicable to Nasdaq.

First of all, the following paragraph will analyze Jesse Fried's opinion on the evidence that board diversity impairs firm performances.

Renee Adams and Daniel Ferreira published research in 2009 that looked at the benefits of board diversity on over 2,000 US companies.[222] Nasdaq is clearly aware of the study's findings, which show that boards with female directors have higher attendance records and exert stronger supervision on CEOs[223] The paper's last statement, however, is missing from Nasdaq: "the average effect of gender diversity on corporate performance is negative."[224] Why? Excessive executive

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[218] Id.
[219] See Adam & Ferreira, *supra* note 207, (finding that directors of gender-diverse boards have better attendance records).
[220] *Supra* note 196.
[221] Olga Kuzmina & Valentina Melentyeva, *Gender Diversity in corporate boards: evidence from quota-implied discontinuities,* NEW ECONOMIC SCHOOL, working paper, (2021). Based on a study of the impact of gender quotas throughout Europe, a widely circulating working paper asserts that adding women to boards enhances shareholder profits.
[222] See Adam & Ferreira, *supra* note 207.
[223] See Nasdaq Filing at 21,28, 148-49, 155.
[224] See Adams & Ferreira, *supra* note 207

supervision appears to be linked to higher gender diversity on boards.[225] The main finding of the paper is concerning. However, Nasdaq's inability to recognize it is not excused.

Fired continues than, highlighting the evidence that pressuring the board to diversify, harms the investors. According to him, Nasdaq also ignores various research showing that when companies are encouraged to employ new directors for diversity reasons, stock returns fall. Kenneth Ahern and Amy Dittmar wrote a well-known 2012 study about Norway's 2003 board gender law, which was published in one of the world's premier economic journals.[226] The rule produced an immediate 3.5 percent drop in the stock values of companies without female directors, according to the report; these companies' stock prices remained low over the next few years, as well.[227] The obvious explanation for this was that investors expected companies to replace more experienced male directors with less experienced female directors.[228]

Returning got the United States, a number of recent publications have looked at California's 2018 board gender law.[229] By the end on 2019, US listed companies headquartered in California have to have at least one female director, and by the end of 2021 at least two.[230]

Firms can escape compliance by paying fines that are very low for a public firm, ranging between $100,000 and $900,000 each year. For many businesses, this is less expensive than adding another board member.

Fried goes on by stating that certain laws in California like Nasdaq's proposal. Noncompliance is made public in order to shame companies into diversifying. Stock prices of impacted companies fell by a market-adjusted 2.6 percent after the bill was announced, resulting in a mean value loss of $328.31 million. This is far more than the current worth of potential noncompliance fines. The decline is partly attributed to the price of replacing boards, according to the article.[231] However, it might also represent the perception that, as previous research suggests[232], a more diverse board would be detrimental to performance. Other studies have come to similar conclusions.[233]

[225] Id.
[226] See Aherm & Dittmar, *supra* note 207.
[227] D.A. Matsa and A.R. Miller, *A female style in corporate leadership? Evidence from quotas,* AM. ECON. J. APP. ECON., 136, 144-48 (2013).
[228] See Aherm & Dittmar, *supra* note 207.
[229] Id.
[230] Id.
[231] Consider a fictional San Diego biotech company to see how the law might cause transition expenses. Assume that each of the firm's five male directors have a distinct skill set required to commercialize the company's cancer medicine, and that the company does not require any additional directors. To comply with California's new gender regulation, the company must either replace one of its present directors with a woman or add an extra board member. Substituting directors is expensive, in part because the new director, regardless of gender, lacks the previous director's expertise of the company. Adding and paying for an extra sixth is also expensive. Investors in the company can expect to lose money in any case. See *supra* note 196.
[232] See Adam & Ferreira, *supra* note 207.
[233] See Daniel Greene et al., *supra* note 207.

Nasdaq states that “it believes that the academic studies support the conclusion that board diversity does not have adverse effects on company financial performances”.[234] However, numerous research that indicate a causal influence, the most majority of which Nasdaq fails to acknowledge, come to the opposite result.

From the standpoint of investors, Nasdaq's standards should only result in board changes if boosting diversity improves—or at the very least does not harm—financial performance. Boards would otherwise be unaffected. However according to Fried investors can not necessarily trust these results. The small penalties placed on non-compliant companies cannot explain the dramatically negative stock market reaction to California's law. However, it is reasonable to predict that, fearing controversy, directors may be unjustly coerced into adopting board changes that hurt shareholders.[235]

Nasdaq's standards, which include a requirement that every director declare their "diversity" status, are intended to have the same naming-and-shaming impact. Many boards will believe that justifying their lack of diversity is a better option than complying. The title of Nasdaq's news release appears to accept this purpose, indicating that the goal is to increase diversity rather than just disclose it: "Through New Proposed Listing Requirements, Nasdaq Will Advance Diversity."[236]

The changes relax Nasdaq's criteria by decreasing the diversity objective for small boards and providing a "cure" time for boards who lose a diverse member unexpectedly. If directors understood they could utilize the "explain" option when the business mistakenly fails to reach Nasdaq's objective without risking reputational damage (e.g., "we only have one diverse director since our second diverse director fell unwell and left"), this easing would not be necessary.

The fact that Nasdaq was under pressure from companies to relax the rules demonstrates that directors want to avoid being labeled non-compliant, even if non-compliance is simple to explain. If investors continue to perceive that forcing companies to diversify their boards detracts from their value, SEC approval of Nasdaq's diversity standards is likely to result in market-adjusted share price decreases for impacted companies.

Fried concludes by asserting that many people and organizations are banding together to combat different societal problems in America, such as systematic racism and sexism. Although Nasdaq's new diversity standards may have positive social consequences, we should not pretend that they would also help investors. High-quality scholarship, including one cited by Nasdaq and numerous others ignored by Nasdaq, tends to point in the opposite direction. Investors are unlikely to applaud if the SEC accepts Nasdaq's new guidelines.[237]

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[234] Nasdaq Filing at 22.
[235] Alex Edmans et al., *CEO Compensation: Evidence from the Field,* ECGI, (2021).
[236] Press Release, Nasdaq, *Nasdaq to Advance Diversity through New Proposed Listing Requirements* (Dec. 1, 2020).
[237] *Supra* note 196.

IX. BOARD DIVERSITY: THE COUNTERPART

Professor Richard Painter wrote a paper in response to Professor. Jesse Fried's view on Nasdaq decision. In this section Professor's painter view will be discussed.

A. Racial Inclusion

The empirical research presented by Professor Fried to support his claim that Nasdaq's board diversity rule's gender component might impair shareholder value. While none of these studies prove that board diversity boosts shareholder value, none of them back up Fried's assertion that board diversity, whether voluntary or mandated by law, hurts shareholder value.
Investors who want greater director oversight may wish seeing more female directors or, if there's none, the explanation the Nasdaq regulation requires of why not.
This section concludes with a discussion of a research that Fried did not mention, assessing a comply-or-explain regulation on board gender diversity established by a Canadian stock exchange in 2014 and the apparent good influence it had on stock price.
Renee B. Adams of the Queensland university of technology and Daniel Ferreira of the London School of Economics conducted the first research highlighted by Professor Fried—a study of data that is now largely two decades old—on the influence of board diversity on stock prices.[238] Nasdaq used this study to back up its proposed comply-or-explain regulation and Fried alleges Nasdaq misrepresented the study's conclusions.
Nasdaq and Fried both declined to comment further on the report. Although the study's findings on the higher performance of female directors are substantial, the data on stock price fluctuations in the 1996-2003 era do not provide strong support to either side of the dispute.
Professors Adams and Ferreira presented a summary of their findings.[239] First, they discovered that female directors behave differently than male directors, and that they seem to be more involved in at least some of the board's monitoring functions.

Adams & Ferreira states the following: "We find that gender diversity in boards has significant effects on board inputs. Women appear to behave differently than men with respect to our measure of attendance behavior. Specifically, women are less likely to have attendance problems than men. Furthermore, the greater the fraction of women on the board is, the better is the attendance behavior of male directors. Holding other director characteristics constant, female directors are also more likely to sit on monitoring- related committees than male directors.

In particular, women are more likely to be assigned to audit, nominating, and corporate governance committees, although they are less likely to sit on compensation committees than men are.

[238] Renée B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance,* J. FIN. ECON., (2009).
[239] See Fried, *supra* note 196.

Women also appear to have a significant impact on board governance. We find direct evidence that more diverse boards are more likely to hold CEOs accountable for poor stock price performance; CEO turnover is more sensitive to stock return performance in firms with relatively more women on boards. In our data, this effect is stronger and more robust than the previously shown effects of board independence on CEO turnover (Weisbach, 1988). We also find that directors on gender diverse boards receive relatively more equity-based compensation. We do not find a statistically reliable relation between gender diversity and the level and composition of CEO pay, which is consistent with our findings that female board members are underrepresented on compensation committees and thus have less involvement in setting CEO pay."[240]
However, this factors do not necessarily translate to improvements in stock price:

"The evidence on the relation between gender diversity on boards and firm performance is more difficult to interpret […] Our results suggest that, on average, firms perform worse the greater is the gender diversity of the board. This result is consistent with the argument that too much board monitoring can decrease shareholder value (Almazan and Suarez, 2003; Adams and Ferreira, 2007). Thus, it is possible that gender diversity only increases value when additional board monitoring would enhance firm value. To investigate this hypothesis, we examine whether gender diversity affects performance differentially in firms with different levels of shareholder rights, […]. Consistent with this hypothesis, we find that gender diversity has beneficial effects in companies with weak shareholder rights, where additional board monitoring could enhance firm value, but detrimental effects in companies with strong shareholder rights."[241]

Professor Painter goes on by stating few observations. The first observation is that this study demonstrated that female directors are capable of doing their duties and are likely to do so better than their male colleagues. The study found that boards with more female directors were more likely to scrutinize management. Female directors may have higher attendance records at board meetings and be more active in keeping management accountable for stock price, according to the research.[242] "We find that gender diversity has good impacts in organizations with inadequate shareholder rights," the report says.[243] This is in line with the fact that a big percentage of institutional investors back Nasdaq's proposed board diversity mandate.[244]
The second observation is that the authors relate the negative effect on company value based on stock price to the fact that increased board of director surveillance may cause some businesses' stock prices to fall. According to the study, there were a considerable number of such companies in the sample, which resulted in the overall unfavorable effect.

Third observation: this research was based on the stock values of over 2,000 firms from 1996 to 2003, a period that saw tremendous economic development and one market downturn—largely

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240 See Adams & Ferreira, *supra* note 235.
241 Id.
242 Richard W. Painter, *Board Diversity: A response to Professor Fried,* STANF. J. LAW BUS., (Apr. 12, 2021).
243 Id.
244 Nasdaq, Amendment 1 to Proposal to Advance Board Diversity and Enhance Transparency of Diversity Statistics Through New Proposed Listing Requirements (Form 19b-4), (Feb. 26, 2021).

tied to the dot-com bubble crash in 2000 and subsequent exposures of fraud at individual corporations. Over the time frame stock prices overall improved.[245]

Fourth consideration was that at the end of the study period, the post-Enron/Worldcom Sarbanes-Oxley Act of 2002 (SOX) was passed, which aimed to improve the quality of public company disclosure and prevent future fraud by demanding heightened board monitoring for compliance with securities laws disclosure obligations.
Failure to monitor, at least since late 2002, might result in enforcement measures against the corporation and its board, which will almost certainly affect profitability. All of this raises serious doubts about the utility of empirical studies of the link between board composition and business earnings conducted prior to SOX.

Fifth, much has changed since then, notably the increased economic and political power of women, as well as the number of women in high-level professional professions, both in the private sector and in government organizations that oversee enterprises. While the absence of a single female director may have had no influence on stock price between 1996 and 2003, this may not be the case if the same study were repeated starting in 2021.

The abstract of the Dam and Ferreira research also talks about takeover defenses which may affect stock prices. However, the connection between the two gets not further explained. It seems that companies with a more diverse boardrooms have fewer takeover defenses and hence authors believe that this affects stock prices by lowering them. All-male boards may theoretically be more prone to consolidate control, implying greater takeover resistance. Takeover defenses can also pose challenging legal and ethical problems, which female board members may be more unwilling to address. There's a lot of speculation here, and it's unclear if the association between female directors and a lack of takeover defense, if any, indicates causality. Fried makes no note of this in his analysis of the research. In fact, whether takeover defenses improve or decrease firm value is a contentious question in corporate law.[246]

Fried also cites research on board diversity mandates imposed by legislation. The study looked at the impact of a legal mandate requiring 40 percent of company directors to be women eighteen years ago in a single foreign country—Norway—a considerable rise from the prevailing 9 percent of directors in Norway at the time. Professor Fried also ignores a successive empirical evaluation of stock returns in Norway performed by three economics professors, which concluded that "the valuation effect of Norway's quota law was statistically insignificant" and that "at the time of the Norwegian quota, the supply of qualified female director candidates was high enough to avoid the negative effects of the quota highlighted previously in the literature."[247]

Whatever transpired in Norway eighteen years ago, the scenario was considerably different from the Nasdaq's proposed comply-or-explain regulation eighteen years later, which asked for a single

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[245] *S & P 500 Index – 90 Year Historical Chart,* MACROTRENDS (Nov. 1, 2021).
[246] Lucian A. Bebchuck, *The Case Against Board Veto in Corporate Takeovers,* U. CHI. L. REV. 973, (2002); Lucian A. Bebchuck, *Why Firms Adopt Antitakeover Arrangements,* U. PA. L. REV. (2003).
[247] B. Espen Eckbo et. al, *Valuation Effects of Norway's Board Gender Quota Law Revisited,* MGMT. SCI. (AUG. 18, 2021)

woman director in the United States—hardly forty percent. The United States boasts the world's greatest economy, thanks to business and law institutions, such as Harvard, where Professor Fried lectures, that have been churning out highly skilled female graduates for decades.[248]

Professor Fried also ignores the scholarship of academics who conducted long interviews with Norwegian directors and management to determine how the system works, instead relying solely on stock market fluctuations to judge Norway's experience with board diversity.[249] Empirical research is less reliable when it purports to find an explanation for a phenomena by relying solely on event studies without corroborating these findings with interviews, review of documents and other equally valid empirical methods.

Fried also fails to mention other European countries that have had successful experiences with diversity mandates for corporate boards. France for example in 2011 enacted the Copé-Zimmermann law that required companies to have at least forty per- cent women representation on their boards of directors by 2020. Now in 2020, institutional shareholders are saying they want more gender diversity in senior management positions in French companies as well as diversity in the boardroom.[250] Fried condemns these studies as "marketing materials,"[251] without explaining why their approach is inferior to the "academic"68 research he claims are better. Goldman Sachs, for example, has made board diversity a requirement for doing business.

The pricing impact of the 2018 California legislation was studied by von Meyerinck et al., who discovered "significant negative announcement returns to the implementation of the gender quota for California businesses and considerable spillover effects for non-California firms"[252] The authors of the von Meyerinck et al. research specifically stated that they "demonstrate that these impacts are not explained by frictions in the director labor market," implying that Fried's arguments from the 2003 Norwegian study probably did not hold water in California in 2018.

The main issue with the California Act is that it departs from the prevalent "incorporation theory" or "internal affairs doctrine" in the United States.[253]

Many California-based corporations are incorporated in Delaware.[254] In most cases, California's gender diversity mandate does not conflict with Delaware law, which does not require the election of women directors but does not prevent them.[255] If California or another state continues this trend in other areas of corporate governance, a conflict between California law and Delaware law—or

[248] *Supra* note, 239.
[249] Amanda K. Packel, *Government Intervention into Board Composition: Gender Quotas in Norway and Diversity Disclosures in the United States,* STAN. J. LAW BUS. & FIN., at 192, 205-219 (2016).
[250] Paulina Pielichata, *Managers Call on French Firms to Up Board Diversity,* PENSIONS AND INVESTMENTS, (NOV. 12, 2020).
[251] See Fried, *supra* note 196.
[252] Felix von Meyerinck et al., *As California Goes, So the Nation? Board Gender Quotas and the Legislation of Non-Economic Values,* EUR. CORP. GOV. INST., (2021).
[253] Deborah A. De Mott, *Perspectives on Choice of Law for Corporate Internal Affairs,* L. & CONTEMP. PROBS. at 161, 163 (1985).
[254] Some corporate lawyers strongly recommend Delaware incorporation for California headquartered companies.
[255] In the case of a company with no women directors, the California law does constrain the choices available to shareholders who under Delaware law elect corporate directors. See DEL. CODE. ANN. 8

the law of another state of incorporation—might arise. Investors are understandably concerned about California's actions. Some shareholders may reasonably want to get out of companies based in California and other states that are expected to follow California's lead.

The proposed Nasdaq regulation has lower diversity criteria than the California requirements for corporations with five or more directors. The comply-or-explain regulation implemented by the Ontario Securities Commission (OSC) in 2014 is more like the Nasdaq rule than the California or Norwegian rules in terms of board gender diversity.[256] The OSC requirement is less detailed than the Nasdaq rule; the business must either have a policy on female board representation or explain why it does not.[257]

However, the mandated disclosure is not significantly different from the Nasdaq rule's gender diversity component. According to the OSC regulation, a firm having a policy on female representation, but no female directors must publish that policy as well as its progress (or lack thereof) toward achieving the policy's objectives. A corporation that does not have a policy but has one or more female directors might explain why, arguing that it does not require one. A business that has no policy and no female directors must explain why.

The overall impact of the OSC rule on Canadian businesses was also impressive: "Prior to the amendment, female directors accounted for 10% of directors in Canadian firms on average, so our estimates imply that the amendment is associated with a 30 to 37 percent increase in female director representation."[258]

To summarize, there is minimal evidence that gender diversity on corporate boards has a negative influence on stock price, even while there is little evidence of a positive statistical link between gender diversity and stock price. However, at least one of the research projects (Adams and Ferreira) indicated that women directors do their roles differently than males and are more effective

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[256] The OSC rules states: "Form 58-101F1 *Corporate Governance Disclosure* is amended by the following…
11. *Policies Regarding the Representation of Women on the Board* (Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nuova Scotia, Nunavut, Ontario, Québec, and Saskatchewan only –
a) Disclose whether the issuer has adopted a written policy relating to the identification and nomination of women directors. If the issuer has not adopted such a policy, disclose why it has not done so.
b) If an issuer has adopted a policy referred to in (a), disclose the following in respect to the policy:
(i) a short summary of its objectives and key provision.
(ii) the measures taken to ensure that policy has been effectively implemented,
(iii) annual and cumulative progress by the issuer in achieving the objectives of the policy, and
(iv) whether and, if so, how the board or its nominating committee measures the effectiveness of the policy".
Amendment Instrument for NI 58-101 *Disclosure of Corporate Governance Practices,* ONT. SEC. COMM'N (Dec. 11, 2014).
[257] Tor-Erik Bakke et al., *The impact of a principles – Based Approach to Director Gender Diversity Policy,* HARVARD LAW FORUM ON CORPORATE GOVERNANCE, (Aug. 27, 2021).
[258] *Supra* note 241.

in managing corporate operations. If greater managerial supervision is beneficial, more gender diversity on corporate boards may be as well.[259]

B. Stock Prices

For ethnic minorities on corporate boards, progress has been glacial. The Alliance for Board Diversity investigated the proportion of women and minorities on public business boards in America's major firms in collaboration with Deloitte.[260] The study indicated that although white women made gains on corporate boards from 2018 to 2020, minorities made virtually little development.[261] Since the study's inception in 2004, minorities have made comparatively little improvement.[262] Despite the fact that minorities' purchasing power has been continuously expanding, this remains the case.[263] Women of color may face greater challenges in the boardroom than White women or males of color.[264]

Few empirical research have been conducted to determine whether or not having minorities on company boards affects corporate governance.

Although there are strong theoretical justifications for a favorable association between business performance and board diversity, empirical investigations based on stock price, earnings, or other performance metrics do not support this theory.

Paul Guest's 2019 paper highlights previous research as well as the current status of both theoretical and empirical data on racial and ethnic diversity in the boardroom[265]:
"In contrast to gender diversity, there is a paucity of such knowledge on racial and ethnic diversity. This is despite the importance to both firms and policymakers… A small number of empirical studies have examined the impact of board ethnic diversity on overall firm performance, the results

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259 *Supra* note 239.

260 Caroline Shoenecker et al., *Missing Pieces Report: The Board Diversity Census of Women and Minorities on Fortune 500 Boards, 6th edition,* ALLIANCE FOR BOARD DIVERSITY & DELOITTE, (2021).

261 Carey Oven & Linda Akutagawa, *The Board Diversity Census of Women and Minorities on Fortune 500 Boards,* HARV. LAW. SCHOOL FORUM ON CORP. GOV., (June 25, 2021) "White women made the largest percentage increase in board seats gained in both the Fortune 100 and Fortune 500, larger than any other group or gender, a gain of 34 seats (15%) in the Fortune 100 and 209 seats (21%) in the Fortune 500…Minority men show no substantive increase in their rate of representation in either Fortune 100…or Fortune 500, which is concerning, as their rate of representation in the Fortune 500 has been growing at less than 0.5% per year since 2010. In fact, African American/Black men lost one seat in the Fortune 100 and five seats in the Fortune 500".).

262 Since 2004, when the *Missing Pieces* census began. Hispanic/Latino(a) representation on corporate board have been relatively flat. African American/Black representation decreased in 2010 and 2012 and then increased in 2016-2018, but then progress came nearly to a halt between 2018 and 2020; the percentage of Asian/Pacific Islander directors on board has increased more steadily. Over 80% of board members of Fortune 500 companies in 2020 were White.

263 Cheryl Grace et al., *The Nielsen Company, From Consumer to Creators: The Digital Lives of Black Consumers,* THE NIELSEN COMPANY (2018).

264 Lisa M. Fairfax, *Some Reflections on Diversity of Corporate boards: Women, People of Color, and the Unique Issues Associated with Women of Color,* 79, JOHN'S L. REV. at 1105,1115-1119 (July 31, 2006). (Discussing how women of color have faced more impediments to their success on corporate boards than White women or men of color).

265 Paul M. Guest, *Does Ethnic Diversity Impact Board Monitoring Outcomes?,* BRIT. J. MGMT. 53, (2019).

of which are mixed. (Larcker and Tayan, 2016). Carter, Simkins and Simpson (2003) find a positive relation between minority directors and Tobin's Q, as do Miller and Triana (2009) for profitability, yet Carter *et al*. (2010) find no association with either measure."[266]

Guest's research looked at business profitability, CEO compensation, CEO turnover, and accounting misstatements, among other things, in 1,906 companies in the United States from 1996 to 2011.[267] The analysis discovered no link between racial and ethnic diversity among directors and the proxy for board management monitoring[268] or business performance.[269] There was no negative link discovered in the study. This data, which dates from between 1995 and 2010, was inconclusive, and it isn't especially useful for predicting the influence of racial and ethnic minority directors on business performance in the economic, social, and political context in 2021 and beyond.

Aside from whether diversity does actually increase profits the right question to ask is whether it changes business decisions, and in some situation it does.
A recent study of the twelve regional Federal Reserve Banks charged with monitoring their member banks' lending policies discovered a link between board diversity and increased lending to underrepresented populations.[270] It's a different matter if such adjustments in corporate choices boost shareholder earnings.
Although research on the impact of boardroom ethnic diversity is limited, there are more studies that show a beneficial relationship between a varied executive team and corporate profitability.[271] Causation isn't necessarily implied by correlation.

According to one research conducted by a major Canadian bank, branches with more racial and cultural diversity in executive teams outperformed ones with less diversity.[272]Although little information regarding this internal study is generally available, several corporations, possibly many companies, have undertaken similar empirical analyses of their branches internally.

When analyses of firm performance, such as those on racial and ethnic diversity in boardrooms, are inconclusive, other empirical methods of research, such as interviews with investors, directors,

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[266] *Supra* note 241.
[267] Kenneth R. Ahern & Amy K. Dittmar, *The Changing of the Board: The Impact on Firm Valuation of Mandated Female Board Representation,* 127 QUARTERLY J. ECON., 137.138, (2012).
[268] See Fried, *supra* note 179.
[269] *Goldman Sachs Commitment to Board Diversity,* GOLDMAN SACHS, (Feb. 4, 2020).
[270] Brian D. Feinstein et al., *Board Diversity Matters: An Empirical Assessment of Community Lending at Federal Reserve-Regulated Banks,* HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE, (Jan. 5, 2022).
[271] There are many studies on the value of a diverse executive workforce, some focusing only on the most senior executives and other focusing also on middle management. E.g. Vivian Hunt et al., *Through Diversity,* MCKINSEY & CO. (Jan. 18, 2018). Other studies focus on ethnic diversity combined with other types of diversity including experience diversity, see e.g, Sylvia Ann Hewlett et al., *How Diversity Can Drive Innovation,* HARV. BUS. REV., (Dec. 2013).
[272] Eddy S.W. Ng & Rosalie L. Tung, *Ethno-Cultural Diversity and Organizational Effectiveness: A Field Study,* INT'L J. HUM. RES. MGMT. (1998), (examining seven branches of a leading Canadian bank and finding that branches with a culturally heterogeneous work groups – a combination of Chinese, East Indians, Caucasian, other Asians, and Aboriginals – achieved higher revenues per full-time employee than the branches with culturally homogeneous work groups of Caucasian or Asians).

and managers about the importance of ethnic diversity in corporate boardrooms, should be used, which is exactly what Nasdaq did.

1. Limitations on stock prices

Empirical studies also have been done on stock prices and those are inconclusive. Basically, there are two main issues with stock prices empirical research: first, even if stock price is the sole factor considered, empirical investigations have yet to provide a conclusive conclusion. Second, if empirical approaches are based on shareholder primacy, they are not adequate for assessing all important issues.[273]

Short-term price changes are assumed to reflect investor assessments of long-term business value in empirical research that draw inferences from stock price movements. This assumption is based on the Efficient Capital Markets Hypothesis (ECMH),[274]which peaked in law and economics academia and regulatory policy in the years leading up to the financial crisis of 2008.

When it comes to gender diversity on corporate boards, investors may be moved by a legal necessity mandating corporations in a certain jurisdiction (such as Norway or California) to appoint female directors. This is likely due to apathy about government control rather than gender, while gender politics and negative reactions to "political correctness" may also play a role.[275]

Alternatively, portfolio managers may see diversity as a strength for firm value (hence institutional investors' widespread support for Nasdaq's rule), but be concerned about other investors' emotional reactions, so they sell affected companies' securities when a gender diversity mandate is announced. Some portfolio managers invest depending on how they believe others will respond, as Keynes suggested.[276] Studies based on data from ten or twenty years ago, when there was less public attention to boardroom diversity, may suggest a certain investor reaction, but that reaction may not be as common now. Moreover, even if investors invest based on underlying value, board diversity may take time to effect business value and hence stock prices. Investors' estimates of the value of board diversity may be inaccurate, at least until a board is faced with a situation in which diversity may make a difference.

Weaker variants of ECMH and other explanations of investor behavior imply that the influence of board diversity on business value, and especially stock price, may take much longer.

Professor Fried, on the other hand, appears to be a staunch supporter of the ECMH, and his methodology stresses stock price changes within the time period of empirical investigations as proof of underlying business value. Fried, for example, dismisses studies demonstrating that

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[273] Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy,* J. CORP. L. 637, 638-640 (2006), (discussing how most empirical studies of corporate performance are focused on stock price or earnings and are thus premised on an assumption of shareholder primacy).
[274] Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work,* J. FIN. at 383, (1970).
[275] S*upra* note 239.
[276] Id.

gender diversity improves board performance if these functions cannot be linked to greater stock prices.[277]

Studies that focus on stock price might have trouble determining when information is integrated into market pricing, especially when it comes to issues like board diversity, which is frequently discussed before diverse directors are appointed. Board members are nominated and later elected, but because most elections are not fought, news of a director nomination or a potential nomination may have a greater impact on stock prices.[278]

Furthermore, Professor Painter goes on by asserting that it is even more difficult to utilize as a basis for conclusion regarding shareholder value, empirical studies that are ambiguous in their finding, employ old data, or include stock prices that might be impacted by numerous other factors absent adequate controls. Professor Painter does not put the blame on professor Fried for referencing these findings, however, according to the former, they cannot be used to support or refute the claim that board diversity benefits or harms investors.[279]

Professor Painter concludes by saying that this discussion has moved beyond the realm of academia. Professor Fried's arguments may be used to bolster the plaintiff's allegation that the Nasdaq regulation has little to do with investor protection, the SEC's basic mandate, and in fact might hurt investors, which is now being litigated in the Fifth Circuit. Finally, Painter recognizes that while it is difficult to prove that boardroom diversity improves corporate profitability in all cases, there is strong empirical evidence and logical arguments to support the conclusion that boardroom diversity, along with the diversity of a corporation's management team, has an impact on corporate operations, and that this impact is in many cases beneficial to investors.[280]

C. *Alternatives and Next Steps*

Even the most outspoken opponents of the California Board Diversity Bills admit the current uneven makeup of business boards in the United States.[281] California should instead utilize its enormous capital market power to encourage institutional investors to affect change through shareholder activism, according to Joseph Grundfest, who has been skeptical of the measures.[282]

Other options have been offered, such as a tax incentive scheme to encourage firms to build more diverse boards of directors and reformulating the measures into a sunset clause contained in another law, allowing them to expire after a limited amount of time without requiring reapproval.[283]
The California Board Diversity Bills and these alternate measures are not mutually exclusive. The proposals are not intended to be a panacea or the only answer to the lack of diversity on business

[277] See Fried *supra* note 179.
[278] Id at 273.
[279] Id.
[280] Id.
[281] *Supra* note 121.
[282] See Grundfest, *supra* note 121.
[283] Teal N. Trujillo, *Do We Need to Secure a Place at the Table for Women? An Analysis of the Legality of California Law* SB-826, 45 J. LEGIS. at 324, 244-47, (2018).

boards in the United States. Rather, they are the first in a long sequence of moves toward a fairer society.[284]
The actual worth of the California Board Diversity Bills may be evaluated not only in the improvements they bring about in the firms they govern, but also in the attention they have given to the issue of board diversity and the alternative solutions they have inspired. By this metric, the California Board Diversity Bills have accomplished more in three years than the previous three decades combined.[285]

According to Fried's view to wrap it up, many people and organizations are banding together to combat different societal problems in America, such as systematic racism and sexism. Although Nasdaq's new diversity standards may have positive social consequences, we should not pretend that they would also help investors. High-quality scholarship, including one cited by Nasdaq and numerous others ignored by Nasdaq, tends to point in the opposite direction. Investors are unlikely to applaud if the SEC accepts Nasdaq's new guidelines.[286]

Recent corporate governance policy debates have focused on board diversity. Despite the attention of the media and social activists, women and minorities continue to be underrepresented on corporate boards. Diverse directors are shown to have higher academic and professional qualifications, have more outside board and committee experience, and have more shareholder support in director elections than their counterparts.[287]
Despite these skills, diverse directors are less likely to be nominated to senior leadership roles on boards. Although there has been some recent advancement in female leadership chances, similar patterns do not apply to minorities. It's critical to stress that our findings are unaffected by variations in relative experience, leadership preferences, monitoring capacity, or prior commitments to serve on the boards of other companies. While relevant experience is a crucial driver of leadership choices, boards tend to regard these abilities less for diverse directors.[288]

X. CONCLUSION

After decades of working to fight inequalities, a great result still has not been achieved. Surely, the acknowledgement of the need to have gender diversity in corporations is a great step toward change, but it is not enough. Despite the laws that have been mandated, and the efforts that have been made in the past and that are still being made in the present, gender diversity in boardrooms still is a very hot topic on the table that needs bigger attentions and greater discussion.

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[284] Sun Eun Kim, *Mandating Board Diversity,* INDIANA LAW J., (May, 2022).
[285] Id.
[286] *Supra* note 179.
[287] Laura Casares Field et al., *At the table but can't break through the glass ceiling: Board leadership positions elude diverse directors,* J. FINANC. ECON., (Oct. 2, 2019).
[288] Id.

Currently the state of gender diversity is increasing in States that have taken the decision to acknowledge the issue and is also getting better in other states where requirements have been mad for investors.

There are many proofs that this kind of changes can only be beneficial for the corporation, for the boardrooms, but also for the directors themselves, in fact the broader opinion that diversity can give, can also help other members of the boardroom 'grow' new points of view and bigger perspectives. The presence of females on boardrooms is not only about gender equality, which is still a very important point also due to the pay gap, but it also can be seen as a tool that boards where the opinion is still biased from other factors, are not exploiting.

The recent data, and amendments of the last two years that have been analyzed and are a concrete proof that action is, as of today, being taken in order to bring up knowledge and awareness on the topic. However, the papers that have been analyzed also demonstrate that not everyone strongly agrees with what the bills are trying to mandate. In fact, it is underlined how the bills sometimes proves to go against the law. However, at the same time it is shown that solutions might be implemented, to 'go around' the problem.

The debate is still on going and hopefully it will soon be resolved, finding some laws that could be both beneficial for the companies, the investors, but most importantly ethically correct towards the minorities and for whom today are considered underrepresented communities.

Even if there are not many mathematical and empirical proofs about the benefits of having a more gender diverse board, there are other intangible factors that can prove the advantages that gender diversity gives.

Even if the change is being very slow currently, the important thing is that the problem has been acknowledge and that solution are being taken, possibly to drive into a world where not only in boardrooms but in all corporations and workplaces gender diversity is not seen as an issue anymore, but as a very important positive, ethical, and strategical factor.

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