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# California Dreaming?

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## CALIFORNIA DREAMING?

DARREN ROSENBLUM\*

### ABSTRACT

*Over the past few years, California became the setting for shocking tales of sex inequality and abuse in Hollywood and Silicon Valley. Decades after women achieved educational parity,<sup>1</sup> men still run the corporate world. In response to these stories exposed by the #MeToo movement, California joined the transnational corporate board quota movement by converting its voluntary quota into a hard one. Will California's first mover status overcome constitutional objections and inspire other jurisdictions to act. Or is just utopian dreaming, California-style? This Essay argues that despite its many flaws, the quota may succeed in curbing male over-representation on corporate boards. After contextualizes the quota within the transnational corporate board quota movement, it rejects the U.S. reaction that emphasizes the private sector's dominion over equality remedies. Despite the U.S. resistance to quotas, comparative experience reveals both that the private sector manages how quota implementation occurs. The Essay concludes that some public intervention—in concert with private efforts—remains necessary.*

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<sup>1</sup> See Alana Samuels, *Poor Girls Are Leaving Their Brothers*, ATLANTIC (Nov. 27, 2017), <https://www.theatlantic.com/business/archive/2017/11/gender-education-gap/546677/>.

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## INTRODUCTION

California, when confronted with the shocking sex inequality in Hollywood and Silicon Valley exposed by the #MeToo movement, followed the transnational corporate board quota movement by converting its voluntary quota into a hard quota. This Essay recounts the reactions to the quota and evaluates them against some comparative experiences.

In 2003, Norway passed the first corporate board quota.<sup>2</sup> France followed suit in 2011, paving the way for other leading economies.<sup>3</sup> Now six of the world's top ten economies have a quota.<sup>4</sup>

Here in the United States, California became a battleground of sex equality efforts. In 2013, California adopted a voluntary corporate board quota.<sup>5</sup> The five years that followed saw growing controversies over women's place in the state's private sector leadership. Twitter's 2013 initial public offering ("IPO") was marred by the initially proposed all-male board.<sup>6</sup> Google, Uber, and other firms faced sex inequality and sexual harassment controversies that exposed significant governance oversights related to sex.<sup>7</sup> In 2018, #MeToo erupted, leaving Hollywood and the corporate sector looking woefully unprepared.<sup>8</sup>

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<sup>2</sup> See Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6.1 BERKELEY BUS. L.J. 55, 62-63 (2009).

<sup>3</sup> See Loi 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle [Law 2011-103 of January 27, 2011 on the Balanced Representation of Women and Men on Board of Directors and Supervisory Boards and Equality Professional], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 28, 2011, p. 1680; Darren Rosenblum & Daria Roithmayr, *More Than a Woman: Insights Into Corporate Governance After the French Sex Quota*, 48 IND. L. REV. 889, 889 (2015).

<sup>4</sup> Simona Comi et al., *Quotas Have Led to More Women on Corporate Boards in Europe*, LONDON SCH. ECON. & POL. SCI.: BUS. REV. (Sept. 30, 2016), <https://blogs.lse.ac.uk/business-review/2016/09/30/quotas-have-led-to-more-women-on-corporate-boards-in-europe/> [<https://perma.cc/W8DJ-WCSM>] (explaining gender quota systems implemented in Germany and Italy); Institutional S'holder Servs., Inc., *Gender Parity on Boards Around the World*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 5, 2017), <https://corpgov.law.harvard.edu/2017/01/05/gender-parity-on-boards-around-the-world/> [<https://perma.cc/LJT5-ULHP>] (detailing gender quota systems in Canada, France, India, and the United Kingdom).

<sup>5</sup> See S. Concurrent Res. 62, ch. 125, 2013 Leg., 2013-2014 Sess. (Cal. 2013).

<sup>6</sup> Vauhini Vara, *Why One Female Board Member Is Not Enough*, NEW YORKER (Dec. 5, 2013), <https://www.newyorker.com/business/currency/why-one-female-board-member-isnt-enough>.

<sup>7</sup> Jena McGregor, *Tech Firms Reckon with the Long Tail of #MeToo*, WASH. POST, Oct. 28, 2018, at G01.

<sup>8</sup> See Sandra Gonzalez, Lisa Respers France & Chloe Melas, *The Year Since the Weinstein Scandal First Rocked Hollywood*, CNN (Oct. 4, 2018, 5:47 PM), <https://www.cnn.com/2018/04/05/entertainment/weinstein-timeline/index.html> [<https://perma.cc/5EJA-Z7FK>]; see also Cara Buckley, *300 Strong: Hollywood Women United to Fight Harassment*, N.Y. TIMES, Jan. 2, 2018, at C1; Sheelah Kolhatkar, *The Tech Industry's Gender-Discrimination Problem*, NEW YORKER, Nov. 20, 2017, at 52.

Although CalPERS—the state’s gargantuan pension fund—leads on inclusion, it is no surprise then that legislators acted, since California often is the first mover.<sup>9</sup> Thus, fifteen years after Norway, quotas finally made it to the United States when California adopted a hard quota.<sup>10</sup>

It was inevitable that the controversy around affirmative action would dominate the debate over the quota. The low regard for California’s overall corporate law did not help inspire respect for the quota, which has attracted broad and deep criticism.<sup>11</sup>

The quota’s urgency persists despite widespread opprobrium, as a subsequent 2018 event demonstrated. The fracas over Brett Kavanaugh’s nomination to the U.S. Supreme Court saw eleven men of the Senate Judiciary Committee confront the challenge of having to interview a woman.<sup>12</sup> The fact that they hired another woman to do the job for them proves that all-male leadership no longer *seems* legitimate, even for the most conservative among us.

But this is no mere question of appearances: men hold approximately 80% of corporate board positions and 95% of CEO positions.<sup>13</sup> More men named James

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<sup>9</sup> See Michael P. Smith, *Shareholder Activism by Institutional Investors: Evidence from CalPERS*, 51 J. FIN. 227, 230-31 (1996) *Diversity & Inclusion*, CALPERS, <https://www.calpers.ca.gov/page/investments/investment-manager-engagement-programs/diversity-inclusion> [<https://perma.cc/KR6X-W5B9>] (last updated Feb. 26, 2019); see also David A. Katz & Laura A. McIntosh, *Corporate Governance Update: Shareholder Activism Is the Next Phase of #MeToo*, Wachtell, Lipton, Rosen & Katz, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Sept. 28, 2018), <https://corpgov.law.harvard.edu/2018/09/28/corporate-governance-update-shareholder-activism-is-the-next-phase-of-metoo/> [<https://perma.cc/639P-ZE9B>].

<sup>10</sup> See CAL. CORP. CODE § 301.3 (West 2019); Rosenblum, *supra* note 2, at 62-63.

<sup>11</sup> See, e.g., Joseph A. Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California’s SB 826*, at 1 (Rock Ctr. for Corp. Governance, Stanford Law Sch., Working Paper No. 232, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3248791](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3248791) [<https://perma.cc/WHM6-YLBP>] (arguing that California’s gender quota law is unconstitutional, unlikely to achieve its objective of more diverse corporate boards, and likely to hurt affirmative action jurisprudence).

<sup>12</sup> See James Poniewozik, *Two Voices with a Notable Contrast in Volume*, N.Y. TIMES, Sept. 28, 2018, at A16.

<sup>13</sup> HEIDRICK & STRUGGLES, *ROUTE TO THE TOP 2018*, at 2 (2018), [https://www.heidrick.com/Knowledge-Center/Publication/Route\\_to\\_the\\_Top\\_2018](https://www.heidrick.com/Knowledge-Center/Publication/Route_to_the_Top_2018) (explaining that, based on an examination of twelve to thirteen countries in Western Europe and the United States, 95% of CEOs are male); Stacy Jones, *White Men Account for 72% of Corporate Leadership at 16 of the Fortune 500 Companies*, FORTUNE (June 9, 2017), <http://fortune.com/2017/06/09/white-men-senior-executives-fortune-500-companies-diversity-data/> [<https://perma.cc/7U76-DTRR>] (stating that, based on an examination of sixteen of the top Fortune 500 companies, 79.5% of senior management are male).

hold CEO positions than all women combined.<sup>14</sup> Decades after women achieved educational parity,<sup>15</sup> men still run the corporate world. Enter quotas.

What remains to be seen is whether, like Norway in Europe, California's first mover status will overcome constitutional objections and inspire other jurisdictions to act. Or is just utopian dreaming, California-style? This Essay argues that despite its many flaws, the quota may succeed in curbing male overrepresentation on corporate boards. Part I first contextualizes the quota within the transnational corporate board quota movement. Part II considers the U.S. reaction—a spate of critiques that question the use of public remedies. Given experience abroad, Part III argues that there is a symbiotic relationship between the public and private sectors. The Essay concludes that some public intervention—in concert with private efforts—remains necessary.

#### I. CALIFORNIA'S STATUTE SET AGAINST THE INTERNATIONAL QUOTA MOVEMENT

On September 30, 2018, California Governor Jerry Brown signed into law the quota, which requires any publicly traded firm with a principal office in California to include women on their boards.<sup>16</sup> The quota, built on a 2013 voluntary quota, establishes a weak requirement for 2019 of one woman on each board, and a much stronger, almost parity, requirement for the end of 2021.<sup>17</sup>

##### A. *The Quota's Fine Print*

The 2019 one-woman requirement<sup>18</sup> mirrors what became a widespread norm in the middle of this decade after Twitter released its IPO plans. They included an all-male board, which aroused widespread criticism.<sup>19</sup> Concerned that this response would mar the sale price of the stock, management quickly revamped

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<sup>14</sup> Claire Cain Miller, Kevin Quealy & Margot Sanger-Katz, *Women are Often Outnumbered by Men Named John in Top Corporate Jobs*, N.Y. TIMES, Dec. 30, 2018, at F10.

<sup>15</sup> See Alana Samuels, *Poor Girls Are Leaving Their Brothers*, ATLANTIC (Nov. 27, 2017), <https://www.theatlantic.com/business/archive/2017/11/gender-education-gap/546677/>.

<sup>16</sup> See Patrick McGreevy, *Brown Signs Bill to Battle Corporate Gender Gap*, L.A. TIMES, Oct. 1, 2018, at A2.

<sup>17</sup> CAL. CORP. CODE § 301.3 (West 2019) (“No later than the close of the 2021 calendar year, a publicly held . . . corporation shall comply with the following: (1) If its number of directors is six or more, the corporation shall have a minimum of three female directors. (2) If its number of directors is five, the corporation shall have a minimum of two female directors. (3) If its number of directors is four or fewer, the corporation shall have a minimum of one female director.”).

<sup>18</sup> *Id.* § 301.3(a).

<sup>19</sup> Bronwen Clune, *There's Absolutely No Excuse for Twitter Not to Have a Woman on Its Board*, GUARDIAN (Oct. 11, 2013, 12:42 AM), <https://www.theguardian.com/commentisfree/2013/oct/11/twitter-ipo-women-board>; Nilofer Merchant, *Viewpoint: Twitter's All-Male Board Spells Failure*, TIME (Oct. 07, 2013), <http://ideas.time.com/2013/10/07/viewpoint-twiters-all-male-board-spells-failure/>.

the board to include a woman.<sup>20</sup> After that incident, many boards began to add at least one female member.<sup>21</sup>

California's short-term requirement of one woman per board also echoes India's 2013 quota.<sup>22</sup> Over 75% of California firms already comply with this rule, so it was a mandate that imposed little on relatively few firms. One study showed that 82% of firms with over \$5 million in revenue meet this basic criterion.<sup>23</sup> It is a credit to CalPERS and other activist investors that firms have already diversified to this basic level.<sup>24</sup>

The 2021 requirement places at least two women on boards of five and three women on boards of six or more.<sup>25</sup> This near parity requirement diminishes as boards grow larger. A twelve member board's mandate is only one quarter women.<sup>26</sup> It is a novel structure but one that may arouse discontent among firms with smaller boards whose compliance standards will prove relatively more onerous as compared to firms with larger boards.

This next stage of enforcement will prove challenging—currently 79% of firms would be noncompliant.<sup>27</sup> Compliance will come more easily to larger firms with the means to perform broader searches.<sup>28</sup> Will some try to avoid enforcement? As Part III explores, several techniques surface to accomplish this—firms may decide just to pay the fines, though substantial for smaller firms. Firms may choose to alter their domicile, although that seems like an extreme response.<sup>29</sup> Firms may change the size of their boards. They may even, as a last option, include “token” women to comply.

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<sup>20</sup> Jessica Guynn, *Twitter Adds First Female Board Member, ex-Pearson CEO—#abouttime*, L.A. TIMES (Dec. 5, 2013, 9:16 AM), <https://www.latimes.com/business/technology/la-fi-tn-twitter-adds-first-female-board-member-20131205-story.html>.

<sup>21</sup> See *supra* note 7 and accompanying text.

<sup>22</sup> See Afra Afsharipour, *The One Woman Director Mandate: History and Trajectory*, in CORPORATE GOVERNANCE IN INDIA: CHANGE AND CONTINUITY 85, 85-86 (Asish K. Bhattacharyya ed., 2016).

<sup>23</sup> Thomas Pereira, Equilar, Inc., *Gender Quotas in California Boardrooms*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Aug. 29, 2018), <https://corpgov.law.harvard.edu/2018/08/29/gender-quotas-in-california-boardrooms/> [<https://perma.cc/FG4R-L5LC>].

<sup>24</sup> See Howard Dicker, Lyuba Goltser & Erika Kaneko, Weil, Gotshal & Manges LLP, *Mandated Gender Diversity for California Boards*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 18, 2018), <https://corpgov.law.harvard.edu/2018/10/18/mandated-gender-diversity-for-california-boards/> [<https://perma.cc/JGV5-LN3C>] (acknowledging actions of BlackRock, Glass Lewis, Institutional Shareholder Services, and State Street).

<sup>25</sup> CAL. CORP. CODE § 301.3(b) (West 2019).

<sup>26</sup> See *id.* (requiring minimum of three women on boards for any company with six or more board members).

<sup>27</sup> Pereira, *supra* note 23.

<sup>28</sup> Interview with 17F, in Paris, France.

<sup>29</sup> Interview with 19F, in Paris, France (stating that adding women to the board is a “minor issue” and would not merit an “overly complex” response).

For noncompliance, though, California imposes fines rather than the existential penalties common in Europe.<sup>30</sup> The Secretary of State will perform a manual review to ascertain compliance.<sup>31</sup> Fines of \$100,000 will accrue for firms with one violation, and a second will garner a \$300,000 fine.<sup>32</sup> While these strict fines may inspire compliance, they could also disproportionately punish smaller firms.

B. *Comparing California's Quota to Quotas Abroad*

U.S. observers of quotas occasionally have a parochial reaction to quotas, which are now so well-established abroad. Over one hundred countries have political quotas.<sup>33</sup> Six of the top ten economies have corporate board quotas, not to mention most of Europe.<sup>34</sup> Most copy two elements of Norway's statute.<sup>35</sup> Several mirror the existential penalty framework (in Norway, dissolution), and they also set a sex balance percentage target for boards.<sup>36</sup>

Firms complied on the whole when faced with these mandates. They complied even though they possessed (albeit challenging) options to avoid the mandate. It is a seachange—now women constitute a plurality on most European countries' corporate boards, and these firms consistently lead in inclusion.

Among the range of quota remedies, at the top sit requirements such as those adopted by France, Norway, and others.<sup>37</sup> These fixed and governmentally regulated measures carry greater weight as firms labor to avoid draconian, even existential, penalties. Below are firm quotas with minor impositions, such as India's one woman rule<sup>38</sup> or jurisdictions that impose financial penalties, such as California. Below that sits a range of still softer public remedies, including

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<sup>30</sup> CAL. CORP. CODE § 301.3(e); see Pereira, *supra* note 23.

<sup>31</sup> CAL. CORP. CODE § 301.3(c); see Dicker, Goltser & Kaneko, *supra* note 24.

<sup>32</sup> CAL. CORP. CODE § 301.3(e).

<sup>33</sup> See *Gender Quotas Database*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, <https://www.idea.int/data-tools/data/gender-quotas/country-overview> [https://perma.cc/4KYE-9RYG] (last visited Apr. 19, 2019).

<sup>34</sup> See *id.*

<sup>35</sup> See, e.g., Nicola Clark, *Getting Women Into Boardrooms, by Law*, N.Y. TIMES (Jan. 27, 2010), <https://www.nytimes.com/2010/01/28/world/europe/28iht-quota.html> (explaining provisions of the Norwegian gender quota statute).

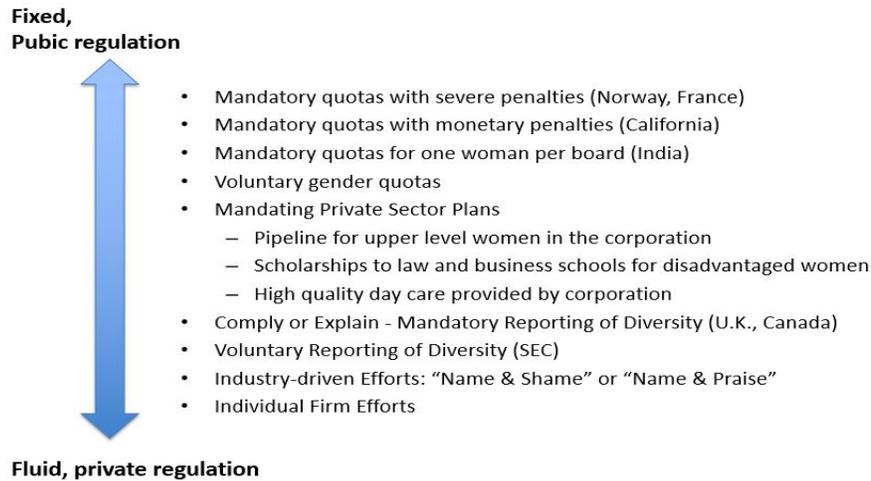
<sup>36</sup> Gwladys Fouché, *Quarter of Norway's Firms Face Shutdown as Female Directors Deadline Approaches*, GUARDIAN (Dec. 27, 2007, 6:44 PM), <https://www.theguardian.com/business/2007/dec/27/norway.female.director>.

<sup>37</sup> Andrew Osborn, *Norway Sets 40% Female Quota for Boardrooms*, GUARDIAN (Aug. 1, 2002, 3:46 AM), <https://www.theguardian.com/society/2002/aug/01/publicsectorcareers.genderissues> [https://perma.cc/9L4L-K8T6].

<sup>38</sup> Afsharipour, *supra* note 22, at 85.

the comply-or-explain model used in the United Kingdom,<sup>39</sup> Canada,<sup>40</sup> and the United States's much-criticized optional reporting regime. Private remedies fall at the bottom of the spectrum, as they seek to inspire rather than mandate progress.

**Figure 1.** Corporate Diversity Remedies.



On this spectrum, the California quota fits just below the strongest quotas for two reasons—its imposition diminishes for larger boards and the penalties are monetary. California was not the first to adopt (even if only temporarily) a one-woman rule, as India continues to impose this requirement.<sup>41</sup>

In contrast to the other quotas, four elements stand out for California's quota. First, it seems an outlier among other common law jurisdictions such as Canada and the United Kingdom, both of which have comply-or-explain models.<sup>42</sup> These requirements engage in much softer pressure on firms by setting a thirty percent target and obligating firms to explain if they fail to meet that number.<sup>43</sup>

<sup>39</sup> FIN. REPORTING COUNCIL, THE UK CORPORATE GOVERNANCE CODE 9 (2018), <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf> [<https://perma.cc/F7G5-UFQD>] (explaining United Kingdom's comply-or-explain model).

<sup>40</sup> AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY 247-48 (2016); see Alexandra Bosanac, *Gender-Equity “Comply or Explain” Rules for Boards Are Working—Sort Of*, CANADIAN BUS. (Jun. 18, 2015), <https://www.canadianbusiness.com/innovation/osc-comply-and-explain-boards-torystudy/> [<https://perma.cc/GV6U-5HZA>] (detailing Canada's comply-or-explain model and its consequences since taking effect).

<sup>41</sup> Afsharipour, *supra* note 22, at 85.

<sup>42</sup> DHIR, *supra* note 40, at 247-48.

<sup>43</sup> *Id.* at 240.

These requirements prove surprisingly effective thanks to rigorous disclosure requirements.

These foreign quotas each reflect a distinct relationship between the state and the market. Even with the most *dirigiste* of quotas—the Norwegian and French quotas—it is the firms themselves which determine how to implement the quota. The other common law countries with quotas—the United Kingdom and Canada—both follow the comply-or-explain model. This model defers much more to firms in whether and how they implement the quota norm. Their flexibility may provide more potential for public-private synergy than the hard fines imposed by the California law. Its firm mandate fits awkwardly in a common law system in which the state often encourages good governance rather than impose it.

Second, California's quota draws on critical mass research in a novel fashion. Critical mass—the percentage of a minority necessary for it to have a voice in governance<sup>44</sup>—arises from Professor Rosabeth Moss Kanter, who argued that one needs a third or three members of a minority out of a group of ten to allow the minority a voice.<sup>45</sup> Drawing on this work, Norway mandated a 40% floor for either sex, followed by France and others.<sup>46</sup> The Canadian, German, and U.K. rules focus on 30%.<sup>47</sup> Both numbers approximate the critical mass measurement. Minimal representation may prove token, leaving the minority voiceless.

The California quota effectively *decreases* as boards get beyond six members. Typically larger firms have larger boards.<sup>48</sup> In effect, California chose to hold smaller firms to higher compliance. It is an unusual policy choice for a state that

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<sup>44</sup> See Rosabeth Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 AM. J. SOC. 965, 966, 968 (1977); see also DOUGLAS M. BRANSON, NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM 110 (2007) (explaining how tokenism and skewed groups cause “women and other minorities to rise no higher than an intermediate management level”).

<sup>45</sup> Kanter, *supra* note 44, at 988.

<sup>46</sup> Osborn, *supra* note 37.

<sup>47</sup> See Alison Smale & Claire Cain Miller, *Germany Sets Gender Quota in Boardrooms*, N.Y. TIMES, Mar. 7, 2015, at A1 (detailing Germany's 30% female quota); see also The Canadian Press, *OSC Urged to Push Companies to Set Targets for Women on Boards*, CBC (Oct. 24, 2017, 3:00 PM), <https://www.cbc.ca/news/business/women-boards-osc-1.4369447> [<https://perma.cc/E77U-XH7H>] (detailing the Ontario Securities Commission's desired target for female board representation); Sarah Gordon, *UK plc Behind Target Number of Women on Boards*, FIN. TIMES (Jun. 27, 2018), <https://www.ft.com/content/ac1449b8-79f7-11e8-bc55-50daf11b720d> (detailing the U.K. Department for Business, Energy and Industrial Strategy's endorsement of a 30% target of female representation on corporate boards).

<sup>48</sup> See, e.g., Troy Segal, *Evaluating the Board of Directors*, INVESTOPEDIA, <https://www.investopedia.com/articles/analyst/03/111903.asp> [<https://perma.cc/KN3S-2T2F>] (last updated Apr. 19, 2018) (explaining breakdown of corporate executive boards and why larger firms require more committees, like nominating or governance committees, which require more board members).

holds itself out as encouraging innovation. One justification is that that a proportional requirement for smaller boards may yield only token representation. Critiques of this model surfaced around India's quota which required only one woman board member, and have arisen in the extensive literature around Black political representation in the U.S.. It was in that context that scholars first realized that token inclusion would add relatively little to decision-making in deliberative bodies.<sup>49</sup>

Third, the most significant divergence is that California gives firms far less time to implement the quota than other countries did. Both Norway and France instituted six-year periods<sup>50</sup>—a substantial amount of time for firms to ramp up broader searches using new methods to find diverse board members. Firms shifted from identifying board members through personal networks to using executive search firms, and civil society had time to organize programs to train women for these positions.<sup>51</sup> This longer delay allowed firms time to accustom themselves to the new reality. By contrast, California allowed its firms half that time for some of them to achieve even more substantial levels of inclusion.<sup>52</sup>

Last, California's requirement is unusually sex-specific. The French and Norwegian quotas, and those that copy the model, set a goal of balance in which there's a forty percent floor for *either* sex.<sup>53</sup> Here I should note that quota implementation reinforces the sex binary, even as it attacks sex inequality over the long term. This element instituted sex-neutrality for constitutionality purposes in which both sexes avoid any substantial under (or over) representation.<sup>54</sup> This balance model skirts the binary by allowing firms more flexibility.

California's quota uniquely melds elements, such as the one-woman rule, with novel obligations, such as the three-woman floor for firms. California's quota

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<sup>49</sup> Afsharipour, *supra* note 14, at 87. See generally Lani Guinier, *The Triumph of Tokenism*, 89 MICH. L. REV. 1077 (1991).

<sup>50</sup> See Daniel Flynn, *France Sets Quota for Women on Big Companies' Boards*, REUTERS (Jan. 13, 2011, 3:48 PM), <https://www.reuters.com/article/us-france-equality/france-sets-quota-for-women-on-big-companies-boards-idUSTRE70C5ZA20110113> [<https://perma.cc/H6AD-BQ2B>].

<sup>51</sup> Cathrine Seierstad, Morten Huse & Silvija Seres, *Lessons from Norway in Getting Women onto Corporate Boards*, CONVERSATION (Mar. 6, 2015, 9:44 AM), <https://theconversation.com/lessons-from-norway-in-getting-women-onto-corporate-boards-38338> [<https://perma.cc/3UA7-HDY3>].

<sup>52</sup> See CAL. CORP. CODE § 301.3 (West 2019).

<sup>53</sup> See generally Darren Rosenblum, *Loving Gender Balance: Reframing Identity-Based Inequality Remedies*, 76 FORDHAM L. REV. 2873 (2008) (applying past remedies of racially based inequality to current corporate gender-based inequalities that exist today, which have each been subjects of debate for decades, and comparing how different countries have utilized different methods in order to remedy gender disparity that exists in the economic sector, each of which with the goal of attaining harmonious gender balance).

<sup>54</sup> Institutional S'holder Servs., Inc., *supra* note 4.

resembles those of Norway or France, and in many ways it resembles quotas in civil law countries most. However, California's use of fines instead of existential penalties reflects a more market-oriented framework.

The peculiarities of California's quota invite criticism, some of it merited. The response has been a clash between rising transnational equality norms and the U.S. opponents' deep resistance to the very idea of a mandatory remedy for inequality.

## II. QUOTA CRITIQUES

Unsurprisingly, the introduction of a state-driven equality mandate aroused a sharp response in the United States.<sup>55</sup> Beyond the bridle over identitarianism, critics argued that the private sector alone can fix sex inequality. The private sector has made advances, it is true, most notably with the rise of shareholder activism for social justice.<sup>56</sup> But these efforts still come up short, which explains why California legislated in the first place.<sup>57</sup> This Part outlines the critiques of the quota, most notably the argument that private sector pressure can best attack inequality.

### A. *Broader Arguments*

Even since late September 2018, the quota garnered substantial opposition.<sup>58</sup> All admit the necessity of diversity, but resist any state mandate.<sup>59</sup> The lack of

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<sup>55</sup> See, Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L. REV. 1119, 1133-35, 1165-83 (2006) (exploring U.S. resistance to quotas as a remedy for inequality).

<sup>56</sup> See DAVID WEBBER, *THE RISE OF THE WORKING CLASS SHAREHOLDER: LABOR'S LAST BEST WEAPON* 134 (2018).

<sup>57</sup> See *Unfinished Business on CA S.B.826 Before the S. Floor*, 2018 Leg., 2017-2018 Sess. (Cal. 2018).

<sup>58</sup> See, e.g., Grundfest, *supra* note 11, at 1-2.

<sup>59</sup> See John M. Conley, Lissa L. Broome & Kimberly D. Krawiec, *Narratives of Diversity in the Corporate Boardroom: What Corporate Insiders Say About Why Diversity Matters*, in DISCOURSE PERSPECTIVES ON ORGANIZATIONAL COMMUNICATION 175, 188-89 (Jolana Aritz & Robyn C. Walker eds., 2010) (describing extensive study of U.S. corporate board members on diversity). Professors Conley, Broome, and Krawiec's study revealed a paradox: interviewees nearly universally lauded diversity, stating its central importance to good governance, and often noting the material benefits to the firm. Yet when pressed as to the specifics of diversity, interviewees were equally universal in their vagueness. *Id.* They loved the idea of diversity but did not have any specific sense of what it would do or why it was important. *Id.*; see also Lissa L. Broome, John M. Conley & Kimberly D. Krawiec, *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759, 805 (2011). It seems the response to the quota matches this research quite closely. See Ilya Somin, *California's Unconstitutional Gender Quotas for Corporate Boards*, VOLOKH CONSPIRACY (Oct. 4, 2018, 3:58 PM), <https://reason.com/2018/10/04/californias-unconstitutional-gender-quot> [<https://perma.cc/6H6S-5CJR>] (arguing that general interest of diversity does not justify gender quotas).

women on boards, commentators generally agree, is wrong as a normative matter and harms California's economy. In introducing the bill, Senator Jackson noted that 52% of the state's population is represented by only 15% of directors on public corporations' boards,<sup>60</sup> below the national average.<sup>61</sup>

The broadest argument made against the quota is that it fails constitutional equality norms, by disfavoring men.<sup>62</sup> Challenges to the quota's constitutionality may impede implementation of the quota, but I leave that analysis to constitutional scholars. California seems determined to advance a remedy, regardless of the shape the quota takes—if this quota is struck down, another perhaps softer one, may take its place. The will to adapt the quota to constitutional norms depends on the political currency and policy analysis. Comparative knowledge clarifies what we may expect.

Critics suggest the quota sets California down a slippery slope toward racial quotas.<sup>63</sup> Others argue that the quota's overreaching puts at risk other affirmative action programs.<sup>64</sup> Similarly, but from an opposing normative stance, others criticize the bill because it elevates sex above other types of diversity as a basis for remedy.<sup>65</sup>

Some have argued that the quota's effect will be limited because of the restrictions imposed by other states that California law can only govern corporations incorporated there.<sup>66</sup> This internal affairs doctrine, if correct, would substantially limit the applicability of the quota to businesses in California, because most corporations headquartered in California are chartered elsewhere.<sup>67</sup>

Tokenism, a related argument, is often lodged against positive or affirmative action. The quota introduces tokenism that serves to stigmatize those it purports

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<sup>60</sup> See Patrick McGreevy, *California Lawmakers Approve Bill to Require Corporate Boards to Include Women*, L.A. TIMES (Aug. 30, 2018, 12:24 PM), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-may-2018-california-lawmakers-approve-bill-to-1535656445-htmistory.html>.

<sup>61</sup> See Valerie Richardson, *California Bill Mandating Gender Quotas for Corporate Boards Heads to Governor*, WASH. TIMES (Aug. 31, 2018), <https://www.washingtontimes.com/news/2018/aug/31/california-bill-mandating-gender-quotas-corporate/> (“Supporters of the bills argued that California boards are less diverse than those in other states. About 15.6 percent of board seats in the state’s publicly traded corporations are held by women, versus 16.2 percent nationwide.”).

<sup>62</sup> See, e.g., Somin, *supra* note 59.

<sup>63</sup> See Jeff Jacoby, *California’s Latest Bad Idea: Gender Quotas for Corporate Boards*, BOS. GLOBE (Sept. 15, 2018), <https://www.bostonglobe.com/opinion/2018/09/15/california-latest-bad-idea-gender-quotas-for-corporate-boards/N2nOYGvqwRkLszi4a5mySK/story.html>.

<sup>64</sup> See Grundfest, *supra* note 11, at 6.

<sup>65</sup> See Richardson, *supra* note 61.

<sup>66</sup> See Grundfest, *supra* note 11, at 3-4.

<sup>67</sup> See *id.*

to benefit, it is argued. Firms will place women on boards because they are women rather than because they are qualified.

One Republican Senator argued, “I can’t support a bill that underestimates the power and strength of women.”<sup>68</sup> He went further: “To say that they can’t find their way onto a board without our help undermines all their hard work.”<sup>69</sup> A business leader echoed these concerns: Lucy Dunn, President and CEO of the Orange County Business Council, stated: “This legislation is, to me, insulting. . . . Rather than celebrate the competitive advantage women bring to positions of leadership in a company, it relegates them to placeholder status.”<sup>70</sup>

Another argument, though, holds more real weight. The quota violates a presumption that the state will stay out of corporate affairs. This norm proves central to corporate governance and the law surrounding it as canonized in the business judgment rule.<sup>71</sup> Former Netflix executive Patty McCord argued that “[i]t’s tough to have the government make decisions for us in terms of the ways we run our businesses, and I personally would prefer that we not have the legislation and that the right thing happens anyway.”<sup>72</sup>

Forcing quotas, they seem to argue, will only slow this process by taking away the legitimacy of those women who do find themselves chosen to serve on boards. This total faith in the market to resolve inequality resides in a complete suspicion of government legislation. This position places trust in wisdom of the market as it presents quotas, as intrusive, destructive, and sexist.

#### B. *Will Private Efforts Prove More Effective?*

U.S. emphasis on autonomy and limited regulation, along with a deep skepticism about the state, drives an exclusive focus on the power of the private sector. This broader phenomenon runs even deeper in the corporate context, where even courts themselves admit they should almost always refrain from second-guessing business judgments. Outside of fundamental duties, nearly everything comes down to firm discretion.<sup>73</sup>

Broader phenomena support this notion of firm autonomy. Professor David Webber powerfully argues that labor’s strongest tool in a time of re-entrenchment is their shareholder power.<sup>74</sup> Public retirement funds are some of the largest investors in the United States, and their support for stakeholders could

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<sup>68</sup> McGreevy, *supra* note 60.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See *Business Judgment Rule*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>72</sup> Jorge L. Ortiz, *Gender Quotas: California Ponders Breakthrough Bill to Boost Female Executives*, USA TODAY (Sept. 18, 2018, 3:20 PM), <https://www.usatoday.com/story/news/2018/09/18/gender-quotas-california-corporate-boards/1339531002/>.

<sup>73</sup> *Business Judgment Rule*, *supra* note 71.

<sup>74</sup> See generally WEBBER, *supra* note 56.

prove central to shifting corporate norms.<sup>75</sup> Firms can and do institute greater equality within their organizations, but many only change when the shareholders that elect their boards insist on that change. Shareholders do, after all, elect the board. Institutional shareholders, such as public retirement funds, hold the power to pressure firms to improve sex equality at the board level.

Webber correctly urges institutional investors—in particular union retirement funds—to stand up for the norms of their funders: workers. David Webber authoritatively delineates the potential here.<sup>76</sup> These institutional investors can and should steer firms toward stakeholder-driven decisionmaking. Whether that institutional shareholder is BlackRock<sup>77</sup> or CalPERS,<sup>78</sup> sex equality fits squarely within this mission.

I agree wholeheartedly with Webber here about the potential for institutional shareholder activism. The private sector does offer an incredible opportunity, so clearly demonstrated in Webber's recent book.<sup>79</sup> The money and power to support progressive change can yield greater inclusion of women. Some social change can come from the private sector—the plethora of consumer boycotts evidence this form of activism.<sup>80</sup> In the U.S. context, it goes without question that private efforts play a central role. Whether from a market efficiency or a social justice framing, the emphasis on private remedies draws on long-established—and criticized—understandings of discrimination.

Many of these arguments rely on Gary Becker's assertion that discrimination is inefficient.<sup>81</sup> Nondiscriminatory firms can snap up underpaid people subject to discrimination and profit from their skills. Other market actors will witness this profitability and over time, will drive the market to eliminate discrimination.<sup>82</sup> For nearly a half century, Becker's theory has impeded efforts to limit public efforts by arguing that the private sector can and will fix inequality.<sup>83</sup>

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<sup>75</sup> *Id.* at 8-10.

<sup>76</sup> *See generally* WEBBER, *supra* note 56.

<sup>77</sup> *See* Emily Winston, *Benevolent Blackrock and the Limitations of Shareholder Power* (Oct. 16, 2018) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3219871](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3219871).

<sup>78</sup> *See* WEBBER, *supra* note 56, at 9-14.

<sup>79</sup> *Id.*

<sup>80</sup> *See Boycotts List*, ETHICAL CONSUMER, [https://www.ethicalconsumer.org/ethical\\_campaigns/boycotts](https://www.ethicalconsumer.org/ethical_campaigns/boycotts) [<https://perma.cc/9WVJ-LEA4>] (last visited Apr. 19, 2019) (explaining rationale for boycotts and listing over fifty ongoing large-scale consumer boycotts).

<sup>81</sup> *See generally* GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971).

<sup>82</sup> *Id.* at 22.

<sup>83</sup> *See* Devah Pager, *Are Firms that Discriminate More Likely to Go Out of Business?*, 3 *SOC. SCI.* 849, 849-50 (2016); Tim Worstall, *Gary Becker Was Right – Markets Deal with Racial Discrimination Because It Costs Money*, *FORBES* (Sept. 22, 2016, 8:30 AM), <https://www.forbes.com/sites/timworstall/2016/09/22/gary-becker-was-right-markets-deal-with-racial-discrimination-because-it-costs-money/#1c2274ba41dc> [<https://perma.cc/JGU9->

Nearly fifty years later, the free-market utopia of a nondiscriminatory workplace remains illusory. As some have argued, history has proven Becker wrong: “[T]he taste for discrimination is very widespread, its cost implications become trivial, and the market corrective never operates.”<sup>84</sup> In the U.S. context, constant emphasis on diversity’s breadth can complicate efforts.<sup>85</sup>

Slow and relatively minor improvement in sex diversity empowers critics to declare that only the private sector should create, foster, and implement remedies for sex inequality.<sup>86</sup> Every few years, efforts to get the private sector to step up flourish. A few years ago, Sheryl Sandberg’s manifesto, *Lean In*, urged women to engage in a concerted social effort to bring other women up to diversify the corporate hierarchy.<sup>87</sup> This push to get women to *lean in* promotes a notion of individualized autonomy to general social change. It presumes that if women just try harder, they can secure more representation. But such individual efforts do not incentivize male elites to yield their *droit de seigneur* over corporate leadership.

Framing the problem using the passive voice allows critics of state action to naturalize discrimination. One advocate of private efforts for equality admitted that “There are too few women at the table in America’s corporate boardrooms. There are also too few ethnic minorities.”<sup>88</sup> The passive voice here erases the actors whose choices exclude women. *Who* is putting too few women on boards? Or, *who* is putting too many men on boards? This we know—it is the nominating committees of the boards themselves, which are dominated by men. Understanding how male elite power works exposes the limits of purely private action to remedy inequality.

Private sector commitments to further equality have begun to help diminish male overrepresentation in corporate leadership, but they cannot on their own generate structural transformation.<sup>89</sup> Such remedies may ultimately remain just that—private—and leave behind wide swaths of the economy. Voluntary measures and the activists that propel them—whether within institutional

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X579] (applying Becker’s theory to current economic climate and evaluating whether evidence proves his theory to be correct).

<sup>84</sup> 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).

<sup>85</sup> See Corporate Governance, 17 C.F.R. § 229.407 (2018); see also Conley, Broome & Krawiec, *supra* note 59, at 188-89. Kimberly Krawiec and her colleagues performed a study on corporate board members and the interviewees confirmed diversity is central but had no specifics to share when pressed. *Id.* This is consistent with the vagueness of the Securities and Exchange Commission (“SEC”) regulation.

<sup>86</sup> See, e.g., Grundfest, *supra* note 11, at 8.

<sup>87</sup> SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* 11 (2013).

<sup>88</sup> Grundfest, *supra* note 11, at 1.

<sup>89</sup> Individual effects on change become particularly limited for token representatives. See ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 210-12 (2d ed. 1993).

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shareholders or among nongovernmental organizations—ebb and flow as new controversies grab shareholder attention.

Consciousness-raising efforts like leaning in cannot match the state's norm-setting power to effect structural change in firms. After all, firms do not function in a vacuum—they do so within the context of law and regulation that gives them the life of their legal personhood and the concomitant limited liability that only the state can provide.

### III. BEYOND PRIVATE REMEDIES: TOWARD A PUBLIC-PRIVATE SYNERGY

U.S. quota critics and advocates of state mandates seem to be at an impasse over equality remedies. In reality, as the extensive transnational experience with quotas demonstrates, effective change only comes through public and private efforts working in concert.<sup>90</sup> This Part argues that the private efforts touted in the U.S. context as the sole remedy for inequality function only in concert with public regulation.

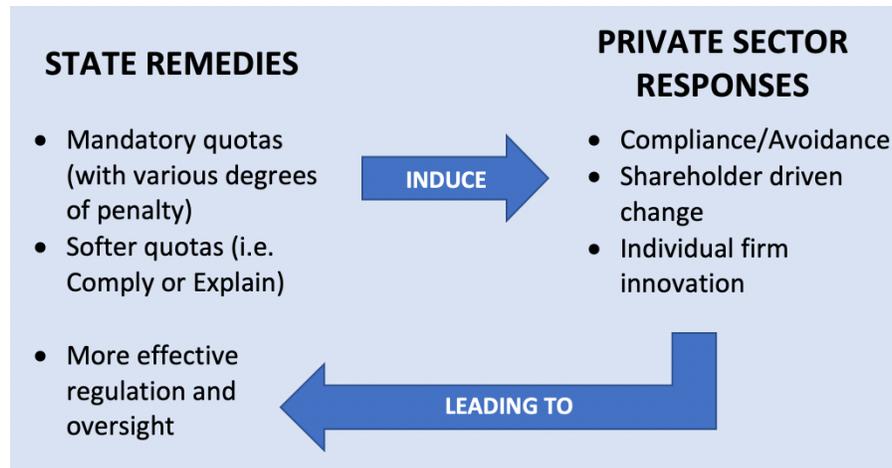
#### A. *How Public Intervention Inspires Private Responses*

Part I described the public efforts for quotas abroad, efforts that prevail in most leading economies. That accurate description only told part of the story. For public mandates to work, we cannot assume that law, by fiat, will engineer social change. The rule of law must hold enough weight over the private sector to inspire its compliance. When firms attend to their public obligations, they may well rise to meet expectations.

Figure 2 reformulates Figure 1 by inserting the private sector and its interactions with the public.

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<sup>90</sup> This argument extends my earlier work on overcoming the public/private divide with regard to quotas. See Rosenblum, *supra* note 2. In some sense, this effect may reflect Frances Olsen's work decades ago on how the intermingling of public norms that give rise to private goals as parties outside the state take advantage of the regulatory regime. See Frances E. Olsen, *International Law: Feminist Critiques of the Public/Private Distinction*, 25 *STUD. TRANSNAT'L LEGAL POL'Y* 157, 157-59 (1993).

**Figure 2.** The Synergy of Public Quotes and Private Compliance.

When the state regulates, how do firms respond? While we can speculate what firms in California will do, other economies provide guidance as to what to expect.

France actually serves as a good model in some respects to answer this question—both it and California produce an annual GDP of around \$2.5 trillion.<sup>91</sup> While their regulatory regimes and the broader states in which they operate differ—the United States is far more integrated than the European Union—comparisons merit attention.

The short answer is that the private sector’s actions look quite distinct when they are taken in response to public norms. When the private sector sees a mandate, it responds in many ways, with nuances often overlooked in heated debate.

#### 1. Public-Private Synergies

The debate over the California quota overlooks how private and public interact. The European context proves quite instructive. Public action can incentivize private action, as we saw in France. After Mme. Marie-Jo Zimmermann proposed the quota there, the “union of bosses,” the *Mouvement des Entreprises de France* (“MEDEF”), quickly prepared its own voluntary quota and presented it to Mme. Zimmermann, with a request that she delay or even

<sup>91</sup> Kieran Corcoran, *California’s Economy Is Now the 5th-Biggest in the World, and Has Overtaken the United Kingdom*, BUS. INSIDER (May 5, 2018, 7:09 AM), <https://www.businessinsider.com/california-economy-ranks-5th-in-the-world-beating-the-uk-2018-5> (describing California’s GDP in relation to countries around the world—including France).

forego legislation.<sup>92</sup> Even though Zimmermann represented the conservative Union for a Popular Movement (“UMP”) party, she rejected the effort and moved forward with the proposed legislation regardless of their effort.<sup>93</sup> What this achieved though, is that when the quota became law, the firms leading the private sector had already gone through the process of considering what quotas would mean and as a result, they were more prepared to implement the requirements.

*Fear* of legislation may prove nearly as powerful as legislation itself. Credible public threats yield private action. This process of public-private interaction within France suggests that voluntary quotas may succeed if followed by mandatory quotas should compliance lag. Legislators might capitalize on the private sector’s aversion to legislation by allowing them to step up their inclusion efforts. Without public pressure of any sort it would be hard to imagine firms voluntarily stretching their inclusion efforts in this fashion.

This influence of public over private functions in the opposite direction. Pension funds—in particular CalPERS—have been very progressive on the questions of gender equity, surely an element that may have influenced legislators to move on this quota.<sup>94</sup> When the state responds to private efforts with creative solutions, it may yield ideal outcomes, in contrast to the solely state driven remedies or the opposite, exclusively private remedies.

To fully understand the effect of public legislation, closer attention to quota implementation abroad proves instructive.

## 2. Firms’ Potential Reactions: Lessons from France

How did firms respond to the exogenous requirement of a hard quota? A study I conducted in France earlier this decade, at the very moment of their quota’s adoption, provides some insight. European firms faced with strict mandates often viewed the quota as a chance to renew their corporate governance. Board members of leading firms generally conveyed that “compliance with the law is

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<sup>92</sup> François Lenglet, *Medef et Afep Promeuvent la Parité dans les Conseils* [Medef and Afep Promote Parity in the Boards], LA TRIBUNE (Apr. 19, 2010, 10:19 PM), <http://www.latribune.fr/journal/edition-du-2004/politique-france/405290/medef-et-afep-promeuvent-la-paritedans-les-conseils.html> [<http://perma.cc/VX96-JPYQ>]; see *Medef et Afep Pomettent Plus de Femmes dans les Conseils d’Administration* [MEDEF and AFEP Promise More Women in Boards of Directors], L’EXPRESS (Apr. 20, 2010, 10:13 AM), [http://lexpansion.lexpress.fr/actualite-economique/medef-et-afep-promettent-plus-de-femmes-dans-les-conseils-d-administration\\_1339420.html](http://lexpansion.lexpress.fr/actualite-economique/medef-et-afep-promettent-plus-de-femmes-dans-les-conseils-d-administration_1339420.html) [<https://perma.cc/QKX3-7SC8>].

<sup>93</sup> Loi 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d’administration et de surveillance et à l’égalité professionnelle [Law 2011-103 of January 27, 2011, on the Balanced Representation of Women and Men on Board of Directors and Supervisory Boards and Equality Professional], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 28, 2011, p. 1680.

<sup>94</sup> See Smith, *supra* note 9, at 230-31; see also Katz & McIntosh, *supra* note 9.

not for discussion.”<sup>95</sup> When referring to non-conformance, this interviewee said, “We don’t speak of it, there were some who didn’t like it, but naturally they will comply with the law.”<sup>96</sup>

Boards’ reactions to the exogenous pressure of a quota could take several forms, ranging from engaged compliance to the opposite response of changing domicile to avoid enforcement. In between sit many other potential ways to comply.<sup>97</sup>

The positive story is that while some firms may be tempted to avoid compliance, the current trend toward greater inclusion of women may be inexorable, as evidenced by the regular gradual increases of women on boards. As in France, firms may simply view the quota as an opportunity “to take advantage of the renewal of boards to add women as the law requires.”<sup>98</sup> Nominating committees may simply respond to the exogenous requirement as a means to “kill two birds with one stone,” and add women who also bring experience that their boards need. That experience can be market exposure, newer perspectives, or otherwise excluded perspectives.<sup>99</sup> The net effect, then, of the quota could be to create a virtuous cycle of equality and inclusion.

At the opposite end of the spectrum sits the most radical response—to change the legal structure or the listing of the firm to avoid the mandate,<sup>100</sup> was rejected as a “more complicated response” to an “easily solved” problem. So

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<sup>95</sup> Interview with 1M, in Paris, France; Interview with 14F, in Paris, France. The author interviewed twenty-four current and former corporate board members from CAC-40 firms—the CAC-40 being the largest and most actively traded companies listed on France’s stock exchange—in 2011. 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.

<sup>96</sup> “For large firms, not complying is out of the question. There are some [firms] that don’t realize but they will comply naturally.” Interview with 11M, in Paris, France.

<sup>97</sup> This may be because of the change in posing the questions. The conviction with which the author posed the question shifted substantially over the course of the interviews. In the beginning it was an entirely sincere question. With this kind of answer as a common response, the author began to excuse the question as a particularly “American” one in which the law figures as a component of a cost-benefit analysis. Interview with 27M, in Paris, France.

<sup>98</sup> As one interviewee stated, “[T]he law is the law and so everyone is trying to take advantage of the renewal in boards to add women as the law requires.” Interview with 18F, in Paris, France.

<sup>99</sup> See generally Rosenblum & Roithmayr, *supra* note 3.

<sup>100</sup> Even after explaining this, most interviewees found the question close to absurd, as conveyed by their tone and sometimes their language, as in the first interview. This reaction reflected the corporatist nature of French business culture. Since many French corporations have had state ownership in their current or recent past, the concept of contravening a legal obligation goes beyond the analytical framework even for top executives. Nationality may play a larger role in corporate identity than it does in the United States or in other, more “liberal” economies, and the legitimacy of the state’s wherewithal to regulate as it sees fit goes unquestioned. The national identity of such firms may overwhelm a near-term profit motive. Interview with 18F, *supra* note 98.

corporations will not change their headquarters or delist from the stock exchange for a reason such as this. It is a “minor issue to have women on board.” So corporations will not “respond to a fly with a hammer.”<sup>101</sup>

Here, the comparative data may prove less dispositive: changing domicile is far easier in California than in France, which has substantial state involvement in major firms and where European incorporation structures remain nascent. By contrast, many California firms already game their domicile to skirt regulation. Delaware incorporations dominate among large firms, in California as elsewhere.<sup>102</sup>

Beyond these two stories of virtuous compliance and outright avoidance, sit several options to avoid full compliance. First, a board may change its size in response to the quota. In France after passage of the quota, board members thought that firms would reduce their boards, asking men to leave so that the proportion of women would increase. This shift alone could render the firm compliant.

The structure of California’s quota directly incentivizes the opposite reaction. Given the already-noted floor of three women, given a perceived challenge of finding more women, boards may grow to comply without changing the percentage of women on the board.

Another “get around” involves the less comfortable discussion of stacking boards with directors who add little to governance. A board could nominate directors simply to comply with the law, but without altering the board’s governance. They may seek women expected to play a minor role. In the language of some French board members, they nominate a “marionette.”

This may include a female relative or paramour who would be subject to the persuasion of another to maintain control or at least not dilute power, or even risk someone who may disrupt a board’s established patterns. Smaller firms, some of the interviewees asserted, may prove more likely to comply by naming such “marionettes” as they would have less access to pay the elevated salaries some board members command in the wake of the quota, and less access to the much larger pool of non-French women.<sup>103</sup>

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<sup>101</sup> Forum shopping simply may not be well-regarded among corporations whose management and customer base is “franco-français.” As one interviewee stated regarding changing domicile, “[I]t’s a response that’s much more complicated for a problem that is easily solved. So we won’t change domicile or delist from the market because of a reason like this. It’s not a sufficient reason. It’s a minor issue to have women on board. We won’t respond to a fly with a hammer.” Interview with 19F, in Paris, France.

<sup>102</sup> See Mark J. Roe, *Delaware’s Competition*, 117 HARV. L. REV. 588, 592-93 (2003); see also Lucian A. Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition Over Corporate Charters*, 112 YALE L.J. 553, 568 (2002).

<sup>103</sup> As one interviewee stated “The CAC40 has the means [to find serious candidates] but also can place women who are not necessarily retained for their skills. Interview with 2F, in Paris, France. An example is LVMH Moët Hennessy Louis Vuitton SE’s inclusion of former First Lady Bernadette Chirac on their board. One interviewee noted Mme. Chirac’s

### 3. Societal Response to the Quota

In France, the quota, as with any law, changed the way market actors behave.<sup>104</sup> There, in itself, the quota incentivized the creation of a deep and broad network for women to prepare themselves to join boards, to be placed on boards, and to serve successfully on boards.<sup>105</sup> Over the course of the implementation period between 2011 and 2018, a huge network sprang into action, as all sorts of market actors stepped up to serve firms that needed women and women who needed training to serve as board members.<sup>106</sup> Business schools established training programs, small women's professional groups became far larger operations, and the French Women's Forum—an annual gathering of professional women—grew substantially.<sup>107</sup> To those who doubted that there

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explanation of her joining a board as similar to her saying she was “going to out to buy a handbag to give herself a little pleasure, and not as taking on a particular responsibility.” Interview with 4F, in Paris, France. Another defended the choice, saying that Mme. Chirac could serve as an ambassador for one of France's most established set of luxury brands. Interview with 8F, in Paris, France.

<sup>104</sup> See Karima Bouaiss & Agnes Bricard, FEDERATION FEMMES ADMINISTRATEURS, LES FEMMES ADMINISTRATEURS AU SEIN DES CONSEILS D'ADMINISTRATION DES SOCIÉTÉS DU SBF 120 EN 2013 (2014), <http://www.federation-femmes-administrateurs.com/wp-content/uploads/2014/02/les-femmes-administrateurs-au-sein-des-conseils-dadministration-des-societes-du-sbf-120-en-2013.pdf> [<https://perma.cc/C3DS-TMUL>].

<sup>105</sup> This network had the support of French corporate leadership. The Institut Français des Administrateurs (“IFA”), along with “the union of bosses,” AFEF/MEDEF, engaged fully in the efforts to implement the quota. See Cécile Daumas, *Davantage de Femmes à la Table des Patrons*, LIBERATION (Jan. 20, 2010), [https://www.liberation.fr/futurs/2010/01/20/davantage-de-femmes-a-la-table-des-patrons\\_605353](https://www.liberation.fr/futurs/2010/01/20/davantage-de-femmes-a-la-table-des-patrons_605353). It created a directory of CAC-40 directors with detailed profiles in order to make it easier to hire women. Véronique Bruneau-Bayard & Dominique Pageaud, *Panorama 2010 des Pratiques de Gouvernance des Bigcaps: Les Tendances 2010*, ADMINISTRATEUR: LA LETTRE DE L'IFA, Dec. 2010, at 3.

<sup>106</sup> There are more than four hundred women's social networks today in France. *Les Réseaux Féminins Permettent-Ils aux Femmes de Réussir dans l'Entreprise?*, RESSOURCES HUMAINES PAR SIA PARTNERS (Dec. 18, 2013), <http://rh.sia-partners.com/les-reseaux-feminins-permettent-ils-aux-femmes-de-reussir-dans-lentreprise> [<https://perma.cc/ZE9S-JKCW>]. For examples of social groups, see ADMINISTRATION MODERNE, <http://www.administrationmoderne.com> [<https://perma.cc/L4WK-25EF>] (last visited Apr. 19, 2019) (stating that it was created in 1998 as the first interministerial association of women civil servants that fights for sex equality in the administration); ARBORUS, <http://www.arborus.org> [<https://perma.cc/L7YT-BPMQ>] (last visited Apr. 19, 2019) (noting that the association was created by the European observatory of equality that contains various associations and firms with the goal of helping promote equality in management); FEMMES 3000, <http://www.femmes3000.fr> [<https://perma.cc/MH46-HELRL>] (last visited Apr. 19, 2019) (stating that the association that strives to increase women's participation in public life); PROFESSIONAL WOMEN'S NETWORK, <http://www.pwnglobal.net/> [<https://perma.cc/CKF5-QQ9S>] (last visited Apr. 19, 2019) (explaining that it is a global federation with 3,000 members created to promote women in business firms in Europe and provide networking and training platforms for professional women).

<sup>107</sup> The Women's Forum is a global network of women corporate leaders that meets annually. See, e.g., *Women's Forum for the Economy & Society Chooses Paris for 2017*

were enough “qualified” women, the answer came from the marketplace in establishing these networks.

It is true that in the United States today we are witnessing a substantial increase in participation of women and efforts toward inclusion. Without detracting from those efforts and their successes, private efforts alone cannot realize the substantial changes necessary. Public efforts foster private action in ways that private action alone may not or cannot achieve.

#### CONCLUSION

After California’s 2013 voluntary quota, California firms in Silicon Valley and Hollywood confronted a series of private sector governance crises around sex equality and sexual harassment. The failure of California firms to diversify their governance began to have major costs. Faced with the outcry around these revelations, California adopted the first “hard” corporate board quota in the United States.

Critics condemned the quota’s identity-driven focus. However, as this Essay has demonstrated, they overlooked the extensive, largely successful experience abroad with quotas. The quota is not ideal. Public efforts need not be as heavy-handed as those in Europe to inspire greater action on the part of the private sector. We must move beyond the unnecessarily dichotomous framing of public and private in the U.S. context to imagine better outcomes.

Beyond the law, firms now have a fiduciary duty to diversify. A decade ago, after the demise of Lehman Brothers, commentators asked, “Would the firm have disappeared had it been Lehman Sisters?”<sup>108</sup> Today we can pose the same question about companies caught in the crosshairs of sexual harassment controversies. For example, both Harvey Weinstein’s and Steve Wynn’s companies faced troubles as a result of sexual harassment.<sup>109</sup> Boards with only

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*Global Meeting*, WOMEN’S F. ECON. & SOC’Y (Aug. 3, 2017), <http://www.womens-forum.com/news/global-meeting-2017-in-paris>. For example, Fédération Femmes Administrateurs was created after the Copé-Zimmermann law to help women to be ready to work in CAC-40 administrations. See FEDERATION FEMMES ADMINISTRATEURS, <http://www.federation-femmes-administrateurs.com/> [<https://perma.cc/NV52-7JSE>] (last visited Apr. 19, 2019). It is a network in which experienced women can help non-experienced women in their future careers. This federation regroups diverse associations like Association Femmes AAA+, which was created in January 2011 to promote women lawyers in director positions of big companies; Administration Moderne, created in 1998; and Association des Femmes Diplômées d’Expertise Comptable Administrateur, created after the CBQ law to obtain the goal of forty percent of women directors in CAC-40 firms. See *id.*

<sup>108</sup> See Tim Worstall, *Of Course the Crisis Would Have Been Different if Lehman Brothers Had Been Lehman Sisters*, FORBES (Mar. 29, 2014, 8:10 AM), <https://www.forbes.com/sites/timworstall/2014/03/29/of-course-the-crisis-would-have-been-different-if-lehman-brothers-had-been-lehman-sisters/>.

<sup>109</sup> Yohana Desta, *\$500 Million Deal Saves Weinstein Company—but Harvey’s Reportedly Getting Nothing*, VANITY FAIR (Mar. 2, 2018, 12:55 PM), <https://www.vanityfair.com/hollywood/2018/03/the-weinstein-company-500-million-deal-harvey-bob>; Khalon Richard,

men like the Weinstein Company or almost all men, like Wynn Resorts, wallow in groupthink.<sup>110</sup> Had these firms' boards included a critical mass of women, one wonders whether the methodical process for decisionmaking—including perhaps methodical questions around hush payments—might have prevented these scandals.

Quotas now appear necessary to respond to a fundamental market failure in corporate leadership. Even after women have matched men for decades as graduates of top professional programs, women lag sharply in corporate leadership. Firms that stick to all-male or mostly male teams—whether on a corporate board or a Senate committee—are simply missing out on the full range of talent available.

Even with its flaws, the quota makes sex equality the core debate in corporate governance. While the specific means of this quota may face challenges, the process of regulation is an iterative one, and states may respond with more carefully targeted remedies for inequality. Regardless of how quotas come into the United States, they are sure to move U.S. corporate leadership away from its all-male club status.

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*After Sexual Misconduct Claims, Vegas Mogul Steve Wynn Fell Fast*, NPR (Mar. 15, 2018, 11:59 AM), <https://www.npr.org/2018/03/15/592318034/after-sexual-misconduct-claims-vegas-mogul-steve-wynn-fell-fast>.

<sup>110</sup> Austen Hufford, *Two More Wynn Directors to Leave Board*, WALL STREET J. (May 14, 2018, 6:26 PM), <https://www.wsj.com/articles/two-more-wynn-resorts-directors-to-leave-board-1526336818>; Shirley Leung, *A Glaring Omission, Seen in a New Light: The Weinstein Scandal Illustrates Why All-Male Boards Are Bad Business*, BOS. GLOBE, Nov. 10, 2017, at B9.