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When Does Sex Diversity on Boards Benefit Firms?

Darren Rosenblum

Elisabeth Haub School of Law at Pace University

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Darren Rosenblum, When Does Sex Diversity on Boards Benefit Firms?, 20 U. Pa. J. Bus. L. 429 (2017), <https://digitalcommons.pace.edu/lawfaculty/1099/>.

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WHEN DOES SEX DIVERSITY ON BOARDS
BENEFIT FIRMS?

Darren Rosenblum*

ABSTRACT

Firms embrace diversity, especially with regard to sex. Overtly optimistic predictions of a diversity dividend, some built on sex stereotypes, lead these firms to count on profits that may never materialize. This Article attempts to reset the agenda on how to study corporate board diversity. We can only assess if and how sex diversity yields benefits by understanding the who, what, and where of diversity. Whether sex diversity produces a “diversity dividend” depends on three key factors: (1) the nature of the benefit of including women (whether for their experience or other qualities); (2) the kind of firm and its governance; and (3) the jurisdiction(s) in which the firm operates. Only by further investigating the precise conditions under which diversity will have an effect can we estimate the potential instrumental benefits of sex diversity.

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* Professor, Haub Law School, Pace University. Thanks to Bill Bratton, Afra Afsharipour, Miriam Baer, Lynne Dallas, Aaron Dhir, Jill Fisch, Cynthia Godsoe, Sara Gubins, Kimberly Krawiec, Janet Halley, Megan Maxwell and Daria Roithmayr. Many thanks to my research assistants for their unfailing support: Kristyn Francese, Briana Costa, Luke Holden and Amanda Fell. I am especially grateful for the extensive feedback received during workshops at Brooklyn Law School, Cardozo Law School, Florida International University Law School, Rutgers Law School, Sciences Po Law School, Université de Lyon III, and Washington & Lee Law School as well as at Law & Society, the National Business Law Scholars Conference, and the Yale Business Law Society.

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INTRODUCTION

Diversity matters; or so we're told. Studies by management consultants, firms, and some scholars¹ assert that diversity benefits business. Corporate diversity advocates claim that diversity propels firms toward greater profits, share prices, and better governance.² Management

1. See, e.g., Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J. L. BUS. & FIN. 85 (2000) (Addressing how and why the business community is adopting diversity to enhance productivity and profitability and suggesting ideas for legal and policy changes).

2. RICHARD DOBBS ET AL., MCKINSEY GLOBAL INSTITUTE, *THE POWER OF PARITY: HOW ADVANCING WOMEN'S EQUALITY CAN ADD \$12 TRILLION TO GLOBAL GROWTH* (MCKINSEY & COMPANY 2015), http://www.mckinsey.com/insights/growth/how_advancing_womens_equality_can_add_12_trillion_to_global_growth [<https://perma.cc/4DJP-8ANX>] [hereinafter *POWER OF PARITY*] (analyzing fifteen gender equality indicators for ninety-five countries and exploring economic potentials resulting from a closed global gender gap); See generally CREDIT SUISSE, *GENDER DIVERSITY & CORPORATE PERFORMANCE* (2012) [hereinafter *GENDER DIVERSITY*]; CREDIT SUISSE, *THE CS GENDER 3000: WOMEN IN SENIOR MANAGEMENT* (2014) [hereinafter *WOMEN IN SENIOR MANAGEMENT*]; Andrew Pettigrew, *On Studying Managerial Elites*, 13 STRATEGIC MGMT. J. 163, 170 (1992); CATALYST INFORMATION CENTER, *WHY DIVERSITY MATTERS* (2013), http://www.catalyst.org/system/files/why_diversity_matters_catalyst_0.pdf [<https://perma.cc/7RSX-B6YN>] [hereinafter *CATALYST INFORMATION CENTER*]; VIVIAN HUNT ET AL., MCKINSEY GLOBAL INSTITUTE, *DIVERSITY MATTERS* (McKinsey & Company 2014), <https://web.duke.edu/equity/toolkit/documents/DiversityMatters.pdf> [<https://perma.cc/3982-7TNA>] [hereinafter *DIVERSITY MATTERS*]; MCKINSEY GLOBAL INSTITUTE, *WOMEN MATTER* (MCKINSEY & COMPANY 2007), <http://www.raeng.org.uk/publica>

consultants go furthest in their predictions of a “diversity dividend,” a term that presumes a regular payout from inclusion.³ In 2015, the McKinsey Global Institute asserted that “advancing women’s equality can add \$12 trillion to global growth.”⁴ As fabulously optimistic as these projections seem, they nonetheless inspire firms to expand diversity and inclusion initiatives. Armed with such studies, firms may reason that they can do well by doing good.⁵

A flashpoint of diversity is the struggle to include women in corporate leadership, which has led many developed economies to mandate board quotas.⁶ While quotas prove anathema in the United

tions/other/women-matter-oct-2007 [<https://perma.cc/K7HC-8GBP>] [hereinafter WOMEN MATTER] (providing a fact-based analysis of the importance of female leadership in business setting and examining how having more female leaders in business will lead to economic growth).

3. See generally Daan Van Knippenberg & S. Alexander Haslam, *Realizing the Diversity Dividend: Exploring the Subtle Interplay Between Identity, Ideology, and Reality*, in *SOCIAL IDENTITY AT WORK: DEVELOPING THEORY FOR ORGANIZATIONAL PRACTICE* 61 (2003) (“Diversity dividend is the positive monetary outcomes “associated with harnessing and leveraging the social identities and resources of diverse individuals and workgroups.”); *THE OXFORD HANDBOOK OF DIVERSITY IN ORGANIZATIONS* 109 (Regine Bend et al. eds., Oxford Univ. Press 2015). For more quotidian uses, see JULIA BOURKE & VISHALLI DONGRIE, *DELOITTE, A GLOBAL DIVERSITY DIVIDEND* (2013), <http://www2.deloitte.com/content/dam/Deloitte/global/Documents/HumanCapital/dttl-humancapital-trends4-diversity-no-exp.pdf> [<https://perma.cc/8SDX-8CPH>].

4. See POWER OF PARITY, *supra* note 2 (Drawing on countries with high metrics of inclusion and estimating how much growth might result if each region matched its highest performer). One wonders whether firm leaders accept such fabulously optimistic projections at face value.

5. The McKinsey Global Institute asserts that more diverse companies and institutions perform better. DIVERSITY MATTERS, *supra* note 2, at 1; POWER OF PARITY, *supra* note 2, at 95. One survey affirms that “greater diversity in boards and management are empirically associated with higher returns on equity, higher price/book valuations and superior stock price performance.” WOMEN IN SENIOR MANAGEMENT, *supra* note 2, at 3. When discussing the initiatives that businesses can adopt to reduce gender inequality, in a separate survey the McKinsey Global Institute claimed that the

“potential benefits to GDP growth [due to increasing diversity] that we have identified can have a positive impact on all companies. In addition, companies that embrace gender diversity and develop effective business models that target women as consumers, distributors, or suppliers can gain greater competitive advantage and growth in profits.” Other studies show that “companies with a higher proportion of women on their management committees are also the companies that have the best performance.”

WOMEN MATTER, *supra* note 2, at 14.

6. David A. Katz & Laura A. McIntosh, *Corporate Governance Update: Gender Diversity on Boards: The Future Is Almost Here*, N.Y. L. J. (Mar. 24, 2016), <https://www.law.com/newyorklawjournal/almID/1202752912972/gender-diversity-on->

States, recent events may have turned the tide. The Weinstein Company had to pass through bankruptcy to find a buyer. Ford fired its CEO for “inappropriate behavior.”⁷ Stock in Wynn Resorts dived after its founder and CEO stepped down in disgrace.⁸ These scandals exposed not only the prevalence of sexual harassment, but the widespread exclusion of women from corporate governance. Boards with only men (the Weinstein Company), almost all men (Wynn Resorts), or mostly men (Ford) suffer from some groupthink, which has been brought to light by the #metoo moment.⁹

The corporate world had earlier warnings. In 2013, a swirl of controversy greeted Twitter’s IPO because its proposed board of directors included no women. Twitter rushed to include a woman on the board.¹⁰ On occasion, firms may bring in “outsider” women to clean the mess of errant male leaders, a role Arianna Huffington played on Uber’s board.¹¹ Indeed,

boards-the-future-is-almost-here/ [https://perma.cc/Q3J3-WX6X].

7. Joann Muller, *Ford North America President Raj Nair Fired for ‘Inappropriate Behavior’*, FORBES (Feb. 21, 2018, 5:10 PM), <https://www.forbes.com/sites/joannmuller/2018/02/21/ford-north-america-president-raj-nair-fired-for-inappropriate-behavior/#2fdd48704d7d> [https://perma.cc/3NVB-349L].

8. Jethro Mullen, *Steve Wynn Steps Down as CEO of Wynn Resorts After Misconduct Allegations*, CNN MONEY (Feb. 7, 2018, 2:51 AM), <http://money.cnn.com/2018/02/06/news/companies/steve-wynn-stepping-down-ceo-wynn-resorts/index.html> [https://perma.cc/WEZ2-BNR2].

9. See generally Melissa Gira Grant, “The Unsexy Truth About Harrassment,” NY REVIEW OF BOOKS (Dec. 8, 2017), www.nybooks.com/daily/2017/12/08/the-unsexy-truth-about-harassment/ [https://perma.cc/BNS4-TJL6].

10. *Board of Directors*, TWITTER, <https://investor.twitterinc.com/directors.cfm> [https://perma.cc/5FYL-27HA] (last visited Feb. 18, 2016); Hayley Tsukayama, *Twitter Appoints First Woman, Marjorie Scardino, to Board of Directors*, WASH. POST (Dec. 5, 2013), https://www.washingtonpost.com/business/technology/twitter-appoints-first-woman-marjorie-scardino-to-board-of-directors/2013/12/05/531f8534-5dc3-11e3-bc56-c6ca94801fac_story.html?utm_term=.b5ab21e9eef4 [https://perma.cc/V49U-B62G]. More recently, even wider opprobrium greeted a Google engineer’s memo which blamed women’s biology for their low numbers in tech engineering. The wave of condemnation led to the firing of James Damore, who then penned his own story. See James Damore, *Why I Was Fired by Google*, WALL ST. J., Aug. 11, 2017, at C2 (providing his perspective on his discharge from Google). The memo’s author, had he been correct, would have absolved Google and other tech companies for the paucity of women in their ranks. The condemnation resembled that against Lawrence Summers, then President of Harvard, who made a highly controversial speech about women in science, which led to his resignation. Suzanne Goldenberg, *Why women are poor at science, by Harvard president*, THE GUARDIAN (Jan. 18, 2005), <https://www.theguardian.com/science/2005/jan/18/educationsgendergap.genderissues> [https://perma.cc/8SY5-P8E3]; Alan Finder et al., *President of Harvard Resigns, Ending Stormy 5-year Tenure*, N.Y. TIMES (Feb. 22, 2006), <http://www.nytimes.com/2006/02/22/education/22harvard.html> [https://perma.cc/V4BH-3MSX].

11. Katie Benner & Mike Isaac, *As Uber Leaders Step Aside, Arianna Huffington’s*

McKinsey's grandiose assertion of the growth that awaits a world of gender equality relies on savior stories like Ms. Huffington's. Most women, however, find themselves left outside corporate leadership, or included as a small minority. Firms may place them in onerous circumstances hoping these outsiders will become savior.¹² Methodologically, we can be skeptical about diversity dividend arguments.¹³ What benefits, precisely, will women's inclusion bring?

The obvious answers touted in diversity consultancy traffic in too many stereotypes to count. Even stronger studies face challenges. Scholars, including myself, have looked at the implementation of quotas for women as a useful natural experiment. Methodological challenges remain: timing issues, control groups, sample selection and other problems undermine the utility of the data.¹⁴ Between the limited actual power of boards and widespread misunderstanding about sex differences, skepticism is the proper posture toward data on diversity's value.

Much of the research involving women on boards fails to report any negative or neutral outcome. Part of the reason for this may be the replication crisis which has revealed that many studies cannot be repeated and that there is a strong bias toward positive results.¹⁵ Social scientists face a replicability

Influence Grows, N.Y. TIMES (June 17, 2017), <https://www.nytimes.com/2017/06/17/business/uber-arianna-huffington-board.html> [<https://perma.cc/PQ48-5QYS>].

12. Devon Carbado & Mitu Gulati, *Acting White?: Rethinking Race in Post-Racial America*, Oxford Press Ed. (2013).

13. Daniel Ferreira, *Board Diversity: Should We Trust Research to Inform Policy?*, 23 CORP. GOVERNANCE: INT'L REV. 108, 108-111 (Mar. 2015).

14. The first issue that Ferreira raises regarding those studies is the timing problem. He mentions the several possible starting dates that such a study could use: in 1999 the gender quota was first discussed, in 2003 a law suggesting a 40% quota was passed (with no penalty for non-compliance), in 2005 liquidation was added as a penalty for non-compliance, and full compliance was not achieved until 2008. The second issue the author identifies is choosing a control group. Other firms that aren't forced into gender diversity in Norway have different corporate structures; companies in other Nordic countries operate under different legal environments, use different currencies, and exist in different macro-economic conditions. The third issue is sample selection. The author contends that defining control and treatment groups is useless because firms self-select into both groups. The fourth issue is the multitude of confounding effects. Other governance-related reforms are occurring contemporaneously with the introduction of gender quotas. How can it be determined that such other governance-related reforms (i.e., Norwegian Code of Practice for Corporate Governance in 2005) are not actually responsible for performance changes? The final issue is the mechanism. There are significant differences in the mechanism that researchers claim lead to changes in firm performance based on gender diversity. For example, some argue that the change is due to the age and experience of the incoming female directors (often younger and less experienced), while others attribute the change to the female leadership style. *Id.*

15. Ed Yong, "Psychology's Replication Crisis Can't Be Wished Away," ATLANTIC (Mar. 4, 2016), <https://www.theatlantic.com/science/archive/2016/03/psychologys-replication->

and tend to refrain from reporting data that reports neutral outcomes.¹⁶ With data on women on corporate boards, the normative support for inclusion may affect the bias on results away from negative findings. A notable exception is one study that argues that stock prices in Norway dipped after full implementation of the corporate board quota in part because of the newly inexperienced boards serving those firms.¹⁷ How then can we determine when board diversity will benefit firms?

This Article presents a friendly but critical challenge to the argument that diversity pays. One can favor diversity but recognize that some firms may not accrue diversity dividends. Women, though providing identity diversity to a male-dominated board, may bring little experiential diversity.¹⁸ As I argue here, diversity benefits depend on each specific context: the type of women that firms include, the types of firms participating in inclusion, and the jurisdictions in which the firms are diversifying. While normative rationales, such as equality of opportunity and/or outcome, or redistribution, prompt support of diversity, this Article contests the less controversial and apparently universal belief that including women yields an instrumental value.¹⁹

crisis-cant-be-wished-away/472272/ [https://perma.cc/QPL4-33MW] (“There’s publication bias—the tendency to only publish studies with positive results, while dismissing those with negative ones”).

16. Wojciech Swiatkowski & Benoit Dompnier, *Replicability Crisis in Social Psychology: Looking at the Past to Find New Pathways for the Future*, INTERNATIONAL REVIEW OF SOCIAL PSYCHOLOGY (2017), <https://www.rips-irsp.com/articles/10.5334/irsp.66/> [https://perma.cc/FU5K-HE34] (“Furthermore, it should also be noted that many scientific practices that easily result in false-positive findings have often been encouraged by unrealistic standards of perfection for publication. Indeed, authors are too often demanded to present an almost perfect match between the theoretical predictions they test and the empirical evidence they find in their studies.” (citations omitted)); Jeffery R. Stevens, Replicability and Reproducibility in Comparative Psychology, 8 *Front Psychol.* 62 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5445189/> [https://perma.cc/UF2P-UXFT] (“At many steps in the scientific process, researchers can fall prey to confirmation bias by focusing on positive confirmations of hypotheses. At the experimental design stage, researchers may develop tests that attempt to confirm rather than disconfirm hypotheses. This typically relies on null hypothesis significance testing, which is frequently misunderstood and misapplied by researchers and focuses on a null hypothesis rather than alternative hypotheses.” (citations omitted)).

17. See Kenneth Ahern & Amy Dittmar, The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation, 127 *Q. J. ECON.* 137 (2012).

18. Women who join a board may or may not share the stereotypically female cognitive repertoire. Kathrine W. Phillips, *What is the Real Value of Diversity in Organizations? Questioning Our Assumptions*, in THE DIVERSITY BONUS: HOW GREAT TEAMS PAY OFF IN THE KNOWLEDGE ECONOMY 229-233 (Earl Lewis & Nancy Cantor eds., 2017).

19. I support inclusion for equality reasons, not instrumental ones, even if my support is inchoate. While I oppose these constraints, this Article focuses on diversity’s instrumentality instead of thorny normative debates.

More specifically, this Article presents a theoretical architecture for *systematizing* diversity’s value.²⁰ The degree of a diversity dividend depends on three contextual factors: the who (which women bring beneficial values?), the what (what types of firms?), and the where (in what nation?). The chart below integrates these contextual factors that mediate the interaction between diversification and the instrumental benefit.

Figure 1: Map of Contextual Factors²¹

FACTOR ONE	FACTOR TWO				FACTOR THREE
A. Women's Traits	B1. Firm Governance	B2. Firm Type	B3. Ownership	B4. Age	C. Jurisdiction
1. Caring/Stakeholder	a. Exec Dominated	a. Industrial	a. Concentrated/Family	a. Start Up	1. Social Democracy
2. Risk Averse	b. Managerial Board	b. Tech	b. Small/Dispersed	b. Mid-Aged	2. Liberal Democracy
3. Methodical		c. Telecom/Media/Communications	c. Institutional/Hedge Fund	c. Established	3. Developing Economy
4. Outsider/New Network	c. Monitoring Board	d. Finance	d. Stato Dominated	d. Post-Peak/Decline	4. Oligarchy
5. "More Guys than the Guys"	d. Labor Presence	e. Natural Resource	e. Venture Capital/Private Equity		
	e. Supervisory Board Structure	f. Consumer Goods			
	f. Close Corp	g. Pharma/Health			

As if ordering from a take-out restaurant menu, one might select a

20. Rather than referencing a diversity dividend, which may imply something specifically monetary, I prefer referencing instrumental benefits, which include a broader field of positive outcomes for firms. One challenge in this exercise is how to ask the right questions about diversity. In that regard, Scott Page provides a persuasive aggregation of social science data on difference that has proven useful to my analyses. See SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES (Princeton Univ. Press 2008) (examining the power of collective wisdom and suggesting that diversity, rather than individuality, contributes to superior outcomes).

21. This chart was drafted based on several sources. The left column represents several of the theories of value posited by legal and social science scholars on what benefits women bring. See *infra* Figure 2 in Part II. The second column sets forth a nonexclusive set of factors that affect diversity implementation.

variable from Factor One²² and a combination of variables from Factor Two²³ and Factor Three.²⁴ The resulting diversity benefit will vary with each combination. From left to right (although not necessarily in a linear fashion), the chart links particular traits to potential instrumental benefits.

This Article analyzes these issues in five parts. Part I explores the diversity's vagueness in the muddled normative and instrumental arguments. The following three parts detail the diversity factors: identity, firm, and national variation. Part II dissects the identity category of "women," through queer theory, to ascertain diversity's actual effects, which draw more on diverse experience than on diverse identity.²⁵ Part III

22. Factor One lists some of the various traits ascribed to women by studies and advocates with regard to corporate governance. Some of these categories derive from my own study of French corporate boards, while others surface from other social science. The presence of these categories on this chart does not confer any currency on these traits, but if one ascribes some purchase to them, we must assess whether it might actually produce the desired corporate purpose. For example, if one hopes or believes that women are "risk averse," one must push said trait through the other factors (the firm and the jurisdiction) to get to a potential instrumental benefit. Risk aversion, to stay with the same example, might prove valuable in an industry such as banking, but could be quite the opposite in technology or pharmaceuticals.

23. Factor Two includes several notable firm traits that may prove relevant to assessing whether some value may result. Firm type, ownership, age, and governance are but four traits – one could easily add more sub-columns to this factor, such as capitalization, globalization, and others. These four provide an idea of how nuanced these analyses must be to prove effective at achieving some instrumental benefit.

24. Factor Three includes distinct types of governmental systems. If space permitted, a fuller analysis could include other aspects of the public context in which the firm operates, such the jurisdiction's legal system, as well as developmental elements. The third draws on basic variation of investment contexts many of which are describe in Mark Roe's work. See MARK J. ROE, *POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT* (2003).

25. See PAGE, *supra* note 20, at 305. This Article builds on a recent article, written by me along with Daria Roithmayr. See Darren Rosenblum & Daria Roithmayr, *More Than a Woman: Insights into Corporate Governance After the French Sex Quota*, 48 IND. L. REV. 889 (2015). This preliminary assessment qualitative study sought to ascertain from board members if and how the French corporate board quota, which requires 40% representation, might alter corporate governance, with a focus on the potential effect on process and substance in board decisions. Two findings surfaced from board members, assuming they represented their boards accurately: first, process may improve but it would not alter the substantive decisions of boards; second, if the quota has had a substantive impact on corporate governance, it is not because new members were women, but because of their newness and outsider status. Firms opportunistically improved their governance through the diversification of perspectives. That article (tentative) conclusion proved surprising: women did not make a substantive difference, only a process one, and the effects of their newness proved more relevant than their sex. Some of the improved process may relate to the newness of participants concerned with impressing new colleagues. Although sex composition of boards has changed, and in some instances decision-making processes varied, board member

addresses variation among firms in market profiles, ownership, and governance structure that affect when diversity creates value. Firms with stronger board cultures will benefit most from greater diversity. Part IV considers where firms operate.²⁶ Regulations differ across national lines as to when and how diversity may be implemented. Critical masses of diversity – whether achieved by regulation or social change – will produce the greatest benefit. Part V uses hypothetical examples to illustrate how the factors interact. The Article concludes by charting subsequent empirical and theoretical work that would test this theory about when, where, and how diversity will likely produce benefits.

I. DIVERSITY: A CAUTIONARY NOTE

U.S. law favors vague definitions of diversity because of its heterogeneity. As a consequence, diversity efforts in the United States have been ambiguous. This approach engenders slippage between normative and instrumental rationales.²⁷ Should boards diversify to rectify inequality or rather, to serve corporate needs? A critique on these motivations helps understand why research on diversity's benefits proves challenging.

A. *Diversity's Omnipresent Haze*

Diversity involves the inclusion of differences in a group or organization.²⁸ While leading institutions in government, business, and nonprofits attempt to further diversity, especially in the U.S., they lack a precise plan of how and with whom to diversify.²⁹ Most large

participants do not believe board decisions have differed substantively because of sex. *Id.* at 910. The conclusions from that project serve to launch the much broader points made in this article.

26. For example, U.S. affirmative action laws and norms permit some accounting for racial and ethnic diversity, while France's constitutional structures further limit such considerations. Firm variation appears still more mutable in light of these vertical factors.

27. See Lawrence M. Solan, et al., *Justifying Board Diversity*, 89 N.C. L. Rev. 901 (2011) ("We believe, however, that the lack of strong empirical support for board diversity with respect to shareholder value or board performance does not necessarily doom the cause of diversity advocates. We argue that diversity advocates should endorse justifications and normative frameworks other than shareholder value to support diverse boards").

28. PAGE, *supra* note 20, at xxiv, 5.

29. Michele E. A. Jayne & Robert L. Dipboye, *Leveraging Diversity to Improve Business Performance: Research Findings and Recommendations for Organizations*, 43 HUM. RESOURCE MGMT. J. 409 (2004).

U.S. firms have a diversity infrastructure of employee identity groups, human resource professionals, and outside consultants.³⁰ This effort plays a central role in recruiting. Multinational firms export United States notions of identity, including diversity, within their human resource efforts abroad. This market-driven push fosters a widespread belief in the value of diversity, despite divergent philosophies driving global competition.³¹

Ambiguity characterizes this staunch pursuit, as firms define diversity in many ways, or not at all.³² Most include identity categories such as race or sex, while few, if any, reference less-defined categories, such as social position or class.³³ The Securities and Exchange Commission's (SEC) rule on diversity in firm governance exemplifies the distinctions of diversity measures within the United States. The SEC's Rule 407(c) of Regulation S-K declines to define diversity but requires firms that have diversity quotas or initiatives to disclose how the policy is implemented.³⁴ A recent study of U.S. board members revealed that while all agreed to diversity's paramount status, but few specifics, suggested as to diversity's lack of real meaning or impact.³⁵

Vague definitions of diversity allow firms to select the one that suits their needs. First, the more facile focus on identity substitute for

30. *Id.* at 412. See, e.g., Frank Dobbin et al., *Diversity Management in Corporate America*, 6 CONTEXTS 21, 21-28 (2007) (describing different approaches for diversifying).

31. Dobbin et al., *supra* note 30; R. Roosevelt Thomas, Jr., *From Affirmative Action to Affirming Diversity*, 68 HARV. BUS. REV. 2, 107 (Mar.-Apr. 1990).

32. AARON DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY 190-191 (2015).

33. *Id.* I use "sex" rather than "gender" because the quota's key determination of who belongs on boards mandates a binarist distinction between men and women, rather than a more fluid framework.

34. 17 C.F.R. § 229.407(c) (2014); *SEC Adopts Final Rules on Enhanced Proxy Statement Disclosures About Risk, Compensation and Other Corporate Governance Matters*, GIBSON DUNN (Dec. 16, 2009), <http://www.gibsondunn.com/publications/pages/SECAadoptsFinalRulesEnhancedProxyStatementDisclosures.aspx> [<https://perma.cc/6QE8-BT2F>] ("The rules as adopted require disclosure of whether, and if so how, a nominating committee considers diversity in identifying nominees for directors. Moreover, in what may be a regulatory first for disclosure of the inner workings of a board, if a nominating committee has a policy with regard to consideration of diversity, the rules require disclosure of how the policy is implemented, as well as how the nominating committee assesses the effectiveness of the policy.").

35. John M. Conley et al., *Narratives of Diversity in the Corporate Boardroom: What Corporate Insiders Say About Why Diversity Matters*, in DISCOURSE PERSPECTIVES ON ORGANIZATIONAL COMMUNICATION (Farleigh Dickinson Univ. Press, 2012).

experience diversity, even though research shows that the latter is more important than the former.³⁶ Firms may, for example, include black employees by hiring West Indian elites rather than African Americans.³⁷ Similarly, some firms bring in foreign diversity to mask a lack of diversity among employees from the United States. Second, this vague diversity permits its use for other broader diversity, such as sexual orientation.³⁸ The SEC rule mentioned above favors this breadth, as it permits firms to self-define. Third, firms use diversity rhetoric to avoid discrimination litigation, or alternatively, to obscure diversity efforts to maintain a non-diverse status quo.

B. *Instrumentalism v. Normativity*

Several normative arguments support sex diversity in leadership: to provide a symbol for newer generations, to reflect the need for public values in private institutions, or to rectify structural exclusion through equality of opportunity, or outcome.³⁹ Normative

36. See *infra* Part II.

37. As Lani Guinier and others have studied, affirmative action programs for race often end up benefitting Caribbean blacks over African Americans, in part because of underlying class issues and culture within the larger rubric of Black identity. See LANI GUINIER, *THE TYRANNY OF THE MERITOCRACY: DEMOCRATIZING HIGHER EDUCATION IN AMERICA* (Beacon Press 2015). See also Belinda Edmondson, *The Myth of Black Immigrant Privilege*, 4 ANTHURIUM: A CARIBBEAN STUDIES J. 1 (2006) (analyzing and comparing African American immigrants with African American natives); Douglas S. Massey et al., *Black Immigrants and Black Natives Attending Selective Colleges and Universities in the United States*, 113 AM. J. EDUC. 243, 249 (2006) (discussing that top universities tend to matriculate more African American immigrants than African American natives); Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, but Which Ones?*, N.Y. TIMES (June 24, 2004) (emphasizing that a vast majority of the African American population at Harvard consisted of West Indian or African American immigrants).

38. "Out Leadership" is a group that advocates for the inclusion of LGBT people in corporate leadership. "About," OUT LEADERSHIP, <http://outleadership.com/about/> [<https://perma.cc/43HX-MLVJ>] (last visited Mar. 25, 2018).

39. I have my own normative argument as to why we should pursue corporate, including board, diversity, but it is, as yet, inchoate. While I have supported equality remedies before I am not sure to what extent they provide an overall normative framework. One argument I previously advanced was that quotas instantiate public values in firms, who owe their existence to the state's recognition of their limited liability status. See Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 BERKELEY BUS. L.J. 55 (2010) [hereinafter *Feminizing Capital*]. Through quotas, women attain descriptive representation in leadership which serves a symbolic role. Veronique Magnier & Darren Rosenblum, *Quotas and the Transatlantic Divergence of Corporate Governance*, 34 NW. J. INT'L L. & BUS. 249 (2014). Quotas function to foster balance in the private sector which may further gender

proponents may couch their support within instrumentalism to gain more traction as normative assertions arouse little widespread agreement. Yet, these business case arguments may conflict with the normative reasons for diversity.⁴⁰ Instrumentalism evades contested debates like affirmative action to focus on profitability, which proves entirely uncontroversial. Thanks to this slippage, instrumentalist arguments dominate, bolstered by sincere instrumentalists and normativists who seek a means to their end goal of diversity.⁴¹ Strong political incentives exist to advance instrumentalism.⁴²

equity in family structures. Darren Rosenblum, *Unsex Mothering: Toward A New Culture of Parenting*, 35 Harv. J. L. & Gender 57 (2012); Darren Rosenblum, *Loving Gender Balance: Reframing Identity-Based Inequality Remedies*, 76 FORDHAM L. REV. 2873, 2891 (2008) [hereinafter *Loving Gender Balance*]. A broader compelling case is made by Professors Lawrence M. Solan, James Fanto, and John M. Darly, in their article, *Justifying Board Diversity*. They note that the board's link to shareholder value is too attenuated to support a diversity argument for instrumental reasons. They further argue that diversity advocates should be content in winning the "diversity battle," despite not winning the "empirical battles." They assert, however, that other reasons exist in support of board diversity, such as improvements in firm functioning and countering group pathologies on boards. See Lawrence M. Solan, et al., *Justifying Board Diversity*, 89 N.C. L. REV. 901, 919 (2011). Patrick S. Shin & Mitu Gulati, *Board Diversity and Corporate Performance: Filling in the Gaps: Showcasing Diversity*, 89 N.C. L. REV. 1017, 1024-44 (2011).

40. I view instrumental arguments and normative arguments as separate tracks that may lead to similar outcomes. This Article underlines the serious methodological challenges in gathering accurate data about women on corporate boards. That challenge, to my mind, does not undermine the normative case for diversity. However, some argue that using instrumental arguments over core moral questions, such as torture, is the wrong approach. Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1714, 1715 (2005) (arguing that human rights law mandates that torture should not even be considered as an option for authorities, even in the case of attempting to find a nuclear bomb). This Article engages with the instrumental debates because they hold so much purchase within the corporate world, whose purpose after all is the instrumental goal of profitability. However, I recognize that it is possible that the dominance of these instrumental arguments may divert attention from normative arguments and override fundamental normative commitments. See generally Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999). On diversity's normative and instrumental arguments, see also Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855 (2011).

41. For example, according to a study by Faccio, Marchica, and Mura, firms run by female CEOs have lower leverage, less volatile earnings, and a higher chance of survival than otherwise similar firms run by male CEOs. Mara Faccio et al., *CEO, Gender, Corporate Risk-Taking, and the Efficiency of Capital Allocation* (University of Manchester Library, Working Paper, 2015).

42. An analogous phenomenon of hidden normative agendas may occur with not-unrelated corporate governance issues, such as sustainability or philanthropy.

Equality norms ground affirmative action; however, since firms are required to prioritize shareholder profits, such efforts may arouse shareholder skepticism. The famous *Dodge v. Ford Motor Co.* case and the more recent *eBay Domestic Holdings, Inc. v. Newmark case* both grapple with this question.⁴³ In *Dodge*, plaintiff shareholders challenged, among other claims, Ford's stated goal of improving workers' lives. The court rejected Ford's objective, upholding the shareholders' arguments that it did not serve the corporate purpose.⁴⁴ Likewise, in *eBay*, the court asserted that because eBay chose to operate as a for-profit firm, the company must primarily operate for the goal of profit-making, not that of aiding other communities.

The instrumental studies referenced above promise stronger growth and better governance.⁴⁵ They reflect the following goals: (a) to attract more and higher quality talent; (b) to increase the firm's market; (c) to avoid employment discrimination litigation; (d) to improve employee relations; and (e) to strengthen corporate governance.⁴⁶ Some persuasively question the methodological basis for instrumentalist studies⁴⁷ and studies may contradict each other in

43. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010); *Dodge v. Ford Motor Co.*, 170 N.W. 668, 679 (Mich. 1919).

44. *Dodge*, 170 N.W. at 685. The *Dodge* decision continues to influence American corporate law to this day. Its impact is best exemplified in *eBay Domestic Holdings, Inc. v. Newmark*, where the Chancellor held that two craigslist directors – and majority shareholders – breached their duties to a minority shareholder, eBay, by putting their public-spirited interests above stockholder wealth maximization. The court further explained that

“[a]s an abstract matter, there is nothing inappropriate about an organization seeking to aid local, national, and global communities by providing a website for online classifieds that is largely devoid of monetized elements. The corporate form in which craigslist operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment. Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders.”

eBay, 16 A.3d at 34.

45. CATALYST INFORMATION CENTER, *supra* note 2; DIVERSITY MATTERS, *supra* note 2; POWER OF PARITY, *supra* note 2; WOMEN MATTER, *supra* note 2.

46. See Fairfax, *supra* note 40 at 858-59 (attempting to understand diversity stagnation on boards).

47. Ferreira, *supra* note 13.

their findings.⁴⁸ Despite these concerns, instrumentalist arguments continue to gain traction.⁴⁹

Diversity's widespread acceptance benefits from slippage between instrumentalist and normative arguments.⁵⁰ Instrumentalism can serve to hide normativity both for *and* against diversity. Normative opponents of diversity may accept instrumentalist diversity arguments to avoid uncomfortable debates. Instrumentalism seems nondiscriminatory and allows adherents to say they favor diversity even as they skirt conversations about its value in and of itself. They may deploy the language of "fit" to avoid inclusion,⁵¹ claim that no "skilled" diverse people were in the pool, or rely on diversity of identity to bypass diversity of experience, as in the Caribbean/African-American example above.

This slippage reflects some core theoretical disagreements over what should fuel diversity efforts. Gary Becker argued that discrimination is inefficient, and that over time an efficient market would right itself by eliminating discrimination.⁵² Critics note that the theory's popularity weakened the push for policy remedies and that discrimination's persistence itself undermines the purchase of Becker's claim.⁵³ Related, arguments for colorblind remedies abound, rejecting the notion that attention to identity can correct inequality.

48. *Id.* Daniel Ferreira argues that while many studies convey that women are risk averse, there are also studies that suggest the opposite. He cites a study of Swedish directors conducted by Adams and Funk in 2012 which found that female directors were more risk-loving than their male counterparts. See R. B. Adams & P. C. Funk, *Beyond the Glass Ceiling: Does Gender Matter?*, 58 MANAGEMENT SCIENCE 219 (2012).

49. Fairfax, *supra* note 40.

50. Shin & Gulati, *supra* note 39, at 1020.

51. "Fit" also plays a key role in the elite corporate context to ensure that new people conform to the expectations of the firm's established elite. See, e.g., Lauren A. Rivera, *Hiring as Cultural Matching: The Case of Elite Professional Service Firms*, 77(6) AM. SOC. REV. 999 (2012). Firms often deploy the language of "fit" to describe whether an individual will succeed in a particular position. This subjective category reinforces extant social advantages for particular groups, and it subtly weeds out difference. The value of diversity may go beyond "fit" and its reduction of elite personnel to atomistic distinctions. See generally PAGE, *supra* note 20. Although all diverse individuals (in this case, women) will not perform similarly in all firms, the converse is not true either. The role of personality suggests that people are people; differences surface at the individual level. Other factors suggest that systematization remains possible, even if the contextual factors complicate such analyses.

52. GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971).

53. See Kevin M. Murphy, *How Gary Becker Saw the Scourge of Discrimination*, CHICAGO BOOTH REVIEW (June 15, 2015) <http://review.chicagobooth.edu/magazine/winter-2014/how-gary-becker-saw-the-scourge-of-discrimination> [<https://perma.cc/3DJ9-CPQA>]

The big tent of instrumentalists, filled with both sincere instrumentalists and normative proponents and opponents, seems to inflate diversity's value.⁵⁴ The loose description of correlative data makes it sound causal. Instrumentalism risks failing to deliver on promised goals. If promised outcomes do not materialize, it would undermine inclusion efforts. Into this instrumentalist morass, I hope to insert some clarity of method.

II. DIVERSITY OF PEOPLE

Firms cannot simply add women and expect an instrumental benefit – sex alone cannot do the work.⁵⁵ However, regulators and

("... if people have a tendency to discriminate on the basis of race, legislation cannot eliminate that tendency. Politicians cannot merely legislate a new outcome, or legislate preferences away. They can only change the way discrimination manifests itself."). Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics Freedom and Legal Suppression of Spanish*, 84 CORNELL L. REV. 595, 641 (1999). For a different demonstration of the persistence of discrimination, see DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* (2014) (explaining racism's persistence as flowing from a series of racist feedback loops through which white people lock in their advantage).

54. Many scholars fit this description but I admit my own *Feminizing Capital* article also merits this criticism with its only-slightly qualified support for quotas. See *Feminizing Capital*, *supra* note 40. Since the qualitative work I performed in 2011 and 2012, I have realized the extent to which context defines such remedies, as discussed *infra* in Part IV.

55. This reflects the current understanding of the nature of sex difference, which eschews an "essential" aspect and recognizes the diversity among individuals that crosses the sexes. Gender theorists, led by U.S. scholars such as Judith Butler, hold that notions of "womanhood" depend exclusively on cultural constructs, hence the use of "gender" rather than "sex," reflects a constructed, rather than biological, phenomenon. Judith Butler and other gender theorists think of gender as grounded in performativity rather than fundamental traits. See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990) (stating that anti-essentialist feminism holds that no essential notion of "womanhood" exists). Anti-essentialists reject presumptions that women are hard-wired nurturers, ascribing such behaviors to cultural constructs. Although one's body cannot fully determine one's politics, some relation must be present. Gayatri Spivak's idea of strategic essentialism, or Judith Butler's idea of "contingent epistemology" provide theoretical frameworks. See *Id.*; GAYATRI SPIVAK, *IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS* (1987). Alice Eagly's work on biosocial essentialism conveys some crucial elements about how various cultures ascribe roles and traits to people based on sex, and how culture produces these presumptions based on biosocial understandings of sex. Wendy Wood & Alice H. Eagly, *Biosocial Construction of Sex Differences and Similarities in Behavior*, 46 ADVANCES IN EXPERIMENTAL SOC. PSYCH. 55 (2012). Simply because an individual woman cannot be assumed to represent another woman does not mean that if half of the legislators were women that this legislature would do no better in voicing women's interests than an entirely male legislature. On a related point, Veronique Magnier and I performed a fuller analysis of descriptive representation and

corporate leaders seem to prefer sex diversity over other kinds for two reasons: the perceived clarity of sex diversity and the strength of the instrumental arguments.⁵⁶ But the categorization of “women” (as diverse based on sex alone) predicts less change than many think. For most identities, no clear categories exist, and identities often blur.⁵⁷ Individuals often do not reflect traits ascribed to their identity.

The weakness of “sex” as a binary becomes clear in the following thought experiment: imagine a female board member, subject to a corporate board quota, who wants to transition from woman to man, but risks losing their board position because the quota requires increasing numbers of women.⁵⁸ Here, a discrepancy surfaces between identity and experience. Does changing sex change one’s perspective? The male board member would presumably no longer

corporate quotas in our piece. Magnier & Rosenblum, *supra* note 39. Although the essentialism debate primarily arises with regard to gender, many have raised such questions with regard to race. In particular, black feminists, such as bell hooks and Kimberlé Crenshaw, have emphasized the white nature of such concepts, asserting that one cannot separate race from gender. bell hooks, *AIN’T I A WOMAN: BLACK WOMEN AND FEMINISM* 32-33 (1981); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

56. DHR, *supra* note 32, at 191.

57. The sex binary, which cabins us humans into “women” and “men,” and accordingly restricts our choices. See Darren Rosenblum, “Trapped” in *Sing-Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499 (2000) (examining human rights issues stemming from the incarceration of transgender prisoners and proposing solutions to alleviate inhumane treatment); Darren Rosenblum, *For Starters, Unsex the Birth Certificate*, N.Y. TIMES (Nov. 3, 2015) (proposing eliminating a fixed notion of sex by unlabeling binary gender at birth), <https://www.nytimes.com/roomfordebate/2014/10/19/is-checking-the-sex-box-necessary/for-starters-unsex-the-birth-certificate> [<https://perma.cc/SW32-TEXB>]. Children are born and society presumes, mostly based on their genitalia, that they have distinct “girl” or “boy” traits—interests and behaviors that develop into professional and familial roles which constrain individual opportunities. With regard to race and sex identity, this blurring occurred in popular U.S. debates over Rachel Dolezal and Caitlyn Jenner. Dolezal was a white woman who portrayed herself as black, possibly in an opportunistic way, to attain a position within black community organizing as part of a local NAACP organization. Tamara W. Harris, *Black Like Who? Rachel Dolezal’s Harmful Masquerade*, N.Y. TIMES (June 16, 2015), <https://nyti.ms/1GrIr1H> [<https://perma.cc/QN65-CD36>]. Jenner, by contrast, had been a celebrity for decades, and became a woman to reflect her inner female identity. Ravi Somaiya, *Caitlyn Jenner, Formerly Bruce, Introduces Herself in Vanity Fair*, N.Y. TIMES (June 1, 2015), <https://nyti.ms/2jOxJ0S> [<https://perma.cc/L8YF-JY29>].

58. She might lose her position or refrain from transitioning to keep her position – a quandary transgender men face in women’s colleges. Ruth Padawer, *When Women Become Men at Wellesley*, N.Y. TIMES (Oct. 15, 2014), <https://nyti.ms/2ka0EJE> [<https://perma.cc/NH5P-WFM5>].

meet the quota's definition⁵⁹ He would, however, fulfill the purpose of sex diversity. This Part explores how sex identity operates in the boardroom.

A. *Women as Women*

The focus on identity rather than experiential diversity is a key shortcoming in many diversity efforts, including quotas. Sex diversity will benefit firms when identity serves as a proxy for experience.⁶⁰ As Daria Roithmayr and I suggested in our study on the French Corporate Board Quota, including women may bring other experiential diversity to the table: different schools, social networks, countries of origin, corporate expertise, etc. Women might make a difference in these firms not because of their gender identity, but because of their newness.⁶¹

Some research suggests that the inclusion of women in corporate boards improves profit and corporate governance thanks to “womanly” traits, such as concern for stakeholders (reflecting a caretaking orientation), or an aversion to risk.⁶² Some social science

59. The sex change hypothetical exposes how the binary within quotas falsely represents sex. The binary often drives women's inclusion especially in the context of corporate board quotas. In that context, regulators, like most people, assume only two sexes exist (cisgender male or cisgender female), even though many more do – intersex people, people with differentials in primary and secondary sex traits, and transgender people. It is worth noting that for the period of the quota's implementation fewer men had the opportunity to join a board – a marked contrast to the prior period. Pre-quota, there was some upward mobility for men within French firms from middle management to the board. Post-quota, many if not most available board positions must be filled with a woman to meet the quota's requirements.

60. PAGE, *supra* note 20.

61. *Id.* at 919.

62. The risk aversion trait in particular played a critical role in the adoption of corporate board quotas since the 2008 financial crisis. This trait may have drawn on inferences of women's role in family life – that women are caretakers or are more empathic. CAROL GILLIGAN, *MAPPING THE MORAL DOMAIN: A CONTRIBUTION OF WOMEN'S THINKING TO PSYCHOLOGICAL THEORY AND EDUCATION* (1989). For example, when Iceland was faced with a financial crisis, the government chose to create a law requiring corporate boards to include at least forty percent women. Nathaniel Popper, *After Crisis, Iceland Holds a Tight Grip on its Banks*, N.Y. TIMES DEALBOOK (Jan. 15, 2014), <https://nyti.ms/2nezFCe> [<https://perma.cc/J4UL-UZ49>]. Women, often serving as primary caretakers, presumption of women as “risk averse,” since caretakers tend to refrain from risky endeavors that might endanger their caretaking function. *Id.* This risk aversion finds some confirmation in social science. For example, one study shows that the differential in wages actually relates to differences in caretaker roles. Catherine R. Albiston et al., *Law, Norms, and the Motherhood/Caretaker Penalty*, http://www.americanbarfoundation.org/uploads/cms/documents/albiston_1205

links these traits to sex – people with caretaking roles tend to avoid riskier work.⁶³ Other traits ascribed to women include higher levels of deliberation, or posing more methodical questions.⁶⁴ Society also places women in ethical decision-making roles.⁶⁵ Although women in the aggregate may exhibit certain traits, we cannot presume any one woman will behave as “women” do.⁶⁶ Experience and identity diverge. Within the corporate board context, many women have professional trajectories that parallel or match those of men, thereby making their traits more akin to those of the men already on the board.⁶⁷

12.pdf [<https://perma.cc/924K-987H>] (stating that caretakers are more risk averse, and therefore receive less compensation).

63. People with caretaking roles may take on less risky jobs, which may explain pay differentials, as compensation increases with risk. Tim Worstall, *Here's Your Gender Pay Gap Fatal Occupational Injuries*, FORBES (Dec. 21, 2016), <https://www.forbes.com/sites/timworstall/2016/12/21/heres-your-gender-pay-gap-fatal-occupational-injuries/#25557cbc6c3e> [<https://perma.cc/G9AY-W3XF>]; but see Barbara S. Kilbourne, Paula England, George Farkas, Kurt Beron & Dorothea Wier, *Returns to Skill, Compensating Differentials, and Gender Bias: Effects of Occupational Characteristics on the Wages of White Women and Men*, 100 AM. J. SOCIOLOGY, no. 3, Nov. 1994, at 689.

64. Interview with 4F, in Paris, France; Interview with 14F, in Paris, France. The author interviewed twenty-four current and former corporate board members from CAC-40 firms. A full transcript, a redacted transcript, and a translated redacted transcript are on file with the author. Interviews are referred to by an identification number and M or F to indicate sex.

65. Law often frames women as keepers of virtue and, by extension, ethics. See, e.g., Cythia Godsoe, *Marriage Equality and the 'New' Maternalism*, 6 CAL. L. REV. 145 (Nov. 2015); Michael J. O'Fallon & Kenneth D. Butterfield, *A Review of the Empirical Ethical Decision-Making Literature: 1996–2003*, 59 J. BUS. ETHICS 375 (Jul. 2005). Society increasingly presumes women behave more ethically than men. See Naomi Mezey & Cornelia “Nina” Pillard, *Against the New Maternalism*, 18 MICH. J. GENDER & L. 229 (2012) (asserting that current culture intensively fosters the idea that mothers are the default parent, responsible for managing the “second shift”); *Modern Family* (ABC Television Network 2009–2015) (depicting Claire, the mother, as the responsible parent in the family). As a result, we see that women on boards tend to find themselves on audit committees. Sheela Thiruvadi, *Gender Differences in Audit Committees* (Jan. 1, 2008) (unpublished dissertation) (on file with Florida International University). Women may even be brought on to serve as role models for future corporate players.

66. Phillips, *supra* note 18.

67. Given that “[t]he advocacy of descriptive representation can emphasize the worst features of essentialism,” it is hard to justify descriptive representation. Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent “Yes”*, 61 J. POL. 628, 638 (1999). Nonetheless, without some identity marking the representative and the people represented, quotas cannot exist. Corporate board quotas mandate that women get descriptive representation on boards, even though women do not necessarily share common experiences.

Including women for their traits poses bigger problems. If we drop facile presumptions of sex, a fuller picture materializes. What traits does the market ascribe to women? Will their inclusion fulfill those elevated expectations? How do women perform as “women”? Drawing on the social science described above, Figure 2 disaggregates the traits ascribed to women. It analyzes stereotypical traits of women (Column 1) and what benefits may result from these purported traits (Column 2). In doing so, the chart attempts to pull apart how women’s purported instrumental value works while also demonstrating the specificity of women’s participation in particular firms – which will be addressed in Part III.

Figure 2. The Benefits of Sex Identity⁶⁸

Purported Women’s Traits	Potential Related Instrumental Benefit
1. Caretaker	Better for Stakeholders
2. Risk Averse	Fewer losses in uncertain markets
3. Methodical	Better governance; newer players may be more careful
4. Outsider/New Network	Relevant but diverse experience yields benefits in creative work
5. Insider/“Manning Up”	Adds sex diversity but no instrumental benefits
6. Role Model/Symbolic	Long term value of encouraging future candidates – broadens pool

This chart includes feminized traits firms may attain by including women. They may have better luck finding proxies other than the overbroad category of “women.”

68. The traits and benefits in this chart were compiled from various of sources, as well as from the author’s personal experiences. See, e.g., Seeung Jung et al., *Gender Wage Gaps and Risky vs. Secure Employment: An Experimental Analysis* (IZA Discussion Paper No. 10132, 2016), <http://ftp.iza.org/dp10132.pdf>; Catherine R. Albiston et al., *supra* note 67; Interview with 4F, *supra* note 70; Interview with 14F, *supra* note 70; Page, *supra* note 20; Interview with 5M, in Paris, France; Interview with 23M, in Paris, France; Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 Wash. & Lee L. Rev. 1643 (2004); Darren Rosenblum, *Manning Up* (forthcoming 2018) (on file with author); HANNA PITKIN, *THE CONCEPT OF REPRESENTATION* (1967).

Given the wide range of traits ascribed to women, this chart reveals the extent to which women may not fulfill firm expectations, which may undermine diversity in the long term. It is not altogether clear that, as a group, elite women would even possess these prized traits. Elite executive women – educated, successful, and networked women – benefit most from the quota wave.⁶⁹ By the time these women arrive at the corporate board level, however, they have extensive executive experience, which inculcates in them (as in their male colleagues) an instinctive market orientation that may transcend or minimize sex differences.⁷⁰ Women who rise to the top often must perform some version of professional maleness – they must be “more guys than the guys.”⁷¹ Women in the corporate elite confront a double bind in which they perform professional maleness – manning up to get ahead – as they femme up to conform to stereotypes of women.⁷²

For example, in my interviews of corporate board members in France, some felt women members adopted distinctively masculine characteristics to fit into male environments.⁷³ One male board member said, “the ladies who succeed frequently in the top jobs [are] more guys than the guys. To say that they brought diversity is a vision,

69. 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. INT’L L. & BUS. 81A, 103A (2012). Lani Guinier’s research underlines a compelling element with regard to women: that when exogenous forces benefit a particular category, the people within the group benefitted will be those most able to take advantage. This helps us understand that elite women likely have other advantaged categories favoring them. See, e.g., GUINIER, *supra* note 37.

70. See *Manning Up*, *supra* note 68 (arguing that women who rise to board positions may engage in some “manning up” to prove themselves to the men who dominate nominating committees that select new board members).

71. Interview with 1M, in Paris, France.

72. After Norway’s path-breaking quota, I argued that including women would feminize capital. *Feminizing Capital*, *supra* note 39. Here, I add a caveat: The women may not feminize firms as much as is expected. A fuller exploration of the sex and gender angle will appear in Rosenblum, *Manning Up*, *supra* note 68. Women mirror the men they aspire to replace and dress and act in a feminine fashion, a corporate femininity that constitutes its own form of drag. Some argue quotas mean that board candidates join boards without full inculcation in the hyper-masculine norms of corporate organizations since they join the board from outside the firm. While for some women this is true, the priority for board-nominating committees (and executives who often drive the process) appears to be obtaining women whose qualifications match those of the men already on the board. While few women have exactly parallel executive experience, other signs mark the new women’s “fit” on the board. See *supra* footnote 51.

73. Interview with 2F, in Paris, France.

a view of the spirit. It is biologically [true] but it is true only biologically.”⁷⁴ In terms of their professional capabilities, the women selected to join the board fit the same mold as the men already on the board. In decision-making, individual skills matter more than sex. Overall, the interviewees suggested that other differences (national, professional, etc.) mattered more than sex.⁷⁵

If firms want stakeholder-oriented thinkers, their search might prove more successful if they look for someone with caretaking experience, such as a primary parent, instead of searching for a so-called average woman. Their experience may not match that of other women, who on average tend to engage in higher levels of caretaking.

Blanket assumptions about women may fail to perform as instrumentalists expect. Many women share certain traits, but if a firm wants to improve its governance by including a caretaker (who may be more stakeholder oriented) or someone more risk averse, it can only use the category of “woman” as an initial proxy. The firm must go further in its inquiries and, as the next subpart details, should look to a woman’s experience.

B. *Identity Matters, Somewhat*

Social scientists have demonstrated that diversity of experience and expertise matters most. Identity may convey diversity’s presence even when the relevant experience remains absent.⁷⁶ Different experiences lead us to develop skills to respond to distinct needs. Most board members have some executive experience and the specific way of thinking about business problems.⁷⁷ One’s professional experience at the time of joining a board has reached such a substantial level that identity may matter less than more prominent

74. Interview with IM, *supra* note 71.

75. Another board member commented that “[board members] have excellent personal skills whether they are men or women. And if they ask good questions it’s because they are good with breasts or without breasts. Here we are new members, but we do not feel we have a women’s role to play more than an administrator role, or put in play by our own personality and our own past experience. So me what I bring over other is industrial experience I gained in . . . , but others bring more management experience or financial experience, so this is where I stand out.” Interview with 7F, in Paris, France.

76. PAGE, *supra* note 20.

77. Devan Grossblatt, *Boarded In: Counteracting the Consequences of Board Insularity by Legitimizing Director Elections*, 20 FORDHAM J. CORP. & FIN. L. 553, 604 (2015).

experiential factors.⁷⁸ Performance as a corporate board member draws on life experiences: where one grew up, where one went to school, and one's family and community situations.⁷⁹ Expertise also matters, including one's professional school, training, and networks. Unlike identity, this all becomes a particular skill set over which one may exercise control.⁸⁰ Despite this, firms often use identity as a proxy for perspectives.⁸¹

While stereotyping can exclude women from typical models of "effective" leadership, some studies suggest that female leaders do express certain styles. Rather than adopting stereotypically male leadership behavior (power, confidence, aggression, objectivity), women may exhibit a more collaborative "transformational style," which takes greater account of others.⁸² Effective corporate decision-making requires board members to explore a wide range of questions, and diverse board members focus on process in decision making.⁸³ By extension, women leaders may consider stakeholders more than men might,⁸⁴ and may consequently think in ways that are more "altruistic" and "long-term."⁸⁵ Women generally exhibit more risk aversion, although that may or may not translate neatly to the boardroom.⁸⁶

78. ROSABETH MOSS KANTER, *THE MEN AND WOMEN OF THE CORPORATION* (1977).

79. Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make*, 39 DEL. J. CORP. L. 377, 395 (2014).

80. DELOITTE, *supra* note 3.

81. Firms may use identity as a marker despite the widespread evidence that women may reflect male perspectives. Take Margaret Thatcher, whose political performance reflected none of the empathy traditionally affiliated with women. Indeed, she recognized that most understood leadership as masculine and worked to deepen her voice in the lead-up to her election as Prime Minister. *Loving Gender Balance*, *supra* note 39. Critical race scholars have focused on this phenomenon. Examples surface in which intellectuals and researchers presumed leaders of particular identities held a distinct political framework based on their identity, but whose actual beliefs differed due to their experiences. During the confirmation hearings of Clarence Thomas, several notable black intellectuals presented him as someone who would express his blackness once on the court, even if his politics suggested otherwise. Maya Angelou, *To Be Sure, Thomas is Woeful, but There is Still Hope*, BALTIMORE SUN (Aug. 28, 1991), http://articles.baltimoresun.com/1991-08-28/news/1991240116_1_clarence-thom as-highest-court-african-american [<https://perma.cc/JAC2-NP86>].

82. David A. Matsa & Amalia R. Miller, *A Female Style in Corporate Leadership? Evidence From Quotas*, 5 AM. ECON. J.: APPLIED ECON. 136 (2013) [hereinafter *A Female Style in Corporate Leadership*].

83. JULIET BOURKE, *WHICH TWO HEADS ARE BETTER THAN ONE?* (2016).

84. *Id.* at 33.

85. *Id.* at 5 (citing Irwin W. Silverman, *Gender Differences in Delay of Gratification: A Meta-Analysis*, 49 SEX ROLES 451 (2003)).

86. *A Female Style in Corporate Leadership*, *supra* note 82 (citing James P. Byrnes et

However, as Catalyst noted, more than forty studies spanning over fifteen years have shown that there are very few differences between how men and women exhibit leadership skills.⁸⁷

Only recently has the corporate world discovered how widespread it is for women to have faced sex discrimination or sexual harassment.⁸⁸ Including people with experiences of subordination, discrimination and harassment may alter processes or decisions. While not all women can represent this experience or positions building on it, identity may be a proxy for experience. The inclusion of few if any women on boards of firms that have faced major sexual harassment scandals is a suggestive if anecdotal data point, which supports women's inclusion *qua* women.

In contrast with such identity-oriented work, the focus on experience rather than identity shows when difference matters. My recent study with Daria Roithmayr supports the theory that experiential diversity matters most.⁸⁹ Corporate board members pointed to the different experiences women brought to the table – such as distinct national exposure, distinct educational backgrounds, or interests in environmental or labor issues.⁹⁰ These experiences, not sex, defined the quota's effects. As one interviewee said, while women may “not run a corporation in the same way as a man,” when they were on the board, women “brought something [new,] less because they were women [more] because of their different background.”⁹¹ Women who are outsiders affect and improve corporate governance primarily through their wealth of diverse experiences.⁹²

al., *Gender Differences in Risk Aversion: A Meta-Analysis*, 125 PSYCH. BULLETIN 367-83 (1999)).

87. Catalyst, *Women “Take Care,” Men “Take Charge:” Stereotyping of U.S. Business Leaders Exposed*, 12 (2005).

88. See, e.g., Susan Chira & Catrin Einhorn, *How Tough is it to Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES (Dec. 17, 2012), <https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html> [<https://perma.cc/D3GR-D3C N>]; Harvey Weinstein: *How the Scandal Unfolded*, BBC NEWS (Feb. 12, 2018), <http://www.bbc.com/news/entertainment-arts-41594672> [<https://perma.cc/Y3QU-RFFB>]; *Sexual misconduct allegations against Steve Wynn hurt his empire*, THE ECONOMIST (Feb. 3, 2018), <https://www.economist.com/news/business/21736201-mr-wynn-first-boss-big-public-company-face-accusations-metoo-era-sexual> [<https://perma.cc/935P-7SDE>].

89. Rosenblum & Roithmayr, *supra* note 25.

90. Interview with 5M, *supra* note 68.

91. Interview with 22M, in Paris, France.

92. See generally PAGE, *supra* note 20. French boards appointed women members who

In this view, women's gender matters only indirectly. Rather, it matters to the extent that they have different experiences, whether that is imposed on them or chosen by them. "Identity differences lead to experiential differences that in turn create tool differences," or different capacities.⁹³ Identity difference can create room for cognitive difference to arise.⁹⁴ For example, we treat large men differently than we treat small women, which leads them to have different experiences and then react to the world in distinct ways.⁹⁵ However, inferences based on identity should not limit individuals' capacity – any person can acquire any skill set regardless of identity.⁹⁶ The leadership context shows how experience far outweighs identity.⁹⁷

Identity difference not only facilitate cognitive difference, but also carry a symbolic effect.⁹⁸ Diverse leaders inspire future leaders by demonstrating that leadership need not be homogenous. A leader may thus play a descriptive role in representing a minority identity.⁹⁹

were more likely to be foreign, from non-elite professional and educational networks, less experienced, and from specialties not traditionally represented on boards, like environment or labor. See Interview with 5M, *supra* note 68; Interview with 23M, *supra* note 68. Some argue that the gradual inclusion of minority individuals leads them to conform to established firm norms. Carbado & Gulati, *supra* note 68. The relatively rapid inclusion of a critical mass of women thanks to quotas may avoid this phenomenon, reducing demands to conform. The force of a corporate board quota means women are not tokens, but play a key role in decision-making. Participants suggest these traits, which are associated with the women's outsider and newcomer status, not their sex, are potentially responsible for any difference in substantive board decision-making after the quota. Some of the improved process may relate to the newness of participants, concerned with impressing new colleagues. Although sex composition of boards has changed, and in some instances decision-making processes varied, board member participants do not believe board decisions have differed substantively because of sex. Women's distinct behavior with regard to process on the board supports Page's framing of diversity. They engage the material differently, but because their managerial experience matches largely that of their male colleagues, their votes follow suit.

93. PAGE, *supra* note 20, at 307. Page continues by stating: "The effects of identity on experience and opportunities are hard to measure. But almost no one disputes that they are large. The relevant question for us is whether those differences translate into meaningful cognitive differences – different perspectives, interpretations, heuristics, and predictive models . . . People belonging to different identity groups pull from different wells of experience." *Id.*

94. Phillips, *supra* note 18.

95. *Id.*

96. "Men and women may differ in the tools they choose to acquire, yet this does not in any way imply that they differ in the perspectives, heuristics, interpretations, and predictive models that they *could* acquire." PAGE, *supra* note 20.

97. *Infra* Part I-C-2.

98. PITKIN, *supra* note 68; Magnier & Rosenblum *supra* note 39.

99. Hanna Pitkin first explored this concept in *The Concept of Representation*, where

Boards oversee management; therefore, a woman's presence at the top of the firm may provide an impression of representation and convey opportunity to women lower in the hierarchy, which may improve stakeholder power.¹⁰⁰

C. *Women's Inclusion - Mixité and other Diversity*

Any discussion of women's inclusion must pose the question: which women? Not all women share a cognitive or experiential identity.¹⁰¹ Women cross every category of identity and experience, and the perspectives they bring to work vary accordingly. Intersectionality theory reflects these differences in how women are treated distinctly across such variation in experience.¹⁰² It is diverse experiences, and the cognitive understandings that arise from such experiences, that lead to an increased instrumental benefit. Sex diversity constitutes a subset of broader diversity, which would include race, class, sexual orientation, and ability. Some other contexts might require considering religion, national origin, language, and education. These inclusion/exclusion categories vary across national lines. For example, in France, sex diversity translates to *mixité*, a legally recognized category in both political quotas and corporate

she distinguished "descriptive" from "interest" representation. PITKIN, *supra* note 68. Her work focused on the context of political representation, in which she addressed how "descriptive" representation involves "a descriptive likeness between representatives and those for whom they stand." *Id.* at 11. This is representation by identity. In this sense, "[a] representative legislature, like a map or a mirror, is essentially an inanimate object, a representation of the people in the sense that a painting is a representation of what it depicts." *Id.* Pitkin criticized descriptive representation as a static portrait of a society, in which a group's representation resides in someone with a like trait. *Id.*; see also Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1102 (1991). By contrast, "interest" representation is about the expression of ideas. Interest representation involves a common belief or idea that finds representation in someone who agrees with that ideology, without regard to identity. PITKIN, *supra* note 68.

100. As I have argued elsewhere, the presence of women on the boards of France's (and possibly Europe's) largest companies will increase descriptive representation of women on the board, and this will result in an increase in stakeholder governance as women (at least descriptively) constitute stakeholders. PITKIN, *supra* note 68.

101. SCOTT PAGE, *THE DIVERSITY BONUS: HOW GREAT TEAMS PAY OFF IN THE KNOWLEDGE ECONOMY* 229-233 (Earl Lewis & Nancy Cantor eds., 2017).

102. See Crenshaw, *supra* note 55, at 1242 (explaining how identity politics problematically does not focus on differences within groups).

board quotas.¹⁰³ Other kinds of *diversité*, such as counting and considering race, are not legal.¹⁰⁴ In other European contexts, corporate diversity focuses on sex as well, and only in the United Kingdom (U.K.) are other categories of diversity widely considered.¹⁰⁵ State recognition of diversity in one identity affects other identities; recognition of sex as a protected category might undermine claims for other diverse groups.¹⁰⁶

Yet, diverse experience generally serves to improve instrumental value and so, by extension, should broaden diversity. Considering other kinds of diversity within the category of “women” reveals how the identity/experience split surfaces with regard to these other identities.¹⁰⁷ Firms may see leadership potential for a given

103. *Mixité* is a French term meaning sex diversity, but the “mixing” implies a mixing of the two sexes. The use of this term reflects a central distinction drawn in the French context, even as diversity remains central in the United States. While *mixité* refers to a clear binary of male/female that is widely accepted in France, diversity carries a broader meaning in the United States. “Mixité,” LAROUSSE FRENCH DICTIONARY, <http://www.larousse.fr/dictionnaire/s/francais/mixite%C3%A9/51851> [<https://perma.cc/7X8F-VRB3>] (last visited Feb. 23, 2018) (follow link to “mixte”).

104. Daniela Caruso, *Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives*, 44 HARV. INT’L L.J. 331, 366 (2003).

105. *The UK Corporate Governance Portal – Diversity and women on boards*, NORTON ROSE FULBRIGHT, <http://www.nortonrosefulbright.com/knowledge/technical-resources/the-uk-corporate-governance-portal/diversity-and-women-on-boards/> [<https://perma.cc/6BNP-VS6G>] (last visited Feb. 23, 2018).

106. Julie Suk argues the corporate board quota in France reflects an effort to bolster the democratic legitimacy of the French state by including women in key institutions in society – corporate boards. Julie C. Suk, *Gender Parity and State Legitimacy: From Public Office to Corporate Boards*, 10 INT’L J. CONST. L. 449, 449 (2012). See Darren Rosenblum, *Sex Quotas and Burkini Bans*, 92 TULANE L. REV. 469 (2017) (exploring the extent to which the advancement of women’s rights in France comes at the disadvantage of other disenfranchised groups, such as racial and ethnic minorities). The democratic legitimacy achieved by the French corporate board quota renders it unnecessary to attain any further legitimacy by including racial, ethnic, and religious groups. The sex binary plays a role here – its neatness draws on the assumption that there are only two categories and that they convey natural and meaningful differences. Race reflects more complex questions of economic inequality, colonialism, and other politically fraught debates. From a European perspective, sex diversity claims appear more cognizable. *Id.*

107. Before moving on to the identity/experience point, I also want to note the linkage that exists within diversity between traits. Some diverse categories may benefit from the misfortune of others. The actual complexity of the categories aside, “women” as a category may benefit from a perception that the other large diversity category of “race” is too complicated to engage. Within the French context in particular this is true – it is unconstitutional for the state to even recognize any racial difference. See Martin Arnold, *Liberté, égalité et fraternité, but Only for Some*, FIN. TIMES (London) (Nov. 7, 2005) at 2. It may even be true in the U.S. if we consider the resistance to race-based affirmative action and

woman rise or fall based on her other diverse identities. Intersectional women who have diverse experiences not typical of corporate elites may provide more value based on these diverse experiences than on their sole identities as women.¹⁰⁸ Occasionally, firms may view such amalgamations of diverse experiences as a “twofer.” Indeed, when French firms decided how to implement the corporate board quota for women, many ended up “killing two birds with one stone” – adhering to the quota, and choosing foreign women to further globalize the firm.¹⁰⁹

Whether this “twofer” analysis takes hold will depend on the lens of social inclusions and exclusions. The inclusion of various diverse perspectives, however, cannot be generalized as some firms may view certain diverse experiences as more valuable than others. One interviewee, in a side comment, mocked the quota saying, “Next, we’ll have to hire a black lesbian.”¹¹⁰ It may be that sex diversity efforts overemphasize the benefits of including women compared to other diverse perspectives. Excluded perspectives are ignored as they may not accrue value for firms. As intersectionality theory demonstrated decades ago, the exclusions people of multiple diverse identities face overlap.¹¹¹ Implicit bias or a simple lack of understanding of the value of diverse experiences might overwhelm consideration of the potential value of diverse experiences.

In sum, the first factor – identity – reveals that whether diversity pays off depends on the type of women brought on and what the firm expects of them. Women will not, by virtue of their sex alone, bring an instrumental benefit.¹¹² Women board members must bring some

the reality that, as some scholars say, white women benefit most from affirmative action. Sally Kohn, *Affirmative Action Has Helped White Women More Than Anyone*, TIME MAG. (June 17, 2013), <http://ideas.time.com/2013/06/17/affirmative-action-has-helped-white-women-more-than-anyone/> [<https://perma.cc/L9W7-BZXV>]. In some ways this makes sense – white women share more in terms of class, education, and culture with men. Even within black identity, certain subgroups benefit more. CONLEY ET AL., *supra* note 35. Action on sex can prevent other diversity efforts; there is a presumption that the sex quota may lead to broader inclusion of other kinds of diversity, as one interviewee asserted. Either way, sex attains the focus as the legal and legitimate category of inclusion, and advocates assert this category will do all the work that diversity more broadly writ needs to achieve. *Id.*

108. See *infra*, Part II.C.

109. See Interview with 1M, *supra* note 71.

110. Interview with 6M, in Paris, France.

111. See Crenshaw, *supra* note 55.

112. As Page argues, experiential diversity matters most. Page, *supra* note 20, at 305.

experience that diverges from others at the firm. There are traits ascribed to women, however, that might have clear consequences for firm governance, such as risk aversion or stakeholder orientation.

Women may or may not embody the traits expected of them. Further, women whose experience matches that of the men in their firm will *not* bring a diversity benefit.¹¹³ Women who share the same experience as men may contribute, in identity, to the critical mass of thirty percent necessary for the effective participation of minorities within group governance but undermine this effectiveness due to their lack of diversity experience.¹¹⁴ As we will see in discussing Factor Two, how their interventions will matter depends on the context in which they operate: the firm.

III. THE DIVERSITY OF FIRMS AND BOARDS

This part argues that the instrumental value of diversity varies depending on the kind of firm and its governance structure. This part will start by focusing on what boards do and how diversity might matter in terms of their work. It will then describe the variation of firm contexts for board work and assess when diversity will matter most. It concludes that diversity will matter most where boards hold a more influential role and where firms foster a critical mass of women.

A. *Boards and Diversity*

Boards play a central role in governance. They select the executive and oversee the executive's work. The way boards function reveals when and how diversity matters. In most United States firms, shareholders elect the board of directors,¹¹⁵ who in turn hire the

Ferreira argues for a heavy dose of skepticism when considering the presumed benefits women bring to governance. Ferreira, *supra* note 13, at 1.

113. See Page, *supra* note 20, at 305, 323, 364.

114. This figure follows Rosabeth Moss Kanter's notion of critical mass as the arbiter for when a minority's voice would matter in a body dominated by a majority group. Rosabeth Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 AM. J. SOC. 965, 988 (1977). Kanter argued that only structural change in organizations might achieve real shifts in the allocation of power, and these structural changes would in turn change people as individuals, while changing the mere identity of individuals would not alter the corporation overall. See also, KANTER, *supra* note 78.

115. STEPHEN M. BAINBRIDGE, *THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE* 155 (2008).

executives.¹¹⁶ The executives make crucial strategic decisions regarding the corporation and run it on a day-to-day basis.¹¹⁷ Once the executives take office, the board considers and approves decisions made by the executives.¹¹⁸ Board members then must ensure the firm's management complies with the law¹¹⁹ and approve "the strategic direction of the company and [oversee] the risks that the company faces."¹²⁰ The board's fiduciary duties require stakeholders to impose high standards.¹²¹ This accountability exposes its members to intense scrutiny for successes and failures.¹²² Boards, most importantly, hire CEOs to lead the firm and decide existential questions related to mergers and acquisitions.¹²³ For that reason, research on the effect women have on corporate governance should focus on those two crucial elements.

Firm governance varies substantially. Small and medium-sized firms face distinct governance questions, and the value of diversity within such firms necessarily depends on whether diversity matters to key stakeholders. Governance structures vary substantially outside the U.S. and affect how firms operate. National distinctions, such as supervisory, tiered, and labor-inclusive boards completely alter board functioning. The board's role legitimizes firms before their principal constituents: equity markets, debt markets, and stakeholders. The size of boards varies, as do rules implemented by both the state and the firm regarding independence, representation, limitations on board memberships, term length, and renewal. Even personalities have their impacts within boards. For example, in some firms, the board culture may be more assertive vis-à-vis the executive; while in others, it may be more deferential.

116. *Id.* at 161.

117. *Id.* at 161-62.

118. *Id.* at 161.

119. BRUCE F. DRAVIS, *THE ROLE OF INDEPENDENT DIRECTORS IN CORPORATE GOVERNANCE* 55 (1st ed. 2010).

120. *Id.* at 60.

121. JONATHAN R. MACEY, *CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN* 52 (2008).

122. See, e.g., Jill E. Fisch, *Taking Boards Seriously*, 19 CARDOZO L. REV. 265 (1997) (explaining how activist institutional investors are holding directors accountable for their actions on the board).

123. See Alexandra R. Laroux, "Role of the Board in M&A," Harvard Law School Forum on Corporate Governance and Financial Regulation (Sept. 7, 2015) <https://corpgov.law.harvard.edu/2015/09/07/role-of-the-board-in-ma/> [<https://perma.cc/UJF4-MX3L>].

With this variation, some boards will benefit more from diversity than others.¹²⁴ Scott Page's work suggests how.¹²⁵ Repetitive work doesn't benefit from diversity, but problem solving or prediction does.¹²⁶ Distinct experiences make a diverse group capable of better problem solving.¹²⁷ The best problem solvers tend to perform similarly, so a collection of the best problem solvers may do little more than one alone.¹²⁸ In contrast, a diverse group shows more collective strength.¹²⁹ Page infers from this that diversity may matter more than ability.¹³⁰ Various management consultancies have confirmed Page's conclusions.¹³¹

Page's work clarifies when the board's engagement will reflect diversity presence and when it will not. This requires assessing whether the board's work involves repetitive/implementation work or creative effort. In analyzing the role boards play, Jill Fisch delineated a range of board work that goes from monitoring work to managerial work.¹³² A monitoring board oversees the firm, a role that Sarbanes-Oxley and Dodd-Frank magnified.¹³³ A managerial board plays a

124. PAGE, *supra* note 20 (incorporating various sources and aggregating other social science data on difference).

125. *Id.* at 325-26.

126. *Id.* at 314.

127. *Id.*

128. *Id.* at 324-25. To test whether diversity helps problem solving, Page focused on one problem: "making the perfect cup of coffee," with two elements, the ideal level of cream and sugar for most people. Participants worked in groups "until no agent in the group could find a better cup of coffee." *Id.* at 135-36.

129. *Id.* at 324-25.

130. *Id.*

131. Ernst and Young conducted a study on diversity in the workforce that demonstrated that more diverse groups performed better than homogeneous ones, even if the members of the homogeneous groups were substantially more capable. ERNST AND YOUNG, *GROUND BREAKERS: USING THE STRENGTH OF WOMEN TO REBUILD THE WORLD ECONOMY* (2009), <http://advancingwomen.org/wp-content/uploads/2013/09/Groundbreakers-Using-the-strength-of-women-to-rebuild-the-world-economy-Report.pdf> [<https://perma.cc/SBR3-KL33>]. The group's diversity mattered as much as their ability and brainpower, if not more. For example, homogenous groups "stake out extreme positions," and often "limit [their] discussions to a small number of alternative courses of action without surveying the full range of alternatives." Lisa Nicholson, *Making In-Roads to Corporate General Counsel Positions: It's Only a Matter of Time?*, 65 MD. L. REV. 625, 637 (2006). Therefore, diversifying boards may mitigate a board's tendency to conform, prevent groupthink, and promote board scrutiny of decision-making. Ramirez, *supra* note 1, at 99.

132. Fisch, *supra* note 122.

133. *Id.* at 268; *see also* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (enacted to protect shareholders and the general public from accounting errors and

more active role. It does not actually manage the firm, of course, but may help guide strategy. Monitoring involves the assessment of management efforts and managing duties, in which the board hires the executive and assesses executive-driven, long-term strategy.¹³⁴ The board oversees and approves the decisions made by the executive committee and ensures that the work of the corporation follows a set of rules, as in the central work of the audit committee.

Given what we know about boards, diversity will matter most where boards matter most. The two dichotomies roughly map onto each other: diversity (repetitive or creative work) and boards (monitoring or managerial work). A monitoring board's duties focus more on the responsive work of evaluating executive proposals. On a monitoring board, process may change thanks to diversity.¹³⁵ Even in a deferential board, women's presence may add a methodical, non-conflictual style to board discussion that could change *how* boards decide.¹³⁶ On substance, however, it is rare for a board member, much less an entire board, to vote against an executive proposal. Board votes typically all lead to the same substantive outcome: approval. At the extreme, some highly deferential boards simply rubber-stamp whatever the executive puts before them, and on such boards, diversity will matter little.¹³⁷

By contrast, more active boards may assist in firm strategy including assessing opportunities.¹³⁸ The creative work of imagining strategic opportunities may have boards move beyond their usual passive role within firm governance. This is where diversity would matter most. The line between monitoring and managing clearly will have substantial gray areas, even within firms, especially over time.

fraudulent practices in the corporate enterprise); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (enacted to prevent the excessive risk-taking that led to the 2008 financial crisis and improve accountability and transparency in the United States financial system).

134. MACEY, *supra* note 121, at 52.

135. DHIR, *supra* note 32; *see also* Anita Williams Woolley et al., *Evidence for a Collective Intelligence Factor in the Performance of Human Groups*, 330 SCIENCE 686, 688 (Oct. 29, 2010) (evidencing how the group intelligence factor was significantly and positively correlated to the number of women in the group.).

136. *See* DHIR, *supra* note 32.

137. Sometimes this will be true, but sometimes deference by the board to management can destroy shareholder value. *Id.*

138. Fisch, *supra* note 122, at 272. Indeed, because of this conflict, Macey argues the United States places too much emphasis on the board's role. MACEY, *supra* note 121, at 56.

The more active the board, the more diversity might augment the firm's productivity.

Two factors increased the board's role. First, market factors after the 2008 financial crisis have increased the role boards play. Boards must now also protect against extreme risk and demonstrate to capital markets that the firm's fortunes remain secure.¹³⁹ As rubber-stamping diminishes, and boards become more active, diversity's effects will grow. Second, independence, an increasingly valued element in good governance, correlates to diversity.¹⁴⁰ Several of the traits that make independent directors seem like they would improve governance reflect the traits ascribed to women.¹⁴¹ Independent directors serve as a counterweight to the executive committee.¹⁴² Independents can dissent, at least theoretically, without cost.¹⁴³ Diversity among independent directors may prove more valuable.¹⁴⁴ The increase in independent and diverse directors on corporate boards

139. Jeffrey A. Sonnenfeld, *What Makes Great Boards Great*, HARV. BUS. REV. (Sept. 2002), <https://hbr.org/2002/09/what-makes-great-boards-great> [<https://perma.cc/YE39-GNKK9>]. Boards may meet more frequently or less depending on financial conditions.

140. "Agency theory suggests that CEOs may need independent oversight. If so, then diversity of the board of directors and the subsequent conflict that is considered to commonly occur with diverse group dynamics is likely to have a positive impact" Niclas L. Erhardt et al., *Board of Director Diversity and Firm Financial Performances*, 11 CORP. GOVERNANCE 102, 108 (2003).

141. One skeptical reflection: it may just be a trope of sex difference that women will act independently simply because they hold little responsibility for the pre-2008 boom years due to low representation. One scholar noted that the crisis led firms to prefer experience to diversity, driving them away from women. Fairfax, *supra* note 40, at 871 (citing Spencer Stuart board index). Consequently, "the economic crisis appears to have narrowed the criteria corporations use to identify board candidates, thereby limiting the ability of corporations to engage in significant diversity efforts." Fairfax, *supra* note 40, at 872. Therefore, while women may have helped mitigate the effects of the financial crisis by tending to be more risk averse, the financial crisis did not necessarily help women obtain board positions.

142. DRAVIS, *supra* note 119, at 4 ("The independence of directors . . . is intended to prevent certain types of management abuses of corporate resources."); *see also* AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS (1994) (encouraging the use of independent directors).

143. Of course, as one interviewee noted, a "bum" can be an "independent director" in that they too are independent. Interview 11M, in Paris, France.

144. The question of board interest capture by the executive may lead to conflicts of interest. *See* MACEY, *supra* note 121, at 70-75 (arguing that the capture of the board by executives is at the heart of corporate crises, including, notably, the Enron collapse.). Macey next describes the Enron collapse, which "has become a metaphor for corporate governance failure." *Id.* at 79.

reflects a growing trend in governance. These two trends, independence and more active boards, will increase diversity's value.¹⁴⁵

Last, smaller firms and close corporations likely face different issues with regard to diversity. Because of their smaller teams and leaner staffing, their pursuit of diversity as a matter of good governance might be less likely. If stakeholders in the close corporation express interest in diversity, however, then it may end up as a priority for the firm. Given the concentration of power typical of smaller firms, good governance benefits stemming from diversity would likely only arise if the principal shareholders value the inclusion of diverse perspectives.

B. *The Forest: Diversity of Firms*

Corporate governance varies widely. Large and small firms, start-ups, and well-established firms all differ substantially. Global firms deploy different processes from national ones. Industries and related risks diverge. This part focuses on four variables within firms: firm type, ownership, age, and governance. Industry matters substantially in terms of diversity. As women tend toward certain courses of study, professions and industries reflect this dynamic. With few women engineers, industries that rely heavily on this profession tend to have fewer women.¹⁴⁶ For technology, aeronautics, automobiles, utilities, construction, and other lines of business in which engineering plays a dominant role in product development, the low participation of women in the field affects diversity at all levels.

145. At the same time, the confluence of these changes would render an objective assessment of diversity's relevance more challenging.

146. Girls tend to veer away from science and engineering subjects. Susan Haag, et al., *Barriers to Math and Science Classes and Careers: Gender Subject and Developmental Differences*, J. OF VOCATIONAL BEHAV., 77, 361-73 (2010), https://www.researchgate.net/publication/268506506_Fouad_NA_Hackett_G_Smith_P_Haag_S_Spencer_D_2010_Barriers_to_Math_and_Science_Classes_and_Careers_Gender_Subject_and_Developmental_Differences_J_of_Vocational_Behavior_77_361-373 [https://perma.cc/S24R-WLZ6]. This leads to reduced participation in engineering as a profession. See, e.g., Nadya A. Fouad & Romila Singh, *Stemming the Tide: Why Women Leave Engineering*, WOMEN IN ENGINEERING 2011 REPORT (2011), http://energy.gov/sites/prod/files/NSF_Stemming%20the%20Tide%20Why%20Women%20Leave%20Engineering.pdf [https://perma.cc/QFE9-2Z3V] (revealing that a workplace culture that is non-supportive of women causes female engineers to leave the field.).

In such industries, the paucity of women at most levels of the firm reduces the potential pool of women who could serve on the board or in the executive committee. Women form a larger proportion of professionals in certain industries that involve sales, customer service, human resources, and finance. The opposite is true in information technology.¹⁴⁷ The phenomenon of Sheryl Sandberg's *Lean In* drew attention to the lack of women in the high growth area of technology as well as in other sectors.¹⁴⁸ By contrast, luxury goods, cosmetics, publishing, and other industries have far larger numbers of women. Beyond management, women play a role as stakeholders, as both workers and customers. In industries with large numbers of women in these groups, management tends to be more inclusive.

Not only do certain industries tend toward more or less sex diversity, but distinct industries require distinct governance. Consider the distinctions among banks, technology, and heavy industry.¹⁴⁹ Banks and technology may have fewer environmental concerns, while heavy industry may be subject to greater governmental intervention and regulation. Although the markets that finance firm operations and growth function on a global scale, some firms continue to focus on distinct capital markets, which hold divergent expectations of firms.¹⁵⁰

A firm's age also plays a role. Newer firms have distinct challenges and methods of grappling with them, while older firms tend to have well-established infrastructures.¹⁵¹ Newer firms tend to take

147. Margaret Yap & Alison M. Konrad, *Gender and Racial Differentials in Promotions: Is There a Sticky Floor, a Mid-Level Bottleneck, or a Glass Ceiling?*, 64 INDUSTRIAL RELATIONS 593, 606 (2009).

148. See generally SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* (Alfred A. Knopf 2013). For a structuralist critique of Sandberg's manifesto, see Darren Rosenblum, *It's Time for the State to 'Lean In' for Gender Equality*, HUFFINGTON POST (Mar. 14, 2013), https://www.huffingtonpost.com/darren-rosenblum/lean-in_b_2847554.html [http s: //perma.cc/M88Z-T6QV].

149. Rohit Arora, *Government Should Think Before Imposing Heavy Regulation on Fintech*, TECHCRUNCH (Aug. 2, 2015), <http://techcrunch.com/2015/08/02/government-should-think-before-imposing-heavy-regulation-on-fintech/> [https://perma.cc/E9SX-Q8X6] (referring to the question of how much regulation should the internet marketplace face in an effort to highlight the severity of governmental control over other industries, including banking).

150. CORPORATE GOVERNANCE IN GLOBAL CAPITAL MARKETS 73-74 (Janis Sarra ed., 2003) (ebook).

151. It is worth noting that newly established corporations are arguably more innovative, allowing them to make riskier decisions that well-established firms often refrain from making. See Stefano Bianchini et al., *Corporate Governance, Innovation and Firm Age: Insights and*

more risks for growth, while well-established firms that worry about risks undermining established lines of business tend toward greater risk aversion. Shareholder ownership constitutes another variable, because firms may have very broad shareholder bases or a concentrated ownership structure.¹⁵² Those with a concentrated structure may have a large presence of institutional investors or a concentrated holding by family members.¹⁵³ Some large investors, whether hedge funds, activist investors, or pension funds, exercise control in how firms operate; others favor management's exercise of judgment, provided returns satisfy the owners.¹⁵⁴ Some firms have shareholders from global capital markets; others have a concentration from their home nation or region.¹⁵⁵ Firms can also free themselves from public regulation by privatizing.

Ownership matters immensely. In firms with a concentrated ownership structure, the board will likely serve the owner's interests. That will prove true whether the owner is the founder or inventor, an activist investor, a hedge fund, or even the state. Indeed, for firms whose shareholders include the state, the rules imposed by the state may be substantial.¹⁵⁶ The state may emphasize more stakeholder-oriented decision-making or may insist on specific actions, such as requiring a firm keep its plants open even if this decision runs counter to the profit motive for the firm.¹⁵⁷

New Evidence 1-2 (GREDEG Working Papers Series, Working Paper No. 2015-05, 2015).

152. Various firm characteristics inform the ideal shareholder base. See Anne Beyer et al., *Does the Composition of a Company's Shareholder Base Really Matter?*, STAN. CLOSER LOOK SERIES (2014), https://www.gsb.stanford.edu/sites/default/files/42_ShareholderComposition.pdf [<https://perma.cc/849A-KXXA>].

153. Firms that value long-term investors typically prefer block shareholders that own significant portions of stock. *Id.*

154. See generally Stuart Gillan & Laura T. Starks, *The Evolution of Shareholder Activism in the United States*, 19 J. APPLIED CORP. FIN. 55 (2007), <http://ssrn.com/abstract=959670> [<https://perma.cc/VXF9-8ETT>] (discussing first the fall in the institutional shareholder's role in corporate governance followed by the subsequent recent rise).

155. CORPORATE GOVERNANCE IN GLOBAL CAPITAL MARKETS, *supra* note 150, at 73 (noting that there are management-related tensions among those who invest, which naturally influences the desired type of shareholders. A firm with a specific image, ideal, or mission may prefer a global shareholder base or a shareholder base from its home region).

156. See, e.g., Mariana Pargendler, *State Ownership and Corporate Governance*, 80 FORDHAM L. REV. 2917, 2935 (2012) (explaining that Brazil's Corporations Law required publicly traded mixed enterprises to consider the interests of employees, communities, and the national economy in their decision-making).

157. See *id.* at 2921 (stating that in firms where the state has an ownership interest, control mechanisms "tend to consistently favor the interests of the state as shareholder over those of

Likewise, the profile of capital markets also affects governance. In flush times, firms may extend more deference to the executive. In times of crisis, when debt or equity markets are weak, firms tend to retrench toward conservative positions that reduce risk and preserve access to capital. Executives and boards alike will attend to the demands of capital markets in their decision-making. Indeed, a firm's choices with regard to the board's structure and power within the firm may vary based on the risk profile the firm chooses.¹⁵⁸ In crucial moments for firms in their relations with capital markets, they may choose a more conservative route concerning diversity. For example, Twitter caused a public uproar when it announced its Initial Public Offering with an all-male board. The firm quickly found Marjorie Scardino, whose elite credentials include Chairman of the Board of the MacArthur Foundation.¹⁵⁹ Twitter, it turned out, was too large and prominent not to include a woman. Because the firm wanted to avoid additional negative press, it found a woman. Thus, the inclusion of at least one woman became an expectation, and the more conservative route for larger firms.

Larger firms also have the wherewithal to hire international search firms to find prominent diverse people. Within this context, the inclusion of women on the board increasingly seems like a norm, which places pressure on large United States firms to follow suit.¹⁶⁰ Smaller, less visible firms face fewer pressures, as do firms with a business-to-business model. Therefore, both may avoid substantial consumer attention that may create pressure for diversity such as that faced by Twitter.

Given the increase in board diversity, how do these various kinds of firms affect board governance and, in turn, the diversity on their boards? It comes down to which firms have the wherewithal to choose how to diversify and which firms diversify unintentionally. Large firms have the resources to find and attract diverse board

outside investors.”).

158. As one scholar suggests, the risk profile of a firm may be reduced by outsourcing the board entirely. See, e.g., Stephen Bainbridge & M. Todd Henderson, *Boards-R-Us: Reconceptualizing Corporate Boards*, 66 STAN. L. REV. 1051 (2014).

159. *Board of Directors*, TWITTER, <https://investor.twitterinc.com/directors.cfm> [<https://perma.cc/J6XH-NJEC>] (last visited Feb. 18, 2016); Hayley Tsukayama, *Twitter Appoints First Woman, Marjorie Scardino, to Board of Directors*, WASH. POST, Dec. 5, 2013.

160. Jennifer Bissel et al., *Shake-up Calls Mount as Lack of Diversity on U.S. Boards Laid Bare*, FIN. TIMES, Aug. 16, 2016.

members, whether their motivation draws on a desire for better governance, or a fear of negative press, as with Twitter.

French firms are instructive, as they experienced an exogenous pressure to include substantial numbers of women. A diversity gold rush of sorts ensued as large firms moved out ahead of the more numerous mid-size firms with fewer resources to find “competent” women to fill their board seats.¹⁶¹ As large firms complied, though, they tended to seek out the women whose competence reflected that of the current members of the board. They looked for women with an elite background and with executive experience.¹⁶² If French women did not fit the bill – and few did, given the rarity of women executives in France – firms looked abroad to fill their quota.¹⁶³ These first-mover firms may have brought on board precisely the women who would be less likely to add new experiences, as their profiles matched that of current board members.

The limited role of boards with regard to the executive undergirds a strong skepticism about the instrumental value of diversity. Perhaps proponents of instrumentalist diversity succeeded with their efforts in the board context precisely because the board does not play a large enough role to disrupt business if the diversity proves ineffective. Even in some of the most egregious groupthink moments in recent corporate history, it is not certain that diversity would have prevented what occurred.¹⁶⁴ However, as a thought experiment one might wonder whether diversity would avert grave risks. One scholar argued that had Enron included women on its board, it would have averted disaster.¹⁶⁵

161. CAC 40 firms had reached 75% compliance with the requirement in 2014, 30% of all board members being female. Matt Orsagh, “Women on Corporate Boards: Global Trends for Promoting Diversity”, MKT. INTEGRITY INSIGHTS (Sept. 14, 2014), <https://blog.scfainstitute.org/marketintegrity/2014/09/24/women-on-corporate-boards-global-trends-for-promoting-diversity/> [https://perma.cc/7MP7-FR4S].

162. Interview 9F, in Paris, France.

163. Interview with 19F, in Paris, France.

164. Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1306-08 (2003). Toward the end of its existence, Enron counted one woman among its seventeen board members. See *Enron's Board of Directors*, GUARDIAN (Feb. 1, 2002, 10:45 AM), <https://www.theguardian.com/business/2002/feb/01/corporatefraud.enron3> [https://perma.cc/7G58-ETMQ].

165. See *id.* More directly, others place the blame on outside firms such as Arthur Andersen, or on the shareholder primacy as having facilitated Enron's continued fraud. See generally, David Millon, *Who “Caused” the Enron Debacle?*, 60 WASH. & LEE L. REV. 309,

More risk-averse people could help firms protect their income sources through careful forethought, crisis management, and risk reduction. The risk aversion ascribed to women may slow down decisions, which market actors often find detrimental. For that reason, women leaders may face pressure to take greater risks to succeed.¹⁶⁶ When Patricia Dunn replaced the embattled Carly Fiorina at the head of HP, she initiated an investigation that, when made public, gave rise to an initial filing of felony charges.¹⁶⁷ Dunn's experience reveals the fine line leaders of any sex must walk.

Which firms' governance might benefit the most from diversity? Among firms, we merely have to look for the factors that suggest stronger governance. Dispersed shareholders may weigh less heavily on a board, allowing diversity to matter. Firms with active boards also create promising environments for diversity to matter. Firms that view diversity opportunistically to improve their governance will succeed, especially those that foster a critical mass of diversity. By contrast, including women on firms with rubber-stamp boards will have little effect on firm performance. Likewise, in firms with a dominant shareholder, the board's role could inevitably play a smaller role in firm affairs. An example would be the technology sector, where several of the founding members of firms continue to dominate.

IV. DIVERSITY OF NATIONALITIES

The question of "where" matters enormously. State and national jurisdictions regulate firms and thus impact diversity's instrumental effect. The firm's size and national/global profile determines who populates its board, as the firm seeks to garner or maintain the respect of its relevant capital markets.

The Brexit referendum and the Trump election have upended the norm of trade liberalization with a push toward de-globalization.¹⁶⁸

320 (2003); William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1287 (2002).

166. ACTING WHITE?, *supra* note 11.

167. See Miriam Baer, *Corporate Policing and Corporate Governance: What Can We Learn from Hewlett-Packard's Pretexting Scandal*, 77 U. CIN. L. REV. 523, 528 (2008) (citing Dunn Submission, *supra* note 5 at 55–56).

168. See Martin Wolf, *Britain's Road to Becoming the EU's Canada*, FIN. TIMES (Feb. 20, 2018, 1:40 PM), <https://www.ft.com/content/e72bf154-1566-11e8-9376-4a6390adb44> [https://perma.cc/ZM8C-CLEE].

Both votes might radically change how multinational firms operate. Subject to this uncertainty, the next part presumes that the status quo of globalized firms will largely continue.

A. *Law and Legal Culture Variations*

The previous part addressed board variation and how it would affect diversity. Variation in national origin among the members of boards proves substantial.¹⁶⁹ National, regulatory, and cultural distinctions run deep and interact with each other regarding diversity. Firms develop governance cultures that respond to local, regional and international capital market conditions as well as state regulatory frameworks. Corporate legal frameworks vary substantially.¹⁷⁰ Social politics affect ownership structures and many other aspects of how firms operate. Political economy determines corporate governance systems, because it determines ownership, size, authority, and, in particular, the division between ownership and control.¹⁷¹ Some politics are national, while others are regional. One scholar notes that social democracy and diffuse ownership cannot coexist easily: social democracy (here, in the European context) stabilizes the workforce, while diffuse ownership favors shareholder primacy and maximizes profit, a distinction reflected in left-right political alignments.¹⁷² In social democracies the ties between shareholders and managers fray and concentrated ownership functions best.¹⁷³

To take but one example, several countries have tiered boards and/or labor inclusion. In Germany, for example, co-determination

169. An admitted shortcoming of this piece is that the examples draw on the European and United States context. Beyond those regions, board structures may vary further. I suspect the question of good governance and owner domination resonates elsewhere.

170. MARK J. ROE, *POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT* 142–45 (2003).

171. While economic development, technology, culture, or tax and legal structures are important, social peace is a prerequisite for businesses to operate successfully. *See id.* (“Before a nation can produce, it must achieve social peace.”). Without social peace there is turmoil, which creates volatile markets.

172. Social democracies do not allow managers the discretion necessary to keep stockholder profits up, which is vital to diffuse ownership goals. Ensuring that people are working is a key goal of social democracies. In these political environments the government creates a wedge between stockholders and managers by forcing firms to make decisions favoring employees. *See generally, id.*

173. *See generally, id.*

allocates half of all supervisory board seats to labor. Germany requires tiered boards with an executive board that manages more detailed strategic issues in addition to the supervisory board, which performs functions closer to that of a United States board.¹⁷⁴ Other countries, such as France, require minimal labor representation. Labor participation in boards increases stakeholder representation, and clearly increases those boards' class diversity. It may also bolster other diversity. In an interview, a union representative on the board articulated why he thought women would not change board decisions: "If we go looking at Goldman Sachs, they would be biased toward Goldman Sachs like a guy. . . . They will function with their own intelligence and sensibility and their experience, like a guy."¹⁷⁵ As he implies, to the extent that a woman on the board will act "like a guy," her inclusion may not alter the board.

The German example raises another question related to culture. German boards typically meet far less often than United States boards, and board members receive documents for consideration upon arrival at the meeting. In addition, German boards tend to be larger, partly because of the co-determination requirement. As a result, German boards tend to be less effective than U.S. boards at overseeing firms. This lower level of efficacy means that diversifying German boards might have less of an instrumental effect than it would in a United States context.

This reality means that governance changes, including diversity, will be unlikely to produce desired results unless the regulatory environment and corporate governance systems align.¹⁷⁶ If the state regulates and the private sector resists, firms can prove very effective at subverting the regulation. The widespread use of the business case argument for board diversity in France led the private

174. Roe, *supra* note 170, at 71-73.

175. Interview with 5M, *supra* note 68.

176. Mark J. Roe, *Political Preconditions to Separating Ownership from Corporate Control*, 53 STAN. L. REV. 539 (2000). "Where social democracy was strong, the public firm was unstable, weak, and unable to dominate without difficulty; where social democracy was weak, ownership diffusion of the large firm could, if other economic and institutional conditions prevailed, begin." Roe, *supra* note 170, at 6-7. That is not to say that countries with social democracies cannot be utilitarian; because they do ensure stability for a larger number of people. *Id.* at 7. However, Roe uses this information to theorize that there are multiple roads to utilitarianism that must begin with social peace. *Id.* The idea that political environment and structure of corporate governance are correlated need to be recognized by policy-makers, especially with increasing globalization. *Id.*

sector to willingly adopt this requirement as it largely viewed the change as a salutary one. Even if it was designed to head off regulation, this effort aligned the private sector with the efforts at inclusion. When board members were questioned about compliance, the universal answer was that firms would comply. Only one possible noncompliance surfaced: firms might choose “marionettes” to join the board – women who served as proxies on boards when the real decision maker was someone else.

B. *Regulatory Variation*

Increased harmonization aside, corporate governance rules vary widely, nationally or federally.¹⁷⁷ Firms may structure themselves with different entities in other jurisdictions. Diversity legislation differs enormously as other countries view inclusion as a priority for legislation, in part perhaps to attain some democratic legitimacy.¹⁷⁸ As this section suggests, diversity will make a difference when regulations require the addition of women to boards. This chart maps the remedies for corporate diversity adopted by various countries since 2003, when Norway first adopted a quota for women on boards.

177. See Roe, *supra* note 176. National contexts vary significantly in terms of regulatory practices. Firms in developing markets pursue certain decisions that contrast with those in low growth states with clearly established legal norms. Consider Walmart’s infamous violation of the Foreign Corrupt Practices Act in Mexico. Walmart decided to locate its new superstore within the boundaries of a historically protected area, but rather than shift its plans, the firm bribed local authorities to change the boundaries of the area to suit their needs. This extreme example reveals how radically business practices differ across national contexts. As countries’ firms differ in ownership and age profiles, such aspects may blur into national norms about firm behavior. Charlie Savage, *With Wal-Mart Claims, Greater Attention on a Law*, N.Y. TIMES (Apr. 25, 2012).

178. See Suk, *supra* note 106, at 450.

Figure 3: National Legislation Compared¹⁷⁹

These remedies range from fixed, government-imposed remedies at the top, to more fluid and voluntary remedies at the bottom. This spectrum of regulatory involvement pairs strong regulation with fixed notions of sex identity – a belief that “men” and “women” are distinct categories that will each contribute differently. On the other end of the spectrum sits weaker regulation which allows for a more fluid understanding of sex.¹⁸⁰ Harder quotas guarantee women positions as they use a fixed meaning of “women.” In contrast, firms like those in the U.S. set their own diversity metrics.¹⁸¹ This range of legislative remedies demonstrates what states might do to advance diversity and also how these measures relate to each other.

The skepticism about stereotypes discussed in Part I carries through here – fixed remedies, such as the quotas in France and Norway, reinforce the idea that gender identity is fixed by nature into

179. This chart appears in Darren Rosenblum & Daria Roithmayr, *The Effect of Gender Diversity on Board Decision-Making: Interviews with Board Members and Stakeholders*, Conference Board (Jan. 2017), <https://www.conference-board.org/publications/publicationdetail.cfm?publicationid=7407> [https://perma.cc/6GVF-E63Q].

180. I borrow this structure from Jane Mansbridge who mapped political quotas in a similar fashion. See Mansbridge, *supra* note 67.

181. Social norms may still lead to widespread use of the binary among firms, but the lack of specificity in the regulation permits more fluid applications. Firms may typically follow the binary but are not mandated to do so.

a binary.¹⁸² Regulation of gender diversity may vary by penalty or duration – for example, some rules can include sunset provisions.¹⁸³ Less-fixed remedies may demand fewer changes in firm culture, as firms can self-enforce.¹⁸⁴ Of the softer quotas, the United Kingdom has the most substantial compliance.¹⁸⁵ The United States stands in

182. As depicted here, any remedy for group inequality relies on some notions of essential identity. *Infra* Part II. The move away from fifty percent reduces the fixed nature of the remedy, even as the harder enforcement mechanism and the requirement of seats on boards (and not just candidates as in the Parity law) increase this nature of the quota. In so doing, it establishes a critical mass for each sex, but one that involves, what I have called, “gender balance,” a less rigid means to improve representation than the fifty percent political quota. Parité, Loi 99-569 du 8 juillet 1999 relative à l’égalité entre les femmes et les hommes [Law 99-569 of July 8, 1999 regarding the Equality between Women and Men], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], July 9, 1999, <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=JUSX9800069L> [<https://perma.cc/AW3T-WEZG>] [hereinafter Loi 99-569]. Interestingly, Dhir’s Norwegian interviewees reported that sex mattered in the boardroom, while my interviewees in France reported otherwise. DHIR, *supra* note 32, at 101. It may be that the contexts define the board members and that in a gender-progressive society, board members will be more progressive on gender matters. One may also argue that Norwegian board members assert sex difference does matter because in their society it does not matter (or matters much less than in the non-Scandinavian world) whereas in France, the board members report sex does not matter (in terms of substantive decisions) because in French society it actually does matter. Otherwise stated, board members in Norway accept sex difference and incorporate it because it is an accepted public policy framework, whereas in France it might raise questions about the professionalism of the board members if they said that their sex defined their choices. In this sense, the professional norm in France may be closer to the U.S. context, where evaluating firm choices must draw on what board members perceive to be objective market criteria. *See id.* at 101-147. This self-reporting may reflect the interviewees’ sense of professional norms within their country which permit the recognition of gender’s role in Norway, but less so in more-traditional France.

183. Temporality is another factor in fixedness. Some quota statutes include mandatory sunset provisions, which render them less fixed. Variations also exist on how hard or soft the remedies are. The Norwegian quota contains the most draconian of punishments – dissolution of the firm’s corporate status. DHIR, *supra* note 32, at 105. Spain’s law is softer – although it obliges an increase in board participation to forty percent, there are no formal sanctions for failure. U.K. DEP’T FOR BUSINESS INNOVATION & SKILLS, WOMEN ON BOARDS (2011). Spain’s 2007 quota requires public companies and IBEX 35-quoted firms with more than 250 employees to attain a minimum forty percent share of each sex on their boards by 2015, but there are no formal sanctions for companies that do not reach this quota. *Id.*

184. Term limits, for example, might promote turnover and the potential inclusion of women without a focus on identity, as I will explore in a subsequent project.

185. The U.K. has a voluntary suggestion of thirty percent for boardrooms. Italy has a boardroom quota of one third, Belgium’s is thirty percent, and Netherlands has a thirty percent “nonbinding target.” Alison Smale & Claire Cain Miller, *Germany Sets Gender Quota in Boardrooms*, N.Y. TIMES, Mar. 6, 2015, <https://www.nytimes.com/2015/03/07/world/europe/german-law-requires-more-women-on-corporate-boards.html> [<https://perma.cc/K532-JS2V>] ; Claire Cain Miller, *Women on Boards: Where the U.S. Ranks*, N.Y. TIMES, Mar. 10, 2015,

contrast to continental Europe in resisting a focus on sex diversity. The S.E.C., as noted above, allows firms to define diversity.¹⁸⁶ Legislative action on women's inclusion in the U.S. seems unlikely, given the historical focus on remedying racial inclusion and accounting for diversity more broadly.¹⁸⁷

The greatest benefits of diversity might be seen in firms with high levels of willing compliance and in countries that foster a critical mass of diversity. Firms will then seek to implement such provisions in ways most beneficial to their own governance.

C. *Regulating Culture & Gender*

Gender itself varies substantially from country to country.¹⁸⁸ Socioeconomic factors such as labor participation, reproductive rights, and childcare access construct power differentials between men and women. Familial roles permit or bar work outside the home.¹⁸⁹ Workforce participation affects women's leadership across national lines.¹⁹⁰ In countries with less gender equality, remedies that force inclusion may confront more resistance.¹⁹¹

<https://www.nytimes.com/2015/03/11/upshot/women-on-boards-where-the-us-ranks.html>
[<https://perma.cc/5VHK-WD64>].

186. See *supra* Part I.A.

187. See generally Jane Mansbridge, *The Descriptive Political Representation of Gender: An Anti-Essentialist Argument*, in HAS LIBERALISM FAILED WOMEN? ASSURING EQUAL REPRESENTATION IN EUROPE AND THE UNITED STATES 19 (Sytte Klausen & Charles S. Maier eds., 2001) (describing the prioritization of other causes over gender parity).

188. Darren Rosenblum, *Internalizing Gender: Why International Law Theory Should Adopt Comparative Methods*, 45 COLUM. J. OF TRANSNAT'L L. 759 (2007) [hereinafter *Internalizing Gender*].

189. Within the European context, see generally Mary Anne Case, *Perfectionism and Fundamentalism in the Application of German Abortion Laws*, in CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW (2009) (emphasizing how gender has a different meaning in Germany, in part drawing on the historical focus on motherhood in the role of women).

190. Those same variations exist across many national lines. One element that creates these distinctions is family structures. Access to family planning and abortion affect how people of different sexes experience their gender, daycare, public education, and healthcare. In social democracies, families often have more security on these elements, freeing women to work more. For example, French women benefit from extensive social services as compared to United States women.

191. For example, a multinational firm adding a woman to a Japanese subsidiary's board may yield challenges given the low number of women in such positions. See Jiji, *Women Account for 5.1% of Executives at Large Japanese Firms, Survey Shows*, JAPAN TIMES (July 27, 2017), <https://www.japantimes.co.jp/news/2017/07/27/business/women-account-5-1->

Contrasting the quota laws of Norway and France provides an example of how political, legal, and cultural realities affect the implementation of a diversity remedy. In 2003, Norway adopted a quota requiring each sex to comprise at least forty percent of a corporate board, and achieved near-universal compliance in 2008.¹⁹² In 2010, France adopted a quota similar to Norway's, requiring boards to adhere to the same floor of forty percent by 2017. Since France's adoption, several other European countries have followed suit, notably Germany.¹⁹³ Likewise, the European Union has been debating whether to adopt a quota that encourages or imposes a requirement on firms within its borders.¹⁹⁴

The French legislation drew inspiration from Norway's efforts. The core component of Norway's quota sets a clear floor and ceiling for either sex, extending Norway's long history of gender balance advancement.¹⁹⁵ Norway instituted the quota as a corporate governance requirement, with a threat of dissolution for

executives-large-japanese-firms-survey-shows/#.WtZlg9PwbHo [https://perma.cc/6YYN-UMLN].

192. DHIR, *supra* note 32, at 104-05; see also Nicola Clark, *Getting Women Into Boardrooms, by Law*, N.Y. TIMES, Jan. 27, 2010, <http://www.nytimes.com/2010/01/28/world/europe/28iht-quota.html> [https://perma.cc/R66R-S3K8] (explaining that Norway adopted a quota in 2003).

193. Smale & Miller, *supra* note 185.

194. See EUROPEAN COMM'N, POSITIVE ACTION MEASURES TO ENSURE FULL EQUALITY IN PRACTICE BETWEEN MEN AND WOMEN, INCLUDING ON COMPANY BOARDS (2012) (detailing gender equality goals and proposing legal measures to achieve those goals in the EU); James Kanter, *E.U. Considers Quotas for Women in Boardrooms*, N.Y. TIMES, Mar. 4, 2012, <http://www.nytimes.com/2012/03/05/business/global/eu-considers-quotas-for-women-in-boardrooms.html> [https://perma.cc/8HLL-J5LA] (reporting on a 2012 gender quota proposal in the European Union). Given that the United Kingdom has resisted such targets, their withdrawal from the European Union may open the way for a more assertive remedy.

195. Danuta Tomczak, *Gender Equality Policies and Their Outcomes in Norway*, 4 ZARZĄDZANIE PUBLICZNE 379, 380-83 (2016). When the law passed in 2003, women's participation in government leadership and civil society approached parity, but female representation on boards was below ten percent. This reflected, as some assert, the predominantly socialist orientation of the feminist movement, which led to women's reluctance to participate in capital, perhaps viewed as the "enemy," as well as lower levels in private sector work by women as compared to state sector employment. Carrie Seim Medill, *Closing the Corporation Gender Gap*, 60 NEWS OF NORWAY 8 (2003). The 1978 Gender Equality Act, amended in 2002, emphasized equal opportunities in education, employment, and cultural and professional advancement. See Press Release, Comm. on Elimination of Discrimination Against Women, Norway Called 'Haven for Gender Equality,' as Women's Anti-Discrimination Committee Examines Reports on Compliance with Convention, U.N. Press Release WOM/1377 (Jan. 20, 2003) (describing Norway as a country standing at the forefront of combating discrimination against women).

noncompliance, leading to near-complete compliance by the 2008 deadline.¹⁹⁶ This quota reflects a compelling linkage between the public and private sectors. It signals a commitment to combat entrenched inequality by increasing both women's role in the corporate sector and men's role in the family.¹⁹⁷ Although France has led in gender equality, Norway's efforts prove more comprehensive.¹⁹⁸

France's economy substantially outranks that of Norway, a factor that affects implementation.¹⁹⁹ The French followed Norway's

196. The law covers state-owned limited liability companies, state-owned enterprises, companies incorporated by special litigation, inter-municipal companies, and privately-owned public limited liability companies, of which there are about 500 on the Norwegian stock exchange. Norway Ministry of Trade, Industry and Fisheries, *Fact Sheet: The Legislation on Representation of Both Sexes in Boards*, <https://web.archive.org/web/20150921004531/https://www.regjeringen.no/en/dep/nfd/contact/press-centre/fact-sheets/fact-sheet-the-legislation-on-representation/id641431/> [<https://perma.cc/3XAZ-DR37>] (last visited Feb. 2, 2018); see *Loving Gender Balance*, *supra* note 39, at 2879.

197. Scandinavian nations consistently earn top rankings in terms of economic competition and technological prowess, but they simultaneously maintain a particularly socialist form of democracy with health, education, and unemployment benefits, as well as retirement and parental leave. *Loving Gender Balance*, *supra* note 39, at 2879; see also DHIR, *supra* note 32. Norway's major political parties have forty percent minimum quotas for both sexes on electoral lists, some dating back to 1975. Norway, QUOTA PROJECT: GLOBAL DATABASE OF QUOTAS FOR WOMEN, <http://www.quotaproject.org/country/norway#party> [<https://perma.cc/VWL5-QY77>] (last visited Feb. 18, 2016); Press Release, *supra* note 195.

198. France has a very mixed record on sex equality, with extensive formal equality but broader exclusion of women from leadership and relatively feminized home work. Caroline Lambert, *French Women in Politics: The Long Road to Parity*, BROOKINGS INST. (May 1, 2001), <https://www.brookings.edu/articles/french-women-in-politics-the-long-road-to-parity/> [<https://perma.cc/WD85-LWUW>]; see also Ariane Pailhé & Anne Solaz, *Employment and Childbearing: Women Bear the Burden of the Work-family Balance*, 426 POPULATION & SOC'YS 1 (2006) (reporting that the number of non-working women in France tends to increase with the number of births because their working careers are more affected by childbirth than those of men). Women's participation in the labor market is also lower than in Norway, as are other indices of sex equality. The Current Situation of Gender Equality in France: Country Profile 2013, European Commission Directorate-General for Justice and Consumers, (2013). In order to pass this quota, France required a constitutional amendment as the quota violated its constitutional norms against treating citizens differently. Loi 2008-724 du 23 juillet 2008 de modernization des institutions de la Ve République [Law 2008-724 of July 23, 2008 on the Modernization of the Institutions of the Fifth Republic], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 24, 2008, Article 1, art 1; Martin A. Rogoff, *Fifty Years of Constitutional Evolution in France: The 2008 Amendments and Beyond*, 6 JUS POLITICUM 22-24, 59 (2011).

199. Norway is a very wealthy but small country – its economy does not have the wide corporate diversity of larger economies. France is the world's fifth largest economy and its corporate sector is quite broad and increasingly globalized. Recent market capitalizations reflect this difference: Norway's publicly traded shares float for \$193B, INDEXMUNDI, https://www.indexmundi.com/norway/market_value_of_publicly_traded_shares.html

forty percent, and, like Norway, drew inspiration from notions of critical mass;²⁰⁰ however, they did not threaten firms with dissolution – they instead decided that board decisions made without a compliant board would have no legal force.²⁰¹

One minor rule in corporate governance resulted in a large impact on the implementation of the French quota. French law allows board members to serve on a maximum of four boards, whereas Norway does not limit board participation. Norwegian companies repeatedly selected the same small group of women, pejoratively referred to as “golden skirts.” Reports suggest that this effect should dissipate as more women become available for board work.²⁰² Women coming from the same pool of people have less diversity of experience to contribute. French firms, in contrast, searched further, both because of the sheer number of women needed and because of the limit on board participation. They could not limit themselves to a small set of elite women. Many firms selected foreign women, “killing two birds with one stone,” as interviewees said.²⁰³ This confirms the conclusion that the French quota fostered newness on boards – French firms went out of network to fill their positions, whereas Norwegian firms did not.²⁰⁴ If this analysis of forcing turnover proves correct, one may argue that France’s quota led to a better result thanks to the four-board limit. This distinction surfaces despite the fact that both France and Norway have socially democratic regimes, which reminds us of the

[<https://perma.cc/EBZ5-DUQN>], while France’s are valued at \$2T. INDEXMUNDI, https://www.indexmundi.com/france/market_value_of_publicly_traded_shares.html [<https://perma.cc/YKE8-J354>] (last visited Feb. 20, 2018).

200. This figure follows Rosabeth Moss Kanter’s notion of critical mass as the arbiter for when the voice of a member of a minority group would matter in a body dominated by a majority group. Rosabeth Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 AM. J. SOC. 965, 966, 988 (1977).

201. French law followed a previously established quota for political representation, *Parité*, adopted in 2000, which requires half of all candidates for public office be women. Loi 99-569, *supra* note 182.

202. In Norway then, women were overtaxed and perhaps less prepared. This may explain the part of Amy Dittmar’s study of the Norwegian quota which concluded that firm values dipped after the quota’s implementation because of the inclusion of less experienced board members. 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 (2012).

203. See Interview with 19F.

204. See Interview with 1M, *supra* note 71.

necessity for rigorous comparative method to prevent the facile import/export of diversity remedies.²⁰⁵

Thanks to the aggressive European sex quotas, women's representation on boards grew immensely. Quotas created a new normal in which boards now typically include some women. Even in the United States, where regulatory government mandates are unlikely, firms increasingly face public pressure to include women, as evidenced in the Twitter controversy.²⁰⁶

Considering the three factors – the woman, the firm, and the state, we may speculate where the greatest instrumental value will surface. In countries where national boards have strong governance structures with a critical mass of women firms may see the largest benefit. It seems no such place exists; it would need to combine the governance typical in the United States context with the regulatory initiatives more typical in the European context. The next decade will provide substantial opportunities to research which governance model advances diversity most – those that target diversity advances or those that do not – and whether instrumental benefits result for these firms.

V. HYPOTHETICALS

This Part fits each factor with the others in regard to instrumental benefits. These examples explore how firms may maximize diversity's utility. While stakeholders who benefit from diversity include the state and society, this assessment focuses on concrete firm benefits such as profits or improved governance. Firms account for opportunity and risk in the near, medium, and long

205. *Internalizing Gender*, *supra* note 188.

206. Looking at Norway and France from the perspective of the United States reminds us of some crucial contrasts. Quotas may be far less likely to arise in the United States partially because of the attitudes toward law reflected toward compliance. It also may relate to the lack of a corporatist history in the United States or the presence of a dispersed ownership base. The focus on sex to the exclusion of other identity concerns raises serious doubts across the political spectrum in the United States. Finally, the United States' federal structure means that such a provision has to arise in a particular corporate jurisdiction. It would be unlikely that Delaware would adopt such a provision for fear of trampling on the discretion of the firms incorporated there. The federal government could choose to intervene, but it seems unlikely given the nature of the SEC's involvement in diversity provision. Its deliberate vagueness conveys the political tension that would surface should the SEC or some other body propose an actual quota. Thomas W. Joo, *A Trip Through the Maze of "Corporate Democracy": Shareholder Voice and Management Composition*, 77 ST. JOHN'S L. REV. 735, 736-37 (2003); Sheryl L. Wade, *"We Are An Equal Opportunity Employer": Diversity Doublespeak*, 61 WASH. & LEE L. REV. 1541 (2004). See *supra* Part III.B.

term, and may wish to do so with regard to diversity should there be a “diversity dividend.” This Part provides practical hypothetical examples where different women might affect decision-making, leading to a potential instrumental benefit.

A. Factor One: Identity Variation

Imagine one core variation between two hypothetical individuals: Anne and Barbara. Firm A in Country A brings Anne to serve on their board. Anne’s professional experience mirrors that of Firm A’s board members – she went to elite schools, served as an executive, and never took parental leave. At the same time, Barbara joins the board of Firm A in Country A. Barbara’s background followed a more traditionally female trajectory – she led the human resources department and took parental leave. Most firms would presume Anne brings the most value. But if we consider how diverse experience trumps identity in creating value, Barbara will prove the better choice. While both women may diversify the board, Barbara’s perspective, if the rest of the board listens, will allow the board to use more analytical tools and consider more information than it previously did. Anne will add another mind similar to the minds already in the room.

Expertise and experience matter most. Work experience may come from within the industry of a specific firm or in diverse industries. One may hold the same function in various industries, such as finance, law, or human resources. One may also have prior board work that enriches one’s expertise. Having an industry-specific background may lend credibility to a board member’s opinions. Other expertise distinctions also matter. For example, people with a background in a firm’s profit center, as opposed to an area such as human resources, express opinions that often carry more weight. We can imagine that someone with a finance background would command respect on financial matters in any firm she serves; however, her authority might shift in industrial firms or in firms where the financial issues raise distinct questions. Through new experiences one develops expertise. A woman with a particular expertise, say in automobiles, will demonstrate more authority in an industrial firm than in a technology firm, at least in the beginning of her board service. Thus, someone with varied industry experience contributes differently to each board.

Other relevant factors include language, which may matter more in some firms than others,²⁰⁷ and personality, which most resembles and legitimizes the notion of fit. On boards where members relate in a freewheeling fashion, an assertive personality influences people. On other more civil or formal boards, a very assertive woman may come across as a “bitch,” to use the term of one of the male board members.²⁰⁸ In such a context, a less direct argument proves more persuasive; a pensive or introverted woman may hold more sway than a more direct one.

Women, constitute a new minority within the firm’s board. Differences surface among individuals in a male majority and a female minority. Within the French context, even within a business context, male/female relations often involve more explicit gendered performance including traditional forms of chivalry and flirtation, both of which raise eyebrows as unprofessional in many United States firm contexts.²⁰⁹

207. In the U.S. we rarely consider this factor, but in other markets language is a considerable issue. Firms historically operate in their local languages but may move beyond this choice to incorporate other market actors – typically incorporating English. In my interviews in France, there was a wide range of language practices on boards. Some interviewees reported French was the exclusive language and English speakers required translation. See Interview with 11M, *supra* note 143; Interview with 19F, *supra* note 163. Others reported that boards switched meetings to English and then switched back to French after a while. Interview with 28M, in Paris, France. Depending on one’s comfort level in the language used on the board, one might prove more or less persuasive given the nuances of expression.

208. Interview with 28M, *supra* note 207.

209. Interview with 15F, in Paris, France. Although not dispositive, to draw on one example from our study, more than one interviewee reported chivalry affected discussion. “If there are two people who raise their hands and it happens that one is a man and the other is a woman, the man will systematically propose that the woman should speak first . . . it’s the rule of normal French chivalry, I don’t know if it would apply elsewhere.” *Id.* This reflection points to the fact that different kinds of femininity may wield influence while others may diminish it. Certainly, the interviewee who described his fellow board member as a “bitch” was likely reacting not only to her assertiveness, but also to the way in which her demeanor eschewed a traditionally feminine approach to wielding influence. On every board, certain kinds of people hold sway while others may not. Even in a U.S. context where these kinds of gender and sexual tensions are more latent, subconscious judgments shift in the wake of a woman’s appropriate use of her femininity. Related to subconscious frameworks for influence, variation among other difference lines affects one’s ability to persuade – class, sex and gender expression, race, age, location, and network are crucial factors for fitting in within a board context and holding influence. Surprisingly, class may vary substantially on boards, albeit within a comfortable framework – old money versus new money. Although most board members in the U.S. and Europe are white, it is important to note the role this commonality must play in terms of cohesion and diversity. Age also varies, as women often constitute

B. Factor Two: Firm Variation

To examine firm differences further, consider two examples: Caroline and Delphine. Caroline built her own startup with two college classmates. Her background reflects elite credentials, but her international education and entrepreneurial experience differentiates her from many board members. Delphine's profile matches Caroline's, but she built a risk-averse reputation through work over the past five years on the boards of two United States firms, in both of which she served on the audit committee.

Firms B, C, and D have considered inviting Caroline to join their boards. Firm B holds a well-established position in media markets, and benefits a dispersed ownership with a strong board. Firm C's position as a relatively new technology company means its concentrated ownership dominates a relatively passive board. Firm D is an established and successful automobile manufacturer with a large market share and a formalized business model. It may be hard to say which firm suits Caroline's skill set best. In one sense, her entrepreneurial experience adds something new to Firm B, and her voice may have weight in firm decision-making. On the other hand, Caroline, like Firm C, understands new businesses' needs. Other board members may also have similar experiences, and with a passive board, Caroline may have little impact there. In short, her experience may matter most where it brings a new perspective in a place where that perspective will matter.

If Delphine joins on the board of Firm C, the technology firm, her risk aversion might not have much effect. At Firm B, the public media company, however, Delphine may prove more influential, given the firm's more established industry. If conditions shift, such as financial challenges from threats in established markets, Delphine's influence may spike in either Firm B or D. In such circumstances, the more closely her specific industry knowledge relates to that of the firm on whose board she sits, the greater her influence. Such a profile may aid her effort to assert a more risk-averse profile on the firm.

Another corporate trait, firm ownership, affects diversity's value. Firms with a dominant owner often pursue a strategy consistent with the owner's interests, so Delphine's risk aversion might only play

younger board members. School networks often matter most – once inside a network, differences within the network may appear less prominent.

a role when consistent with the owner's interests. The relationship between a firm and the state also matters – whether the state relates to the firm as a client, an active regulator, or a distant regulator. Each of these profiles matters in terms of the board's role within the firm, and consequently the influence of particular diverse board members.

Caroline and Delphine may contribute differently to firms depending on their age. Since new firms typically resist a risk-averse strategy, Caroline might swim with the tide and Delphine against it. However, all firms change direction, and a new firm with a very strong market position might seek a risk-averse strategy to maintain its dominant position. A board for a slow-growth company typically faces a reduced number of strategic decisions, unless the firm faces extensive regulation or scrutiny.

Imagine if Firm D were gaming emissions tests to report higher fuel efficiency, as Volkswagen did in 2015.²¹⁰ Although it cannot serve as causal proof, the supervisory board lacked diversity and the management board was staffed entirely by men.²¹¹ Ferdinand Piëch, grandson of Ferdinand Porsche, ran the supervisory board. In 2012, the board named his fourth wife, Ursula, former governess to Piëch's twelve children, to the board.²¹² In Ursula's place, a woman such as Delphine would challenge the executive, or might insist on a thorough

210. The 2015 Volkswagen scandal revealed up to 11 million cars worldwide loaded with illegal software that falsified emissions data. Hiroko Tabuchi & Jack Ewing, *Volkswagen to Pay \$14.7 Billion to Settle Diesel Claims in U.S.*, N.Y. TIMES (June 27, 2016). With the two-tier board structure, typical of the German system, it is unusual that Volkswagen's malfeasance went without notice; however, the supervisory board was composed of outsiders, many of whom were part of the controlling families and other related individuals. Charles M. Elson, Professor of Finance and Director of the John L. Weinberg Center for Corporate Governance at the University of Delaware, noted that Volkswagen's governance "was a breeding ground for scandal," and "[i]t was an accident waiting to happen." James B. Stewart, *Problems at Volkswagen Start in the Boardroom*, N.Y. TIMES (Sept. 24, 2015). The firm's peculiar hybrid of "family control, government ownership and labor influence" played a role in the scandal. *Id.* In 2012, Ferdinand Piëch, head of the company's supervisory board, managed to get his admittedly unqualified wife, a former kindergarten teacher, a position on the board. *Id.* The position, filled based on shareholder voting, was secured despite protests that the Piëch and Porsche families own over half of the company's voting shares. *Id.* The supervisory boardroom is described, by Professor Elson, as "an echo chamber": a place where "[o]utside views rarely penetrate." *Id.* Some blame over-influence of labor over the firm's decisions, which favored employment over long-term prospects. Richard Milne, *Germany's two-tier governance system comes under fire*, FIN. TIMES (May 9, 2007).

211. Chris Bryant & Richard Milne, *Boardroom politics at heart of VW scandal*, FIN. TIMES (Oct. 4, 2015), <https://www.ft.com/content/e816cf86-6815-11e5-a57f-21b88f7d973f> [<https://perma.cc/NZW6-ZN9Y>].

212. Stewart, *supra* note 210.

process which could have revealed the deception before it damaged the firm. Delphine would have used her extensive business background to protect the firm more effectively from executive overreaching than the fourth Mrs. Piëch, a contrast that underscores the value of experience over identity. This situation suggests a potential cost of a lack of critical mass.

C. Factor Three: National Variation

For this factor, imagine hypothetical board member Elodie was educated in France and the United States and served as an executive in both countries in established luxury sector companies. Where will Elodie's contributions matter most? Being one woman on an otherwise all-male board may hamper full participation. Studies on critical mass reflect that below a third, minorities may feel constrained by the reality or perception that the majority scrutinizes the minority board member. France's quota forces firms to include a critical mass of women, while many United States boards may have only one. A critical mass will improve Elodie's ability to share her views – particularly those involving experiential diversity – leading the firm to benefit from the inclusion of a different voice on the board. Within a firm like Wynn Resorts, for example, with one woman board member, one can imagine she might have been self-conscious and that could have hampered her assertiveness about her experiential difference.

Given how common it is for firms to have only one woman on their board, the sidelining of such pioneers comes as no surprise. For example, Liz Dolan served on the board of Quiksilver, the sports clothing manufacturer, and resigned in 2015 after claiming bias from the male board members. She stated: “. . . I learned . . . that even when a woman earns a seat at the table, the men can put you in a soundproof booth.”²¹³ Therefore, even if a woman brings a unique perspective, she might lack influence. On the other hand, some “pioneer” interviewees

213. Liz Dolan, *Gender Bias Forced Me to Quit Quiksilver's Board*, FORTUNE (June 15, 2015) (explaining how she felt that the other directors excluded her from crucial discussions and votes on whether to oust the now-former CEO of Quiksilver based on the biased assumption that, as a woman, she would vote to keep the CEO in power, as she had a previous professional relationship with him); Joann S. Lublin, *Quiksilver Director Exits Amid Spat*, WALL ST. J. (June 4, 2015).

reported that, as outsiders, they received substantial respect from the boards on which they served.

Other jurisdiction-specific factors favor the inclusion or exclusion of stakeholder values, which some studies ascribe to women.²¹⁴ Imagine a U.S. woman, Fanny, who does favor stakeholder interests, and place her within similar firms, but alter the national contexts. Say she serves on the boards of two competitor firms similarly situated in their markets, but operating out of different national contexts: German and British. As Mark Roe noted, firms in social democracies tend to adhere to the social contract for a variety of reasons, while firms in liberal democracies pursue choices that promote shareholder value.²¹⁵ Germany's social democratic context – which requires union representation on boards – may provide Fanny with a better environment to voice her concerns, while a British firm may continue to direct the firm toward shareholder value maximization. National corporate cultures do influence firm choices, but they do not predetermine every outcome. Firms in more liberal economies may choose more stakeholder-oriented strategies to claim worker or customer loyalty. Despite her United States background and stakeholder orientation, Franny's ability to engage with issues involving labor in a firm in a social democracy might be more limited than someone whose principal career arose within a social democracy context. This difference may prove fruitful in the context of a firm trying to expand into a different realm.

Last, with regard to jurisdiction, this discussion focused on national differences, but we also should note that in federal contexts, wide variations may arise within one country. The federal overlay of legislation makes differences between one state and another within the United States relatively minor. Therefore, distinctions between states will only affect certain firms. Some states allow public benefit

214. "Existing studies provide inconclusive evidence of the benefit, from a shareholder value perspective, of increasing the number of women and ethnic and racial minorities on public company boards." Solan, *supra* note 37, at 919 (citing Sabina Nielsen et al., Board Diversity and Firm Performance: An Empirical Investigation of the Mediating Effects of Board Processes and Task Performance (Acad. of Mgmt. Proceedings, No. 14,474, 2008), available at <http://www.ebscohost.com/academic/business-source-premier> [<https://perma.cc/BA6G-276J>] (accessible through fee-based membership); see also Sanjai Bhagat & Bernard Black, The Non-Correlation Between Board Independence and Long-Term Firm Performance, 27 J. CORP. L. 231, 231-34 (2002) (discussing the lack of evidence for the benefit of independent board members)).

215. See Roe, *supra* note 176, at 27-38.

corporations or give more rights to close corporation shareholders. These distinctions affect how board members operate within a particular context.

These six hypothetical women present a variety of traits of individuals, firms, and jurisdictions to articulate the kinds of more precise questions one may pose about diversity's instrumentality.

CONCLUSION

Even deft market actors may find themselves maladroit in responding to diversity and inclusion demands. The utopic overreach of instrumental arguments does not help guide firms who require concrete data on the actual value of women on boards. Therefore, substantial context is necessary to assess how firms may realize diversity benefits. Three contextual factors will determine the existence and magnitude of the instrumental benefit. Factor One considers whether and how traits ascribed to women actually connect to women, who may not conform to stereotype. Factor Two shows how firms and board governance vary enormously. Factor Three places these elements of the individuals and the firms in the national and global contexts. Methodical study that accounts for these contexts would likely show that firms with strong board governance in countries whose regulations foster inclusion would gain the most benefits from diversity.

Further theoretical work links social science studies on sex difference to the specific context of corporate leadership where diversity must be analyzed beyond stereotypes. What kinds of experiential diversity contribute the most to improved decision-making? For example, does women's more regular caretaking actually lead them to risk aversion and/or stakeholderism? Does the social science on caretakers and risk aversion extend to the boardroom?²¹⁶ Does women's greater caretaking experience link to board decisions in favor of stakeholder values, like firing fewer staff?²¹⁷ Does the "methodical" nature of women reflect something about women or is it related to their newness on the board as they try hard to succeed. Does their methodical approach produce a lasting increase in care on the board?

216. Seeung Jung et al., *supra* note 68; Byrnes et al., *supra* note 87.

217. *A Female Style in Corporate Leadership*, *supra* note 82.

As more women join boards, quantitative and qualitative research can evaluate whether women's work on boards actually reflects these traits. Research can demonstrate if and how firms benefit from inclusion. Between the close contextualization urged in this Article and the bias toward positive results, one may despair about the actual potential for reliable research in this area. One response is to emphasize normative arguments. Another is to insist that we not displace normative anxiety into a lack of methodological rigor.

As European countries lead the world toward legislated inclusion of women on boards, contextually accurate work is more urgent than ever. In the wake of recent corporate sexual harassment scandals, firms can no longer deny the immediacy of diversity and inclusion imperatives. Across the public/private divide, leaders, legislators, and regulators, as well as industries and firms are deciding whether and how to act. Their crafting of remedies demands rigorous studies on the actual benefits of diversity.