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The Morals of the Women on Boards Story: Global Board Gender Diversity Efforts Still Need Fairness-Based Arguments to Move Regulation to the Next Chapter

DIANA C. NICHOLLS MUTTER*

I. Introduction

Canada and the United States have some of the lowest rates of female participation on public boards among nations that have introduced regulation aimed at addressing the underrepresentation of women on boards.¹

The impact of increasing board diversity (and, by extension, legislation or regulation aimed at increasing board gender diversity) depends upon the board's influence itself.² There are a number of reasons to begin with the board when discussing the underrepresentation of women in the upper echelons of corporations. First, corporate law provides directors with a great deal of power and responsibility, placing the board at the top of the corporate hierarchy.³ Furthermore, directors are responsible for operational and strategically important aspects of corporate oversight including voting

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1. Currently, women represent 17 percent of directors of public company boards in Canada. See CSA MULTILATERAL STAFF NOTICE 58-311: REPORT ON FIFTH STAFF REVIEW OF DISCLOSURE REGARDING WOMEN ON BOARDS AND IN EXECUTIVE OFFICER POSITIONS (October 2, 2019), https://www.osc.gov.on.ca/en/SecuritiesLaw_sn_20191002_58-311_staff-review-women-on-boards.htm. Boards of companies on the Russell 3000 Index are comprised of approximately 20 percent women. See Rachel Feintzeig, *Women's Share of Board Seats Rises to 20%*, WALL ST. J. (Sep. 11, 2019), <https://www.wsj.com/articles/womens-share-of-board-seats-rises-to-20-11568194200>. Other jurisdictions with similar securities laws that have introduced disclosure-based policies aimed at increasing female participation on public boards tend to have much higher rates of female directors. For instance, as will be discussed in more detail below, Australia has 29.7%. See Greta Stonehouse, *Not Enough Women on ASX200 Boards: AICD*, 7NEWS (July 24, 2019), <https://7news.com.au/business/not-enough-women-on-asx200-boards-aicd-c-365480>.

2. AARON A. DHIR, *CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY* 165 (Cambridge University Press 2015).

3. *Id.* at 26. See also James A. Fanto et al., *Justifying Board Diversity Board Diversity*, 89 N.C. L. REV. 901, 906 (2011); Sonja S. Carlson, *Women Directors: A Term of Art Showcasing the Need for Meaningful Gender Diversity on Corporate Boards*, 11 SEATTLE J. FOR SOC. JUST. 337, 338 (2012).

on mergers and acquisitions, approving financial statements and bylaws, and issuing dividends.⁴ The board is responsible for monitoring and approving the actions of management. It also has a role in advising executives and in providing important external networks and signals to the public.⁵

There is a prominent theory that once boards diversify other levels of the corporation may in turn see greater diversity. For instance, a Canadian Conference Board study found that corporations with more women on their boards in 1995 had thirty percent more women in executive roles by 2001, as compared to corporations with all-male boards in 1995.⁶ A study conducted using data from the MSCI All World's Index published in 2016 found similar results, namely that those corporations with three or more female directors had a higher average percentage of women in senior management.⁷ Matsa & Miller also found that each ten percentage point increase in women on boards increased the likelihood of having women among the top five executives in the next year by 0.9 percentage points.⁸ Tinsley and Purnal more recently found that as female representation on boards increases, females are much more likely to be appointed as CEOs of large, U.S. companies.⁹ Thus, there is strong evidence of what Matsa and Miller term "gender spillover" from the board to the executive suite.¹⁰

The question of where diversity initiatives will have the most impact depends on where true corporate power resides. Directors are often blamed in the wake of corporate scandals and failings—usually for not doing enough to detect or prevent corporate misdoings.¹¹ Thus, it can be argued that

4. DHIR, *supra* note 2, at 31.

5. Fanto et al., *supra* note 3, at 909. For a discussion of how effective, or ineffective, these signals might be, see Lissa Lamkin Broome & Kimberly D. Krawiec, *Signaling Through Board Diversity: Is Anyone Listening?*, 77 U. CIN. L. REV. 431, 447–48 (2008).

6. DAVID BROWN ET AL., WOMEN ON BOARDS: NOT JUST THE RIGHT THING . . . BUT THE "BRIGHT" THING 8 (2002), <https://utsc.utoronto.ca/~phanira/WebResearchMethods/women-board&fp-conference%20board.pdf>. See also Carlson, *supra* note 3, at 384.

7. MEGGIN TIWING EASTMAN ET AL., THE TIPPING POINT: WOMEN ON BOARDS AND FINANCIAL PERFORMANCE 9–10 (2016), <https://www.msci.com/documents/10199/fd1f8228-cc07-4789-acee-3f9ed97ee8bb>.

8. David A. Matsa & Amalia R. Miller, *Chipping Away at the Glass Ceiling: Gender Spillovers in Corporate Leadership*, 101 AM. ECON. REV. 635, 638 (2011).

9. Catherine H. Tinsley & Kate Purnal, *Research: Board Experience Is Helping More Women Get CEO Jobs*, HARV. BUS. REV. (Jul. 29, 2019), <https://hbr.org/2019/07/research-board-experience-is-helping-more-women-get-ceo-jobs>.

10. Matsa & Miller, *supra* note 8, at 638.

11. For example, see TORONTO STOCK EXCHANGE, WHERE WERE THE DIRECTORS? (1994). See Proposed National Policy 58-201: Effective Corporate Governance, 27 OSCB 8850 (proposed Oct. 29, 2004) (Can.), https://www.osc.gov.on.ca/documents/en/Securities-Category5/rule_20041029_58-201_corp-gov-guidelines.pdf. A specific example is the case of Bre-X, one of the most notorious Canadian corporate scandals in history. A small Alberta mining company, which allegedly struck gold in Indonesia, saw its stock prices explode in the mid-1990s. It turned out that the projections being publicly disclosed were a result of tampering with core samples. Once these fraudulent disclosures were brought to light, Bre-X's stock plummeted. This scandal ended in criminal trials for the company's directors and a great deal of speculation as to how much they did or did not know and why they were not able to

boards (especially those of public companies) play a critical role in corporate governance and the capital markets.¹² Questions of their composition are, therefore, of the utmost importance in the realm of securities regulation and corporate governance. However, some scholars view the board's role as superfluous. On this view, the board's role is largely to "rubber stamp" management's decisions. They claim that executives hold the true power. Directors, according to this perspective, do not have any impact on a company's performance and so the board's composition makes little difference either to individual corporate performance or to capital markets more generally.¹³ Since boards do very little, efforts aimed at diversifying them make little sense. The counter-argument of course is that if boards do so little, what is the disadvantage of requiring them to become more diverse?

Whatever the practical, effective role of boards, in seeking to improve diversity within public corporations, the board is at least a logical place to start for at least two reasons. First, formally the board is at the center of the corporation's power structure. Second, if it is accepted that change in the boardroom leads to change throughout companies, then regulation of diversity on boards will have important knock-on effects, regardless of any general lack of board efficacy. Thus, the board "offers a contained and sensible place to begin diversification initiatives."¹⁴

Typically, arguments in support of regulation aimed at increasing women's participation on public boards fall into two categories: the business case and the fairness-based (or normative) case.¹⁵ The business case is essentially the idea that women bring some instrumental benefit to the board, which leads to improvements in firm functioning or performance overall. While politically attractive, the business case for justifying

prevent the massive fraud. For a full description, see Christopher C. Nicholls, *The Bre-X Hoax: A South East Asian Bubble*, 32 CANADIAN BUS. L. J. 173 – 222 (1999). See also Fanto et al., *supra* note 3, at 912; Akshaya Kamalnath, *The Value of Board Gender Diversity vis-a-vis the Role of the Board in the Modern Company*, 33 COMPANY & SEC. L.J. 90, 95 (2015), <http://www.ssrn.com/abstract=2608301>. An American example of this is Enron, one of the largest corporate scandals in U.S. history. The energy company was one of the largest, seemingly successful companies in the United States in the late 1990s. However, Enron filed for bankruptcy in 2001, and it came to light that behind the scenes the executives were misappropriating funds and self-dealing while fraudulently reporting success to shareholders. For a detailed description, see John R. Kroger, *Enron, Fraud, and Securities Reform: An Enron Prosecutor's Perspective*, 76 U. COLO. L. REV. 57, 138 (2005); Kristin N. Johnson, *Banking on Diversity: Does Gender Diversity Improve Financial Firms Risk Oversight*, 70 SMU L. REV. 327, 346 – 347 (2017); John C. Coffee Jr., *Understanding Enron: "It's About the Gatekeepers, Stupid,"* 57 BUS. LAW. 1403, 1419 (2002) (wherein it is argued that Enron was actually a failure on the part of various gatekeepers, rather than on the part of the board).

12. Angela Foster, *A Quest to Increase Women in Corporate Board Leadership: Comparing the Law in Norway and the U.S.*, 26 WASH. INT'L L. J. 381, 382 (2017).

13. Kimberly Krawiec et al., *A Difficult Conversation: Corporate Directors on Race and Gender*, 26 PACE INT'L L. REV. 13, 14 (2014); DHIR, *supra* note 2, at 29; Kamalnath, *supra* note 11, at 99.

14. DHIR, *supra* note 2 at 29.

15. Darren Rosenblum, *When Does Sex Diversity on Boards Benefit Firms*, 20 U. PA. J. BUS. L. 429, 438 – 39 (2018).

regulation has yet to convince most of those in the business community in Canada and the U.S. If it had, we would have seen a much greater transformation in board composition in recent years than we have seen. The normative case, which is the idea that women deserve board seats because this is the right thing to do, is less politically attractive because it is often seen to clash with the view, particularly in the U.S., that the role of corporations—and by implication the boards that manage them—is to maximize shareholder wealth. Board transformation, in keeping with this paradigm, cannot be justified unless this leads to higher profit or share price.

This article will use the Canadian and American experiences to argue (1) that the normative case, by itself and in combination with the business case, can justify stronger regulation encouraging greater female participation on boards, especially given the role of the board and the involvement of institutional investors; and (2) that securities regulators in each jurisdiction have a critical and appropriate role to play in increasing board diversity. Part II begins with an overview of various jurisdictions' regulatory regimes aimed at increasing board diversity and the respective increases of female participation on public boards. Part III outlines the normative case and provides an analysis of the popular critiques and responses thereto. Part IV includes a description of the business case and its acknowledged weaknesses. Finally, it will be argued that normative-based rationales for implementing regulation aimed at enhancing gender diversity on public boards justify action by the SEC in the U.S. and provincial securities regulators in Canada, recognizing, however, that it is important for these capital market regulators to stay within the boundaries of their respective mandates and ensure that regulation does not harm the interests of investors or damage capital markets.

II. Rising Action: Regulation and Numbers, Canada and the U.S. Fall Short

A. QUOTAS, COMPLY-OR-EXPLAIN, EXPLAIN-OR-EXPLAIN, AND NO REGULATION

Assuming the decision has been reached in a jurisdiction to increase the level of female representation on corporate boards, what is the most effective legislative or regulatory approach to accomplish this? Regulatory options vary from invasive, quota-based regimes in countries such as Norway, Spain, France, Italy, Germany, and Belgium; to disclosure-based regimes, which can be found in the U.K., Australia, the Netherlands, the U.S.,¹⁶ and Canada; to no regulatory intervention as in China, Japan, and Hong Kong. Consistently across the globe, the stricter the regime and the more severe the penalty for non-compliance, the greater the percentage of female

16. ONTARIO SEC. COMM'N STAFF, CONSULTATION PAPER 58-401, DISCLOSURE REQUIREMENTS REGARDING WOMEN ON BOARDS AND IN SENIOR MANAGEMENT 7 – 17 (2013) [hereinafter OSC CONSULTATION PAPER 58-401].

directors. Canada and the U.S. for instance have some of the weakest disclosure-based policies and have lower percentages of female directors than the U.K. and Australia, which both have stricter disclosure policies. The highest percentages of female directors are found in jurisdictions that have implemented quotas with harsh penalties for non-compliance. As Jim Leech of the Ontario Teacher's Pension Plan said in his statement at the 2013 Roundtable conducted by the Canadian Securities Administrators (CSA),¹⁷ "If you're serious and you really want to make that difference and you really believe in it, then set it up for seven years from now as a target, and people have to get there. And it's a listing requirement."¹⁸

1. Quotas

Norway was the first of several European countries to adopt board gender diversity quotas. The Norwegian Companies Act was amended in 2003 to include a requirement that public corporate boards (of a certain size) be composed of at least forty percent of the underrepresented gender.¹⁹ From 2004 to 2006 this quota was voluntary,²⁰ but there was insufficient compliance with the quota during the voluntary period. By 2006, only twenty-four percent of board seats in Norway were occupied by women.²¹ This forty percent quota requirement became mandatory in 2006. Companies were required to meet the quota by 2008 or risk dissolution.²² Unsurprisingly, once the quota was mandatory, corporate boards became gender diverse very quickly.²³

17. The CSA is the umbrella organization to which all of Canada's provincial and territorial securities regulators belong. Canadian securities regulation remains a provincial matter. See Reference re Securities Act, [2011] 3 S.C.R. 837 (Can.). Recently, the Supreme Court of Canada approved of a plan for a cooperative national regulator; see Reference re Pan-Securities Regulation [2018] 3 S.C.R. 191 (Can.). What the role of this regulator will be is yet uncertain and for now the provincial and territorial regulators are still in place.

18. TRANSCRIPT OF ONTARIO SEC. COMM'N, ROUNDTABLE DISCUSSION RE WOMEN ON BOARDS AND SENIOR MANAGEMENT 48 (2013), http://www.osc.gov.on.ca/en/SecuritiesLaw_oth_20131016_58-401_transcript.htm [hereinafter OSC Roundtable Discussion 2013]. As mentioned above, the Ontario Teachers' Pension Plan supported a much more stringent TSX rule that would require issuers with shares trading on the TSX to add three women to their boards by 2020 or face the consequence of being de-listed. See Wayne Kozun, Ontario Teachers' Pension Plan, Comment Letter on Ontario Sec. Comm'n Consultation Paper 58-401 (Proposed Amendments of 58-101F1) (Oct. 4, 2013) [hereinafter Kozun Letter for OTPP], https://www.osc.gov.on.ca/documents/en/Securities-Category5-Comments/com_20131004_58-401_ontario-teachers-pension-plan.pdf.

19. Norwegian Public Limited Liability Companies Act, Del G:1 § 6-1 (Act No. 45 of June 13, 1997), translated in *Acts and Regulations*, OSLO BØRS, https://www.oslobors.no/ob_eng/Oslo-Boers/Regulations/Acts-and-regulations (then follow "Norwegian Public Limited Liability Companies Act" link) (last visited Feb. 25, 2020).

20. Anne Sweigart, *Women on Board for Change: The Norway Model of Boardroom Quotas As a Tool For Progress in the United States and Canada*, 32 NW. J. L. & BUS. 81A, 83A (2012).

21. OSC CONSULTATION PAPER 58-401, *supra* note 16, at 16.

22. *Id.*

23. Sweigart, *supra* note 20, at 83A.

Eric Lamarre from the McKinsey Company asserted in 2013 that without sanctions, quotas have similar results as comply-or-explain policies.²⁴ This conclusion is consistent with what occurred in Spain but inconsistent with what happened in France. Following Norway's lead, Spain and France adopted board diversity quotas. In 2007, women represented approximately six percent of board members of Spanish public companies.²⁵ The government of Spain declared that public companies with 250 or more employees would be required to have at least forty percent female directors by 2015.²⁶ The Gender Equality Act implemented in that same year included this board gender diversity quota. The Act states that companies subject to the quota "will endeavour to include a sufficient number of women on their boards of directors to reach a balanced presence [defined as a range of 40 – 60 percent] of women and men within eight years of entry into effect of this Act."²⁷ However, despite this explicit quota, women's participation on boards did not increase to anywhere near forty percent. Instead, by 2014 women represented only about twelve percent of directors on public boards.²⁸ Commenters speculate this is because the Spanish quota is a "soft law," meaning that there are no sanctions for non-compliance.²⁹ While there are no penalties for non-compliance in Spain, there are supposed incentives for complying with the quota, including the promise of more access to public contracts. A recent study, however, found that firms complying with the quota have not seen a serious increase in their income from public contracts and that only 9 percent of companies subject to the quota actually comply with it.³⁰

Contrarily, implementation of a quota had a much more significant impact in France. In 2008, the French constitution was amended to mandate that men and women be given the same access to professional and social leadership.³¹ In 2011, a law was passed implementing corporate gender quotas that required public corporations and private corporations with significant assets and large numbers of employees to reach twenty percent female board participation by 2014 and forty percent by 2017.³²

24. OSC Roundtable Discussion 2013, *supra* note 18, at 46 – 47.

25. Ruth Mateos et. al, *Disentangling Discrimination on Spanish Boards of Directors*, 19 CORP. GOVERNANCE: INT'L REV. 77, 79 (2011).

26. Sandeep Gopalan & Katherine Watson, *An Agency Theoretical Approach to Corporate Board Diversity*, 52 SAN DIEGO L. REV. 1, 45 (2015).

27. *Id.* at 45 – 47.

28. Siri Terjesen, *Why Some Board Gender Quotas Don't Work*, CATALYST (Feb. 12, 2019), <https://www.catalyst.org/2019/02/12/why-some-board-gender-quotas-dont-work/>.

29. Ruth Mateos de Cabo et al., *Do 'Soft Law' Board Gender Quotas Work? Evidence from a Natural Experiment*, 37 EUR. MGMT. J. 611, 615 (2019).

30. *Id.* at 622.

31. Julie C. Suk, *Gender Parity and State Legitimacy: From Public Office to Corporate Boards*, 10 INT'L J. CONST. L. 449, 454 (2012); Carlson, *supra* note 3, at 361.

32. Loi 2011-103 du 27 janvier 2011 relative à la représentation & équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle (1) [Law 2011-103 of January 27, 2011 on the Representation and Parity of Women and Men

Unlike in Norway, the punishment for non-compliance in France was not corporate dissolution. Instead, if a company did not comply with the quota, the nomination of its directors would be null and void.³³ Today, France is a leader in board gender diversity, with 44.2 percent female representation.³⁴ Thus, it is not clear whether it is the quota itself or the sanctions that make the difference.

Quotas in Italy, Germany, and Belgium were also quite effective at increasing women's participation on boards. In Italy a quota was implemented mandating that one third of boards of listed companies be composed of the underrepresented gender.³⁵ Law 120/2011, which included the gender diversity board quota, came into effect in 2012.³⁶ At the time, women represented less than six percent of directors. After the quota's implementation, women represented 31.3 percent of directors in 2016. Penalties for non-compliance include fines of 100,000 to one million euros.³⁷ Germany implemented a similar quota that was to increase female directorships for Germany's 100 largest companies from thirty percent in 2016 to fifty percent by 2018.³⁸ It also required 3500 mid-sized firms to set their own targets for female participation. Prior to this quota, women represented 21.2 percent³⁹ of directors in Germany. By 2017 the 100 largest listed companies in Germany had increased female representation on boards to an average of thirty percent.⁴⁰ Belgium also implemented a quota requiring one third of companies' boards to be represented by women.⁴¹ A law amending the Companies Code in Belgium came into effect in 2002 to

within Boards of Directors and Management, and on Equality in the Workplace (1)], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 27, 2011, p. 1680. See also OSC CONSULTATION PAPER 58-401, *supra* note 16, at 16.

33. Emmanuel Zenou, Isabelle Allemande & Bénédicte Brullebaut, *Gender Diversity on French Boards: Example of a Success from a Hard Law*, in 1 GENDER DIVERSITY IN THE BOARDROOM 103, 113 – 114 (Cathrine Seierstad et al. eds., 2017).

34. Claire Zillman, *Need Proof That Companies Can Have Gender Diverse Boards? Look to France*, FORTUNE (Dec. 3, 2018), <http://fortune.com/2018/12/03/board-diversity-france/>.

35. G.S.F. Bruno et al., *Boardroom Gender Diversity and Performance of Listed Companies in Italy: A Natural Experiment* 8 (CONSOB Working Paper No. 87, Sept. 2018), <https://ssrn.com/abstract=3251744>.

36. *Id.* See also Legge 12 luglio 2011, n.120, G.U. Jul. 28, 2011, n.174 (It.).

37. Bruno et al., *supra* note 35, at 17.

38. Kim Willey, "Bringing Canadian Women on Board": *A Behavioural Economics Perspective on Whether Public Reporting of Gender Diversity Will Alter the Male-Dominated Composition of Canadian Public Company Boards and Senior Management*, 29 CAN. J. WOMEN & L. 182, 192 (2017).

39. GLOB. CTR. FOR CORP. GOVERNANCE, DELOITTE, WOMEN IN THE BOARDROOM: A GLOBAL PERSPECTIVE 53 (5th ed. 2017) [hereinafter WOMEN IN THE BOARDROOM], <https://www2.deloitte.com/global/en/pages/risk/articles/women-in-the-boardroom5th-edition.html>.

40. Sebastian Kollman, *DIW Women Executives Barometer 2018: The Gender Quota for Supervisory Boards is Effective, Development on Executive Boards Has Almost Reached a Standstill*, DIW BERLIN (Jan. 18, 2018), https://www.diw.de/en/diw_01.c.574761.en/topics_news/diw_women_executives_barometer_2018_the_gender_quota_for_supervisory_boards_is_effective_development_on_executive_boards_has_almost_reached_a_standstill.html.

41. See DHR, *supra* note 2, at 76.

ensure the presence of women on Belgian corporate boards.⁴² In 2011, corporate board gender quotas were implemented to require thirty-three percent of listed and state-owned company boards to be comprised of women. State-owned companies were required to comply with the quota immediately, while listed firms had five years to transition into compliance. The penalty for non-compliance was a fine.⁴³ Women represented 26.4 percent of directors of listed companies in Belgium by 2016,⁴⁴ compared to 2009 when female directors represented only 6.5 percent of board members.⁴⁵

The European Union encouraged a number of the above countries to consider and implement quotas. Its directive, which was initiated in 2012, states that boards should aim for forty percent representation of the underrepresented gender. In considering nominations, there should be priority given to a member of this gender “if that candidate is equally qualified as a candidate of the other sex in terms of suitability, competence and professional performance.”⁴⁶

2. *Disclosure-Based Policies*

The U.K., Australia, the Netherlands, the U.S., and Canada all have disclosure-based policies. After these disclosure-based policies were implemented, the number of women on corporate boards for the most part increased incrementally.

a. The United Kingdom

The British government in 2010 commissioned a report by Lord Davies exploring the barriers stopping women from being placed on boards in greater numbers and ways in which their numbers on boards could be

42. Loi modifiant la loi du 21 mars 1991 portant réforme de certaines entreprises publiques économiques [Amendment of Articles to the Companies and Associations Code] of Jul. 28, 2011 *MONITEUR BELGE* [M.B.] [Official Gazette of Belgium], Sept. 14, 2011, 2d ed., 59600, art. 4 (Belg.) (inserting a new Art. 518bis § 1 in the Companies and Associations Code); see also *Gender Equality*, EUR. COMM'N, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality_en (last visited Dec 16, 2019).

43. Law Modifying the Law of March 21, 1991, art. 4 (Belg.).

44. SPENCERSTUART, *BELGIUM BOARD INDEX 4* (2017), <https://www.spencerstuart.com/-/media/pdf%20files/research%20and%20insight%20pdfs/belgiumbi2017web.pdf>.

45. LORD DAVIES OF ABERSOCH ET AL., *WOMEN ON BOARDS 25* (2011) [hereinafter *DAVIES REPORT*], <https://www.gov.uk/government/news/women-on-boards> (follow “independent review into Women on Boards” hyperlink under “Women on boards”).

46. *Commission Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance Among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures*, at 20, COM (2012) 614 final (Nov. 14, 2012); see also *Gender Balance in Decision-Making*, EUR. COMM'N, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/gender-balance-decision-making-positions_en (last visited Dec 16, 2019).

increased.⁴⁷ Following the report's publication, the United Kingdom's Corporate Governance Code was updated in September 2012 to include two principles of the code that relate to diversity. One principle states that board candidate searches should be conducted with an emphasis on merit, relying on objective criteria with appropriate weight placed on the benefits of diversity, including gender. Secondly, the board should review its performance, the performance of its committees, and the performance of directors individually. It should in this review consider, among other things, its diversity, including gender.⁴⁸ Listed corporations must disclose their compliance with the Code's principles and if they do not comply, they must provide reasons for non-compliance.⁴⁹ This policy was accompanied by a recommendation that Financial Times Stock Exchange (FTSE) 100 companies aim for twenty-five percent female representation on boards.⁵⁰ In 2010, women comprised 8.9 percent of board seats in the U.K. By 2017 women represented 20.3 percent of U.K. board seats.⁵¹ This represents an increase of female board participation of approximately one to two percent per year.

b. Australia

Australia has a fairly rigorous comply-or-explain policy. Eight core principles in the ASX Corporate Governance Council Principles and Recommendations provide non-mandatory guidance to listed corporations regarding their board nominating process, board composition, and board renewal process. Recommendation 1.5 states that corporations should implement a diversity policy and disclose the content of this policy.⁵² This recommendation also provides a suggestion for what should be included in the diversity policy. It further states that corporations should disclose the measurable objectives they have in place to achieve gender diversity, as well as the progress towards achieving these objectives.⁵³ Corporations must also disclose the number and percentage of women on their boards and explain

47. OSC CONSULTATION PAPER 58-401, *supra* note 16, at 12; *see also* DAVIES REPORT, *supra* note 45.

48. *Gender Balance in Decision-Making*, *supra* note 46, at 14. *See also* FIN. REPORTING COUNCIL, DEVELOPMENTS IN CORPORATE GOVERNANCE 2012, at 13 (2012), <https://www.frc.org.uk/getattachment/0aea228a-9c81-4d4c-bd59-b55683c6b88c/Developments-in-Corporate-Governance-2012-final-for-web.pdf>; FIN. REPORTING COUNCIL, THE UK CORPORATE GOVERNANCE CODE 8 – 9 (2018), <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf>.

49. OSC CONSULTATION PAPER 58-401, *supra* note 16, at 14.

50. In 2016, a subsequent recommendation was made in the Hampton-Alexander Review: that FTSE 350 companies aim for 33% female board representation by 2020. *See* WOMEN IN THE BOARDROOM, *supra* note 39, at 71.

51. *See Women on Corporate Boards: Quick Take*, CATALYST (Dec. 21, 2018), <https://www.catalyst.org/research/women-on-corporate-boards/>.

52. ASX CORP. GOVERNANCE COUNCIL, CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS 9 (4th ed. 2019), <https://www.asx.com.au/documents/regulation/cgc-principles-and-recommendations-fourth-edn.pdf>.

53. *Id.*

deviations from these recommendations. Before this regime, in 2010, women represented 10.8 percent of directors in Australia. Australia more recently has made substantial progress in increasing female board participation. They now lead all other countries with disclosure-based regimes, with 29.7 percent of listed corporations' boards being female.⁵⁴

c. The Netherlands

The Netherlands has had a fairly comprehensive comply-or-explain policy in the Dutch Corporate Governance Code since 2011. Listed company boards must be comprised of at least thirty percent female and thirty percent male directors. If a listed corporation does not comply with this requirement, it must explain the reason for its non-compliance in its annual report and must further provide an explanation of actions it will take in the future in order to comply.⁵⁵

This is an example of a true comply-or-explain policy, but one which has not had a serious impact upon gender diversity on corporate boards in the Netherlands. Prior to the comply-or-explain policy's implementation, women represented approximately 10.3 percent of directors on Dutch public companies.⁵⁶ Currently, female directors represent 18.8 percent of board members on Dutch listed companies.⁵⁷ The rate of increase of female board representation from 2004 – 2011 (before the policy's implementation) was 1.84 percent per year.⁵⁸ After the quota's implementation, from 2012 – 2017, the rate of change increased to only 1.95 percent a year.⁵⁹ A total of nine companies are in compliance with the regulation.⁶⁰ Thus, it may very well be penalties and not targets that make the difference. An update of the legislation was implemented in 2017, and the target percentages of female directors are now to be met by 2020.⁶¹

d. The United States

The SEC in the United States effected what may be the weakest version of a diversity policy. In 2009, the SEC amended the proxy disclosure requirements to include this policy.⁶² Regulation S-K, Item 407(c)⁶³ requires

54. Greta Stonehouse, *Not Enough Women on ASX200 Boards: AICD*, 7NEWS (July 24, 2019), <https://7news.com.au/business/not-enough-women-on-asx200-boards-aicd-c-365480>.

55. Hogan Lovells, *Women on Boards – Netherlands*, LEXOLOGY (March 13, 2014), <https://www.lexology.com/library/detail.aspx?g=59fb9028-6e3b-4f57-b9ab-5067cdedd915>.

56. DAVIES REPORT, *supra* note 45, at 25.

57. MIJNTE LÜCKERATH-ROVERS, *THE DUTCH FEMALE BOARD INDEX 2018*, at 8 (2018), <https://www.tias.edu/docs/default-source/Kennisartikelen/female-board-index-2018.pdf>.

58. Mateos de Cabo et al., *supra* note 29, at 622.

59. *Id.*

60. LÜCKERATH-ROVERS, *supra* note 57, at 15.

61. *Id.*

62. Proxy Disclosure Enhancements, Securities Act Release No. 33-9089, Exchange Act Release No. 34-61175, Investment Company Act Release No. IC-29092, 74 Fed. Reg. 68334 (Dec. 23, 2009).

63. *Id.*

that publicly traded companies disclose in their proxy statements whether the nominating committee “considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees,” they must “describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy.”⁶⁴ The Commission deliberately declined to define diversity, leaving the definition up to reporting corporations.⁶⁵ The policy, the SEC claimed, was not intended to “steer behavior” but may lead to benefits such as increased board independence and access to a wider talent pool of candidates.⁶⁶ Their belief was that investors would directly benefit from these disclosures.⁶⁷ Prior to the policy’s implementation, women held 15.2 percent of Fortune 500 board seats.⁶⁸ Approximately ten years after the policy’s implementation, 22.5 percent of directors of the Fortune 500 are women, and approximately 20 percent of the directors of the Russell 3000 are women.⁶⁹ The SEC’s diversity disclosure policy, therefore, has appeared to have had a very limited impact on the number of women on public corporate boards.

A more significant change, however, has been implemented at the state level in the U.S. In the fall of 2018, Senate Bill No. 826 (Bill 826) was signed in California.⁷⁰ This bill adds sections 301.3 and 2115.5 to the California Corporations Code.⁷¹ Bill 826 requires public corporations with “principal executive offices” located in California to have a minimum of one female director. This minimum number is to increase over time.⁷² By 2021, boards will be required to have at least two female directors if the board has five or more members, or three female directors if the board has at least six members.⁷³ This initiative has faced much controversy.⁷⁴ Following the

64. *Id.*

65. *Id.* at 68344.

66. *Id.* at 68355.

67. *Id.*

68. Rachel Soares & Jan Combopiano, 2009 *Catalyst Census: Fortune 500 Women Board Directors*, CATALYST (Dec. 9, 2009), <https://www.catalyst.org/research/2009-catalyst-census-fortune-500-women-board-directors>; Feintzeig, *supra* note 1.

69. DELOITTE & ALLIANCE FOR BOARD DIVERSITY, MISSING PIECES REPORT: THE 2018 BOARD DIVERSITY CENSUS OF WOMEN AND MINORITIES ON FORTUNE 500 BOARDS 17, (2019), <https://www2.deloitte.com/us/en/pages/center-for-board-effectiveness/articles/missing-pieces-fortune-500-board-diversity-study-2018.html>; Betty Moy Huber & Paula H. Simpkins, *Women Board Seats in Russell 3000 Pass the 20% Mark*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 5, 2019), <https://corpgov.law.harvard.edu/2019/10/05/women-board-seats-in-russell-3000-pass-the-20-mark>.

70. See S.B. 826, 2017 – 18 Leg., Reg. Sess. (Cal. 2018).

71. See *id.*

72. *Id.*

73. *Id.*

74. For a fuller analysis of the history of this bill, see, e.g., Diana C. Nicholls Mutter, *Crashing the Boards: A Comparative Analysis of the Boxing Out of Women On Boards in the United States and Canada*, 12 J. BUS. ENTREPRENEURSHIP & L. 285 (2019); Joseph Grundfest, *Mandating Gender*

enactment of Bill 826, other states have begun to write similar legislation. The House in Illinois, for instance, recently passed a bill which was originally going to require that all public companies in Illinois have at least one female and one African American board member by 2020.⁷⁵ It is as yet unclear what impact these initiatives will have on women's representation on public companies in the United States for at least two reasons. First, the majority of public corporations in the United States are incorporated in Delaware and so are subject to Delaware state corporate law.⁷⁶ Second, and relatedly, the California bill attempts to regulate companies with head offices in California, but which may be incorporated elsewhere.⁷⁷ This, critics say, may be an unconstitutional breach of the "Internal Affairs

Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826, (Stan. L. Sch. & The Rock Ctr. for Corp. Governance, Working Paper No. 232, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3248791###; Stephen Bainbridge, *Can California Require Delaware Corporations to Comply with California's New Board of Director Gender Diversity Mandate? No.*, PROFESSORBAINBRIDGE.COM (Sept. 1, 2018), <https://www.professorbainbridge.com/professorbainbridge.com/2018/09/can-california-require-delaware-corporations-to-comply-with-californias-new-board-of-director-gender.html>; Hester Pierce, Commissioner, Sec. & Exch. Comm'n, Remarks at the 17th Annual SEC Conference: *My Beef with Stakeholders* (Sept. 21, 2018), <https://www.sec.gov/news/speech/speech-peirce-092118>; Keith Paul Bishop, *Why California's Gender Quota Bill Is More Likely To Be Unconstitutional Than California's Pseudo-Foreign Corporation Statute*, ALLEN MATKINS: CAL. CORP. & SEC. L. (Sept. 4, 2018), <https://www.calcorporatelaw.com/why-californias-gender-quota-bill-is-more-likely-to-be-unconstitutional-than-californias-pseudo-foreign-corporation-statute>; Emily Stewart, *California Just Passed a Law Requiring More Women on Boards. It Matters, even if it Fails*, VOX (Oct. 3, 2018, 1:10 PM), <https://www.vox.com/2018/10/3/17924014/california-women-corporate-boards-jerry-brown>; Martha Groves, *Can California's New Boardroom Diversity Law Withstand Courtroom Backlash? Women Say 'bring it on'*, CAL MATTERS (Nov. 26, 2018), <https://calmatters.org/economy/2018/11/california-women-boardroom-law-faces-legal-challenges>.

75. See H.B. 3394, 101st Gen. Assemb., Reg. Sess. (Ill. 2019). The bill was substantially amended only to require that firms disclose the demographics of their boards. See Emma Hinchliffe, *Illinois Almost Follows in California's Board Footsteps: The Broadsheet*, FORTUNE (June 7, 2019, 7:27AM), <https://fortune.com/2019/06/07/illinois-almost-follows-in-californias-board-footsteps-the-broadsheet>; Bo Erickson, *House Democrats Consider New Rules Related to Diversity, Legislative Process*, CBS NEWS (Nov. 15, 2018, 6:13 PM), <https://www.cbsnews.com/news/democrats-consider-new-rules-related-to-diversity-legislative-process/>; Gregory Meeks, *Critic Has it Wrong: Legislation Seeks Greater Disclosure of Diversity on Corporate Boards*, THE HILL (Jan. 8, 2019, 6:20 PM), <https://thehill.com/blogs/congress-blog/politics/424432-critic-has-it-wrong-legislation-seeks-greater-disclosure-of>; Tim Shelley, *Bill Requiring Women, African-Americans on Corporate Boards Passes Illinois House*, 25 NEWS (Apr. 4, 2019, 12:26 PM), <https://week.com/2019/04/04/bill-requiring-women-african-americans-on-corporate-boards-passes-illinois-house>; Jaime Di Paulo, *Corporate Board Diversity Is Good for Business. But It's Not the Norm – And That's Why a Law is Needed*, CHICAGO TRIBUNE (May 03, 2019, 4:20 PM), <https://www.chicagotribune.com/opinion/commentary/ct-perspec-diversity-corporate-boards-bill-20190503-story.html>.

76. *Annual Report Statistics*, DELAWARE.GOV, <https://corp.delaware.gov/stats> (last visited Jan. 17, 2020).

77. See S.B. 826, 2017 – 18 Leg., Reg. Sess. (Cal. 2018).

Doctrine.”⁷⁸ Other opponents argue that Bill 826 violates the equal protection clause of both the U.S. Constitution and the California Constitution by creating a quota mandate based on an express gender classification.⁷⁹ The conservative activist group Judicial Watch has launched a lawsuit against the California Secretary of State alleging that the law is unconstitutional on this basis.⁸⁰ The Judicial Watch challenge was somewhat surprising, not only because it was not based on an alleged breach of the Internal Affairs Doctrine, but also because it was launched by an outside organization, not by a corporation subject to the quotas.⁸¹

e. Canada

In Canada, like in the United States, a fairly weak disclosure-based diversity policy was implemented in 2014 through amendments to Form 58-101F1—a form mandated by National Instrument 58-101—that require issuers to include certain corporate governance disclosures in management information circulars.⁸² Before its implementation, women represented 11 percent of directors on public company boards.⁸³ Since the policy’s implementation over five years ago, women now represent seventeen percent of directors on public company boards.⁸⁴ The disclosure regime under NI 58-101F1 is what is referred to as a comply-or-explain policy.⁸⁵ A reporting issuer⁸⁶ must first disclose if it does or does not have a policy

78. See MARC. I. STEINBERG, *THE FEDERALIZATION OF CORPORATE GOVERNANCE 2* (2018), wherein he defines the Internal Affairs Doctrine as, “the law that governs the relations among and between the corporation, its fiduciaries, and its stockholders is the law of the subject corporation’s state of incorporation.” For a fuller description of how this bill may come up against the Internal Affairs Doctrine, see Nicholls Mutter, *supra* note 74, at 320 – 326.

79. Shelly Heyduk et al., *Lawsuit Challenges Constitutionality of California Law Mandating Women on Public Company Boards*, O’MELVENY & MEYERS, LLP (Aug. 14, 2019), <https://www.omm.com/resources/alerts-and-publications/alerts/lawsuit-challenges-constitutionality-of-california-law-mandating-women-on-public-company-boards>.

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

81. *See id.*

82. Corporate Governance Disclosure, NI 58-101F1, (effective Dec. 31, 2016) (Can.) [hereinafter Disclosure NI 58-101F1], https://www.bccsc.bc.ca/Securities_Law/Policies/Policy5/Group/?group=58%20101.

83. CSA MULTILATERAL STAFF NOTICE 58-311, *supra* note 1, at 3.

84. *Id.* at 2.

85. Comply-or-explain is a form of regulation in which corporations making a disclosure must comply with stated best practices or requirements or explain why they did not comply. *See* Willey, *supra* note 38, at 193.

86. *See* Securities Act, R.S.O. 1990, c. S.5, § 1(1) (Can.). An issuer is defined by the Ontario Securities Act as “a person or company who has outstanding, issues or proposes to issue, a security”. *Id.* A reporting issuer is, among other things, an issuer whose shares are publicly traded. *Id.* Henceforth, publicly traded corporation and reporting issuer will be used interchangeably unless otherwise specified.

regarding representation of women on its board of directors.⁸⁷ If it has such a policy, it must also disclose what measures are taken to effectively implement the policy and the progress in achieving the policy's objectives.⁸⁸ If the issuer has no such policy, it must explain the reason why it does not.⁸⁹ Secondly, reporting issuers must disclose whether or not they consider the representation and identification of women during their director nominating process.⁹⁰ If an issuer does not consider the representation and identification of women in this process, it must disclose the reason it does not.⁹¹ Thirdly, the issuer must describe whether (and if not, why not) it has set targets concerning the representation of women on its board and what progress has been made toward reaching said targets.⁹² Lastly, the reporting issuer must disclose the number and percentage of women on its board at the time of disclosure.⁹³ One scholar has referred to NI 58-101F1's diversity disclosure as an "explain-or-explain," rather than a comply-or-explain policy because it provides no specific recommendations with which to comply.⁹⁴

National Instrument 58-101 has been implemented across Canada under the auspices of the Canadian Securities Administrators, an umbrella organization to which all of Canada's provincial and territorial securities regulators belong.⁹⁵ The instrument is only effective in each province or territory when adopted by that province or territory because securities regulation in Canada has, thus far, been entirely within the jurisdiction of the provinces.⁹⁶ Canadian corporate law, on the other hand, is a matter over which both the provinces and the federal government have jurisdiction.⁹⁷ Businesses may choose to incorporate under any of the ten provincial or three territorial business corporations statutes or under the federal statute, the Canada Business Corporations Act (CBCA).⁹⁸ On May 1, 2018, the federal government also introduced a board diversity measure to the CBCA when Bill C-25 received Royal Assent.⁹⁹ This bill, coming into force in 2020, will add section 172.1 to the *CBCA*.¹⁰⁰ Directors of prescribed corporations will be required to provide shareholders with all of the

87. The issuer must also disclose its policy as it relates to women in executive officer positions. This work's focus is on the regime as it relates to women on boards.

88. Disclosure NI 58-101F1, *supra* note 82, at 4.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 5.

94. Willey, *supra* note 38, at 193.

95. *Protecting Investors: Maintaining Confidence in Canada's Markets*, CANADIAN SEC. ADMIN., <https://www.securities-administrators.ca/aboutcsa.aspx?id=45> (last visited Jan. 17, 2020).

96. *Id.*

97. Canada Business Corporations Act, R.S.C. 1985, c 44.

98. *Id.*

99. Bill C-25, 1st Sess., 42nd Parliament, 2018 (assented to May 1, 2018) (Can.).

100. *Bill C-25 Proposed Regulations*, GOV. CAN., <https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/cs07273.html> (last visited March 1, 2020) (under proposed regulation description number 10).

information currently required to be disclosed by reporting issuers pursuant to Form 58-101F1 items 10 through 15.¹⁰¹ Additionally, the requirements of this bill will apply to “designated groups”—as defined by the Employment Equity Act—unlike the requirements in the diversity policy of Form 58-101F1, which apply only to women.¹⁰² These amendments are certainly an example of stronger regulation of board diversity generally, but, in terms of board gender diversity, they do not impose any new regulatory requirements for reporting issuers.

3. *No Regulation*

Several jurisdictions have not implemented any regulation relating to the underrepresentation of women on boards. Unsurprisingly, states with no regulation aimed at increasing women’s representation on boards have some of the lowest percentages of female directors. China, Hong Kong, and Japan, for instance, have no regulation and respectively have rates of 11.2 percent, 13.8 percent, and 4.5 percent women on boards.¹⁰³

In China, 35.1 percent of companies have all male boards.¹⁰⁴ Furthermore, the percentage of women on boards in China has remained consistently low. For instance, in 2010, women represented 10.1 percent of board members in China.¹⁰⁵ There has been very little change since then. Female board representation has increased by less than a percentage point in almost ten years.¹⁰⁶

Outside of the regulatory context, in Japan and Hong Kong, there have been some initiatives to encourage greater gender diversity on boards. In Japan, many large companies have joined the 30% Club.¹⁰⁷ While this may eventually foster some growth in Japan, women still only represent 4.5 percent of directors.¹⁰⁸ This is one of the lowest percentages among

101. *Id.*

102. *Id.* “Designated groups” must include but are not limited to women, visible minorities, Aboriginal peoples and people with disabilities. See *Green Light for CBCA Amendments on Board Diversity, Director Elections and Online Meeting Materials*, STRIKEMAN ELLIOTT (May 1, 2018), <https://www.stikeman.com/en-ca/kh/canadian-ma-law/Green-Light-for-CBCA-Amendments-on-Board-Diversity-Director-Elections-and-Online-Meeting-Materials>.

103. See *Percentage of Women on Boards Globally Reaches 20.6%*, THE ASSET: ESG F. (Oct. 15, 2019), <https://esg.theasset.com/ESG/38947/percentage-of-women-on-boards-globally-reaches-206> (last visited January 26, 2020); *Women on Boards 2019 Q2*, COMMUNITY BUS., <https://www.communitybusiness.org/women-boards-2019-q2> (last visited Dec. 16, 2019).

104. MORGAN ELLIS & MEGGIN EASTMAN, *WOMEN ON BOARDS 12* (Dec. 2018), <https://www.msci.com/documents/10199/36ef83ab-ed68-c1c1-58fe-86a3eab673b8>.

105. See *Percentage of Women on Boards Globally Reaches 20.6%*, *supra* note 103, at para. 9.

106. *Id.*

107. The 30% Club is an organization which began in the U.K. whose mission is to encourage gender balance on boards and in senior management. See *Who We Are*, 30% CLUB, <https://30percentclub.org/about/who-we-are> (last visited Dec 16, 2019).

108. Lawrence Loh, *How To Get More Women On Asia’s Boards? Go Beyond Number Counting*, FORBES (Jun. 18, 2018, 4:35 AM), <https://www.forbes.com/sites/nusbusinessschool/2018/06/19/how-to-get-more-women-on-asias-boards-go-beyond-number-counting/#cb2e8934b721>.

countries with a developed market. Similarly, despite the 30% Club's influence in Hong Kong, there has been incredibly slow movement over the past year. Out of 611 directorships in Hong Kong, eighty-five are held by women, and females represented 13.8 percent of board members in 2018.¹⁰⁹ In 2019, they represented 13.9 percent.¹¹⁰ At this rate of change, the 30% Club's goal of twenty percent female board members in Hong Kong by 2020 will not be met.¹¹¹

Even with voluntary efforts being made outside regulatory initiatives, it appears that the percentages of women on boards tend to increase with stronger regulation and remain stagnant with no regulation at all.

While the United States and Canada's female representation on boards is higher than those of countries with no regulation, among nations that have implemented regulation addressing this issue, Canada and the United States' percentages of women on boards remain strikingly low.¹¹²

III. The Conflicting Underlying Theories of Regulation of the Underrepresentation of Women on Boards

What then is missing in North America? Why do business leaders remain so unconvinced about the desirability of increasing the representation of women on corporate boards, and what underlying rationales should proponents of board diversity rely upon in seeking to agitate for legislative or regulatory change?

In the following sections the most common justifications underlying theories of regulation will be examined to determine how these competing rationales might be most effectively used by regulators in the United States and Canada, two of the most lenient jurisdictions in their tolerance of non-diverse corporate boards and in which boards of public companies have persistently had extremely low percentages of women directors. Special attention will be given to the normative case, specifically identifying the major criticisms of this rationale while suggesting that the normative case may still be persuasive to boards of directors and perhaps regulators.

Should boards diversify to rectify inequality or, rather, to serve corporate needs?¹¹³ In order to understand how the underrepresentation of women on boards is or should be regulated, it is important first to understand how the problem to be regulated is perceived. The arguments used by proponents of regulation aimed at increasing representation of women on corporate boards fall into two main categories. There are those who conceive of the underrepresentation of women on boards as a financial or instrumental issue, whereby corporations (and their shareholders) are missing out on the business benefits greater numbers of female directors bring. Alternatively,

109. See *Women on Boards 2019 Q2*, *supra* note 103.

110. *Id.*

111. *Id.*

112. See *id.*

113. Rosenblum, *supra* note 15, at 437.

there are those who conceive of female underrepresentation on corporate boards as a social justice issue. For those who view this issue as a business-based problem, stronger securities regulation is justified in order to benefit the market and better protect investors. For those who view the problem as one of social justice, regulation is justified on broader public policy grounds supported by normative arguments. Business case rationales tend to be appealing both to businesses and securities regulators.¹¹⁴ Academics more recently have noted the weaknesses of the business case and have cautioned against relying on it as the basis for demanding change, favoring instead a normative-based justification.¹¹⁵ Both rationales have been heavily criticized and are steeped in controversy.

IV. An Important Subplot: The Business Case

The business case is complex. Over time regulators and scholars alike have put forward many iterations of this rationale to justify or criticize regulation aimed at ameliorating the underrepresentation of women on corporate boards. First, there is the straightforward version of the business case that simply asserts that increased gender diversity enhances firm financial performance.¹¹⁶ The last three decades have seen a wealth of studies examining the relationship between boardroom gender diversity and financial performance. These studies have used a variety of metrics to measure financial performance, including Tobin's Q,¹¹⁷ Return on Assets (ROA),¹¹⁸ Return on Sales (ROS),¹¹⁹ Return on Equity (ROE),¹²⁰ and Return

114. Nicholls Mutter, *supra* note 74, at 316.

115. David A. Carter et al., *The Gender and Ethnic Diversity of US Boards and Board Committees and Firm Financial Performance*, 18 CORP. GOVERNANCE: INT'L REV. 396, 412 (2010); Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. BOARDS 377, 383 – 393 (2014), Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 856, 879 (2010).

116. Aaron Dhir, *Toward a Race and Gender-Conscious Conception of the Firm: Canadian Corporate Governance, Law and Diversity*, 39 QUEEN'S L.J. 569, 573 (2010); Rhode & Packel, *supra* note 115, at 382 – 83; *Why Diversity and Inclusion Matter: Financial Performance*, CATALYST (Aug. 01, 2018), <https://www.catalyst.org/knowledge/why-diversity-and-inclusion-matter-financial-performance>; Fairfax, *supra* note 115, at 860; Geneva R. Fountain, *The Case for the Business Case Rationale*, 15 FLA. ST. U. BUS. REV. 81, 83 (2016); Fawn Lee, *Show Me the Money: Using the Business Case Rationale to Justify Gender Targets in the EU*, 36 FORDHAM INT'L L.J. 1471, 1481 (2013); David Carter et al., *The Diversity of Corporate Board Committees and Firm Financial Performance* 1, 4 (Soc. Sci. Res. Network Paper No. 927763, 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=927263.

117. Tobin's Q is defined as the ratio comparing a firm's value with the cost of replacing its assets. See CHRISTOPHER C. NICHOLLS, *CORPORATE FINANCE AND CANADIAN LAW* 144 (2d ed. 2013); see also James Tobin & William C. Brainard, *Asset Markets and the Cost of Capital* 238 (Cowles Found. Discussion Paper No. 427, Mar. 26, 1976), <https://cowles.yale.edu/sites/default/files/files/pub/d04/d0427.pdf>

118. Return on Assets is an accounting measure that reveals how much revenue can be generated from assets. It is calculated by dividing total earnings by total assets. See Fountain, *supra* note 116, at 86.

on Investment or Invested Capital (ROI/ROIC).¹²¹ Financial performance studies have given rise to varying results. Some have demonstrated a positive relationship between boardroom gender diversity and financial performance,¹²² while others have shown either no relationship or in some

119. Return on Sales is an accounting measure determined by dividing the pre-tax profit by revenue. See NANCY M. CARTER & HARVEY M. WAGNER, *THE BOTTOM LINE: CORPORATE PERFORMANCE AND WOMEN'S REPRESENTATION ON BOARDS (2004–2008)* 3 (2011), https://www.catalyst.org/wp-content/uploads/2019/01/the_bottom_line_corporate_performance_and_womens_representation_on_boards_2004-2008.pdf.

120. Return on Equity is an accounting measure determined by dividing total income by equity, or shares. See Fountain, *supra* note 116, at 86.

121. Return on Investment or Return on Invested Capital is another measure of firm performance calculated by dividing net income by invested capital. See CARTER & WAGNER, *supra* note 119, at 3.

122. A great number of empirical studies spanning many years and jurisdictions, using several financial performance metrics, have shown a strong positive relationship between greater board gender diversity and better financial performance. Erhardt et al.'s study of 127 large, publicly traded American companies between 1993 and 1998 found that there was a positive relationship between board diversity and ROA as well as ROI because, the authors concluded, of enhanced monitoring of gender diverse boards. See Niclas L. Erhardt et al., *Board of Director Diversity and Firm Financial Performance*, 11 *CORP. GOVERNANCE: INT'L REV.* 102, 104 (2003). Campbell and Minguez-Vera, whose data set consisted of observations of firms listed in Madrid from 1995 – 2000, observed that the percentage of women on public boards was positively and significantly related to Tobin's Q and that the impact of firm value on the percentage of women was insignificant. See Kevin Campbell & Antonio Minguez-Vera, *Gender Diversity in the Boardroom and Firm Financial Performance*, 83 *J. BUS. ETHICS* 435, 444 (2008). Using data collected from 1998 – 2002, Carter et al. found evidence of a causal relationship between board gender diversity and financial performance as measured by Tobin's Q. The authors were hesitant to definitively conclude that the relationship was causal because they could not say for certain that there was not a third variable impacting both gender diversity and Tobin's Q. See Carter et al., *supra* note 116, at 26 – 27. Nguyen and Faff came to a similar conclusion in their study, which used data from large Australian publicly traded corporations from 2000 – 2001. Their results indicated that, on average, if two firms are the same in every way except that one has female directors and one does not, the former's Tobin's Q will be higher than the latter's. Further, as the number of female directors increases, so will Tobin's Q. Thus, Tobin's Q is positively related to both the incidence of female directors and the proportion of them on the board. See Hoa Nguyen & Robert Faff, *Impact of Board Size and Diversity on Firm Value: Australian Evidence*, 4 *CORP. OWNERSHIP & CONTROL* 24, 28 (2007). Conyon and He, using data from over 3,000 U.S. public companies from 2007 – 2014, found a positive relationship between gender diversity on boards and Tobin's Q. See Martin J. Conyon & Lerong He, *Firm Performance and Boardroom Gender Diversity: A Quantile Regression Approach*, 79 *J. BUS. RES.* 198, 203 (2017). Schwartz-Ziv's 2013 study demonstrated that board gender diversity, particularly where a critical mass of female directors is present, was positively correlated with ROE and profit margins. See Miriam Schwartz-Ziv, *Does the Gender of Directors Matter?*, (Edmond J. Safra Ctr. for Ethics, Working Paper No. 8, 2013), <http://www.ssrn.com/abstract=2257867>. Eastman, Rallis, and Mazzuchelli's study, which used data from 2011 to 2016 of company boards from the MSCI All Country World Index, similarly concluded that companies with a critical mass of women on boards far outperformed those with all male boards using ROE as a measurement of firm performance. See EASTMAN ET AL., *supra* note 7, at 15. Finally, a McKinsey Report of 2018, whose authors collected data from 1,007 companies across 12 countries, concluded that corporations with greater board diversity were more profitable than those with less diverse

cases a negative relationship.¹²³ Importantly, a number of these latter studies were conducted at the same time and using similar data as those showing a positive relationship between board gender diversity and firm financial performance.¹²⁴ Although, it may be noted that those studies demonstrating a positive relationship significantly outnumber those demonstrating a negative relationship.¹²⁵ A second version of the business case is based on the idea that greater board diversity will lead to improved corporate

boards. See JULIA DAWSON ET AL., *THE CREDIT SUISSE GENDER 3000: WOMEN IN SENIOR MANAGEMENT* 5 (Sept. 2014), <https://www.calpers.ca.gov/docs/diversity-forum-credit-suisse-report-2015.pdf>.

123. Adams and Ferreira, for instance, collected data from 1996 – 2003 from 1,939 firms of differing sizes. Their results suggested that diversity was positively related to firm financial performance when the company had weaker governance policies, but negatively related to financial performance when the corporation had strong governance and monitoring policies in place. This, they concluded, is consistent with the idea that female directors tend to be stronger monitors of management. These results, according to the authors, also support the idea that if a board is already performing its monitoring function well, adding more females could lead to a breakdown in communication between management and the board, thus hurting the firm's overall value. See Renée B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, 94, J. FIN. ECON. 291, 305 (2009). Conyon and He found that increased board gender diversity was significantly and negatively related to ROA. They found that gender diversity seems to have a much more positive impact on firms already performing well and a negative impact on lower performing firms. The authors' explanation for this is that female board members' value is less likely to be properly realized in lower performing firms focused on the threat posed by poor performance. See Conyon & He, *supra* note 122, at 208. In a subsequent study published in 2010, but using data from 1998 – 2002, Carter et al. concluded that gender diversity had no impact on firm performance, although their data did show in some regressions that gender diversity was positively related to ROA. Overall, they reported no evidence that higher numbers of female directors led to better financial performance. See Carter et al., *supra* note 115, at 408. Dobbin and Jung, analyzing data from Fortune 500 companies during firm years 1997 – 2006, concluded that increased numbers of female directors negatively affected stock value as measured by Tobin's Q and had no impact on profits as measured by ROA. This conclusion was based on the authors' observations that non-blockholding institutional investors tended to reduce their holdings in corporations who added women to their boards, but that the new female directors had no impact on board processes affecting ROA. See Frank Dobbin & Jiwook Jung, *Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?*, 89 N.C. L. REV. 809, 835 (2011). Using data from 2007 – 2009, Ahern and Dittmar observed a negative relationship between increased board gender diversity and firm performance. This study examined the impact of a quota law implemented in Norway in 2003, which became mandatory in 2006, requiring public companies to have 40 percent female directors on their boards. Ahern and Dittmar's results indicated that following the mandatory quota law, increased gender diversity led to a downturn in the Norwegian market and was negatively related to Tobin's Q. These results, they note, may be explained by the fact that younger, less experienced directors were selected in order to comply with the quota, although there could be another explanation as well. See Kenneth R. Ahern & Amy K. Dittmar, *The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation*, 127 Q.J. ECON. 137, 163 (2012).

124. DHIR, *supra* note 2, at 64.

125. *Id.*

governance,¹²⁶ a result which may not necessarily enhance financial performance, at least in the short term.¹²⁷ A third iteration posits that by enhancing gender diversity on corporate boards, a corporation necessarily must be accessing a wider talent pool.¹²⁸ Accessing a greater talent pool should lead to better business outcomes.¹²⁹ Each of these iterations has its own weaknesses and each has been heavily criticized.¹³⁰

126. On this view, gender diverse boards will indirectly benefit a corporation's bottom line in the long run. First, this may be by way of reducing group think, a phenomenon whereby group members fail to consider alternatives because they place the agreement of the group above constructive dissent. See Janis Sarra, *Class Act: Considering Race and Gender in the Corporate Boardroom*, 79 *ST. JOHN'S L. REV.* 1121, 1131 (2005). Many attribute the disaster that was Enron to this phenomenon. See, e.g., Erhardt et al., *supra* note 122, at 108. Empirical evidence also suggests that greater numbers of female directors encourage better attendance at board meetings. See Adams & Ferreira, *supra* note 123, at 296. Female directors are also thought to reduce agency costs by being tougher monitors of management. See Nguyen & Faff, *supra* note 122, at 24. For a fuller description of agency theory and agency costs, see Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. FIN. ECON.* 305, 308 (1976). Finally, there is the idea that corporations, by not adopting diversity as a priority, may suffer reputational losses because the investing public sees diversity as an important corporate governance issue. Not only will their reputation be damaged in this way, but additionally, less diverse corporations are typically subject to more discrimination litigation, resulting in financial loss and further damage to their reputation. See Sarra, *supra* note 126, at 1124.

127. Rhode & Packel, *supra* note 115, at 393.

128. Carter et al., *supra* note 116, at 10.

129. Carter et al., *supra* note 116, at 10; DHIR, *supra* note 2, at 42; Erhardt et al., *supra* note 122, at 104; Rosenblum, *supra* note 15, at 441.

130. The financial performance metrics studies are criticized not only because of their mixed results, but also because of their various methodological shortcomings. Many of these studies for instance are based on small sample sizes over brief periods of time. Rhode & Packel, *supra* note 115, at 382–83; Dobbin & Jung, *supra* note 123, at 813; Fountain, *supra* note 116, at 87. They also do not always account for problems of endogeneity generally and reverse causality specifically. Dobbin & Jung, *supra* note 123, at 818. The governance case is heavily criticized for some of the same reasons. The empirical evidence upon which this iteration is based is also mixed. Rhode & Packel, *supra* note 115, at 397. Further, it is not clear that having less agreement among group members leads to anything more than more conflict between members. Also, as shown by Adams and Ferreira, enhanced monitoring by directors may not always be an advantage and may, at a certain point, hinder communication between management and the board. Adams & Ferreria, *supra* note 123, at 292. Finally, the talent case runs up against one of the most common criticisms of board gender diversification efforts, that is, the pool problem. To be qualified for board membership usually means having executive experience, with an emphasis on CEO experience. Because fewer females have CEO experience, there are not as many qualified for directorships. See DHIR, *supra* note 2, at 40; Fountain, *supra* note 116, at 90; Fairfax, *supra* note 115, at 871; Sarra, *supra* note 126, at 1131; Carlson, *supra* note 3, at 356. There are of course various problems with this argument, including the fact that it may not reflect an accurate view of the Canadian or U.S. labor markets, or it could be a myth altogether. See *The "Think Director, Think CEO" Myth: Fortune 500 Companies*, CATALYST, <https://www.catalyst.org/knowledge/think-director-think-ceo-myth-fortune-500-companies> (last visited Feb. 6, 2019). While the pool problem may or may not exist, it is still a pervasive argument that may be affecting the attitudes of those in the business community.

The scholarly debate surrounding the business case is still very much alive. Scholars point to various reasons why the business case has had such little impact on boardroom diversity despite its political appeal.¹³¹ It could be, some speculate, because of the mixed empirical results that the business case relies upon.¹³² Many corporate decision makers remain entirely unconvinced of any relationship between board gender diversity and financial performance or improved corporate governance.¹³³ As one critic of board diversity regulation has said:

If there was some link between board diversity and firm performance, we would see some differential in trading values. We do not. . . . I also fail to see how cultural, religious, or gender-based perspectives differ on, for instance, how to structure a debt offering or divest an operating subsidiary.¹³⁴

Still, the glacial pace of change remains a mystery even if a clear relationship has not been established empirically between board diversity and enhanced financial performance or corporate governance. As Fairfax notes, other corporate governance best practices, such as the importance of director independence, were met with little to no resistance despite the mixed empirical results regarding their relationship to firm performance.¹³⁵

Other scholars warn against reliance on the business case for fear that gender diversity efforts will become conditional on share price.¹³⁶ Implied within justifications that diversification leads to wealth is that these efforts would not be worth pursuing otherwise.¹³⁷ In this sense, the business case “belittles” or “cheapens” boardroom diversity initiatives.¹³⁸ Finally, scholars point to the business case being “inextricably linked with the moral or social case for board diversity because moral and social rationales are embedded in the so-called business case.”¹³⁹ Perhaps this linkage is why many remain unconvinced of the business case.

While a full picture of the debate surrounding the weaknesses of the business case is beyond the scope of this article, there are several reasons to avoid using purely business case rationales to justify diversity efforts. It may be useful, therefore, to focus on what Rosenblum calls the “normative case” for board gender diversity.¹⁴⁰

131. Fairfax, *supra* note 115, at 869.

132. *Id.*

133. J.W. Verett, *Diversity for Corporate Boards*, TRUTH ON THE MARKET (Dec. 23, 2009), <https://truthonthemarket.com/2009/12/23/diversity-for-corporate-boards> (last visited January 26, 2020).

134. *Id.*

135. Fairfax, *supra* note 115, at 878.

136. DHIR, *supra* note 2 at 66; Fanto et al., *supra* note 3, at 930.

137. DHIR, *supra* note 2 at 66; Dhir, *supra* note 116, at 601.

138. Fanto et al., *supra* note 3, at 930.

139. Fairfax, *supra* note 115, at 879.

140. Rosenblum, *supra* note 15, at 437.

V. The Normative Case Is Still Crucial to the Diversity Narrative

For if those who support diversifying corporate boards do so because they believe diversity to be a worthy value in its own right, then the arguments about whether diversification enriches shareholders would seem to be a necessary intellectual justification, but not one of significant concern.¹⁴¹

The remainder of this article will provide an in-depth look at the normative case, including the various criticisms of this case and the responses to each of these criticisms, before proposing how the normative case may be usefully combined with the business case. The normative case has fewer iterations than the business case. In general, it is the idea that stronger regulation aimed at increasing the number of women on boards is justified because this is the right thing to do.¹⁴² Other nuances include the fact that historically, women have been disadvantaged.¹⁴³ Stronger regulation promoting female advancement is a way to rectify historical injustices.¹⁴⁴ Normative rationales and social justice goals do in fact seem to underlie most board diversification initiatives.¹⁴⁵ McKinsey in its 2016 report recognized this and stated that “social justice . . . is typically the initial impetus behind these [diversity] efforts.”¹⁴⁶ Thus, even for those who support the business case rationale, it is widely accepted that the normative case is usually the spark that ignites diversity developments.¹⁴⁷ Further, some authors argue that the normative case is more persuasive than business case arguments.¹⁴⁸

However, just as “there is no ‘pure’ business case for board diversity,”¹⁴⁹ there may currently be no pure normative case either. To regulate the inner workings of corporate boards with purely normative rationales has so far proven difficult, if not impossible, for securities regulators.¹⁵⁰ In Canada, the mandate of the Ontario Securities Commission (OSC), the securities regulator in Canada’s largest province, is to “provide protection to investors from unfair, improper or fraudulent practices; to foster fair and efficient capital markets and confidence in capital markets; and to contribute to the

141. Fanto et al., *supra* note 3, at 921.

142. DHIR, *supra* note 2, at 58.

143. *Id.*

144. *Id.*

145. VIVIAN HUNT ET AL., MCKINSEY & CO., DELIVERING THROUGH DIVERSITY 1 (Jan. 2018), https://www.mckinsey.com/~/_media/mckinsey/business%20functions/organization/our%20insights/delivering%20through%20diversity/delivering-throughdiversity_full-report.ashx.

146. *Id.*

147. *See id.*

148. Rhode & Packel, *supra* note 115, at 379.

149. Fairfax, *supra* note 115, at 879.

150. *See* Securities Act, R.S.O. 1990, c. S.5, § 1 (Can.); *The Role of the SEC*, INVESTOR.GOV, <https://www.investor.gov/introduction-investing/basics/role-sec> (last visited Nov. 7, 2018).

stability of the financial system and reduction of systemic risk.”¹⁵¹ Similarly, in the U.S., the SEC’s mission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.¹⁵² The securities regulators in these jurisdictions, therefore, do not seem to have a statutory mandate or authority to implement a regulation which would damage the capital markets, or even to implement one that fails to promote the above mandates.¹⁵³ Despite a certain amount of slippage between the business case and the normative case,¹⁵⁴ it appears that securities regulators must justify any regulation of this issue, at least in part, with business case rationales.

A. CRITICISM OF THE NORMATIVE CASE

1. *Merit*

The normative case (provided it can stand alone) does not take into account what impact regulation of board diversity has on corporate performance or its greater potential impact on the capital markets.¹⁵⁵ Following the normative case to its logical end suggests that mandatory quotas are the appropriate solution to the underrepresentation of women on corporate boards, irrespective of the impact of such quotas on firm performance.¹⁵⁶

Even ignoring financial performance arguments, though, critics still point to some real concerns with mandatory quotas. For instance, a report issued by one of Canada’s largest chartered banks, TD, has referred to quotas as the “antithesis of merit.”¹⁵⁷ The House of Lords European Union Committee in 2012 similarly stated that affirmative action “would risk fostering the perception—though entirely incorrect—that women on boards were not there by merit.”¹⁵⁸ There is first the risk that women will be included on boards solely because they are women, regardless of their relative experience or directorial ability.¹⁵⁹ The data from Norway suggests that this is a possible risk.¹⁶⁰ Ahern & Dittmar’s study found that there was a downturn in the market after the mandatory quota regulation was implemented.¹⁶¹ The authors speculate that, as corporations scrambled to meet the regulation’s requirements—at the risk of dissolution—members

151. Securities Act, R.S.O. 1990, c. S.5, § 1 (Can.).

152. *The Role of the SEC*, *supra* note 150.

153. See Securities Act, R.S.O. 1990, c. S.5, § 1 (Can.); *The Role of the SEC*, *supra* note 150.

154. Rosenblum, *supra* note 15, at 437.

155. Fanto et al., *supra* note 3, at 930 – 31.

156. *Id.* at 935.

157. *Get On Board Corporate Canada: Greater Transparency Needed for Gender Diversity on Canadian Boards*, TD ECONOMICS (March 7, 2013), <https://www.td.com/document/PDF/economics/special/GetOnBoardCorporateCanada.pdf>.

158. EUR. UNION COMM., WOMEN ON BOARDS REPORT, 2012–13, HL 58, ¶ 70 (U.K.).

159. Ahern & Dittmar, *supra* note 123, at 144.

160. *Id.* at 140.

161. *Id.* at 180.

with less experience were appointed.¹⁶² “People should not have to wonder, ‘Was I hired simply to check a box?’”¹⁶³ It is important to note, however, that Matsa and Miller’s explanation of this downturn contradicts that of Ahern and Dittmar. Matsa and Miller conducted a study of Norwegian companies during a similar time period and using similar data as Ahern and Dittmar, but they argue that the lower short-term gains occurring after the quota’s introduction were actually due to the difference between male and female directors preferences.¹⁶⁴ Matsa and Miller found that boards in Norway on average remained stable in both average age and average experience, even with the addition of younger females with less CEO experience.¹⁶⁵ Instead, they argue, women tend to be more long-term and stakeholder oriented.¹⁶⁶ Women are on average more altruistic and less concerned with short-term profits than men.¹⁶⁷ This is evidenced by the fact that the Norwegian boards with more female directors during the sample period were less inclined to undertake large layoffs, even during a recession.¹⁶⁸ This strategy may save money for the shareholders in the future because once demand is renewed, firms will not have to spend money on hiring and training new employees.¹⁶⁹ Thus, the “female style” may lead to short-term losses, but long-term gains.¹⁷⁰ Importantly, both Matsa and Miller and Ahern and Dittmar’s data related to a specific time in Norway when the implementation of a mandatory quota led to significant board composition transformations almost overnight.¹⁷¹ They may not, therefore, be truly representative of the effect increased board gender diversification would have on a board and a firm as a whole if the transformation were more gradual.¹⁷²

162. *Id.* at 144.

163. Kristen Tate, *Corporate Diversity Is Just Another Misguided Policy from Democrats*, THE HILL (Jan. 1, 2019), <https://thehill.com/opinion/civil-rights/424064-corporate-diversity-is-just-another-misguided-policy-from-democrats>.

164. See generally David A. Matsa & Amalia R. Miller, *A Female Style in Corporate Leadership? Evidence from Quotas*, 5 AM. ECON. J.: APPLIED ECON. 136 (2013).

165. *Id.* at 138.

166. *Id.* at 160 – 61.

167. *Id.* at 138.

168. *Id.* at 165.

169. *Id.* at 161.

170. *Id.* at 152 – 53.

171. *Id.* at 139; Ahern & Dittmar, *supra* note 123, at 137.

172. Schwartz-Ziv, *supra* note 122, at 60. A question which should be addressed here is why the market would not account for and reward the corporations which, due to this female leadership style, decided not to undertake large layoffs, etc.? Why would these choices not be reflected in a higher Tobin’s Q? One explanation is that prior to the quota’s implementation in Norway there was a great deal of negative press surrounding quotas. See Cathrine Seierstad, *Beyond the Business Case: The Need for Both Utility and Justice Rationales for Increasing the Share of Women on Boards*, 24 CORP. GOVERNANCE: INT’L REV. 390, 396 (2016) (suggesting to the investing public that quotas would lead to the nomination of directors who were under-qualified and who did not merit board positions). Thus, it may be that when boards were forced to add women,

There is also a risk that women appointed after a quota's implementation chosen entirely based on merit could still be viewed as having been appointed merely because they were women.¹⁷³ Thus, there is a worry among quota critics that women appointed after quotas are implemented will be stigmatized.¹⁷⁴ In Dhir's study, although participants feared and expected that there would be stigma surrounding female directors nominated as a result of the Norwegian quota, after its implementation, board members found that there was little to no stigma attached to those female directors.¹⁷⁵ In fact, participants found that women who they never would have otherwise heard of and who were impressively intelligent and competent were appointed instead.¹⁷⁶ Hence, an argument could be made that this type of regulation appropriately addresses systemic barriers and actually opens the door to deserving women who would, if not for quotas, go unnoticed.

2. *Free Choice*

Following from the merit criticism is the free choice criticism—the idea that perhaps there are not enough women to fill board seats based on merit because women make different career choices from men.¹⁷⁷ As Epstein asserts, women's choices should not be questioned in order to achieve a social goal.¹⁷⁸ There are studies that show that women do not gravitate towards competition as frequently as men, despite performing just as well as men in competitive situations.¹⁷⁹ If attempting to move up in the corporate hierarchy to management positions, and eventually board seats, is considered an example of gravitating towards competitive situations, one would assume that there was evidence that women attempt this less frequently than men. There is, though, evidence to suggest that it is not for lack of ambition that women leave management jobs. Instead, women report feeling under-valued and as if they have limited choices in their careers.¹⁸⁰ Furthermore, there is actually very little evidence to suggest women leave their jobs in large numbers after having children.¹⁸¹ Survey data demonstrates that despite common perception, women in middle and top management roles have the same aspirations as men in the same positions.¹⁸² They are also amenable in

highly qualified or not, market participants incorporated this negative press into their investment decisions.

173. DHIR, *supra* note 2, at 142.

174. *Id.*

175. *Id.* at 143.

176. *Id.* at 116.

177. Richard A Epstein, *Is Women's Empowerment a Bureaucratic Imperative?*, HOOVER INST. (Mar. 13, 2012), <https://www.hoover.org/research/womens-empowerment-bureaucratic-imperative>.

178. *Id.*

179. DHIR, *supra* note 2, at 45.

180. *Id.* at 46.

181. Foster, *supra* note 12, at 391.

182. *Id.*

the same way as their male colleagues to compromise parts of their private lives in order to achieve their career goals.¹⁸³ Thus, the free choice argument may be based on speculation and gender stereotyping rather than on empirical evidence.

3. *The Market Should Decide*

In comparing the U.S. approach with that of Europe, Epstein said:

Women are, in ever-larger numbers, graduating from universities with advanced degrees in business and management. As they move up the ranks, their presence on boards may well increase, wholly without quotas. . . . Firms have every incentive to pick the best board members, male or female. . . . So what is the difference between the Wall Street Journal and the EU's approach? Simple. The former uses voluntary action and enlists high-profile leaders to make its case, while the latter uses coercion in a ham-handed effort to achieve some narrow and counterproductive initiative toward the same general end.¹⁸⁴

Critics of the normative case, like Epstein, argue that the market should be left to correct the underrepresentation problem itself.¹⁸⁵ There is no need for government interference because public companies already have all the motivation they need to hire the best directors.¹⁸⁶ Discrimination is a market inefficiency, one that will be righted over time.¹⁸⁷

For proponents of stronger regulation, though, market-based arguments disregard reality. Some describe the glacial pace of diversity in the boardroom as a persistent market failure.¹⁸⁸ Professor Dhir details one participant's description of Norway's quota law in the following way: "It was almost as if she was grudgingly accepting that the free market principles she held so dearly had disappointed her—and that the quota was a necessary correction of market failure."¹⁸⁹ Following the financial crisis, during a

183. Sandrine Devillard, Sandra Sancier-Sultan, & Charlotte Werner, *Moving Mind-Sets on Gender Diversity*, MCKINSEY & CO. (Jan. 2014), <https://www.mckinsey.com/business-functions/organization/our-insights/moving-mind-sets-on-gender-diversity-mckinsey-global-survey-results>.

184. Epstein, *supra* note 177.

185. *Id.*

186. *Id.* See also Anita Indira Anand, *An Analysis of Enabling vs. Mandatory Corporate Governance Structures Post-Sarbanes-Oxley*, 31 DEL. J. CORP. L. 229, 252 (2006).

187. GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 61–62 (2d ed. 1971); RICHARD ALLEN EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 8–9 (1992); Fountain, *supra* note 116, at 94–95.

188. See BEATA CARANCI ET AL., TD ECON., *GET ON BOARD CORPORATE CANADA: GREATER TRANSPARENCY NEEDED FOR GENDER DIVERSITY ON CANADIAN BOARDS 1* (2013), <https://www.td.com/document/PDF/economics/special/GetOnBoardCorporateCanada.pdf>; see also Anita Anand & Krupa Kotecha, *Canada's Approach to Board Diversity Needs a Rethink*, *GLOBE & MAIL* (Mar. 22, 2017), <https://www.theglobeandmail.com/report-on-business/rob-commentary/canadas-approach-to-board-diversity-needs-a-rethink/article34386450/>.

189. DHIR, *supra* note 2 at 117.

senate debate in Canada over proposals to implement mandatory quotas for public company boards through amendments to the CBCA, Senator Ruth pointed out that while it is true that women are graduating at higher rates than men, leadership roles remain almost exclusively held by men.¹⁹⁰ As she put it, “I observe, of course, that these numbers suggest as the pool of men shrinks overall they maintain leadership positions.”¹⁹¹ We are not seeing increasing graduation rates among women affect the top positions in corporate Canada or the United States.¹⁹² In the U.S., for example, women are graduating with MBAs from top business schools at almost the same pace as men, and yet, represent a much smaller fraction of directors and executive officers of public companies.¹⁹³

Pamela Jeffrey at the OSC’s roundtable dedicated to discussing the regulation of women on boards stated, “we will not be anywhere close to gender parity until 2097 at this pace of change here between half a percent and a percent a year. So 2097, we’re all dead, and our children are dead, and our grandchildren. So let’s get on with [it].”¹⁹⁴ Although the rate of change has improved since 2013, it will still take approximately fifty more years to reach gender parity on Canadian public boards, and this is assuming that as board seats become available fifty percent of those seats will be filled by women, a higher female fill rate than there currently is.¹⁹⁵ The U.S. has seen a similarly stagnant rate of change and so will, likewise, take approximately thirty years to reach gender parity.¹⁹⁶ Thus, like free choice arguments, market based arguments may not have much evidence to support them.

4. *Role of the Board Is to Maximize Shareholder Wealth*

Although some criticisms of the normative case may not be well supported in the literature, the board’s assumed role as a shareholder wealth maximizer is a persuasive argument against stronger regulation. Perhaps the reason why the business case is so politically attractive is because it appeals to those who see the board’s role as maximizing shareholder wealth.¹⁹⁷ If the directors’ function is almost exclusively to enhance wealth, then a transformation of the board’s composition should only be undertaken if it would advance this goal. Hence, if gender diverse boards are not beneficial to shareholders, then diversity initiatives do not align with directors’ duties.

190. May 13, 2010, 147 DEBATES OF THE SENATE 550, at 563, 40th Parl., 3d Sess. (2010) (Can.).

191. *Id.*

192. DAWSON ET AL., *supra* note 122, at 17.

193. *Id.*

194. OCS Roundtable Discussion 2013, *supra* note 18.

195. ONTARIO SEC. COMM’N, ROUNDTABLE ON THE THIRD ANNUAL REVIEW OF WOMEN ON BOARDS AND SENIOR MANAGEMENT (2017), http://www.osc.gov.on.ca/documents/en/Securities-Category5/sn_20171103_transcript-wob-roundtable.pdf [hereinafter OSC Roundtable Discussion 2017].

196. S.B. 826, 2017 – 18 Leg., Reg. Sess. § 1(a) (Cal. 2018).

197. Suk, *supra* note 31, at 452 – 53.

However, for the reasons outlined below, the shareholder wealth maximization norm is contestable. In fact, in Canada—and even in the U.S. where it has most often been asserted that a corporation's exclusive or primary purpose is to generate shareholder wealth—directors acting in accordance with their fiduciary duties are at the very least permitted, and may be required, to pursue board diversity efforts.¹⁹⁸ The normative case may also be readily and usefully combined with business case arguments.

The normative case for board gender diversity is based upon the idea that women should be represented in greater numbers on boards, not to serve as a means to an end (that is, better firm performance) but rather as an end in itself.¹⁹⁹ The fundamental premise is that it is wrong that women are inadequately represented in positions of power. There are various versions of the normative case, as previously mentioned.²⁰⁰ One is that it is unfair to women at an individual level that they are poorly represented in the upper echelons of corporations given that they now represent half of the labor force and the majority of university graduates.²⁰¹ Another version is that in order to have a legitimate economic system, we need the representation of women in positions of power.²⁰²

It is difficult to separate the normative case from the business case because public corporate boards are, by their very nature, an integral part of for-profit businesses. A purely normative or social justice-based argument may not be persuasive if the role of a public corporation's board is to pursue profit above all else.²⁰³ Thus, in order for the normative case to truly resonate, it may be necessary to accept a view of the board (and corporation itself) as something beyond a shareholder wealth maximizer. There are sound reasons to believe that, both in practice and as a matter of corporate

198. Fairfax, *supra* note 115, at 858.

199. Fanto et al., *supra* note 3, at 930 – 31.

200. *Id.*

201. Suk, *supra* note 31, at 452.

202. May 1, 2014, 149 Debates of the Senate 1419, at 1431, 1450, 41st Parl., 3d Sess. (2014) (Can.). This argument is similar to the one described by Suk and is more popular in Europe. Countries such as France and Norway, Suk argues, prioritize gender balance in democratic bodies and have for years. These states have mandatory quotas for elected officials as a result of a change in rhetoric in the late 1990s and early 2000s. People stopped justifying affirmative action with women's advancement arguments and began adopting state legitimacy arguments. The state cannot be legitimate if it does not represent half of the population. This same argument began to be used in the corporate setting as well. However, as Suk describes, corporations in Norway and France participate actively in the states' democracies. Public economic policy is shaped through negotiation with corporations. This is a recognized practice. Thus, because of their interaction with state actors and known influence in public policy, in order for the state to be legitimate, it is important for corporations to be legitimate. See Suk, *supra* note 31, at 455, 459 – 61. Canada and the U.S. do not have such a system, and so perhaps this is why the state legitimacy argument has yet to become popular there.

203. Rosenblum, *supra* note 15, at 439 – 40.

law, it is not accurate to describe corporations simply as shareholder wealth maximizers.²⁰⁴

a. Plot Twist: Boards Legally Permitted and Encouraged to Pursue Goals Beyond Profit or Shareholder Wealth Maximization

“The corporate persona, however, is not so monolithic as to preclude consideration of factors besides the business case and profit motive.”²⁰⁵ Shareholder primacy is thought to be a pervasive norm of corporate governance.²⁰⁶ However, even in the U.S. this norm may not actually exist as a matter of law and as a concept seems to be incoherent. Further, corporate pursuit of policies directed toward board diversity, even accepting the shareholder primacy norm, would be protected by the business judgment rule. In Canada, where the shareholder primacy norm has not been supported by the Supreme Court, the legitimacy of board diversity policies is even more unassailable.²⁰⁷

i. The Extreme Case of Shareholder Primacy: Not So Extreme after All

In the U.S. context, where shareholder primacy is much more ingrained in corporate governance than in Canada, it is still wholly legal for corporations to pursue goals going beyond profit maximization. Indeed, since the Great Depression there has been controversy over whether corporations should operate solely for the benefit of their shareholders. Adolf Berle and Merrick Dodd’s famous Harvard Law Review debate in the 1930s raised some important points regarding corporate governance which remain relevant today.²⁰⁸ In Berle’s view, corporations are, and ought to be, operated purely for shareholders.²⁰⁹ Powers granted to the corporation, or a group within the corporation (such as its board of directors), are at all times to be exercised for the benefit of the shareholders.²¹⁰ If a corporate decision is to be scrutinized, it should be judged in its specific context with reference to whether it fairly protects shareholder interests.²¹¹ Dodd was critical of this view.²¹² He argued that it may be more appropriate to view a corporation as

204. LYNN A. STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 3 (2012).

205. Thomas Lee Hazen, *Diversity on Corporate Boards: Limits of the Business Case and the Connection between Supporting Rationales and the Appropriate Response of the Law*, 89 N.C. L. REV. 887, 890 (2011).

206. Henry Hansmann & Reinier Kraakman, Essay, *The End of History for Corporate Law*, 89 GEORGETOWN L. J. 439, 440 (2000).

207. *Peoples Dep’t Stores Inc. v. Wise*, [2004] 3 S.C.R. 461, paras. 41, 42 (Can.); *BCE, Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, para. 40 (Can.).

208. See generally A. A. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931).

209. *Id.* at 1049.

210. *Id.*

211. *Id.* at 1074.

212. See E. Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1145 (1932).

an institution run for the benefit of itself. A corporation should operate not solely for the benefit of shareholders, but rather as an individual would, with regard to the law and public opinion.²¹³ Dodd identified corporate stakeholders, one of which was the general public,²¹⁴ and stated that “[o]ne no longer feels the obligation to take from labor for the benefit of capital, nor to take from the public for the benefit of both, but rather to administer wisely and fairly in the interest of all.”²¹⁵

The law and economics scholars of the latter part of the twentieth-century reformulated, and in some ways reinvigorated, the shareholder primacy view but within a context that allows for important firm-by-firm variation. Easterbrook and Fischel, for example, advance a persuasive argument that the corporation is a “nexus of contracts.”²¹⁶ They use contract law as an analogy to demonstrate the relationship between shareholders, directors, and managers.²¹⁷ Shareholders, they state, in exchange for bearing the residual risk of the firm’s actions, expect that the firm will act to maximize long-term profits, which will result in an increase of the share price.²¹⁸ These shareholders are entitled to residual claims to profit because they are bearing this risk.²¹⁹ If investors are promised that profits will be maximized (or an attempt at maximization of profits will be made), actions in furtherance of this goal must be taken or else shareholders will have a cause for complaint. But, these authors note, it should not matter what the purpose of a corporation is.²²⁰ For instance, so long as it is made clear to investors at the outset, it is perfectly acceptable for a newspaper publisher’s primary goal to be printing a newspaper, while profit remains a secondary goal.²²¹

They further acknowledge that society may impose financial penalties in order to curb corporate behavior.²²² They argue that it is better for corporate behavior to be curbed by prices increasing or decreasing rather than for regulation to alter governance structure and impede a firm’s ability to maximize wealth.²²³ “A manager told to serve two masters (a little for equity holders, a little for the community) has been freed of both and is answerable to neither.”²²⁴ In other words, management (and presumably the board) cannot effectively maximize profits and consider society as a whole in every decision made and be held accountable to all constituencies. Finally,

213. *Id.* at 1154.

214. The others were the shareholders, the employees, and the customers.

215. Dodd, *supra* note 212, at 1154 – 55.

216. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 12 (1991).

217. *Id.*

218. *Id.* at 36.

219. *Id.*

220. *Id.*

221. EASTERBROOK & FISCHEL, *supra* note 216, at 36.

222. *Id.* at 37.

223. *Id.* at 38.

224. *Id.*

Easterbrook and Fischel argue that wealth maximization in turn benefits social wealth.²²⁵ High-performing firms are more likely to provide better working conditions and adopt environmentally friendly practices.²²⁶ It is not difficult to apply this argument to the issue of women on boards. For instance, it is clear that high-performing firms have far more resources to devote to diversity initiatives generally and at the board level. Thus, profit and wealth maximization by this logic may actually further gender diversity on boards.

Historically in the U.S., however, corporations were chartered with reference to the public interest. They were not intended to serve wholly as wealth maximizers.²²⁷ The public utility of business was not viewed as conflicting with private benefits. Thus, it was possible for a corporation to operate within a shareholder primacy norm and in the public interest.²²⁸ Indeed, the “[shareholder] primacy norm may be one of the most overrated doctrines in corporate law.”²²⁹ While legal scholars often assume that this norm is embedded within all managerial actions, in reality this may not be true. In Smith’s opinion, in almost all corporate actions, shareholder primacy is not considered by management.²³⁰

This could be because corporate law in the U.S. has never obligated corporations to pursue shareholder wealth over and above all else.²³¹ State corporation codes do not define the purpose of corporations as such. The majority of these codes actually contain provisions that explicitly allow boards to consider the interests of other stakeholders in making strategic decisions.²³² The U.S. Supreme Court has also recognized that profit may be important to corporate functioning but may not be the be-all and end-all of such an operation.²³³ In *Burwell v. Hobby Lobby Stores, Inc.*, for instance, the Supreme Court stated:

[Although] a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide

225. *See id.*

226. *Id.* at 38 – 39.

227. D. Smith, *The Shareholder Primacy Norm*, J. CORP. L. 277, 292 (1998).

228. *Id.* at 294.

229. *Id.* at 322 – 23.

230. *Id.* at 279 – 80. For a fuller look at his argument supporting this claim, see *id.* at 279 – 291.

231. Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 164, 165 – 66 (2008); STOUT, *supra* note 204, at 2.

232. *See, e.g.*, Stout, *supra* note 231, 169. Stout notes that while Delaware’s corporation code does not explicitly mention the board and management’s consideration of other stakeholder interests, it still does not define shareholder wealth maximization as the corporation’s purpose. *Id.*

233. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 710 – 11 (2014).

variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives.²³⁴

This line of thinking may be taken one step further. Shareholder wealth maximization as a concept is itself undefinable.²³⁵ First of all, as Stout points out, many view shareholders as the owners of corporations.²³⁶ This is inaccurate. A corporation is a legal entity, which, like a human being, cannot be owned.²³⁷ Rather than ownership, Stout claims, similarly to Easterbrook and Fischel, shareholders have a contract that allows for certain legal rights.²³⁸ Unlike Easterbrook and Fischel though, Stout argues that shareholders are not the residual claimants of the corporation, other than in the context of bankruptcy.²³⁹ Furthermore, she argues, shareholders have no direct control over the behavior of management or the board of directors, especially in large, widely-held companies.²⁴⁰ Boards, therefore, can choose to engage in attempts to maximize shareholder wealth or pursue objectives that benefit society while maintaining the firm itself. Moreover, shareholder wealth maximization does not make sense because shareholders' interests themselves differ across classes of shareholders, between those who have diversified portfolios and those who do not, and between those who wish to sell their shares in the short term and those who wish to hold them for the long term.²⁴¹ In fact, leading U.S. business executives have recently acknowledged the shortcomings of corporate shareholder wealth maximization. The Business Roundtable in August 2019 issued a statement asserting that corporations "share a fundamental commitment to all of [their] stakeholders."²⁴² In other words, CEOs of some of the United States' largest companies view corporations as more than simply shareholder wealth maximizers and appear to be retreating from the shareholder primacy norm.

If one views a corporation and its shareholders in this more expansive and enlightened way, it is far easier to accept a normative rationale for diversifying boardrooms. Viewing shareholder wealth maximization as simply one possible business strategy among many, corporations should be free to pursue social goals, provided those goals are in the best interests of the firm itself. If shareholder wealth is an incoherent concept which a board is not required by law to pursue at all times, then there is no reason why a board cannot and should not pursue diversity as a goal, provided it does not

234. *Id.* at 711 – 12.

235. See STOUT, *supra* note 204, at 103 – 116.

236. See *id.* at 33 – 46.

237. *Id.*

238. *Id.*

239. *Id.*

240. STOUT, *supra* note 204, at 33 – 46.

241. *Id.* at 63 – 73.

242. *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [hereinafter *Business Roundtable Redefines the Purpose of a Corporation*].

harm the firm in the long term. If corporations can be vehicles for positive social change, they certainly ought to be able to pursue diversity at the board level.

On the other hand, even if shareholder wealth maximization is a coherent concept to be treated as the board's main mission, diversity efforts should still be protected by the business judgment rule. Under the business judgment rule, boards are given broad discretion in the United States.²⁴³ Diversity proponents, therefore, should not need unassailable empirical evidence to support the case for board diversification. Rather, they should only need persuasive arguments to be adopted by boards.²⁴⁴ The law, as Fanto et al. illustrate, allows the board to take actions that are only tenuously related to shareholder value.²⁴⁵ There is no reason for diversity advocates to not take full advantage of how flexible the law is on this point. Unless convincing evidence is presented proving that board heterogeneity is harmful to shareholder value (which is unlikely), the law allows action by the board to promote gender diversity.²⁴⁶

Hence, it may be possible that even in the United States, where it has often been assumed that the board's role is primarily to pursue shareholder wealth maximization, there is at least hope for normative-based rationales for board diversification. Those in favor of greater board diversity "should not limit themselves to the shareholder value paradigm, for it obscures the other perspectives and values that they offer to justify board diversity and reinforces that paradigm."²⁴⁷ Corporate law in the United States allows directors the freedom to diversify at the board level.

The obvious difficulty with this argument is that it is not appealing to those who accept a shareholder-centric view of the corporation. It would require a massive cultural shift and change in perspective in the United States, where shareholder primacy is still very much embedded in corporate governance rhetoric, although the Business Roundtable's August 2019 statement suggests that such a shift may be possible.²⁴⁸ In Canada, however, shareholder primacy is not so deep-seated in corporate governance.

ii. The Canadian Case: A Stakeholder-Friendly Model

Canadian boards are permitted and encouraged to approach decisions in a stakeholder-friendly manner. Directors have a duty of loyalty that requires that they act honestly and in good faith with a view to the best interests of

243. The business judgment rule in the U.S. is a standard of review applied to directorial decisions. "It is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds*, *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

244. Fanto et al., *supra* note 3, at 919.

245. *Id.* at 904 – 05.

246. *Id.* at 931.

247. *Id.* at 935.

248. See *Business Roundtable Redefines the Purpose of a Corporation*, *supra* note 242.

the corporation.²⁴⁹ Directors, thus, at all times owe a duty to the corporation itself, not to shareholders in particular.

Generally speaking, a director's fiduciary duties in the U.S. are assumed to be both to the corporation and its shareholders. For example, there is a line of Delaware case law, known as the *Revlon* case series,²⁵⁰ which makes it clear that when a break-up or change of control transaction is inevitable, the board's fiduciary duty is to sell the company to the highest bidder.²⁵¹ *Revlon* has been interpreted and referred to in Canada.²⁵² However, the Canadian Supreme Court in *BCE* clarified that the directors' duties are to the corporation itself at all times.²⁵³ This fits with the statutory duties prescribed by federal and provincial corporate legislation.²⁵⁴ Recently, section 122 of the CBCA was amended to include a subsection essentially codifying the *BCE* decision, with some modifications that, if anything, expanded the range of non-shareholder interests beyond those referred to in *BCE*.²⁵⁵ Section 122(1.1) now specifically allows directors and officers, when acting with a view to the best interest of the corporation, to consider a list of various factors, including the interests of employees, pensioners, consumers, the environment, and the long-term interests of the corporation itself.²⁵⁶ Commenters remain unconvinced as to whether these amendments to the CBCA will impact the behavior of directors in any way,²⁵⁷ a partial recognition of the fact that directors of Canadian corporations already understand their duties to entail something other than merely maximizing shareholder wealth.

Though the CBCA has been amended to refer to non-shareholder interests specifically and the Canadian Supreme Court has stated that directors, in discharging their fiduciary duty to the corporations they serve,

249. Canada Business Corporations Act, R.S.C. 1985, c 44, § 122(1)(a).

250. See, e.g., *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986). The Delaware Chancery court held that considering stakeholders' interests who are not stockholders is inappropriate if a change of control transaction is inevitable. *Id.* Once this threshold is reached, the role of directors shifts to auctioneers and they must maximize shareholder wealth.

251. The *Revlon* duty was interpreted and narrowed in *Paramount Communications, Inc. v. Time Inc.* 571 A.2d 1140, 1150 (Del. 1989). The *Revlon* duty in *Time*, was held not to apply if a change of control transaction is inevitable, but where the control will still be widely dispersed and there will be no controlling shareholder. *Id.*

252. For a detailed account of how *Revlon* has been interpreted by Canadian courts, see CHRISTOPHER C. NICHOLLS, *MERGERS, ACQUISITIONS, AND OTHER CHANGES OF CORPORATE CONTROL* 229 – 39 (Irwin Law, 2d ed. 2012).

253. *BCE, Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, paras. 36 – 37 (Can.).

254. Canada Business Corporations Act, R.S.C. 1985, c 44, § 122; Ontario Business Corporations Act, R.S.O. 1990, c. B.16, § 134 (Can.).

255. Bill C-97, 1st Sess., 42nd Parliament, 2019, § 141 (assented to June 21, 2019) (Can.)

256. *Id.*

257. Cameron M. Rusaw, Robin Upshall & Emily Uza, *Significant Amendments to CBCA Proposed in 2019 Federal Budget*, DAVIES WARD PHILLIPS & VINEBERG LLP (Apr. 24, 2019), <https://www.dwpv.com/en/Insights/Publications/2019/Amendments-to-CBCA-in-Federal-Budget>.

may consider the interests of various stakeholders even in *Revlon*-type situations as described above,²⁵⁸ there is still no guidance about how seriously other stakeholders' interests must be considered. Given the strength of the business judgment rule, directors are unlikely to be penalized for prioritizing shareholder wealth. Professor Puri notes that the *BCE* decision did not provide directors with guidance on how to balance the interests of various stakeholders in making challenging decisions.²⁵⁹ It leaves the decision of how to balance these rights entirely up to directors—rather than the court—while simultaneously leaving the door open for boards to prioritize stakeholders. The expansive statement of the business judgment rule in *BCE* essentially protects directors' decisions from review by the court, regardless of whether those decisions are pro-shareholder or pro-stakeholder.²⁶⁰

One can imagine possible cases where the interests of the corporation diverge from the interests of shareholders. If the view is taken that the board is a wealth generator,²⁶¹ this does not necessarily mean that in every instance it should maximize *shareholder* wealth.²⁶² Instead, the wealth-generator view could mean that the board should maximize the total enterprise value of the corporation, a view which necessarily incorporates considerations for claimants other than shareholders. We know from *BCE* and *Peoples* that Canadian directors are given broad discretion.²⁶³ The business judgment rule should protect them from the charge of violating their fiduciary duties, provided they uphold what they consider in their judgment to be the best interests of the corporation, even if this means not always prioritizing shareholder wealth maximization.²⁶⁴

On the other hand, while supporting a stakeholder-friendly model of corporate governance (rather than a purely shareholder-centric model), the Supreme Court, in a situation that had some *Revlon*-type elements, upheld a decision by the directors that had the effect of favoring shareholders over the debentureholders.²⁶⁵ Thus, it seems even in Canada the directors are welcome to favor the shareholders, even if they are permitted to consider “the interests of, *inter alia*, shareholders, employees, creditors, consumers,

258. *BCE, Inc.*, [2008] 3 S.C.R. 560, para. 40.

259. Poonam Puri, *The Future of Stakeholder Interests in Corporate Governance*, 48 CAN. BUS. L.J. 427, 430 (2010).

260. Puri, *supra* note 259, at 431 – 32.

261. See generally William W. Bratton, *Confronting the Ethical Case Against the Ethical Case for Constituency Rights*, 50 WASH. & LEE L. REV. 1449, 1462 – 63 (1993) (highlighting the wealth generator line of thinking).

262. See Sarra, *supra* note 126, at 1139.

263. See generally *Peoples Dep't. Stores Inc. v. Wise*, [2004] 3 S.C.R. 461, 463 (Can.) In interpreting the business judgment rule in this case, the Supreme Court stated, “courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making.” *Id.* See also *BCE, Inc.*, [2008] 3 S.C.R. 560, para. 40.

264. Sarra, *supra* note 126, at 1139.

265. See *BCE, Inc.*, [2008] 3 S.C.R. 560, paras. 112 – 14.

governments and the environment to inform their decisions.”²⁶⁶ Thus, while it can be argued that Canadian corporations have a duty to the broader community and, as the Supreme Court of Canada has said, to be “good corporate citizen[s],”²⁶⁷ business corporations are nevertheless formed and operated in order to make profits, and directors will not be found at fault for pursuing a strong shareholder-centric agenda.

In short, permitting directors to consider other interests and pursue goals beyond profit and shareholder wealth maximization does not require them to do so. At the very least though, it is apparent that in Canada directors are more than able to pursue goals that go beyond making a profit. So long as the directors believe that diversity would be in the best interests of the corporation, board diversity efforts would certainly be among these acceptable goals. Thus, Canadian corporations are welcome to prioritize diversity and pursue it at the board level.

b. Accepting the Shareholder Wealth Maximization View of the Board

Milton Friedman conceived the firm’s social responsibility as solely to increase profits.²⁶⁸ The managers, as economic agents, are to fulfill the wishes of the shareholders (the supposed owners).²⁶⁹ Generally, these wishes are fulfilled by making as much money as possible. He asserts that social efforts made by a corporation that diminish shareholders’ returns are akin to an unacceptable form of taxation, as they are social initiatives paid for with other people’s money.²⁷⁰ What Friedman fails to address, however, is the idea that shareholders, aside from and including institutional investors, may agree with, and indeed invest in, a corporation because of its social conscience.²⁷¹

Even if it is true that boards exist only to protect the interests of shareholders and maximize profits, given the current calls from institutional investors, greater gender diversity may still be an issue permitted, and perhaps required, to be addressed by directors in their duties as fiduciaries. Powerful institutional investors are pushing for greater gender diversity on large public boards in both the United States and Canada. Some examples of these initiatives include BlackRock’s letter to corporations with no women

266. *Id.* at para. 40.

267. *Id.* at para. 66.

268. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://is.muni.cz/el/1456/podzim2015/MPH_AMA2/um/58872690/The_Social_Responsibility_of_Business_is_to_Increase_its_Profits.pdf.

269. *Id.*

270. *Id.*

271. For a fuller description of these investments, see Shlomit Azgad-Tromer, *The Virtuous Corporation: On Corporate Social Motivation and Law*, 19 U. PA. J. BUS. L. 341, 351 (2017). Cf. Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J. L. FIN. & ACCT. 247, 270 (2017) (arguing that investors incorporate social externalities into their investments; neither investors nor the corporations they invest in separate money making from social goals).

directors urging them to diversify,²⁷² ISS and Glass Lewis' promises to recommend voting against nominations of directors on boards with no women,²⁷³ and the Ontario Teachers' Pension Plan's letter to the OSC calling for companies with fewer than three female directors by 2020 to be delisted from the TSX.²⁷⁴ The Canada Pension Plan (CPP) and Caisse de dépôt et placement du Québec (CDPQ) are requesting that boards with all men diversify.²⁷⁵ "The responsible investment team at CDPQ now maintains a database of highly qualified female directors, which they send to male-dominated boards who claim "[t]here are no qualified female candidates to join our board"]."²⁷⁶ Both the Ontario Municipal Employees Retirement System (OMERS), a pension fund for Canadian and Ontarian government employees, and the Healthcare of Ontario Pension Plan (HOOPP), a pension plan for Ontarian healthcare workers, have updated their respective proxy voting guidelines to include support for diversity initiatives at the board level of those corporations with which they have invested.²⁷⁷ They have both also stated that they may consider voting against the chair or nominating committee if a company's board lacks sufficient diversity.²⁷⁸

It is not just firms with large market capitalizations that are being pushed by institutional investors to diversify. In the U.S., the Teachers Insurance and Annuity Association of America (TIAA) has begun to focus its attention on firms with small to medium market capitalizations. During the last proxy season, TIAA reached out to 500 firms with no female directors and requested that they adopt search practices that require nomination pools to have diverse candidates and to promise to nominate a female director in the next two years.²⁷⁹ They have stated publicly that if these efforts do not work, they may consider voting against directors who they view as responsible for the gender gaps.²⁸⁰ While these initiatives are based in part on business case

272. See Larry Fink, *Larry Fink's 2018 Letter to CEOs: A Sense of Purpose*, BLACKROCK, <https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter> (last visited March 1, 2020).

273. See Vivian L. Coates, *ISS and Glass Lewis Update Proxy Voting Guidelines for 2019; ISS Updates Qualityscore and Issues Preliminary Compensation FAQs*, NAT'L L. REV. (Dec. 10, 2018), <https://www.natlawreview.com/article/iss-and-glass-lewis-update-proxy-voting-guidelines-2019-iss-updates-qualityscore>.

274. See Kozun Letter for OTTP, *supra* note 18, at 5.

275. Dustyn Lanz, *Gender Lens Investing*, INVESTMENT EXECUTIVE (Apr. 26, 2019), https://www.investmentexecutive.com/inside-track/_dustyn-lanz/gender-lens-investing/.

276. *Id.*

277. See Danial Lam, *OMERS Proxy Voting Guidelines*, OMERS (Mar. 29, 2018), https://www.omers.com/Investing/OMERS_Investment_business/Capital_Markets/Proxy-Voting-Guidelines; *Statement of Guidelines and Procedures on Proxy Voting*, HOOPP (Nov. 7, 2019), <https://hoopp.com/docs/default-source/investments-library/policies-agreements/hoopp-proxy-voting-guidelines.pdf?sfvrsn=4>.

278. See sources cited *supra* note 277.

279. Roger Ferguson, *All Boards Must Be Accountable for Gender Balance*, FIN. TIMES (Mar. 24, 2019), <https://www.ft.com/content/3b457a38-4c9a-11e9-bde6-79eaca5acb64>.

280. *Id.*

rationales, they are also based on morality. If we are to accept that the interests of shareholders should outweigh any other stakeholders, boards may still be required to diversify if this is what the shareholders demand.

There is a great deal of debate about whether shareholder activism is good or bad for corporations in the long term and whether the normative leanings of institutional investor leaders should impact corporate governance in this way. Institutional investor efforts may be an efficient and cost-effective way to promote board diversity. Or at the very least, a board decision to preemptively pursue diversity may be the most cost-effective way to avoid shareholder activism.²⁸¹ Not only do these initiatives place no regulatory burden on firms, but these initiatives also allow for diversity to increase rapidly.²⁸² Further, they address many of the concerns raised by opponents of stronger regulation, primarily, concerns of inappropriate interference from regulators. Lastly, successful shareholder proposals may mean that those stakeholders concerned with diversity will be more likely to increase their holdings in companies that have diversified as a result of these proposals.²⁸³

The question remains as to whether it is appropriate for institutional investors to demand that boards diversify. There are those who disagree with institutional investor involvement in social issues. For instance, in 2005, the Ontario Teachers' Pension Plan took the position that non-financial considerations—such as Environmental, Social, and Governance (ESG) considerations—could not take priority over the risk and return management of the fund.²⁸⁴ However, as just mentioned, Teachers' has since changed its position and even advocated for gender quotas to be required for corporations listed on the TSX.²⁸⁵ Moreover, if ESG requirements benefit long-term shareholder value, then this criticism becomes moot. Nevertheless, institutional investors are using other people's money in order to pursue a normative goal, one which is not clearly linked to returns for those on whose behalf they are investing. It is as yet unclear if shareholder activists' interests align with only short-term share value or if they align with the long-term value of the firms which they target.²⁸⁶ It may, therefore, still be appropriate for a board to recommend voting against a shareholder proposal if the directors believe it not to be in the best interests of the corporation in the long term.

Like the business case, the normative case may not have garnered support in the business world because of the serious problems with which its

281. Johnson, *supra* note 11, at 366.

282. See Grundfest, *supra* note 74, at 2.

283. SUSAN R. MADSEN, MORE WOMEN ON BOARDS: AN INTERNATIONAL PERSPECTIVE 8 (Lynne E. Devnew et al. eds., 2018).

284. Sarra, *supra* note 126, at 1143 – 44.

285. See Kozun Letter for OTTP, *supra* note 18, at 5.

286. For review of the evidence and its ambiguity, see John C. Coffee, Jr. & Darius Palia, *The Impact of Hedge Fund Activism: Evidence and Implications* 49 – 64, (Eur. Corp. Governance Inst., Working Paper No. 266/2014, 2014), <http://ssrn.com/abstract=2496518>.

proponents must contend. It is difficult to rely solely on normative arguments when justifying regulation, especially mandatory quotas, because what is being regulated is the private sector—namely, for-profit corporations. The normative case may also need to be updated if it is to gain traction. The business and normative cases for board gender diversity are extremely difficult to separate. The combination of utility and morality may be “inextricably linked.”²⁸⁷ While the business case may not be persuasive as a stand-alone justification, perhaps the normative case is not either.

B. DIRECTORS NOMINATED NOT ON THE BASIS OF MERIT

A study of large, American, public companies found that, on average, female first-time directors were much more highly qualified for board membership than their male colleagues.²⁸⁸ Despite their merit, women were far less likely to be recommended for additional board seats as compared with their first-time male counterparts.²⁸⁹ Thus, women, even at the highest levels of the corporate elite, may still be passed over in favor of less qualified men. Two logical conclusions are, therefore, that boards are not as highly qualified as they could be and the current nomination system is not truly a meritocracy. Not only is this unfair to the women who are being passed over, but it is hard not to conclude that boards could be improved if board nomination was truly a meritocratic process.

This quantitative evidence is supported by qualitative evidence. In a study examining the opinions of those who benefited from the Norwegian quotas, Seierstad found that quotas became a welcomed corporate governance strategy once implemented.²⁹⁰ Participants used both instrumental arguments and individual justice rationales to justify the usefulness of quotas.²⁹¹ It was found that these rationales were interrelated: female directors who benefited from the Norwegian quotas spoke about how their talents and skills had been ignored in favor of mediocre men.²⁹² Importantly, this author noted that only two respondents relied entirely on fairness rationales in discussing the justification of gender quotas.²⁹³ This study highlights the point made above. Unfairness (that is, ignoring talented women in favor of less talented men) may actually have an instrumental impact on the corporation (that is, it may lead to less meritorious director nominations). This argument is based on a combination of morality and business case reasoning.

287. Fairfax, *supra* note 115, at 879.

288. See Michael L. McDonald & James D. Westphal, *Access Denied: Low Mentoring of Women and Minority First-Time Directors and its Negative Effects on Appointments to Additional Boards*, 56 *ACAD. MGMT. J.* 1169, 1181 (2013).

289. *Id.* at 1171.

290. Seierstad, *supra* note 172, at 391.

291. *Id.* at 392.

292. *Id.* at 399.

293. *Id.* at 398.

C. CONSUMER AND SHAREHOLDER LOYALTY

The normative case merges with the business case in other contexts as well. It is difficult to ignore public opinion and social values in making corporate decisions. Rooted within every corporate decision are social considerations.²⁹⁴ Corporate conduct that advances social goals can increase revenue. Consumers are often more loyal to—and willing to pay more for the goods and services of—brands they consider socially conscious.²⁹⁵ In 2015, it was found that investors contributed \$8.2 billion to socially-responsible stocks and bond funds since 2013. While the total assets in all mutual funds rose by fifty-two percent between 2012 and 2017, the assets in these socially-conscious funds rose by fifty-nine percent.²⁹⁶ Other studies have shown that firms with social and environmental policies perform better than those without.²⁹⁷ There is a growing interest in ESG reporting and transparency, and some view ESG disclosure as a proxy for management quality.²⁹⁸ Thus, the normative case bleeds into the business case. Market participants are calling for board diversity. Consumers and investors—while they are not the only constituencies whose interests should be considered by corporate directors in North America—are willing to pay more for diversity. If share prices rise because of the growing demand and reward for diversity efforts, then institutional investors and boards themselves, even if one accepts the shareholder primacy norm, may be required to prioritize board diversity.

VII. Conclusion

Canada and the U.S. may not reach gender parity on public corporate boards in the foreseeable future without at least a limited acceptance of normative-based rationales justifying stronger regulation and greater efforts from boards themselves. Paradoxically, while politically appealing, the business case has yet to be established empirically, and, without stronger regulatory intervention aimed at increasing women's board participation, it may never be. Similarly, the fairness-based rationale for stronger regulation may not be able to stand alone. In order for stronger regulation to be justified by the normative case, we may have to view for-profit firms as social institutions with purposes that go beyond shareholder wealth maximization. The Supreme Court of Canada has already accepted a stakeholder-friendly model of the corporation, allowing for the board to consider interests

294. Azgad-Tromer, *supra* note 271, at 343; *see also* Fanto et al., *supra* note 3, at 908 (noting that firms and boards do not exist in a vacuum and are influenced by societal pressures and norms).

295. Azgad-Tromer, *supra* note 271, at 347.

296. *Id.* at 351 – 52.

297. Robert G. Eccles, Ioannis Ioannou & George Serafeim, *The Impact of Corporate Sustainability on Organizational Processes and Performance*, 60 MGMT. SCI. 2835, 2836 (2014).

298. Robert G. Eccles, George Serafeim & Michael P. Krzus, *Market Interest in Nonfinancial Information*, 23 J. APPLIED CORP. FIN. 113, 113 (2011).

beyond shareholder value.²⁹⁹ The Canadian Parliament has endorsed such a view in the recent CBCA amendments. Combined with the stated objective of Canada's gender diversity policy—that is, to enhance female representation on reporting issuer boards—it is obvious that public corporations are not only permitted by law, but encouraged in many ways, to diversify at the board level. Even in the U.S., where shareholder primacy is often assumed to be a governing norm, boards are still more than able to pursue diversity efforts under the protection of the business judgment rule. In fact, members of the Business Roundtable in the U.S. stated recently that corporations should consider the interests of stakeholders other than shareholders in making decisions.

Beyond the fact that boards are permitted, or even encouraged as a matter of moral imperative, to pursue diversity efforts, the normative case usefully combines with the business case in a number of ways. Thus, it may not be necessary for regulators to rely entirely on business case rationales, nor does it seem necessary to justify any stronger regulation on purely normative rationales. Regulators in the U.S. and Canada may consider this in devising future amendments to the diversity policies of each of these jurisdictions. Given the lack of progress in North America after lax diversity policies were implemented and the observed impact of stronger regulation—whether it be stricter comply-or-explain policies in the U.K. and Australia, or quotas in Norway and France—it may be necessary to amend the American and Canadian regimes to reflect this reality. If gender parity is a goal worth pursuing, Canadian and American regulators should consider relying on the normative case, as it can be usefully combined with the business case to justify stronger regulation.

299. See *BCE, Inc.*, [2008] 3 S.C.R. 560, para. 40; *Wise*, [2004] 3 S.C.R. at 482.

