CORPORATE BOARDROOMS AND THE NATIONAL FOOTBALL LEAGUE: A GENDER DIVERSITY MARRIAGE MADE IN CORPORATE GOVERNANCE HEAVEN

ABSTRACT

A corporate boardroom is stereotypically viewed as a "boys' club." This stereotype, however, is not completely unfounded. On average, Fortune 250 companies elected the first woman onto their boards in 1985. In 2018, women accounted for about half the world's population but not even a quarter of Fortune 500 companies' directorships. Countries across the world are prioritizing this issue and promoting more diverse directorships. In 2018, California became the first U.S. state to implement a gender-based quota for corporate directorships with Senate Bill 826. In August 2019, activist group Judicial Watch sued California over the constitutionality of Senate Bill 826. Judicial Watch argued the gender-based classification violated the Equal Protection Clause of the Fourteenth Amendment. After exploring the importance of gender diversity on corporate boards in Part I, this Comment argues in Part II that the gender-based quota created by Senate Bill 826 is unconstitutional and runs afoul of the Internal Affairs Doctrine. Part III of this Comment recognizes action must be taken to address the lack of female directors and discusses potential state-based, shareholder-based, and U.S. Securities and Exchange Commission-based solutions. This Comment concludes by suggesting that the National Football League's Rooney Rule coupled with a comply or explain requirement is the most legally sound and effective solution to address the lack of truly gender-diverse boards and to improve progress toward gender diversity on corporate boards in the United States.

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INTRODUCTION

In 1920, women in the United States were guaranteed the right to vote.[1] In 1924, the first woman was elected as a U.S. state governor.[2] In 1932, the first woman was elected to the U.S. Senate.[3] However, it was not until 1985 that the average Fortune 250 company elected its first woman to its board of directors (board).[4]

In 2010, women held 15.7% of Fortune 500 companies' board seats; by 2018, that percentage had grown to 22.5%.[5] While women's representation on corporate boards continues to increase, an unacceptably large gap remains between the number of board seats held by men compared to those held by women.[6] Shareholders across the United States have called for corporations to improve their boards' gender diversity.[7] To speed up progress regarding gender diversity on corporate boards, it is necessary to implement new, mandatory rules rather than waiting for the old boys' club[8] to organically progress toward true gender diversity.

In 2018, California passed Senate Bill 826 (S.B. 826).[9] S.B. 826 mandates that public corporations—incorporated or headquartered in California—must have a minimum number of board positions filled by

1. *See* U.S. CONST. amend. XIX.
2. *See Nellie Tayloe Ross*, BRITANNICA, https://www.britannica.com/biography/Nellie-Tayloe-Ross (last visited Oct. 25, 2020).
3. *See* KATHRYN CULLEN-DUPONT, *Caraway, Hattie Ophelia Wyatt*, *in* ENCYCLOPEDIA OF WOMEN'S HISTORY IN AMERICA 40, 40–41 (2d ed. 2000).
4. David F. Larcker & Brian Tayan, *Pioneering Women on Boards: Pathways of the First Female Directors*, STAN. CLOSER LOOK SER., Sept. 3, 2013, at 1, 2.
5. ALL. FOR BD. DIVERSITY, DELOITTE, MISSING PIECES REPORT: THE 2018 BOARD DIVERSITY CENSUS OF WOMEN AND MINORITIES ON FORTUNE 500 BOARDS 17 (2019).
6. *See* Jeff Green et al., *Wanted: 3,732 Women to Govern Corporate America*, BLOOMBERG BUSINESSWEEK (Mar. 21, 2019), https://www.bloomberg.com/graphics/2019-women-on-boards/ (discussing corporate board structure and gender make-up across corporations if California's S.B. 826 applied nationwide).
7. *See* Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L.J. 145, 156–57 (2019).
8. Moira Forbes, *Will Corporate Boards Remain a Boys' Club?*, FORBES (Nov. 30, 2015, 12:14 PM), https://www.forbes.com/sites/moiraforbes/2015/11/30/will-corporate-boards-remain-a-boys-club/#4e5ba2bef08b.
9. S.B. 826, 2018 Leg., Reg. Sess. (Cal. 2018).

women.[10] While this law attempts to remedy a real problem in corporate America by promoting gender diversity on corporate boards, it violates the Internal Affairs Doctrine (IAD) as well as the U.S. Constitution's Equal Protection Clause.[11] A different, constitutionally viable rule must be implemented to promote gender diversity on corporate boards.

In Part I, this Comment details the importance of gender diversity on corporate boards as well as the implemented or proposed solutions, both internationally and domestically, to address the lack of gender diversity on corporate boards. In Part II, this Comment moves to explore two of S.B. 826's fatal flaws and explains why this law is likely unconstitutional and in violation of established U.S. corporate law.

However, while federal or state courts may not uphold S.B. 826, as then-Governor Jerry Brown explained while signing the bill into law, the inspiration and desire to mandate greater gender diversity on corporate boards is compelling.[12] In light of S.B. 826's legal flaws, other solutions clearly must be considered. In Part III, this Comment discusses potential state-based, shareholder-based, and U.S. Securities and Exchange Commission (SEC)-based solutions. This Comment concludes by suggesting that the National Football League's (NFL) solution to the lack of racial diversity in its head coaching ranks—the Rooney Rule—coupled with a "comply or explain" requirement, is the most legally sound and effective solution to address the lack of truly gender-diverse boards and to improve progress toward gender diversity on corporate boards in the United States.[13]

I. BACKGROUND

A corporation's board plays an active role in the governance and oversight of the corporation.[14] The board guides the corporation and its executives through key decisions and crises while keeping shareholder interests in mind.[15] This principle of shareholder primacy, which instructs a board to manage its corporation to maximize shareholder profit and promote shareholder interests, is a widely accepted norm of corporate governance.[16] Due to the crucial role the board plays, its composition

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10. *Id.*; *see* discussion *infra* Section I.C.

11. *See Judicial Watch Sues California over Gender Quota Mandate for Corporate Boards*, JUD. WATCH (Aug. 9, 2019), https://www.judicialwatch.org/press-releases/judicial-watch-sues-california-over-gender-quota-mandate-for-corporate-boards/.

12. *See* Patrick McGreevy, *Gov. Jerry Brown Signs Bill Requiring California Corporate Boards to Include Women*, L.A. TIMES (Sept. 30, 2018, 3:57 PM), https://www.latimes.com/politics/la-pol-ca-governor-women-corporate-boards-20180930-story.html (quoting California's then-Governor Brown's S.B. 826 signing message that "it's high time corporate boards include the people who constitute more than half the 'persons' in America").

13. *See* discussion *infra* Section III.D.

14. Nili, *supra* note 7, at 153–54.

15. *Id.*

16. Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 1951–53 (2018).

bears scrutiny. While improving overall diversity on corporate boards is necessary, this Comment focuses solely on gender diversity.[17]

A. Why Gender Diversity on Corporate Boards Is Important

Three arguments are typically used to promote gender diversity on corporate boards: (1) equality; (2) economic; and (3) better business.[18] All three arguments seek to avoid tokenism[19] and also fundamentally agree that corporate boards should include women but differ in the reasoning why corporations should increase the number of women on their boards. Increased shareholder interest and calls for corporations to take action to increase the gender diversity of their boards is further reason to increase corporate boards' gender diversity.[20] This Comment suggests that because each argument may be individually insufficient to garner support for gender-diverse corporate boards, all three should be used in tandem to bring further progress in this area to fruition.

1. The Equality Argument

One rationale for increasing female representation on corporate boards is the equality argument. This argument focuses on promoting women to positions of power because they were historically excluded from these positions.[21] This argument focuses on improving the representation of women on boards for a more societal-focused reason—to bring equality into the corporate boardroom in order for that corporation to signal an "acceptance of social values."[22] Simply put, this argument pushes for more women to be included on corporate boards because it is "the right thing to do."[23] Gender-diverse corporate boards, under this argument, are necessary because there must be an equal amount of "power[,] . . . resources, participation and influence [shared] between men and women."[24] Beyond being "right," this argument aims to level the representative numbers of men and women on corporate boards.

Seeing as a gap between the number of board seats held by men and women still exists, it appears that, on its own, this argument has failed to substantially influence corporations to change their board composition—

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17. *See* Joann S. Lublin, *Dozens of Boards Excluded Women for Years*, WALL ST. J. (Dec. 27, 2016, 9:03 AM), https://wsj.com/articles/dozens-of-boards-excluded-women-for-years-1482847381.

18. Barnali Choudhury, *New Rationales for Women on Boards*, 34 OXFORD J. LEGAL STUD. 511, 512–13 (2014); *see also* Nili, *supra* note 7, at 161.

19. Stated otherwise, to avoid "the policy or practice of making only a symbolic effort" to increase the number of women on corporate boards. *Tokenism*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/tokenism (last visited Oct. 25, 2020).

20. Douglas M. Branson, *Initiatives to Place Women on Corporate Boards of Directors – A Global Snapshot*, 37 J. CORP. L. 793, 811–12 (2012); Nili, *supra* note 7, at 155–56.

21. Nili, *supra* note 7, at 159.

22. James A. Fanto et al., *Justifying Board Diversity*, 89 N.C. L. REV. 901, 931 (2011).

23. Nili, *supra* note 7, at 159 (quoting Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 854, 856–57 (2011)).

24. Choudhury, *supra* note 18, at 519.

thus, the continued existence of overwhelmingly male-dominated boards.[25] While this school of thought is "entirely justified in terms of equality and justice," it likely fails to bring more women to positions of power because it ignores the arguments that often bring in corporations' support: the economic and good-business rationales.[26]

2. The Economic Argument

The economic argument relies on data suggesting that corporations with female directors on their boards perform better economically than those without female directors.[27] In fact, a recent study comparing corporations' boards found that those with the "highest percentage of women" on their boards outperformed those with the lowest percentage of women by 53%.[28] Other studies showed that companies with "strong female leadership," including reaching the "tipping point"[29] of female directors, have a better bottom line than those without any female directors.[30] Further, studies found that corporations with boards in the top 25% for gender diversity were 21% more likely to display above-average profitability compared to those corporations with boards in the lower 25% for gender diversity.[31] Further strengthening this argument, studies also indicate that those companies with boards in the lower 25% for "gender and ethnic . . . diversity were 29% less likely to [demonstrate] above-average profitability than . . . all other companies in [the study's] data set."[32]

However, critics of this argument may point to data which suggests companies that comply with a gender quota show an increased economic performance, not due to the quota itself, but due to stock prices rebounding after an initial decline in anticipation of the quota or a general change in leadership.[33] These findings indicate that it is initial shareholder resistance, followed by their acceptance of change to the board composition, rather than female directors' influence, that causes the changes in

25. Nili, *supra* note 7, at 159.
26. Choudhury, *supra* note 18, at 542.
27. Nili, *supra* note 7, at 148–49, 160.
28. *Id.* at 148; *see also* Catherine M.A. McCauliff & Catherine A. Savio, *Gender Considerations on the Boards of European Union Companies: Lesson for US Corporations or Cautionary Tale?*, 16 GEO. J. GENDER & L. 505, 516–17 (2015) (highlighting a recent study which found companies with higher percentages of female board members and those lead by a female CEO to be more profitable).
29. *See* Nili, *supra* note 7, at 161 n.103 (defining tipping point as "having three or more similar 'minorities' within a group [which] provides a critical mass to present opposing and additional viewpoints").
30. *Id.* at 160–61; *see also Appendix: Why Diversity and Inclusion Matter: Financial Performance*, CATALYST (Jun. 24, 2020), https://www.catalyst.org/research/why-diversity-and-inclusion-matter-financial-performance/ (detailing different research studies that establish the correlation "between diversity and improved financial performance," including more positive accounting returns, earnings per share, and revenue, among many others).
31. VIVIAN HUNT ET AL., MCKINSEY & CO., DELIVERING THROUGH DIVERSITY 8 (2018).
32. *Id.* at 1.
33. McCauliff & Savio, *supra* note 28, at 518.

economic performance.[34] This conflicting data on gender diversity's positive impact on economic performance[35] means the economic argument alone is unreliable until further studies are conducted.

3. The Better Business Argument

The third argument promotes gender diversity to encourage better business practices by a corporation's board.[36] Ultimately, the effectiveness of a board's governance impacts a corporation's success and profitability.[37] A diverse board allows for discussion between directors with a variety of expertise, networks, and experience.[38] Studies show that gender diversity helps counteract corporate board groupthink,[39] although that same diversity has been found to lead to conflict making the board less cohesive and, thus, less effective.[40]

Aside from introducing diverse perspectives, female directors[41] are also "particularly adept at critically questioning, guiding, and advising" the management of a corporation.[42] Female directors tend to ask more difficult questions and push for action and solutions.[43] Multiple studies suggest that women are more risk averse and less risk prone in many situations.[44] Additionally, a female director's contributions to a board's decision-making can result in superior performance of the board's tasks, management monitoring, strategy development, and engagement with stakeholder issues.[45] Further, female directors "have a positive impact on

34. *Id.* at 518–19.

35. *See, e.g.*, Nili, *supra* note 7, at 161 (explaining there are many recent studies showing a positive correlation between a gender-diverse board and the company's performance). *But see, e.g.*, *id.* at 162 ("[C]onflicting studies show that diverse boards fail to truly outperform the market . . . .").

36. *Id.* at 162–63.

37. Akshaya Kamalnath, *Corporate Diversity 2.0: Lessons from Silicon Valley's Missteps*, 20 OR. REV. INT'L L. 113, 147 (2018).

38. Lawrence J. Trautman, *Corporate Boardroom Diversity: Why Are We Still Talking About This?*, 17 SCHOLAR 219, 222–23 (2015).

39. Nili, *supra* note 7, at 162–63; *see also Groupthink*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/groupthink (last visited Oct. 25, 2020) (defining groupthink as "a pattern of thought characterized by . . . conformity to group values and ethics").

40. *See* Choudhury, *supra* note 18, at 530–31.

41. There is conflicting data relating to these findings. Because the sample set of female directors is so small, many researchers struggle in isolating the impacts of female directors. However, "recent studies have begun to make strides" in assessing this impact. Trautman, *supra* note 38, at 227.

42. Nili, *supra* note 7, at 163 (quoting AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY 35 (2015)).

43. Sandeep Gopalan & Katherine Watson, *An Agency Theoretical Approach to Corporate Board Diversity*, 52 SAN DIEGO L. REV. 1, 17 (2015) (citing Douglas M. Branson, *An Australian Perspective on a Global Phenomenon: Initiatives to Place Women on Corporate Boards of Directors*, 27 AUSTL. J. CORP. L. 2, 18 (2012)).

44. *Id.* at 16 ("[A] research study of hedge funds showed risk appetite on the trading floor resulted in women performing 56% better than men in the period of 2000 to 2009, and in the height of the global financial crisis in 2008, men lost twice as much as women.").

45. Choudhury, *supra* note 18, at 531. This idea also supports the economic argument: perhaps it is the improvement in addressing stakeholder issues which leads to stock prices rebounding after gender-based quota implementation.

financial reporting, auditing, and internal controls."[46] Finally, research clearly "suggests that boards with a critical mass of female directors perform better at monitoring and holding CEOs accountable."[47] This argument strongly suggests that female directors have a positive effect on the governance of a corporation, a key role the board plays.[48]

4. Shareholders Want Improved Gender Diversity

Considered together, these three arguments provide a strong case for improving gender diversity on corporate boards. Despite the small sample sets[49] or conflicting data,[50] each argument shows there are tangible benefits to having female directors on corporate boards. Or, at the very least, the arguments show there are no permanent disadvantages to hiring female directors. Thus, today's corporate culture must improve upon this important issue.

Further, current trends in corporate America reveal that board diversity is at the forefront of the minds of corporations' shareholders. In 2017, the United States saw an "all-time high" of board diversity shareholder proposals.[51] Investor shareholders, individual shareholders, and proxy advisors all supported these shareholder proposals.[52] Most of these proposals call for corporations to take two actions: (1) increase the diversity of its hiring pool, and (2) report on the actions undertaken by the board to increase its diversity.[53] Clearly, shareholders want to improve gender diversity on corporate boards, as this improvement will help corporations' decision-making and, likely, achieving the corporation's economic bottom line. Consequently, a question arises: How can this diversity be achieved?

B. What Have Other Countries Done to Increase Gender Diversity on Corporate Boards?

Countries across the world have taken measures to promote gender diversity on corporate boards, including mandatory and nonmandatory rules and guidelines. The first country to take concrete, legal action and require corporate boards to increase their gender diversity was Norway.[54]

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46. McCauliff & Savio, *supra* note 28, at 516.
47. Gopalan & Watson, *supra* note 43, at 20–21. However, many studies differ on this argument and show different, and sometimes negative, impacts on the board's governance due to the interactions between male and female directors. *See, e.g.*, *id.* at 16–17.
48. *See* Choudhury, *supra* note 18, at 531–32; Nili, *supra* note 7, at 153–55.
49. *See supra* note 41 and accompanying text.
50. *See supra* note 35 and accompanying text.
51. Nili, *supra* note 7, at 155–56.
52. *Id.*
53. *Id.* at 156.
54. Kamalnath, *supra* note 37, at 120.

After amending its Companies Act to adopt gender quotas in 2003,[55] Norway required state-owned companies to have at least 40% representation of each gender on their boards.[56] Norway subsequently expanded the law in 2006 to include companies beyond only those listed on the Oslo stock exchange.[57] Norway's gender quota has been extremely successful in creating gender-diverse boards.[58] The success can be attributed to both Norwegian culture, which strongly emphasizes gender equality, and the severe sanctions for noncompliance with the quota.[59] If a company failed to meet the gender quota, it first received a warning, then a fine, and if it continued in noncompliance, it would be forcibly dissolved.[60] Although a small number of companies avoided Norway's quota by converting from public to private companies, those that chose not to convert complied with the quota without being sanctioned under the law.[61]

In the years since Norway enacted its gender quota, the European Union (EU) and many of its member states followed suit.[62] Many EU treaties specifically mention gender equality—including the treaty which founded the EU, the Treaty of the Functioning of the European Union.[63] Additionally, EU courts have upheld the principle of gender diversity.[64] While the EU Commission has pushed for EU community-wide gender quotas for corporate boards, it has not yet passed community-wide regulation.[65] These gender-diversity initiatives occurred across the EU—possibly because of the focus on gender equality in the foundations of the EU. Individual countries have created their own quotas; a number of member states have amended their constitutions to do so.[66]

France was one EU member state that amended its constitution to enact a gender quota on its corporations' boards.[67] In 2011, France passed legislation requiring (1) publicly listed companies, (2) companies

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55. Darren Rosenblum & Daria Roithmayr, *More Than a Woman: Insights Into Corporate Governance After the French Sex Quota*, 48 IND. L. REV. 889, 890, 897 n.50 (2015) (providing the text of Norway's Companies Act which was amended in 2003 to create a gender quota on public corporations' boards).

56. Kamalnath, *supra* note 37, at 120–21.

57. Julia Glen, Note, *Affirmative Action: The Constitutional Approach to Ending Sex Disparities on Corporate Boards*, 101 MINN. L. REV. 2089, 2097 (2017).

58. *See id.* at 2095–96.

59. *See id.* at 2097–99.

60. *Id.* at 2097.

61. *Id.* at 2097–98; Kamalnath, *supra* note 37, at 122.

62. *See, e.g.*, McCauliff & Savio, *supra* note 28, at 529–31.

63. Consolidated Version of the Treaty on the Functioning of the European Union art. 8, Oct. 26, 2012, 2012 O.J. (C 326) 53.

64. McCauliff & Savio, *supra* note 28, at 509.

65. *See id.* at 506, 542; s*ee also* Jennifer Rankin, *EU Revives Plans for Mandatory Quotas of Women on Company Boards*, GUARDIAN (Mar. 5, 2020, 7:56 AM), https://www.theguardian.com/world/2020/mar/05/eu-revives-plans-for-mandatory-quotas-of-women-on-company-boards.

66. Glen, *supra* note 57, at 2100.

67. *Id.* at 2099–100.

with specific financial earnings and more than 500 employees, and (3) universities and other administrative entities to ensure their boards were comprised of at least 20% of each gender by 2014.[68] The law then required those same boards to be comprised of at least 40% of each gender by 2017.[69] If a company failed to comply with these requirements, its board elections would be nullified and their directors' benefits suspended.[70] France's gender quota has been exceedingly successful; in 2018, seven years after France instituted the quota, 44.2% of corporate directors were women.[71] This percentage was 14.3% higher than the United Kingdom's (UK) board makeup.[72]

The UK took a different path than Norway and France. It did not impose a quota but rather changed its Corporate Governance Code in July 2018 to include a suggestion that corporations focus on increasing their gender diversity.[73] The code states that board appointments "should promote diversity of gender."[74] As the UK's gender diversity initiative is voluntary, there are no specific sanctions or penalties for noncompliance; the initiative simply requires the corporation to voluntarily comply with the initiative or explain why it has not complied.[75] Much like critics of the equality argument, critics here claim that because the initiative relies on voluntary action instead of legislation, the UK has failed to bring satisfactory change to their corporate boards' gender composition.[76]

Outside of the amended UK Corporate Governance Code, in 2010, CEO and financier Dame Helena Morrissey implemented a "Thirty Percent Club."[77] This club aims to use public opinion to sway corporations to increase the number of women on their boards by publishing the gender composition of their boards—a naming and shaming strategy.[78] In 2016, the club set a goal to have the boards of the Financial Times Stock Exchange 350 composed of at least 30% female directors by 2020.[79] UK Corporations met this target in September 2019—increasing the previous percentage of female directors from 23%.[80] This demonstrates that even

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68. McCauliff & Savio, *supra* note 28, at 533.
69. *Id.*
70. *Id.*
71. Claire Zillman, *Need Proof That Companies Can Have Gender Diverse Boards? Look to France*, FORTUNE (Dec. 3, 2018, 8:58 AM), https://fortune.com/2018/12/03/board-diversity-france/.
72. *Id.*
73. FIN. REPORTING COUNCIL, THE UK CORPORATE GOVERNANCE CODE 8 (2018).
74. *Id.*
75. *See* McCauliff & Savio, *supra* note 28, at 531; ERNST & YOUNG, 2018 UK CORPORATE GOVERNANCE CODE AND NEW LEGISLATION 2 (2018).
76. *See* Giovanni Razzu, *Women on Company Boards: Time for the Government to Adopt Legislative Quotas*, LONDON SCH. ECON.: BRIT. POL. & POL'Y (Nov. 15, 2017), https://blogs.lse.ac.uk/politicsandpolicy/women-on-company-boards-time-for-the-government-to-adopt-legislative-quotas/.
77. *United Kingdom*, 30% CLUB, https://30percentclub.org/about/chapters/united-kingdom (last visited Oct. 25, 2020).
78. Glen, *supra* note 57, at 2101–02.
79. 30% CLUB, *supra* note 77.
80. *Id.*

without a government-imposed quota, pressure from stakeholders can lead to increased gender diversity on corporate boards as it did in the UK.

Similar to the UK, Australia also implemented a voluntary program which has yielded positive results.[81] The Australian Institute of Company Directors set a nonbinding goal of 30% female representation on Australian Securities Exchange-listed (ASX) companies' boards in 2015.[82] That same year, in a demonstration of support, investor shareholders began to implement "vote no" campaigns against companies that lacked female directors.[83] Combined, these two actions saw ASX companies' board gender diversity increase from approximately 19% in 2015 to nearly 30% in 2019.[84]

Furthermore, Recommendation 1.5 of the ASX Corporate Governance Principles and Recommendations states that each ASX-listed entity should disclose its diversity policy and, each reporting period, should disclose the objectives for achieving gender diversity as well as its progress towards meeting those objectives.[85] Australia's successful increase of gender-diverse boards through nonbinding measures demonstrates the power and influence held by investor shareholders.

C. What Can the United States Do to Increase Gender Diversity?

Unlike EU corporations,[86] U.S. corporations are generally regulated by the individual state in which they are incorporated.[87] Nevertheless, under the Commerce Clause, Congress retains the power to regulate corporations when their actions affect interstate commerce.[88] The SEC also has the authority to impose regulations upon public corporations operating within the borders of the United States.[89]

The SEC, among other things, enforces U.S. securities law and promotes stability in U.S. markets.[90] The Securities Act of 1933 governs the steps and requirements corporations must complete before they are

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81. Jamie Smyth, *Australia's Corporate Boards Shrink the Gender Gap*, OZY (Feb. 3, 2019), https://www.ozy.com/acumen/australias-corporate-boards-shrink-the-gender-gap/92425.

82. *Id.*

83. *Id.* See *infra* Section III.B, for a more in-depth discussion of vote no campaigns.

84. Smyth, *supra* note 81.

85. ASX CORP. GOVERNANCE COUNCIL, CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS 9 (4th ed. 2019).

86. Kresimir Pirŝl, *Trends, Developments, and Mutual Influences Between United States Corporate Law(s) and European Community Company Law(s)*, 14 COLUM. J. EUR. L. 277, 280 (2008).

87. 18 AM. JUR. 2D *Corporations* § 14 (2020).

88. *See* U.S. CONST. art. I, § 8, cl. 3.

89. *See International Regulatory Policy*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about/offices/oia/oia_regpolicy.shtml (last updated Oct. 16, 2014).

90. *See What We Do*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/Article/whatwedo.html (last updated Oct. 15, 2020).

authorized to go public.[91] Further, the Securities Exchange Act of 1934 grants the SEC "broad authority over all aspects of the securities industry," including publicly traded companies.[92] Currently, the SEC has only used its broad authority to require corporations to disclose their diversity policy, if one exists, and to develop a voluntary initiative to promote diversity on the boards of the publicly traded corporations it regulates.[93] However, neither Congress nor the SEC have promulgated binding regulations to promote gender diversity on corporate boards.[94]

Much of the responsibility for regulating U.S. corporations lies with individual states. It is nearly, if not entirely, universally accepted that the internal affairs of a corporation are subject to the corporate laws enacted by the state where that corporation is incorporated.[95] Internal affairs are defined as "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders."[96] The IAD is a choice of law doctrine which allows only the laws of the state of incorporation to "govern disputes over the corporation's internal affairs."[97] A widely accepted doctrine, the IAD offers predictability, stability, uniform treatment, and consistency for corporations when making decisions or undertaking litigation over their internal affairs.[98] The IAD also, for better or worse, encourages competition between the states to enact corporation-positive legislation to attract corporations to incorporate within their state.[99]

1. California's S.B. 826: The United States' First Attempt to Create a Binding Regulation to Promote Gender Diversity on Corporate Boards

In the United States, gender diversity initiatives prior to S.B. 826 provided external encouragement to corporations to increase their boards' gender diversity rather than impose requirements to do so. One example is California's Senate Concurrent Resolution 62 (Resolution)

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91. *The Laws That Govern the Securities Industry*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/answers/about-lawsshtml.html [hereinafter *Securities Laws*] (last updated Oct. 1, 2013).

92. *Id.*

93. *See* discussion *infra* Section III.C.

94. In 2014, Senator Tim Scott of South Carolina introduced Senate Resolution 511. S. Res. 511, 113th Cong. (2014). This resolution encouraged corporations to "develop an internal rule modeled after a successful business practice such as the Rooney Rule" to ensure the corporation "will always consider candidates from underrepresented populations" when filling a leadership position. *Id.* However, this resolution did not move out of committee and was not enacted. *Id.* Because Congress failed to enact a simple resolution, the responsibility should lie with the SEC or individual states.

95. Edgar v. MITE Corp., 457 U.S. 624, 645 (1982); *see also* Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 35–36 (2006).

96. 18 AM. JUR. 2D *Corporations* § 15 (2020).

97. Tung, *supra* note 95, at 39.

98. *Id.* at 40.

99. *Id.* at 41.

passed in 2013.[100] This Resolution urged public companies in California to increase the number of women on their boards and offered suggestions as to the number of women to include on the boards.[101] California's legislature introduced the nonbinding Resolution with the intent to encourage corporations in California to focus on increasing board gender diversity.[102] However, the Resolution had little effect; by the end of 2016, which was the target date to meet the goals stated in the Resolution, less than 20% of the public corporations in California met the suggested targets.[103] This Resolution and its failure directly led to the passage of S.B. 826.[104]

In 2018, California became the first U.S. state to pass a law—S.B. 826—requiring public corporations to take concrete action to improve gender diversity on their boards.[105] S.B. 826 requires every publicly held domestic or foreign corporation headquartered in California to have "at least one woman" on its board by the end of 2019.[106] The law continues to push corporations to address their lack of gender diversity by requiring corporations with five directors on their board to have "a minimum of two women directors" by the end of 2021.[107] If a corporation has six or more directors on their board, S.B. 826 requires its board to "have a minimum of three female directors" by the end of 2021.[108]

S.B. 826 requires approximately 537 California-headquartered companies to add at least one female director to their boards.[109] If these companies do not comply, S.B. 826 imposes a fine for each violation: for a first-time violation, the company must pay a fine of $100,000;[110] for each subsequent violation, the fine increases to $300,000.[111] While these

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100. S. Con. Res. 62, 2013 Leg., Reg. Sess. (Cal. 2013).

101. California Legislature Women's Caucus, *Senate Bill 826 Factsheet* (2017), https://womenscaucus.legislature.ca.gov/sites/womenscaucus.legislature.ca.gov/files/PDF/SB%20826%20Factsheet%20Women%20Corporate%20Boards.pdf [hereinafter *S.B. 826 Factsheet*].

102. Cal. S. Con. Res. 62.

103. *S.B. 826 Factsheet*, *supra* note 101. Several states across the United States have also passed resolutions to encourage gender diversity on corporate boards; however, these nonbinding resolutions have resulted similarly to California's Resolution. *See, e.g.*, Iris Hentze, *Gender Diversity on Corporate Boards: What Will 2019 Bring?*, NCSL: THE NCSL BLOG (Jan. 4, 2019), http://www.ncsl.org/blog/2019/01/04/gender-diversity-on-corporate-boards-what-will-2019-bring.aspx (discussing state-introduced resolutions, including Massachusetts and Illinois, regarding gender diversity of corporate boards).

104. *S.B. 826 Factsheet*, *supra* note 101.

105. S.B. 826, 2018 Leg., Reg. Sess. (Cal. 2018). The legislatures in both Illinois and New Jersey considered similar bills to S.B. 826; these bills, however, have not survived their respective legislatures. *See* Mohsen Manesh, *The Contested Edges of Internal Affairs*, COLUM. L. SCH.: BLUE SKY BLOG (Sept. 23, 2019), http://clsbluesky.law.columbia.edu/2019/09/23/the-contested-edges-of-internal-affairs/.

106. Cal. S.B. 826; *S.B. 826 Factsheet*, *supra* note 101.

107. Cal. S.B. 826.

108. *Id.*

109. Press Release, Jud. Watch, Judicial Watch Sues California Over Gender Quota Mandate for Corporate Boards (Aug. 9, 2019) [hereinafter Judicial Watch Press Release] (on file with author).

110. Cal. S.B. 826.

111. *Id.*

fines may seem high to individuals, many of the affected corporations likely view these fines as miniscule compared to their revenues.[112] Thus, corporations are unlikely to comply with S.B. 826 solely because of the monetary penalties.

Judicial Watch[113] sued the state of California in August 2019,[114] labeling S.B. 826 as a "gender quota law" and deeming it "brazenly unconstitutional."[115] In its complaint, Judicial Watch alleged that because S.B. 826 creates a necessary classification based on gender, it may only be justified and upheld if there is a compelling government interest and the quota system is narrowly tailored to meet that interest.[116] Judicial Watch further alleged that California has not provided any compelling government interest, and thus S.B. 826 creates an unconstitutional gender-based quota.[117] As of the publication of this Comment, the case is still pending in the Superior Court of California, Los Angeles County.[118]

II. LEGAL ANALYSIS OF S.B. 826

Judicial Watch will likely succeed in its legal challenge against S.B. 826. Upon signing S.B. 826 into law, even then-Governor Brown anticipated legal issues with S.B. 826, stating that "serious legal concerns [about S.B. 826] have been raised . . . . [These concerns] indeed may prove fatal to its ultimate implementation."[119] This Comment argues that S.B. 826 violates the IAD and the Equal Protection Clause of the U.S. Constitution.[120] However, the exclusion of women from corporate boards

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112. *See* Erin Duffin, *Top Publicly Traded Companies in California in 2019, Ranked by Revenue: (In Billion U.S. Dollars)*, STATISTA (May 25, 2020), https://www.statista.com/statistics/312707/california-s-top-companies-by-revenue/ (showing a graphic of the highest revenue-generating publicly traded companies that were headquartered in California in 2019).

113. *A Message From President Tom Fitton*, JUD. WATCH, https://www.judicialwatch.org/about/#mission (last visited Oct. 25, 2020) (describing itself as "a conservative, non-partisan educational foundation, which promotes transparency, accountability and integrity in government, politics and the law").

114. Crest v. Padilla, No. 19STCV27561, 2019 WL 3771990, at *1 (Cal. Super. Ct. Aug. 6, 2019). Another group, Pacific Legal Foundation, filed a separate suit challenging S.B. 826 in the U.S. District Court for the Eastern District of California on November 13, 2019; this suit was dismissed for lack of standing but is not discussed in this Comment. Meland v. Padilla, No. 19-cv-02288, 2020 WL 1911545, at *1, *5 (E.D. Cal. Apr. 20, 2020); Andrea Vittorio, *California Faces Another Lawsuit Over Board Diversity Mandate*, BLOOMBERG L. (Nov. 13, 2019, 2:40 PM), https://www.bloomberglaw.com/document/XTV6ME0000000.

115. Judicial Watch Press Release, *supra* note 109.

116. Complaint for Declaratory and Injunctive Relief at ¶ 19, *Crest*, 2019 WL 3771990 (No. 19STCV27561).

117. *Id.*

118. *Crest*, 2019 WL 3771990, at *1.

119. McGreevy, *supra* note 12 (internal quotations omitted).

120. S.B. 826 is also subject to a Title VII of the Civil Rights Act of 1964 analysis as it is an employment practice that negatively impacts people of one sex and is unrelated to the corporation's position or operation. *See Sex-Based Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov//laws/types/sex.cfm (last visited Oct. 25, 2020). However, a Title VII discussion goes beyond the scope of this Comment and is not addressed. See generally *Ricci v. DeStefano*, 557 U.S. 557 (2009) and *Hawn v. Exec. Jet Mgmt.*, 615 F.3d 1151 (9th Cir. 2010), for further discussion on the applicability of Title VII.

is a valid concern—a concern which led to the passage of S.B. 826[121]—and a legally viable solution must be found.

A. Internal Affairs Doctrine Analysis

S.B. 826 applies to all publicly held corporations "whose principal executive offices, according to the corporation's SEC 10-K form, are located in California."[122] The state in which a corporation chooses to incorporate is not necessarily the same state in which the corporation chooses to place its headquarters, its so-called principal place of business.[123] For example, Facebook, Inc. is headquartered in Menlo Park, California,[124] and thus is subject to S.B. 826 requirements. However, although Facebook is headquartered in California, like the majority of corporations in the United States, Facebook is incorporated in Delaware.[125] Accordingly, California is attempting to enforce its state law upon corporations, like Facebook, that choose to incorporate outside the state but headquarter their operations in California.

Imposing a requirement on companies who incorporated outside the state does not automatically trigger an IAD violation. The internal affairs of a corporation are those matters "among or between the corporation and its current officers, directors, and shareholders."[126] S.B. 826 requires a corporation to change the composition of its current board if that board fails to meet the requirements under the law.[127] Thus, the law governs a matter between the corporation and its directors. Because shareholders elect the directors of the corporation,[128] S.B. 826 also applies to a matter between the corporation and its shareholders. The IAD exists to guarantee that only one state's law "govern[s] the internal affairs of a corporation."[129] Here, California is imposing its law onto public corporations who choose to incorporate outside of California but operate their principal place of business within California's borders. This creates the exact conflict of laws that the IAD intends to prevent. Therefore, it is highly probable that S.B. 826 violates the IAD.

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121. *See* McGreevy, *supra* note 12 (quoting California's then-Governor Brown's S.B. 826 signing message that "it's high time corporate boards include the people who constitute more than half the 'persons' in America").

122. S.B. 826, 2018 Leg., Reg. Sess. (Cal. 2018).

123. *See* 18 AM. JUR. 2D *Corporations* § 251 (2020).

124. *See Location*: *Menlo Park, CA*, FACEBOOK, https://www.facebook.com/careers/locations/menlo-park (last visited Oct. 25, 2020).

125. Facebook, Inc., Eleventh Amended & Restated Certificate of Incorporation (Oct. 1, 2010), https://www.sec.gov/Archives/edgar/data/1326801/000119312512046715/d287954dex31.htm.

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

127. Cal. S.B. 826.

128. 18 AM. JUR. 2D *Corporations* § 615.

129. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 78 (1987).

The legislative history of S.B. 826 even concedes that the law will likely be challenged on this point.[130] The Assembly Committee on Judiciary's report explains that California can regulate portions of a corporation that operates within its borders, even if that corporation is incorporated in another state.[131] However, the report notes that those activities which can lawfully be regulated by California do not include the corporation's internal affairs.[132] If courts hold S.B. 826 as violating the IAD—which is likely—S.B. 826 will not apply to corporations incorporated outside of California; the laws of the state in which those corporations are incorporated will still govern. [133] The majority of the nearly 400 corporations on the Russell 3000—approximately 83%—which are headquartered in California are incorporated in Delaware.[134] This severely limits the power and reach of S.B. 826 if it does not apply to those corporations incorporated outside of the state and may even encourage some of these corporations to unincorporate and reincorporate in another state to avoid the reach of S.B. 826.

B. Equal Protection Analysis

Even if the IAD does not prove fatal to the impact of S.B. 826 or if a court finds that S.B. 826 does not violate the IAD, a court will likely find that S.B. 826 violates the Equal Protection Clause of the Fourteenth Amendment.[135] The Equal Protection Clause guarantees that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[136] To invoke the Equal Protection Clause, government action must first occur.[137] Here, California, a state government, passed a law which satisfies that initial hurdle; thus, the Equal Protection Clause of the Fourteenth Amendment applies directly to S.B. 826.

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130. ASSEMB. COMM. ON JUDICIARY, COMMITTEE REPORT ON SB 826, 2018 Leg., at 5–6 (Cal. 2018).

131. *Id.*

132. *Id.* However, the Court of Appeal of California, in *Vaughn v. LJ International, Inc.*, explained in dicta that the IAD may be ignored if a corporation's "books, records and principal operations are located in California." 94 Cal. Rptr. 3d 166, 174 (Cal. Ct. App. 2009).

133. *See* State Farm Mut. Auto. Ins. Co. v. Superior Court, 8 Cal. Rptr. 3d 56, 67–68 (Cal. Ct. App. 2003) (explaining that there are matters where California law may apply to corporations which are incorporated outside of the state; however, when the issue involves the relationships between a corporation, its directors, and its shareholders, the IAD remains the controlling doctrine and the law of the incorporated state is the choice of law). Further, because S.B. 826 will not apply to those corporations not incorporated within California, it may encourage corporations currently incorporated within California to unincorporate and reincorporate in another state to avoid S.B. 826's requirements. A robust discussion of this possibility, however, is beyond the scope of this Comment.

134. Green et al., *supra* note 6; Irina Ivanova, *Nearly 100 California Companies Have No Women on Their Board of Directors*, CBS NEWS (Oct. 1, 2018, 5:12 PM), https://www.cbsnews.com/news/nearly-100-california-companies-have-no-women-on-board-of-directors/.

135. U.S. CONST. amend. XIV, § 1.

136. *Id.*

137. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 696–97 (5th ed. 2015).

In general, courts must establish the standard of judicial review appropriate for the specific type of constitutional violation alleged.[138] The California court hearing the challenge to S.B. 826 will determine the level of scrutiny to apply to S.B. 826 by considering if S.B. 826 involves a suspect class.[139] U.S. case law defines a suspect classification as one based on, among other things, an immutable characteristic.[140] Sex classification is based upon an immutable characteristic.[141] The U.S. Supreme Court explained that because gender "frequently bears no relation to ability to perform or contribute to society," discrimination based on sex falls within "recognized suspect criteria."[142] Thus, S.B. 826 involves a suspect, or rather a "quasi-suspect," classification.[143]

The California court must therefore determine whether there is a discriminatory classification of this suspect class.[144] S.B. 826 requires "a minimum of one female director" on the board of each public corporation headquartered in California.[145] This creates a facial classification[146] of female versus nonfemale board members. S.B. 826 does not provide additional requirements these female directors must meet, only that they must be female.[147] Because S.B. 826 is facially discriminatory and specifically creates a classification based upon gender, which is a quasi-suspect class,[148] courts will apply intermediate scrutiny.[149]

An application of intermediate scrutiny requires California to prove that the classification created by S.B. 826 serves an important government interest and that the classification substantially relates to achieving that interest.[150] A court will require California's justification to be "exceedingly persuasive."[151] S.B. 826 section 1(a)–(g) lays out California's reasoning behind the law.[152] The key justification presented, among others, is boosting California's economy.[153] While it is possible that a court may find that improving the state's economy is an important government interest, it is unlikely that a court will view it as important governmental

138. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (describing the different levels of scrutiny for courts to apply when reviewing the constitutionality of legislative acts).
139. *See* CHEMERINSKY, *supra* note 137, at 698–701.
140. Frontiero v. Richardson, 411 U.S. 677, 686–87 (1973).
141. *Id.*; *see also* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723–26 (1982).
142. *Frontiero*, 411 U.S. at 686–87.
143. *See* Craig v. Boren, 429 U.S. 190, 197 (1976); *see also Quasi-Suspect Classification Law and Legal Definition*, USLEGAL, https://definitions.uslegal.com/q/quasi-suspect-classification [hereinafter *Quasi-Suspect Classification*] (last visited Oct. 25, 2020).
144. *See* Reed v. Reed, 404 U.S. 71, 77 (1971).
145. S.B. 826, 2018 Leg., Reg. Sess. (Cal. 2018).
146. CHEMERINSKY, *supra* note 137, at 791–92.
147. Cal. S.B. 826.
148. *Craig*, 429 U.S. at 197; *Quasi-Suspect Classification*, *supra* note 143.
149. *Craig*, 429 U.S. at 197.
150. *Id.*
151. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).
152. *See* Cal. S.B. 826 § 1(a)–(g).
153. *See id.*

interest with an exceedingly persuasive justification. This finding is unlikely because "gender-based discriminations must serve important governmental objectives and . . . the discriminatory means employed must be substantially related to the achievement of those objectives."[154] S.B. 826 likely does not meet this requirement.[155]

The U.S. Supreme Court has held that a classification based on biological differences between the sexes or on real facts or data that highlight the differences between the sexes will likely be upheld.[156] S.B. 826 does not include any justification for imposing the classification based on the biological differences between female directors and male directors.[157] Instead, S.B. 826 cites to studies and reports indicating the economic benefits of female directors.[158] However, as discussed above, this argument is heavily critiqued[159]—some studies show improved economic performance whereas others show no correlation or causation.[160] Because this data is refutable, as explained in Section I.A.2, and is not necessarily based on biological differences between the sexes, a court is likely unwilling to view this data alone as an exceedingly persuasive justification[161] for S.B. 826.

Even if gender diversity is substantially related to an important government interest, to pass constitutional muster, S.B. 826 must not violate the constitutional ban on quotas.[162]

In 1978, the Supreme Court held that admissions programs where applicants are wholly excluded from selection due to lacking a certain characteristic, such as being a member of a minority group, violate the Equal Protection Clause.[163] In *Regents of the University of California v. Bakke*,[164] a medical school reserved sixteen out of one hundred seats for minority applicants only.[165] White students were not permitted to take one of these "special admissions seats."[166]

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154. Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980).

155. *See infra* notes 177–79 and accompanying text.

156. *See* Tuan Anh Nguyen v. INS, 533 U.S. 53, 64 (2001); United States v. Virginia, 518 U.S. 515, 533 (1996); *Miss. Univ. for Women*, 458 U.S. at 728–30. The Supreme Court has also held that a classification designed to remedy a specific past discrimination may be a permissible gender classification. *See, e.g.*, Schlesinger v. Ballard, 419 U.S. 498, 508–10 (1975). See *infra* text accompanying notes 163–79, for further discussion of this aspect of the Equal Protection Clause analysis.

157. *See* Cal. S.B. 826.

158. *Id.* § 1(c)–(g).

159. *See* discussion *supra* Section I.A.2.

160. *See, e.g.*, Cheryl L. Wade, *Gender Diversity on Corporate Boards: How Racial Politics Impedes Progress in the United States*, 26 PACE INT'L L. REV. 23, 28–29 (2014).

161. *Miss. Univ. for Women*, 458 U.S. at 724. A full discussion of this point goes beyond the scope of this Comment.

162. *See* Grutter v. Bollinger, 539 U.S. 306, 334 (2003); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315–20 (1978).

163. *See Bakke*, 438 U.S. at 320.

164. 438 U.S. 265 (1978).

165. *Id.* at 289.

166. *Id.*

The *Bakke* Court determined that an admissions program cannot cause applicants who are not members of a minority group to be "totally excluded from a specific" number of seats in the program.[167] The Court explained that racial classifications are not per se invalid[168] but that race may only be a factor in admissions and not a means to set a quota.[169]

In *Grutter v. Bollinger*[170] and *Gratz v. Bollinger*,[171] the Court further explained which admissions programs violated the Equal Protection Clause and which were permissible.[172] The Court held that diversity is a compelling interest for race-conscious admissions programs but that interest cannot be met through a quota system.[173] An admissions program must be an individualized, holistic process that takes the entire applicant into account, using race only as a "plus factor" rather than assigning a specific seat or a certain number of "points" to an applicant based on their minority status.[174]

The Equal Protection Clause does not permit a quota based on a racial classification of people.[175] As racial classifications are based on a high level of scrutiny, a quota cannot be applied to a group of people based on gender even though gender classifications are subject to a lower standard of review.[176] S.B. 826 reserves at least one seat on a corporation's board for a woman. The law does not suggest an individualized, holistic review of board candidates. This creates circumstances similar to *Bakke*: under S.B. 826, if a board has a total of five board seats, men can only compete for four of those five, whereas women will compete for all five seats and are guaranteed one of those seats. S.B. 826 creates a gender-based quota that is likely unconstitutional under the Equal Protection Clause.

S.B. 826 supporters argue that women are excluded from corporate boards, and thus, the bill acts as a remedial measure to this historical exclusion as a form of gender affirmative action.[177] While the Supreme Court has held that remedial actions permissibly justify characteristic-conscious measures, these measures must focus on specific instances of discrimination to be upheld under the Equal Protection Clause.[178] Measures cannot be designed to remedy a general history of discrimina-

167. *Id.* at 319–20.
168. *Id.* at 356 (Brennan, J., dissenting).
169. *Id.* at 314–20 (majority opinion).
170. 539 U.S. 306 (2003).
171. 539 U.S. 244 (2003).
172. *Grutter*, 539 U.S. at 333–35; *Gratz*, 539 U.S. at 270–75.
173. *Grutter*, 539 U.S. at 333–35.
174. *Id.* at 334; *Gratz*, 539 U.S. at 270–73; *Bakke*, 438 U.S. at 317–18.
175. *Bakke*, 438 U.S. at 316–18.
176. *Id.* at 302.
177. *See* Lublin, *supra* note 17.
178. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 489–91 (1989) ("That Congress may identify and redress the effects of society-wide discrimination does not mean that, a *fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate.").

tion.[179] Thus, because S.B. 826 targets a general instance of gender discrimination within corporate cultures, it is unlikely to be upheld.

S.B. 826 does not intend to remedy a specific instance of discrimination but rather intends to address the general lack of women on corporate boards.[180] Further, S.B. 826 does not take specific measures beyond setting aside one seat on California public corporations' boards for a woman.[181] It does not require the state to provide women-specific outreach, mentorship, or training programs to help women organically develop into board members on specific corporate boards. Moreover, it does not provide any programs after female directors are elected to help guide them through their new role and ensure they effectively participate in the oversight of the corporation. S.B. 826's singular goal of placing individuals on corporate boards solely based on their gender, without further programming or support to promote women onto corporate boards, shows only a legislative intent to generally place women on corporate boards rather than to remedy a specific instance of discrimination by these corporate boards.[182] Thus, a court will unlikely hold S.B. 826 as a permissible remedial action and will likely strike down S.B. 826 as an impermissible gender-based quota.

III. PROPOSED SOLUTIONS AND RESPECTIVE ANALYSES

While S.B. 826 is likely unconstitutional and violative of well-established corporate governance law, a policy promoting gender diversity on corporate boards in the United States should be enacted. However, an important question remains: What can be done to create an enforceable policy or regulation consistent with established U.S. law?

Several possible solutions could feasibly improve gender diversity on boards in a legally permissible way: (1) a legislative solution aimed at changing states' corporate laws; (2) a shareholder–activist solution aimed at changing individual corporations' boards without necessarily changing the law; (3) changing current SEC diversity disclosure and self-assessment initiatives; and (4) a director nomination rule, implemented by either the states or the federal government, modeled after the NFL's Rooney Rule.

A. State Legislature-Based Solution

One method to promote gender-diverse corporate boards is through state legislatures. State law generally controls corporate regulations with-

179. *Id.* at 498–99.

180. *See* Glen, *supra* note 57, at 2089 (explaining that while women are nearly one out of every two U.S. workers, they hold less than one out of every six board positions).

181. S.B. 826, 2018 Leg., Reg. Sess. (Cal. 2018).

182. *City of Richmond*, 488 U.S. at 498 ("[A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.").

in state borders.[183] Therefore, states could amend their corporate codes to require the boards of corporations incorporated within their state to participate in gender diversity initiatives. This would be a legal, effective way to ensure boards become more gender diverse. However, this solution is only permissible if each state limited its regulation to corporations incorporated within its own borders. Otherwise, the state law would encounter the same conflict with the IAD as S.B. 826.[184] Additionally, as previously discussed, a government-driven solution cannot create a quota.[185] To encourage gender diversity, state legislatures should create their own disclosure requirements for those corporations incorporated within their borders.

While a state legislature-created solution would be legal and effective, importantly, it may be risky for states to choose. States compete by utilizing corporate regulations to make themselves more attractive to corporations.[186] Corporate charters and corporations themselves are viewed as a source of state revenue; this creates a competition between states to attract corporations.[187] Thus, states are incentivized to offer corporations the most attractive regulations to encourage incorporation in their state.[188] This often creates, within state governments, a fear of over-regulation as it may encourage corporations to incorporate in another, less regulatory-heavy state.[189] Individual states therefore are hard-pressed to impose new regulations that may not be instituted by other states. This regulatory competition and mutual influence between states encourages states to remain within the status quo and has led to "corporate law [that is] relatively uniform across most states."[190]

Although it is one of the smallest states in the United States, Delaware has the largest number of corporations incorporated within its borders—66% of all publicly traded U.S. corporations.[191] One view of Delaware's success is that it was the first state to win the supposed "race to the bottom" by intentionally creating pro-corporation regulations early in its corporate code history that were less stringent than those of other states.[192] Others view Delaware's success as a product of winning the "race to the top" by creating the "best system of governance available" in

183. Tung, *supra* note 95, at 35.
184. *See* discussion *supra* Section II.A.
185. *See* discussion *supra* Section II.B.
186. Tung, *supra* note 95, at 36.
187. *Id.* at 36, 41.
188. *Id.* at 41.
189. *Id.* at 37; Pirŝl, *supra* note 86, at 298–302.
190. Pirŝl, *supra* note 86, at 284.
191. Alan M. Dershowitz, *Should Your Company Incorporate In Delaware? Not So Fast*, FORBES (Oct. 27, 2017, 12:25 PM), https://www.forbes.com/sites/janetnovack/2017/10/27/should-your-company-incorporate-in-delaware-not-so-fast/#3f56c63723de.
192. *See* Robert E. Wright, *How Delaware Became the King of U.S. Corporate Charters*, BLOOMBERG OP. (June 8, 2012, 12:03 PM), https://www.bloomberg.com/opinion/articles/2012-06-08/how-delaware-became-the-king-of-u-s-corporate-charters; Pirŝl, *supra* note 86, at 303.

the United States.[193] Regardless of the reason, as the state with the largest number of public corporations, Delaware clearly holds the most power to affect U.S. corporate law.[194] This makes Delaware a natural starting point for change.

If gender-diversity activists directed grassroots action[195] toward the Delaware legislature to amend Delaware corporate law, it would be instrumental in creating gender diversity requirements in U.S. corporations. After all, gender diversity is "one of the biggest issues" faced by corporate boards—and grassroots action by shareholders is already occurring within corporate structures.[196] By turning their attention to the Delaware state legislature, shareholder activists could spur change at the state level rather than the individual corporation level.

However, should grassroots activists fail to sway the Delaware legislature, focusing their attention on other states is another viable alternative. Notably, "Delaware does not always lead [the states] in the adoption of innovative rules, but it is seen as the best imitator [of innovative rules]."[197] If other states were to successfully impose a pro-gender diversity disclosure requirement onto its corporations, resulting in positive publicity and positioning that state as a corporate governance leader, Delaware would likely follow suit and imitate those regulations to keep its preeminent position as a "favorite destination for incorporation."[198]

There are numerous avenues state legislatures could take to increase gender diversity on the boards of the corporations incorporated within their borders. Amending corporate codes to require corporations to disclose specific information regarding their board's gender diversity policies is one legally viable way state legislatures could create positive change and improve gender diversity on corporate boards. Should change start with an influential state such as Delaware, this change would more likely affect states and corporations across the country.

B. Institutional Shareholder Activism-Based Solution

A second solution to improve gender diversity on corporate boards is through increased shareholder activism within corporations themselves. Shareholder activism is the idea that shareholders can and should use their stake in a company to effect change.[199] Individual shareholders

193. Wright, *supra* note 192.
194. Pirŝl, *supra* note 86, at 285–86, 305–08.
195. *See* Daniel E. Bergan, *Grassroots*, BRITANNICA (Aug. 2, 2016), https://www.britannica.com/topic/grassroots.
196. *See* Nili, *supra* note 7, at 155–57.
197. Pirŝl, *supra* note 86, at 305.
198. *Id.* at 303–04; *see also id.* at 305 (explaining that Delaware often waits to watch the effects of the new rules in other states before implementing a similar rule).
199. *Activist Shareholder*, CFI, https://corporatefinanceinstitute.com/resources/knowledge/finance/activist-shareholder/ (last visited Oct. 25, 2020).

hold little power over American corporations. However, institutional investors, many of whom are long-term investors that may hold corporate social responsibility in high regard, form a power bloc that corporations cannot ignore.[200] These large shareholders hold trillions of dollars of assets and can spend money on publicity campaigns, white paper reports, or shareholder proposals that call for corporations to make the changes they want to see.[201] Historically, these large shareholders, which include institutional investors and hedge funds, have "kept a low profile."[202] However, this trend is changing.[203] These institutional investors are now using activism to realize positive, long-term economic and social value from their investments.[204] In fact, in January 2020, Goldman Sachs Group Inc.—one of the largest underwriters for initial public offerings in the United States—announced it will not take any companies public "if it lacks a director who is either female or diverse."[205] If this pro-diversity trend continues, institutional shareholders and underwriters may wield enough power to effect change on their corporations' boards.

In 1950, institutional investors such as pension and mutual funds held a little more than 6% of all U.S. equities.[206] By 2017, that number had risen dramatically to 70%.[207] These investors, which today include BlackRock, Vanguard Group, and State Street Global, have trillions of dollars of assets under their control.[208] Their influence is palpable, and they will continue exerting this influence on the corporations in which they invest.[209] Indeed, BlackRock and State Street Global have used their influence to encourage gender diversity on corporate boards by voting against directors if the board does not have a female director.[210] Two of the most popular tactics utilized by shareholder activists to exert their influence on boards are shareholder proposals and vote no campaigns.[211]

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200. Yuliya Ponomareva, *Shareholder Activism is on the Rise: Caution Required*, FORBES (Dec. 10, 2018, 12:27 PM), https://www.forbes.com/sites/esade/2018/12/10/shareholder-activism-is-on-the-rise-caution-required/#7b816c294844.

201. *Id.*

202. *Id.*

203. *Id.*

204. Paula Loop et al., *The Changing Face of Shareholder Activism*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 1, 2018), https://corpgov.law.harvard.edu/2018/02/01/the-changing-face-of-shareholder-activism/.

205. Jeff Green, *Goldman to Refuse IPOs if All Directors are White, Straight Men*, BLOOMBERG (Jan. 24, 2020, 9:05 AM), https://www.bloomberg.com/news/articles/2020-01-24/goldman-rule-adds-to-death-knell-of-the-all-white-male-board.

206. Loop et al., *supra* note 204.

207. *Id.*

208. *Id.*

209. *Id.* Additionally, recent years brought an "all-time" record number of shareholder proposals calling for improving the board's gender diversity. This trend suggests this is an area of interest for institutional investors and is where they will likely continue to exert influence. *See* Nili, *supra* note 7, at 155–57.

210. Green, *supra* note 205.

211. Loop et al., *supra* note 204.

Shareholder proposals are resolutions submitted for a shareholder vote at the company's annual shareholder meeting.[212] While shareholder proposals are typically unsuccessful (whether focused on increasing the number of women directors or other issues) these proposals are "reasonably effective" at bringing the issue to the public's attention.[213] In 2017, the number of shareholder proposals regarding gender diversity "reached an all-time high" and many institutional investors voted in support of these proposals.[214] The significant increase in these shareholder proposals across the country may have encouraged California to pass S.B. 826.

Vote no campaigns would be the more successful tactic to effect change on corporations' board composition. Vote no campaigns urge shareholders to vote against the corporation's "say on pay"[215] or to withhold their votes from board nominees to voice their disapproval of the corporation's policies.[216] Unlike shareholder proposals, these campaigns do not require a majority vote to be effective.[217] Typically, corporations observe shareholder support for both director nominees and say on pay to be over 90%.[218] When a vote passes with less than 70% support, "it sends a stark message about shareholder dissatisfaction" and creates media scrutiny which may negatively affect the directors' and corporation's reputation.[219]

As discussed in Section II.B, shareholder activism leading to voluntary corporation changes to the director nomination practice could be a constitutionally sound affirmative action process—so long as corporations remedy specific instances of gender-based exclusion against women from their boards.[220] While gender-based quotas remain impermissible, a corporation could include gender as a plus factor in considering potential director candidates to present to shareholders.[221] Any changes through shareholder activism must be done on a corporation-by-corporation basis. As gender diversity on corporate boards is an

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212. *Activist Shareholder*, *supra* note 199.

213. *Id.*

214. Nili, *supra* note 7, at 155–56.

215. "[A] provision of the 2010 U.S. Dodd-Frank financial reform legislation that requires companies to put their executive pay practices to a (nonbinding) shareholder vote at least once every three years." Justin Fox & Jay W. Lorsch, *What Good Are Shareholders?*, HARV. BUS. REV. (July–Aug. 2012), https://hbr.org/2012/07/what-good-are-shareholders.

216. Loop et al., *supra* note 204. See also Green, *supra* note 205, for explanation of BlackRock and State Street Global Advisor's vote no campaigns.

217. Loop et al., *supra* note 204.

218. *Id.*

219. *Id.*

220. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 489–91 (1989); United Steelworkers v. Weber, 443 U.S. 193, 209 (1979) (explaining that Title VII leaves discretion "to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous . . . imbalance in traditionally segregated job categories").

221. Grutter v. Bollinger, 539 U.S. 306, 333–34 (2003); Gratz v. Bollinger, 539 U.S. 244, 271–76 (2003); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 317-18 (1978).

extremely hot issue in corporate governance,[222] corporations that make the first move would garner positive press likely leading to increased profitability.[223]

Spurring action at the corporation level could successfully improve progress toward gender diversity on boards. While legally viable, progress would likely be slow due to the number of corporations that lack true gender diversity on their boards.[224] This does not mean that activist shareholders should stop exerting their influence and calling for their corporations to change and improve. It simply means that proponents of gender diversity should seek a more effective solution to create swift, large-scale change.

C. Reforming the SEC's Diversity Disclosures Solution

The Securities Exchange Act of 1934 gives "the SEC [authority] to require periodic reporting of information by companies with publicly traded securities,"[225] the same category of companies California attempts to regulate with S.B. 826.[226] The SEC amended its corporate governance disclosure requirements in 2009 to require public corporations to disclose the existence of a diversity policy when considering nominees for director positions.[227] If a corporation has a diversity policy, it must disclose how it implements the policy and whether the policy is effective.[228] However, these amendments did not require corporations to actually have a written diversity policy or to even consider diversity when selecting new directors.[229] The SEC clarified these amendments in 2019 but only insofar as to require the diversity disclosures if a company's nominating committee considers diversity characteristics in its board selection process.[230]

The SEC introduced the Diversity Assessment Report in 2018 to further promote diverse boards.[231] This self-assessment report is similar to Australia's diversity initiative[232] in that it calls for public companies to voluntarily provide a self-assessment regarding the diversity on their

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222. *See* Nili, *supra* note 7, at 155–57.

223. Luciano Fanti & Domenico Buccella, *Profitability of Corporate Social Responsibility in Network Industries*, 65 INT'L REV. ECON. 271, 287 (2018).

224. *See* Nili, *supra* note 7, at 198–200.

225. *Securities Laws*, *supra* note 91.

226. *See* S.B. 826, 2018 Leg., Reg. Sess. (Cal. 2018).

227. 17 C.F.R. § 229.407(c)(2)(vi) (2020); Tamara S. Smallman, Note, *The Glass Boardroom: The SEC's Role in Cracking the Door Open so Women May Enter*, 2013 COLUM. BUS. L. REV. 801, 811–13 (2013).

228. 17 C.F.R. § 229.407(c)(2)(vi).

229. Smallman, *supra* note 227, at 812.

230. David Sparkman, *SEC Issues Guidance on Board Diversity*, MH&L (Apr. 4, 2019), https://www.mhlnews.com/labor-management/sec-issues-guidance-board-diversity.

231. Press Release, U.S. Sec. & Exch. Comm'n, SEC Invites Regulated Entities to Voluntarily Submit Self-Assessments of Diversity Policies and Practices (Jan. 25, 2018) [hereinafter SEC Press Release] (on file with author).

232. *See supra* notes 81–85 and accompanying text.

boards.[233] However, unlike Australia, the SEC does not require companies to explain why they have not submitted a self-assessment or detailed any actions the company undertakes to diversify its board.[234] Furthermore, there are no goals associated with the voluntary self-assessment, giving corporations nothing concrete to strive toward to improve their board's gender diversity. Thus, the SEC must take more direct, binding action.

The SEC's current action of promoting disclosure and self-assessments in a corporation's annual disclosures falls short in ensuring gender diversity on corporate boards. In fact, a study of SEC disclosures showed that 76% of Fortune 50 companies failed to fully comply with the SEC disclosure rules.[235] Neither the disclosure nor self-assessment rules require public corporations to establish a diversity policy.[236] A corporation without such a policy is simply not required to disclose any information regarding diversity on their boards. This may unintentionally discourage corporations from creating a formal diversity policy to avoid disclosing that aspect of their hiring process.[237]

Additionally, the 2018 self-assessment report gives corporations far too much flexibility to define diversity should they choose to disclose their diversity policies. The SEC does not define diversity; instead, companies "define what they mean by diversity in their policies and disclosures."[238] This allows companies to broadly interpret diversity and remain in compliance with both the 2009 disclosure amendments and the 2018 self-assessment reporting initiative.[239] Companies define diversity as everything from "gender and race to age and life experiences" in their disclosures.[240] This lack of definition seemingly rendered a well-intentioned SEC regulatory scheme to become essentially meaningless and nothing more than a talking point for those companies who want to appear socially conscious while continuing status quo operations.

Neither the 2009 amendments nor the 2018 self-assessment reporting is a strong enough regulation to increase gender diversity on corporate boards. However, the SEC can legally create stronger regulations to improve gender diversity on boards. The Securities Act of 1933[241] requires a company going public "'to make full and fair disclosure of rele-

233. SEC Press Release, *supra* note 231.
234. *See id.*
235. Smallman, *supra* note 227, at 817–22.
236. 17 C.F.R. § 229.407(c)(2)(vi) (2019); Sparkman, *supra* note 230; *see also* Smallman, *supra* note 227, at 812 (explaining the disclosure rules do not require any diversity policy); SEC Press Release, *supra* note 231 (explaining the assessment rule is voluntary).
237. Nili, *supra* note 7, at 188.
238. *Id.* at 183–84.
239. *Id.* at 184.
240. *Id.* at 187.
241. Securities Act of 1933, 15 U.S.C. §§ 77a–77mm.

vant information' by filing a registration statement with the SEC."[242] The Securities Exchange Act of 1934 requires "periodic reporting of information by companies with publicly traded securities."[243] Although corporate law is generally left to the states, states have long recognized and continue to accept the regulatory power of the SEC over their corporations.[244]

The SEC could use its authority under the Securities Act of 1933 and the Securities Exchange Act of 1934 to create additional requirements for corporations' initial or annual disclosures. First, the SEC should specifically define diversity—or, preferably, create different categories of diversity—which could be as broad or narrow as the SEC desired. By first providing specific categories, including gender, which comprise the definition of diversity on corporate boards, the SEC could then require corporations to identify their policies and practices and report on the effectiveness of those policies and practices.

A new SEC requirement, however, must go further than simply defining diversity. One main criticism of current SEC regulations is that they apply only to those companies that currently have a diversity policy in place for their nominating of directors.[245] A future regulation's effectiveness rests with its ability to apply to all public companies.[246] Similar to the UK and Australia,[247] if the SEC imposed a comply or explain standard alongside this regulation, compliance would remain voluntary but would require a company to explain why it chose not to have a diversity policy or why it did not consider gender diversity during its board nomination process.

To date, the SEC has taken a mostly hands-off approach to improving gender diversity on corporate boards. While prior actions are a step in the right direction, the SEC must go further and require corporations to address the defined diversity categories, including gender. More specific and broadly applicable SEC disclosure requirements would create more useful corporate disclosures and provide a map of where corporations can and should improve their board's gender diversity.[248]

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242. Sciabacucchi v. Salzberg, No. 2017-0931-JTL, 2018 WL 6719718, at *3 (Del. Ch. Dec. 19, 2018) (quoting Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund, 138 S. Ct. 1061, 1066 (2018)), *rev'd*, 227 A.3d 102 (Del. 2020).

243. *Securities Laws*, *supra* note 91.

244. *See, e.g.*, Manesh, *supra* note 105 ("*Sciabacucchi* sought to protect Delaware's regulatory domain [over corporate law] from the risk of a damaging collision with federal law.").

245. Nili, *supra* note 7, at 188.

246. The SEC could also implement a regulation under the Securities Act of 1933 requiring all corporations going public to have a gender-diverse board. An exploration of this solution goes beyond the scope of this Comment.

247. *See* discussion *supra* Section I.B.

248. While additional SEC regulation would affect corporate boards' gender diversity, simply the threat of federal regulation may be enough to spur change at the state level. Some scholars have explained that while corporate law is mostly left to states as an "unwritten compromise on corporate law" based on profederalism ideals, states have harmonized their corporate laws amongst each other

D. NFL Rooney Rule Solution

The solution with the strongest potential for impact is for state legislatures,[249] the federal legislature,[250] or the SEC[251] to implement a director-nominating process modeled off the NFL's Rooney Rule with the addition of a comply or explain requirement. Instituting the Rooney Rule has had a "phenomenal impact" on the number of minority head coaches in the NFL.[252] Minority head coaches led eight out of thirty-two NFL teams during both the 2010–2011 and 2018–2019 seasons.[253] Compared to a total of five minority head coaches over the course of the past ninety-nine NFL seasons, this is a demonstrable success.[254]

The Rooney Rule is a hiring practice that was instituted by the NFL in 2003 to combat the severe lack of minority head coaches in the league.[255] This rule requires teams to interview at least one minority candidate for a vacant head coach position.[256] The Rooney Rule does not require a team to hire a minority candidate; however, the NFL does impose a fine on both the team and the team's executives if they do not interview a minority candidate during the hiring process.[257] So long as the team follows the letter of the law, even if the team violates the spirit of the law, the Rooney Rule does not impose any penalty.[258] Therefore, so long as the team interviews a minority candidate, even with no intention of hiring that candidate, the team has not violated the Rooney Rule.

In the corporate context, the addition of a comply or explain requirement to a Rooney-based rule would avoid any issue of a corporation not adhering to the spirit of this new regulation. Under a comply or explain requirement, a company must "comply with governance requirements or explain why they do not."[259] Many countries, including Australia and the UK, have also adopted this requirement into their corporate codes.[260]

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to prevent federal intervention into the traditionally state-based corporate regulatory scheme. Pirŝl, *supra* note 86, at 291, 296 (internal quotations omitted) (quoting Mark J. Loewenstein, *The Quiet Transformation of Corporate Law*, 57 SMU L. REV. 353, 357 (2004).

249. Using their authority under the IAD and the generally accepted notion that states regulate corporations within their borders.

250. Using their power under the Commerce Clause. U.S. CONST. art. I, § 8, cl. 3.

251. Using their authority under the Securities Act of 1933, 15 U.S.C. 77a–77mm, and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78kk.

252. Bram A. Maravent, *Is the Rooney Rule Affirmative Action? Analyzing the NFL's Mandate to Its Clubs Regarding Coaching and Front Office Hires*, 13 SPORTS LAWS. J. 233, 245 (2006).

253. Ken Belson, *The N.F.L.'s Minority Head Coaching Ranks Are Thinning*, N.Y. TIMES (Jan. 15, 2019), https://nyti.ms/2RLwgtP (discussing the declining numbers of minority coaches after the 2018–2019 season which is irrelevant to the scope of this Comment).

254. *See* Maravent, *supra* note 252, at 236.

255. *See id.* at 240–42.

256. *Id.* at 234.

257. *See id.* at 242–43.

258. *Id.* at 248.

259. Branson, *supra* note 20, at 807.

260. *Id.* at 807–08.

Simply requiring corporations to interview a female candidate for a board position does not guarantee more women in the boardroom. However, requiring corporations who choose not to nominate female directors to explain their decision would encourage the nominating committee to closely examine all the candidates, ensure corporations were keeping with the spirit of the law, and provide useful information regarding the nomination process to other women considering directorships.

A board director nominating practice modeled off the Rooney Rule with a comply or explain requirement would provide a strong, constitutionally sound regulation on U.S. corporations. The Rooney Rule itself is a form of soft affirmative action.[261] This nomination practice would simply bring a female candidate in front of the nomination committee; it does not guarantee her the position. To be nominated, she must still be the most qualified individual for the position. Under this nominating practice, gender is a plus factor for getting an interview but not for directorship nomination.[262] Thus, the policy would pass constitutional muster because it is not a gender quota like S.B. 826 but rather makes gender a plus factor, which U.S. case law permits.[263] Further, including a comply or explain requirement along with the Rooney Rule would guarantee Title VII protection to the women interviewing for directorships[264] and would help to prevent personal biases from improperly influencing the nominating committee.

The Rooney Rule also prevents tokenism. A gender quota runs the risk of electing a token female director to the board to simply satisfy the mandated quota. Tokenism fails to promote true gender diversity on corporate boards. However, giving at least one female candidate the opportunity to present herself and her qualifications to the nominating committee does not create a token position. If the female candidate is qualified, and the nominating committee acts to find the best-qualified candidate, the committee should consider her as they would any other qualified candidate. Additionally, because the hiring practice does not make gender a criterion for selection, other board members are more likely to view female directors as chosen based on their merit rather than solely to comply with a regulation;[265] this would further add to the "better business" attributes woman tend to bring to their corporate boards.[266]

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261. *Compare* Glen, *supra* note 57, at 2107 (explaining that "[a]ffirmative action allows preferential treatment to a group of persons based on a common characteristic"), *with* Maravent, *supra* note 252, at 240 (discussing the Rooney Rule's requirements).

262. *See* Glen, *supra* note 57, at 2107.

263. *See* Grutter v. Bollinger, 539 U.S. 306, 333–34 (2003); Gratz v. Bollinger, 539 U.S. 244, 270–73 (2003); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 319 (1978).

264. *See supra* note 120 and accompanying text.

265. Choudhury, *supra* note 18, at 538.

266. *See* discussion *supra* Section I.A.3.

The director-nomination process often begins with senior officers from other corporations[267] and is influenced by personal relationships between the candidate and the nominating committee.[268] Because it pushes the nominating committee to seek qualified candidates outside their typical candidate pools, the Rooney Rule creates a more level playing field when it comes to interviews but still promotes fair competition in the final director nomination.[269] If more women are considered for directorship positions, corporate culture will evolve from that of an old boys' club[270] to one that is gender inclusive and promotes both female and male leadership.

By widening the applicant pool, personal relationships between the nominating committee and the director candidates will likely expand, and as more female directors are elected, there will be more female candidates who have director experience, and these women will have more personal characteristics in common with the nominating committee. This will continue to increase the number of female directors. To avoid the token female directors and embed gender diversity as a universal value, the corporate culture in the United States must change.[271] The Rooney Rule plus a comply or explain requirement is one way to both initiate and encourage this cultural change.

The Rooney Rule with a comply or explain requirement would pass a constitutional challenge because it does not create a quota and does not prevent a board from interviewing any male candidates. Typically, there are no time constraints when choosing a new director. If a board has three male individuals it wants to interview for an open directorship, those three individuals can still be interviewed. So long as the board interviews at least one female candidate in addition to those three male candidates and intends to nominate the female candidate if she is the most qualified or competitive, the board will meet its obligation under both the letter and the spirit of the rule. If the board decides not to choose the female candidate and provides a sufficiently detailed explanation as to why it did not choose her, it meets the comply or explain requirement.[272]

Successful implementation of the Rooney Rule, coupled with a comply or explain requirement, depends on whether state legislatures, Congress, or the SEC implement the rule. State legislatures could pass this rule under their ability to regulate the corporations incorporated

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267. *See* Smallman, *supra* note 227, at 808.
268. Choudhury, *supra* note 18, at 517.
269. *Id.* at 537.
270. *See* Forbes, *supra* note 8.
271. *See id.*
272. This is applicable to all candidates rejected for the directorship position. Information as to why individuals were not selected is useful to all candidates as candidates may use the information to improve themselves as future candidates, regardless of gender.

within their borders.[273] Under the Commerce Clause, Congress has the authority to regulate those activities that substantially affect interstate commerce.[274] Arguably, the boards of most public corporations make decisions that affect interstate commerce.[275] Thus, Congress can likely enact this rule. Additionally, because of the authority granted to the SEC under both the Securities Act of 1933 and the Securities Exchange Act of 1934, the SEC is also well-positioned, or arguably better positioned,[276] to institute this rule.[277]

CONCLUSION

S.B. 826 violates well-established and nearly universally accepted corporate law by attempting to regulate the internal affairs of corporations incorporated outside of California. Additionally, S.B. 826 creates an unconstitutional gender-based quota. However, pressure from investors and shareholders to improve gender diversity on corporate boards continues to grow.[278] Countries across the world have implemented policy changes, sometimes even constitutional changes, to promote gender diversity on their corporations' boards.[279] Unlike many of these countries, the United States cannot constitutionally impose gender quotas on its corporations' boards. Nevertheless, there remain various legal solutions to address the lack of gender-diverse corporate boards in the United States.

These solutions range from state legislatures amending their corporate codes to shareholder activists continuing to push for gender-diverse boards through proposals and vote no campaigns. Separately, the SEC should also amend its diversity disclosure and self-assessment initiatives to make such disclosure mandatory while providing a specific definition for diversity.

Of all possible legal solutions to promote gender diversity on corporate boards, the most effective way is for Congress or the SEC to implement a rule modeled after the NFL's Rooney Rule and include a comply or explain component. This solution addresses the board gender diversity proposals offered by shareholders across the United States while avoid-

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273. However, see *supra* Section III.A, for discussion as to why this is an uncompelling choice.

274. U.S. CONST. art. I, § 8, cl. 3; *see also* Wickard v. Filburn, 317 U.S. 111, 123–25 (1942) (holding Congress's power under the Commerce Clause extends to activities that affect interstate activities in a substantial way).

275. This discussion goes far beyond the scope of this Comment.

276. *See supra* notes 90–92 and accompanying text.

277. As discussed above, if the SEC discussed implementing this rule, states may choose to implement the rule themselves to avoid federal regulation in an area traditionally left to the states. *See supra* note 248 and accompanying text.

278. *See* Nili, *supra* note 7, at 155–56 (discussing shareholder proposals to increase gender diversity).

279. See *supra* Section I.B, for a discussion regarding other countries' efforts to promote gender diversity on corporate boards.

ing tokenism.[280] U.S. courts will unlikely uphold S.B. 826 but will likely uphold the Rooney Rule as applied to corporate boards because it does not create a gender-based quota and, if promulgated by Congress or the SEC, does not violate the IAD. Implementing the Rooney Rule will initiate a necessary shift in U.S. corporate culture toward gender diversity, similar to how the Rooney Rule caused a necessary shift toward racial diversity in the NFL's head-coach culture.[281]

Danielle Hartley[*]

280. *Compare* Nili, *supra* note 7, at 156–57 (discussing shareholder gender diversity proposals), *with* Maravent, *supra* note 252, at 240 (discussing the Rooney Rule's requirements).

281. *See supra* notes 252–54 and accompanying text.

* J.D. Candidate 2021, University of Denver Sturm College of Law. I would like to thank Professor Celia Taylor for her inspiration, guidance, and input throughout this entire writing process. Additionally, I would like to thank the members of the *Denver Law Review* for their tireless work to perfect this Comment and Lydia Sorensen for her willingness to review this Comment. Finally, I would like to extend a heartfelt thank you to Ben Snyder for his unwavering support, encouragement, and love.