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As the benefits of gender equality for governance become more apparent, boardroom diversity initiatives abound. At the same time, institutional investors play an increasingly central role in the corporate world. This Article takes a novel approach to achieve this necessary change. Institutional investors already oversee firm leadership quite closely. This Article suggests that institutional investors hold a fiduciary duty to ensure there is gender diversity in leadership. As objections to state mandates

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persist, institutional investors can bring the benefits of private ordering to play a central role in ensuring equality.

Institutional investors play a dominant role over firms as principal shareholders. With that power comes responsibility. As stewards to their beneficiaries and the companies in which they invest, institutional investors could have a fiduciary duty to observe and encourage equality for women in the boardroom. Such investors, by virtue of their influence, can foster a marked improvement in gender equality. This Article analyzes the role fiduciary duties play for institutional investors and how diversification should figure as central among them.

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INTRODUCTION

> *I'm sometimes asked when will there be enough [women on the Supreme Court] and I say, 'When there are nine,' people are shocked. But there'd been nine men, and nobody's ever raised a question about that.*
>
> —Ruth Bader Ginsburg[1]

Despite recent improvements, corporate leadership continues to be a man's world. As of 2019, men constituted 80% of board members and 96% of CEOs.[2] Parity in corporate leadership remains a distant dream.

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[1] Gloria Feldt, *"Where There Are Nine" and Other Powerful Quotes About Gender Equality from Justice Ruth Bader Ginsburg*, GLORIAFELDT (Sept. 28, 2020), https://gloriafeldt.com/2020/09/28/when-there-are-nine-and-other-powerful-quotes-about-gender-equality-from-justice-ruth-bader-ginsburg/ [https://perma.cc/GR7J-JDZG].

[2] This Article focuses on women, but people of all sexes, apart from cisgender men, face these same exclusions. For information on this male dominance, see *infra* Sections A–B. *See also* DELOITTE GLOB. CTR. FOR CORP. GOVERNANCE, WOMEN IN THE BOARDROOM: A GLOBAL PERSPECTIVE 8-9 (6th ed. 2019), https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Risk/gx-risk-women-in-the-boardroom-sixth-edition.pdf [https://perma.cc/76QB-LNJJ].

The past twenty years have brought a sea of change, as most of the world's top ten economies have embraced some regulation to advance boardroom gender equality.[3] California adopted legislation not only for women, but also for other "underrepresented groups." Dominant critics in the United States question whether the State should force companies to implement gender diversity on boards.[4]

Amid escalating battles over diversity, activist shareholders are demanding change. Shareholder derivative lawsuits recently began targeting major public and private companies.[5] They allege that their board of directors breached their fiduciary duties as a result of an "old boys' club" corporate culture.[6] Despite making public commitments to diversity, the pursuit of equality, and inclusion, boards often fall short of welcoming diverse directors, especially women.[7] These lawsuits mark a shift to a focus on corporate culture.[8] Some of them unequivocally focus on the board's lack of focus on diversity.[9]

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[3] *See infra* Parts II.B.1–5.

[4] *See infra* Parts I.C–D.

[5] *See* Samantha Burdick, Bianca DiBella, Pamela Palmer, Alexandra Peurach & Howard Privette, *A New Wave of Board Diversity Derivative Litigation*, JDSUPRA (Oct. 21, 2020), https://www.jdsupra.com/legalnews/a-new-wave-of-board-diversity-89301/ [https://perma.cc/7LDB-QLDJ]. *See generally* Verified Shareholder Derivative Complaint at 5, Klein v. Ellison, No. 20-cv-04439 (N.D. Cal. July 2, 2020) (filing suit against Oracle for its lack of diversity); Verified Shareholder Derivative Complaint at 3, Ocegueda v. Zuckerberg, No. 20-cv-04444 (N.D. Cal. July 2, 2020) (filing suit against Facebook for its lack of diversity); Verified Shareholder Derivative Complaint at 2, Falat v. Sacks, No. 8:20-cv-01782 (C.D. Cal. Sept. 18, 2020) (filing suit against Monster Beverage Corporation for its lack of diversity).

[6] Burdick et al., *supra* note 5; Jessie K. Liu, Susan L. Saltzstein & Tansy Woan, *Shareholder Suits Demand More Progress on Diversity*, SKADDEN (Apr. 13, 2021), https://www.skadden.com/insights/publications/2021/04/the-informed-board/shareholder-suits-demand-more-progress [https://perma.cc/37MY-CFR2].

[7] Most of these Companies targeted are incorporated in Delaware, but are headquartered primarily in California. Burdick et al., *supra* note 5; *cf.* Nina Yadava, John C. Tang, Robert M. Tiefenbrun & Glenn R. McGillivray, *Jones Day Discusses Shareholder Lawsuits Concerning Diversity*, CLS BLUE SKY BLOG (Oct. 5, 2020), https://clsbluesky.law.columbia.edu/2020/10/05/jones-day-discusses-shareholder-lawsuits-concerning-diversity/ [https://perma.cc/7CNJ-P3UZ].

[8] *See* Amelia Miazad, *Sex, Power, and Corporate Governance*, 54 UC DAVIS L. REV. 1913, 1947 (2021) ("This marks a clear departure from the traditional shareholder focus on adequate compliance, training, and reporting systems and is yet another power example of a shift from an era of compliance to an era of culture.").

[9] *See* Third Amended Class Action Complaint for Violations of the Federal Securities Laws at 61, *In re* Signet Jewelers Ltd. Sec. Litig., No. 1:16-cv-06728-JMF, 2018 WL 2191300 (S.D.N.Y. Nov. 26 2018); Notice of Pendency and Proposed Settlement of Derivative Actions, *In re* Alphabet S'holder Derivative Litig., No. 19CV341522, 2020 Cal. Super. LEXIS 1493 (Cal. Super. Ct. Oct. 22, 2020); Complaint, Stein v. Knight, No. 18CV38553 (Or. Cir. Ct.

Concurrently, institutional investors have made bold public statements on their commitments to engage with companies to pressure them to increase board diversity and be more transparent on their current diversity practices.[10] One could wonder if institutional investors are concerned that they might be targeted next by such lawsuits. In any case, we believe that they will be. Indeed, stakeholders and stockholders will evaluate them not merely on their statements, but also on their actions and whether their boards and the boards of the firms they invest in remain largely homogenous.

Regardless of the outcome of such litigation, this Article raises a core question that corporate law has yet to answer: Is the duty to diversify and push for equality especially for women located within the firm and its ownership structure? Moreover, if so, do institutional investors have a duty to focus on corporate culture and specifically push for gender equality in the boardroom?

Aug. 31, 2018); Miazad, *supra* note 8, at 1947; Kevin LaCroix, *Nike Board Hit with Sexual Misconduct-Related Derivative Suit*, D&O DIARY (Oct. 30, 2018), https://www.dandodiary.com/2018/10/articles/director-and-officer-liability/nike-board-hit-sexual-misconduct-related-derivative-suit/ [https://perma.cc/2PUX-QHM7].

[10] *See, e.g.*, BLACKROCK, OUR APPROACH TO ENGAGEMENT ON BOARD DIVERSITY 1 (2021), https://www.blackrock.com/corporate/literature/publication/blk-commentary-engaging-on-diversity.pdf [https://perma.cc/BD6Y-U5W5] ("This is why we expect companies to . . . demonstrate how diversity is accounted for within the proposed board's composition."); Rebecca Sherratt, *Board Diversity Deliberations*, *in* 8 PROXY MONTHLY 5, 7 (2021), https://www.proxyinsight.com/wp-content/uploads/dlm_uploads/2021/08/Proxy-Monthly-July-2021.pdf [https://perma.cc/KZ9H-NCXE] (noting that "BlackRock voted against the re-election of AT&T nomination committee chair Matthew Rose . . . due to concerns over insufficient steps taken to address board diversity" and that "[BlackRock] expects companies to 'disclose their approach to ensuring appropriate board diversity . . . .'"); Phil Brown, *Institutional Investors Turn Up Pressure on Companies to Embrace Diversity*, CORP. COMPLIANCE INSIGHTS (Mar. 29, 2019) https://www.corporatecomplianceinsights.com/institutional-investors-turn-up-pressure-on-companies-to-embrace-diversity/ [https://perma.cc/7SZN-M5EV] ("[T]he EY Center for Board Matters singled out board composition and enhanced diversity as investors' top priorities for companies."); *State Street Insists on Board Diversity Disclosure*, FAIR PLAY TALKS (Jan. 13, 2021), https://www.fairplaytalks.com/2021/01/13/STATE-STREET-INSISTS-BOARDS-DISCLOSE-ETHNIC-RACIAL-COMPOSITION/ [https://perma.cc/3PYR-9CZG] ("State Street Global Advisors is the latest financial institution to insist that firms disclose the racial and ethnic composition of their boards, applying further pressure on companies to diversify their boards."); Amy Whyte, *State Street to Turn Up the Heat on All-Male Boards*, INSTITUTIONAL INV. (Sept. 27, 2018), https://www.institutionalinvestor.com/ARTICLE/B1B4FH28YS3MR9/STATE-STREET-TO-TURN-UP-THE-HEAT-ON-ALL-MALE-BOARDS [https://perma.cc/S8H7-2XK4] (noting that State Street Global Advisors "will update new proxy voting guidelines in 2020 for firms that have no women on their board and have failed to engage in 'successful dialogue on State Street Global Advisor's board diversity program'").

This Article presents the novel idea that institutional investors may already have a fiduciary duty to advance gender equality in the firms in which they invest. More specifically, we suggest that board members of institutional investors who fail to ensure that diverse candidates are selected to sit on the boards of the firms they invest in could be viewed as breaching their existing fiduciary duties.

Institutional investors' influence on corporate governance is hard to overstate, as they are "universal owners."[11] Therefore, this Article suggests that they can play this oversight role concerning gender equality. Their weight as market actors could allow them to be more effective in promoting equality than quotas and other controversial State-mandated specific inclusion levels. After all, institutional investors are in a unique position to direct firms' actions.[12] Their influence stems notably from their focus on the long-term value of their investments, which draws them to seek good governance.[13]

Fiduciary duties may seem at first blush an odd location within corporate law for gender equality requirements. It is unquestionably a novel place. Nevertheless, it is through fiduciary duties that the State articulates the behavior expected of duty holders. Indeed, fiduciary duties allow the State to deputize duty holders to act in ways that reflect widely accepted public governance norms.

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[11] SHAREACTION, 'FIDUCIARY DUTIES OF INVESTMENT INTERMEDIARIES: INITIAL QUESTIONS' RESPONSE FROM SHAREACTION 5 (2016), https://shareaction.org/wp-content/uploads/2016/01/LawCommStakeholder.pdf [https://perma.cc/KL8U-U3MU] [hereinafter FIDUCIARY DUTIES].

[12] *See infra* Part IV; *see, e.g.*, Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1243 (2020) (arguing that index funds have taken a leading role in challenging management to advance board diversity and corporate sustainability); Lucian A. Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2029-30 (2019) (noting that index funds own an increasingly large proportion of American public companies and have a profound impact on the governance and performance of public companies and the economy); Jill E. Fisch, Asaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17, 17 (2020) (noting that ETFs and index funds dictate capital flows); Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 863 (2013) (recognizing the reconcentration of equity ownership in the hands of institutional investors); Marcel Kahan & Edward B. Rock, *Index Funds and Corporate Governance: Let Shareholders Be Shareholders*, 100 B.U. L. REV. 1771, 1772 (2020) ("Because high profile contests between activist shareholders and boards often have a significant effect on firm value, the Big Three have strong direct incentives to acquire information and vote intelligently.").

[13] *See* Barzuza et al., *supra* note 12, at 1258.

The following reasons underscore why establishing a fiduciary duty to focus on corporate culture, diversity, and gender equality may bolster governance. *First*, social science underscores how diversity is an important aspect of effective decision-making, risk oversight, and innovation.[14] *Second*, research demonstrates that, because groupthink hobbles effective decisionmaking, companies with limited diversity tend to underperform in comparison to their more diverse peers, take excessive risk, and face reputational harm.[15] *Third*, as long-term investors in global public companies, institutional investors must ensure that they invest in firms with a strong, independent, and effective board that exercises high-quality oversight.[16] *Fourth*, institutional investors can best figure out how firms should diversify and strive for gender equality based on their unique roles as dominant shareholders.[17] *Finally*, and most importantly, creating a fiduciary duty for diversity and gender equality establishes equality as a normative goal, reflecting the public value equality already holds.[18]

Institutional investors monitor corporate governance issues, which include paying attention to the diversity and quality of the members of boards of directors of their investee companies. Their fiduciary duty stems from their power to influence the composition of the corporation's (investee company) board. They need to make sure that they pick the "best" qualified board members to (i) serve the corporate business for the (ii) benefit of the corporation and its shareholders.

This fiduciary duty extends both to current and future shareholders, investors, and beneficiaries, who invest their money but have no power to choose their own directors. The board of directors also gains not only by offering diverse experience and opinions, but also by recognizing its duty to work together by committing to a unified corporate leadership.

Many institutional investors already behave as if they have a duty to diversify[19] Especially since the summer of 2020, which included mass

[14] *See infra* Part I.

[15] *See infra* Part I.B.

[16] *See infra* Part III.

[17] *See infra* Part IV.

[18] *See infra* Part IV.

[19] *See* Dylan Bruce & Peter Rasmussen, *Analysis: Mandated Board Diversity Takes Center Stage in 2021*, BLOOMBERG L. (Nov. 16, 2020, 3:31 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-mandated-board-diversity-takes-center-stage-in-2021 [https://perma.cc/UH83-MLDZ] [hereinafter *Mandated Board Diversity*].

Black Lives Matter protests, firms increasingly acknowledge their duty to diversify.[20]

Firms are also responding to these changes and changing their practices. This shift is evident from the organizational aspect — the rise in Chief Diversity Officer ("CDO") positions.[21] In this sense, this Article aims to restate what is already increasingly understood as an implicit duty of institutional investors. It is thought that formalizing this duty may hold potential as a means to improve governance.

There is broad agreement among scholars that corporate governance suffers from a lack of diversity.[22] It is not only women who face exclusion from corporate power — for example, California recently legislated inclusion for people of color and LGBT people.[23] One group's

[20] According to Glassdoor, executive and leadership job openings have more than doubled since the protests from the May 2020 death of George Floyd, with "chief diversity officer" and "vice president of diversity & inclusion" being in-demand roles. *How Companies Are Honoring the Need for Diversity and Inclusion While Calling Out Racial Inequity Within the Workplace*, GLASSDOOR (July 15, 2020), https://www.glassdoor.com/blog/how-companies-are-honoring-the-need-for-diversity-and-inclusion-while-calling-out-racial-inequity-within-the-workplace/ [https://perma.cc/WS8Q-7SJZ] [hereinafter *Companies Are Honoring*].

[21] The role of Chief Diversity Officer is "to work across the organization to optimize organizational culture, align the organization's diversity and inclusion goals with business outcomes, and be able to respond to changes or policies that occur outside of the organization that affect organizational culture, or employee and customer populations." Tiffany Jana, *What Is a Chief Diversity Officer and Why Does Your Company Need One?*, MEDIUM (Sept. 18, 2018), https://tiffanyjana.medium.com/the-short-answer-450d46e6ed17 [https://perma.cc/5NMT-WGYX]; *see also Companies Are Honoring*, *supra* note 20; Ashley Peterson, *Diversity Executives Are in Demand*, LINKEDIN (Jan. 7, 2021), https://www.linkedin.com/news/story/diversity-executives-are-in-demand-5331410/ [https://perma.cc/HNH5-2XKS].

[22] Renée B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, 94 J. FIN. ECON. 291, 291 (2009); Douglas Cumming, T. Y. Leung & Oliver Rui, *Gender Diversity and Securities Fraud*, 58 ACAD. MGMT. J. 1572, 1572 (2015); Lisa M. Fairfax, *"With Friends Like These . . .": Toward a More Efficacious Response to Affinity-Based Securities and Investment Fraud*, 36 GA. L. REV. 63, 67 (2001); Jill E. Fisch & Steven Davidoff Solomon, *Centros, California's 'Women on Boards' Statute and the Scope of Regulatory Competition*, 20 EUR. BUS. ORG. L. REV. 493, 493 (2019); Sarah Haan, *Corporate Governance and the Feminization of Capital*, 74 STAN. L. REV. (forthcoming 2022); Jasmin Joecks, Kerstin Pull & Katrin Scharfenkamp, *Perceived Roles of Women Directors on Supervisory Boards: Insights from a Qualitative Study*, 33 GER. J. HUM. RESOURCE MGMT. 5, 5 (2019); Faith Stevelman & Sarah C. Haan, *Boards in Informational Governance*, 23 U. PA. J. BUS. L. 179, 181 (2020). *See generally* IRVING LESTER JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES (1982).

[23] UNITED NATIONS, LEAVING NO ONE BEHIND: THE IMPERATIVE OF INCLUSIVE DEVELOPMENT 55 (2016), https://www.un.org/esa/socdev/rwss/2016/full-report.pdf [https://perma.cc/6WLR-F85C]; Allison Herren Lee, Comm'r, U.S. Sec. & Exch.

dominance infuses corporate governance with group-think and deprives it of the critical analysis of opportunity and risk that diversity brings. While many countries and states have tried various state-driven approaches to regulate inclusion as well as gender equality, such approaches face controversy and may not prove as effective as private ordering solutions.[24]

Given the clear data on diversity's benefits for good governance, institutional investors could hold a fiduciary duty to advance diversity and push for gender equality in the boardroom. This fiduciary duty to change the old boys' club culture and push for gender equality presents a practical way to advance inclusion in corporate governance by placing the burden on decision makers to implement diversity.

Many institutional investors already act as if such a duty already exists.[25] In fact, it crosses both the *duty of care* and the *duty of loyalty*. The *duty of care* obligates leaders to make informed decisions in a reasonably prudent fashion. We argue that the *duty of loyalty* also encompasses a duty for diversity, gender equality, and inclusion.[26] Directors must exercise oversight over a corporation and can be sued if they fail to act and if the failure is further "sustained or systematic."[27]

The current health situation only exacerbates the underlying challenges that make action necessary. COVID-19 has laid bare the gross disparity between workers who have caretaking responsibilities

Comm'n, Diversity Matters, Disclosure Works, and the SEC Can Do More: Remarks at the Council of Institutional Investors Fall 2020 Conference (Sept. 22, 2020), https://www.sec.gov/news/speech/lee-cii-2020-conference-20200922 [https://perma.cc/96HA-U5UM] [hereinafter Diversity Matters]; *see* Danyelle Solomon, Connor Maxwell & Abril Castro, *Systemic Inequality: Displacement, Exclusion, and Segregation, How America's Housing System Undermines Wealth Building in Communities of Color*, CTR. FOR AM. PROGRESS (Aug. 7, 2019, 7:00 AM), https://www.americanprogress.org/issues/race/reports/2019/08/07/472617/systemic-inequality-displacement-exclusion-segregation/ [https://perma.cc/9D98-D6PK].

[24] *See* Darren Rosenblum & Yaron Nili, *Board Diversity by Term Limits?*, 71 ALA. L. REV. 211, 258 (2019); Darren Rosenblum & Daria Roithmayr, *More than a Woman: Insights into Corporate Governance After the French Sex Quota*, 48 IND. L. REV. 889, 889 (2015).

[25] Saijel Kishan, *Investors Pressure Corporate America with Record Diversity Push*, BLOOMBERG (Apr. 22, 2021, 5:51 AM GMT), https://www.bloomberg.com/news/articles/2021-04-22/investors-pressure-corporate-america-with-record-diversity-push [https://perma.cc/XC2X-HX57].

[26] Strine and Brummer also support this thesis. Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. (forthcoming 2022).

[27] Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 364 (Del. 2006) (quoting *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996)); Daniel Hemel & Dorothy Shapiro Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1630 (2018).

and those who do not.[28] With children and the elderly sheltering in place, those in charge of their care cannot participate in the market economy.[29] Some have noted that this may harm women who tend to bear more family care responsibilities.[30] Firms need inclusive governance to account for the risk of loss in productivity of those who bear caretaking responsibilities, mainly women, and instituting a fiduciary mandate may prove most effective at realizing this goal.

On the other hand, we have witnessed institutional investors stepping up to ensure gender equality as part of diverse leadership teams in the past few years.[31] A wide range of corporate actors struggle to find suitable remedies to advance our shared gender equality norms. For example, David Solomon, Goldman Sachs' CEO, committed to insisting on at least one "diverse board candidate, with a focus on women" on boards of companies they take public.[32]

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[28] *Cf.* Arica White, Leandris C. Liburd & Fátima Coronado, *Addressing Racial and Ethnic Disparities in COVID-19 Among School-Aged Children: Are We Doing Enough?*, CTR. FOR DISEASE CONTROL & PREVENTION (June 3, 2021), https://www.cdc.gov/pcd/issues/2021/21_0084.htm [https://perma.cc/R7KM-72Z5] (studying the disproportionate impact of COVID-19 on minority group teenagers who are affected by working parents' ability to provide oversight).

[29] UNITED NATIONS, POLICY BRIEF: THE IMPACT OF COVID-19 ON WOMEN 13 (Apr. 9, 2020), https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2020/06/report/policy-brief-the-impact-of-covid-19-on-women/policy-brief-the-impact-of-covid-19-on-women-en-1.pdf [https://perma.cc/F962-HZEV]; Michal Agmon Gonnen, *Women and the COVID-19 Pandemic: A Gender Perspective on the Socio-economic Crisis and the Opportunities for Change* (on file with authors); *COVID-19: Protecting People and Societies*, OECD (Mar. 31, 2020), https://www.oecd.org/coronavirus/policy-responses/covid-19-protecting-people-and-societies-e5c9de1a/ [https://perma.cc/FD8M-EFA7]; *see* Janani Umamaheswar & Catherine Tan, *"Dad, Wash Your Hands": Gender, Care Work, and Attitudes Toward Risk During the COVID-19 Pandemic*, 6 SOCIUS: SOCIO. RSCH. DYNAMIC WORLD 1, 1 (2020).

[30] *See* Sarah Bradshaw, *Engendering Development and Disasters*, 39 DISASTERS S54, S54 (2014); Sarah Bradshaw & Maureen Fordham, *Double Disaster: Disaster Through a Gender Lens*, *in* HAZARDS, RISKS AND DISASTERS IN SOCIETY 233, 233 (Andrew E. Collins, Samantha Jones, Bernard Manyena & Janaka Jayawickrama eds., 2015); *see also* Helen Jaqueline McLaren, Karen Rosalind Wong, Kieu Nga Nguyen & Komalee Nadeeka Damayanthi Mahamadachchi, *Covid-19 and Women's Triple Burden: Vignettes from Sri Lanka, Malaysia, Vietnam and Australia*, 9 SOC. SCIS. 87, 87 (2020). *See generally* Caroline Moser, *Gender Planning and Development: Theory, Practice and Training,* 49 FEMINIST REV. 117 (1995) (discussing the development of gender planning for households).

[31] *See infra* Parts IV.C.1.a-b. One can note efforts such as that undertaken by BlackRock and others focus on economic, social and governance goals ("ESG") and corporate social responsibility ("CSR") initiatives.

[32] This announcement has implications for any new company that wants to go public. If you want Goldman to be your underwriter and take you public, you have to have at least one "diverse" board member, namely a woman. However, Goldman, like

These initiatives appear to be part of a larger "paradigm shift" in thinking about corporate governance recognizing the benefits of gender diversity in management.[33] However, this shift's instigators still face barriers, imbedded notably in current selection processes, investment analysis, and due diligence.[34] To help institutional investors push for board gender equality, we are also proposing some solutions to these problems. First, to address the lack of accessible information on diversity, we suggest that public companies could have an obligation to disclose, in proxy statements, data relating to diversity within their ranks, especially the number of women. Second, we call on companies to adopt new policies compatible with this imperative regarding search committees and selection processes.

This Article accepts the premise that gender equality on its own proves necessary and advantageous to investors, businesses, and society. Studies have established that "high-performing boards are more likely to exhibit gender balance and inclusive behaviors."[35] We believe that the board can change the "old boys' club" culture into a more inclusive, gender equal and diverse culture, reducing the prevelance of group-think and encouraging innovation. This is particularly true in our "knowledge economy,"[36] where companies depend on their

BlackRock, doesn't have full equality on its board either. Only four of its board members are women, out of the total number of eleven directors. Katie Mehnert, *Why Goldman Sachs's Push for Diversity Is Unlikely to Drive Real Change*, HARV. BUS. REV. (Feb. 20, 2020), https://hbr.org/2020/02/why-goldman-sachss-push-for-diversity-is-unlikely-to-drive-real-change [https://perma.cc/UTX6-FZJX]; Hugh Son, *Goldman Won't Take Companies Public Without 'At Least One Diverse Board Candidate,' CEO Says*, CNBC (Jan. 23, 2020, 5:57 PM EST), https://www.cnbc.com/2020/01/23/goldman-wont-take-companies-public-that-dont-have-at-least-one-diverse-board-candidate-ceo-says.html [https://perma.cc/Y7UR-QY54].

[33] Anat Alon-Beck, *Times They Are a-Changin': When Tech Employees Revolt!*, 80 MD. L. REV. 120, 128 (2020) [hereinafter *Times They Are a-Changin'*].

[34] *See* Stephanie Bornstein, *Disclosing Discrimination*, 101 B.U. L. REV. 287, 331 (2021).

[35] Mike Fucci & Terri Cooper, *The Inclusion Imperative for Boards: Redefining Board Responsibilities to Support Organizational Inclusion*, DELOITTE (Apr. 2, 2019), https://www2.deloitte.com/us/en/insights/topics/value-of-diversity-and-inclusion/redefining-board-responsibilities-to-support-organizational-inclusion.html [https://perma.cc/AQE8-6D83]; *see* DELOITTE, TOWARD GENDER PARITY: WOMEN ON BOARDS INITIATIVE 2 (2016), https://www2.deloitte.com/au/en/pages/economics/articles/toward-gender-parity-women-on-boards-initiative.html [https://perma.cc/L57Y-PKG7].

[36] *See* ROBERTO MANGABEIRA UNGER, THE KNOWLEDGE ECONOMY 1-18 (2019). Also, Powell and Snellman define the knowledge economy as "production and services based on knowledge-intensive activities that contribute to an accelerated pace of technological and scientific advance, as well as rapid obsolescence. The key components of a knowledge economy include a greater reliance on intellectual capabilities than on

employees to provide the human capital that helps the firm grow and compete in this dynamic, complex, and ever-changing world.[37]

The corporate sector drives our lives, economies, political leadership, environment, and even cultural norms.[38] Boards of directors hold an important role in firm governance. They establish firms' mission and vision. The board is responsible for organizational planning, including determining and monitoring the corporation's performance, compliance, policies, and financial statements.

Women do not have equal leadership representation in firm governance.[39] Women, as employees in these firms, do not have equal bargaining powers with the firm and lack access to information.[40] In turn, this situation contributes to the systemic problem of gender inequality. Institutional investors could have the duty to require that investee firms disclose information on company policies with regards to the gender board composition, and take into account the issue of women's equal representation in firm governance. This Article attempts to delineate the nature of that potential duty.

This Article will proceed as follows: Part I will address the general efforts to advance gender equality in the boardroom.[41] Part II will present a fiduciary duty to diversify.[42] Parts III and IV will consider how

physical inputs or natural resources . . . ." Walter W. Powell & Kaisa Snellman, *The Knowledge Economy*, 30 ANN. REV. SOCIO. 199, 201 (2004).

[37] *See* Alon-Beck, *Times They Are a-Changin'*, *supra* note 33, at 123 ("There is a shortage in skilled labor that contributes to a 'war for talent' where large companies, especially tech companies, aggressively compete for talent.") (footnote omitted).

[38] *See* BRIAN ROACH, CORPORATE POWER IN A GLOBAL ECONOMY 2 (2007), https://www.economicsnetwork.ac.uk/sites/default/files/Brian%20Roach/Corporate_Power_in_a_Global_Economy.pdf [https://perma.cc/T5UL-8JTN] ("In the traditional economic view, corporations are entities that provide maximal benefits to society when they continually seek greater profits . . . . [T]his view holds little validity – MNCs are unlikely to provide the greatest social benefit through their own volition. All those impacted by the decisions of multinationals must be given an acknowledged voice through existing or new institutional arrangements. Realizing the full potential of MNCs to serve the welfare of society will require a mixture of voluntary initiatives, market forces, and regulations.").

[39] Regarding the underrepresentation of women, see Jamillah Williams, *Diversity as a Trade Secret*, 107 GEO. L.J. 1685, 1687 (2019). *See generally* David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1138 (2017) (describing FOIA's procedural obstacles).

[40] *See generally* Kate Bahn, *Understanding the Importance of Monopsony Power in the U.S. Labor Market*, WASH. CTR. FOR EQUITABLE GROWTH (July 5, 2018), https://equitablegrowth.org/understanding-the-importance-of-monopsony-power-in-the-u-s-labor-market/ [https://perma.cc/N2J3-QQPX].

[41] *See infra* Part I.

[42] *See infra* Part II.

institutional investors may come to implement this fiduciary duty.[43] We will conclude by suggesting that a fiduciary duty may be an effective internal governance mechanism that could improve good governance through gender equality.[44]

I. RATIONALES FOR GENDER EQUALITY IN THE BOARDROOM

> *[F]iduciary law is not a static concept, nor is it tied to a single investment theory. Rather, it is a flexible set of principles that have been subject to varying interpretations over time.*
>
> —James Hawley, Keith Johnson, and Ed Waitzer[45]

In 2020 and beyond, corporate boardroom diversity, particularly gender inequality, is a highly contested corporate law and governance issue. Gender inequality continues to be the oldest form of inequality in human history.[46] The latest corporate governance reforms have mostly failed to address this problem.[47] To achieve social equality, it is crucial to reach equal representation of women in boardrooms.

While we have seen significant improvements in gender equality, evidence shows that market forces may bring on even more remarkable progress on that front.[48] Disparate jurisdictions have grappled with this challenge through legislation, in which the state plays a central role in fostering change.[49] This Article presents a novel angle: rather than

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[43] *See infra* Parts III, IV.

[44] *See infra* Conclusion.

[45] James Hawley, Keith Johnson & Ed Waitzer, *Reclaiming Fiduciary Duty Balance*, 4 ROTMAN INT'L J. PENSION MGMT. 4, 7 (2011).

[46] Archeologists and historians found that gender inequalities can be traced to our pre-history, even before written records emerged. *See* Marta Cintas-Peña & Leonardo García Sanjuán, *Gender Inequalities in Neolithic Iberia: A Multi-Proxy Approach*, 22(4) EUR. J. ARCHEOLOGY 499, 516 (2019).

[47] *See infra* Part I.D.

[48] *See* VICKY PRYCE, WOMEN VS CAPITALISM: WHY WE CAN'T HAVE IT ALL IN A FREE MARKET ECONOMY 1-44 (2019).

[49] *See, e.g.*, Billy Culleton, *State Lawmakers Continue Push to Increase Diversity in Corporate Boardrooms*, MULTISTATE (Mar. 17, 2021), https://www.multistate.us/insider/2021/3/17/state-lawmakers-continue-push-to-increase-diversity-in-corporate-boardrooms [https://perma.cc/PV53-WAKS] ("In 2018, California Governor Jerry Brown (D) signed landmark legislation (CA AB 826) mandating that publicly traded corporations based in California have a specified number of female directors on their board depending on the board's size. Two years later, California lawmakers enacted another bill (CA AB 979) to expand the original law to require that at least one director on a corporate board come from an underrepresented community (defined as someone who self-identifies as Black, African American, Latino, Asian, or Native American) by the end of 2021. Following California's decision, a total of seven states — California,

advocate for legislatively mandated inclusion, it suggests that all firms, including institutional investors, should bear a fiduciary duty to act towards gender equality.

The fiduciary duty to push for gender equality has unique attributes regarding all firms, especially for institutional investors, because their duties lie in the crossroads between law and economics.[50] The fiduciary duty of institutional investors requires them to act in their investors' and beneficiaries' best interests when making investment decisions on their behalf.[51] Through corporate and trust fiduciary duties, institutional investors enforce good governance norms in many ways — perhaps most notably by requiring firms to engage in a long-term strategy. For that reason, we suggest the institutional investors have a fiduciary duty to push for gender equality.

Thanks to global structural changes in capital management, financial markets, economic theory, and risk management, our understanding of fiduciary principles continues to evolve.[52] Moreover, there is substantial criticism from economics and behavioral finance scholars on the current investment and risk management practices due to the underlying popular modern portfolio theory.[53] This Article presents the recent changes and examines a new way for fiduciary practices and principles to evolve to align with sustainable long-term investment goals.

Fiduciary duties are designed to protect beneficiaries (and society) from abuse by fiduciary agents. Local culture, legal structures, authorizing statutes, regulations, practice codes, and court decisions impact how fiduciary principles are conceptualized.[54] Accordingly, over

Colorado, Illinois, Maryland, New York, Pennsylvania, and Washington — have enacted some type of board diversity measures. Specifically, legislation falls into one of three broad categories: (1) mandating board diversity; (2) encouraging board diversity; or (3) requiring disclosure of board diversity information").

[50] *See* Robert H. Sitkoff, *An Economic Theory of Fiduciary Law*, HARV. L. SCH. F. CORP. GOVERNANCE (Feb. 24, 2014), https://corpgov.law.harvard.edu/2014/02/24/an-economic-theory-of-fiduciary-law/ [https://perma.cc/35PW-PWWR].

[51] *See* U.S. DEP'T LABOR, MEETING YOUR FIDUCIARY RESPONSIBILITIES 2 (2020), https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/meeting-your-fiduciary-responsibilities.pdf [https://perma.cc/LY4W-XW4K].

[52] *See* Hawley et al., *supra* note 45, at 4.

[53] *See* Andrea Devenow & Ivo Welch, *Rational Herding in Financial Economics*, 40 EUR. ECON. REV. 603, 612 (1996); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 264 (1979); John Montgomery, *Economic Analysis in ERISA Litigation over Fiduciary Duties*, HARV. L. SCH. F. CORP. GOVERNANCE (Dec. 24, 2011), https://corpgov.law.harvard.edu/2011/12/24/economic-analysis-in-erisa-litigation-over-fiduciary-duties/ [https://perma.cc/99R9-SZNL].

[54] *See infra* Part II.A.

the past forty years, the application of these fiduciary principles has evolved in response to changing circumstances and investor demand. Today, the stark lack of representation of female directors in the boardrooms of major public and private corporations has become a significant focus of the current international evolution in fiduciary thinking, due to the fact that it involves fiduciary issues of intergenerational equity[55] and fairness and has financial implications.[56]

A concern for intergenerational justice, and specifically for the advancement of women's participation in the corporate world, leads us to take a closer look at economic theories. It supports a proposal to change the current institutional design and extend our current understanding of fiduciary duties to include a duty to diversify as well as to gender equality. Outside the United States, a new movement advocates for a potentially disruptive (re)evolution of fiduciary duties — as evidenced by the *Fiduciary Duty in the 21st Century* report.[57]

In the past few decades, institutional investors' fiduciary duties have been understood to forbid any investment decision that might sacrifice financial returns for other social imperatives, such as equality.[58] After conducting a comparative analysis of the principal common law jurisdictions, our view is that fiduciary duties to invest prudently can be extended in some jurisdictions to include investment decisions that promote equality for women. However, regarding the United States, there is a need for legal reform to encourage investors to consider the consequences of their decisions on different stakeholders, including women's equality.

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[55] To improve intergenerational equity, we must advance the rights and opportunities for current women and future generations.

[56] For more on the evolution of fiduciary duty, see Hawley et al., *supra* note 45, at 4 ("Years of focus on the fiduciary duty of prudence has generated myopic investment herding behaviors, undermined intergenerational pension equity, and disrupted attention to the fiduciary duties of loyalty and impartiality. Reclaiming fiduciary duty balance between prudence, loyalty and impartiality is critical to sustaining pension promises.").

[57] *See* RORY SULLIVAN, WILL MARTINDALE, ELODIE FELLER & ANNA BORDON, FIDUCIARY DUTY IN THE 21ST CENTURY 11 (2015), https://www.unpri.org/download?ac=1378 [https://perma.cc/2XA6-4C6N] [hereinafter FIDUCIARY DUTY IN THE 21ST CENTURY]; *see also* ALEX EDMANS, GROW THE PIE: HOW GREAT COMPANIES DELIVER BOTH PURPOSE AND PROFIT 1 (2020); COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD 39 (2018).

[58] *See* Tamar Frankel, *The Rise of Fiduciary Law*, HARV. L. SCH. F. CORP. GOVERNANCE (Sept. 10, 2018), https://corpgov.law.harvard.edu/2018/09/10/the-rise-of-fiduciary-law/ [https://perma.cc/DVS5-EV9N]. *See generally Fiduciary Duties*, AM. BAR ASS'N (Mar. 11, 2021), https://www.americanbar.org/groups/business_law/publications/the_business_lawyer/find_by_subject/buslaw_tbl_mci_fiduciaryduty/ [https://perma.cc/6KTN-MH66].

Social science consistently demonstrates how diverse groups make better decisions than homogeneous ones.[59] By contrast, men's current domination in boardrooms is at the root of a critical shortcoming in today's governance: group-think.[60] Corporate governance duties might reflect the value of diversity as a central core of good governance.

A. Corporate Boardrooms and Gender-Based Segregation

Women face exclusion even though substantial arguments support their inclusion. While women hold half of all employment, most firms' organizational charts are radically less balanced at their pinnacles.[61] Boards hover around 20% women. C-suite positions are far fewer, with women serving as only 5% of CEOs.[62]

To focus on governance, boards play a central role. Global firms influence billions of people's lives and drive our politics, environment and cultural norms.[63] The underrepresentation of women on boards

[59] *See* SUNDIATU DIXON-FYLE, KEVIN DOLAN, VIVIAN HUNT & SARA PRINCE, DIVERSITY WINS: HOW INCLUSION MATTERS 3 (2020); Evan Apfelbaum, *The Trouble with Homogeneous Teams*, 59 MIT SLOAN MGMT. REV. 43, 43 (2017); David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, HARV. BUS. REV. (Nov. 4, 2016), https://hbr.org/2016/11/why-diverse-teams-are-smarter [https://perma.cc/X9PG-JLAB].

[60] *See* Darren Rosenblum, *California Dreaming?*, 99 B.U. L. REV. 1435, 1457 (2019) [hereinafter *California Dreaming?*].

[61] For the first time in almost a decade, at the beginning of 2020, women held the majority of jobs (50.04%) in the U.S. labor markets, according to the Bureau of Labor Statistics. Jack Kelly, *Women Now Hold More Jobs than Men in the U.S. Workforce*, FORBES (Jan. 13, 2020, 10:43 AM EST), https://www.forbes.com/sites/jackkelly/2020/01/13/women-now-hold-more-jobs-than-men/#7addc8db8f8a [https://perma.cc/PD3E-K4KC].

[62] *Women Serve As CEOs on Only 5% of Fortune 500 Companies*, BIG NEWS NETWORK (Feb. 25, 2020, 1:08 GMT), https://www.bignewsnetwork.com/news/264124296/women-serve-as-ceos-on-only-5-of-fortune-500-companies [https://perma.cc/YU4Q-DDQ3]; *see also* 2020 WOMEN ON BOARDS, GENDER DIVERSITY INDEX 3 (2019), https://2020wob.com/wp-content/uploads/2019/10/2020WOB_Gender_Diversity_Index_Report_Oct2019.pdf [https://perma.cc/5WJW-D94Z]. "The percentage of women in the 100 largest companies is 27.7%; in the 1,000 smallest companies it is 15.7%." *Id.*

[63] *See* ROACH, *supra* note 38, at 2 ("In the traditional economic view, corporations are entities that provide maximal benefits to society when they continually seek greater profits . . . . this view holds little validity – MNCs are unlikely to provide the greatest social benefit through their own volition. All those impacted by the decisions of multinationals must be given an acknowledged voice through existing or new institutional arrangements. Realizing the full potential of MNCs to serve the welfare of society will require a mixture of voluntary initiatives, market forces, and regulations."); Cassia Peralta, *Storytelling for Business Success*, WHARTON MAG. (Dec. 16, 2015), https://magazine.wharton.upenn.edu/digital/storytelling-for-business-success/ [https://perma.cc/PQ5M-SCEV].

affects firm governance as the board establishes the corporation's mission and vision. They select, vet, and monitor the executives and other directors and their organizational planning defines and monitors the firm's performance, compliance, policies, and financial statements.

However, directors tend to favor people that are just like them, and *insiderism* still defines the selection of candidates for board and C-suite positions.[64] Directors may come from other boards and senior management without formal procedures to identify potential candidates. (Un)conscious biases may explain this exclusion. [65] For example, if four finalists — three men and one woman — compete for a board slot in a hypothetical scenario, her chances tend closer to zero than 25% because of unconscious biases.[66] Women may appear inferior, less reliable, and unsuited for leadership.[67] Additionally, they might also be viewed as prioritizing family or as emotional or irrational.[68]

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[64] *See* Luc Renneboog & Yang Zhao, *Director Networks, Turnover, and Appointments* 11 (Harv. L. Sch. F. Corp. Governance, Working Paper No. 534, 2018), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3164442_code1664187.pdf?abstractid=3045221&mirid=1 [https://perma.cc/A9JU-A5YR].

[65] Johanne Grosvold, *Where Are All the Women? Institutional Context and the Prevalence of Women on the Corporate Board of Directors*, 50 BUS. & SOC. 531, 538 (2011); *see* Amir N. Licht, *Culture and Law in Corporate Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 129, 154 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018); Amir N. Licht, *Stakeholder Impartiality: A New Classic Approach for the Objectives of the Corporation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 18, 2019), https://corpgov.law.harvard.edu/2019/10/18/stakeholder-impartiality-a-new-classic-approach-for-the-objectives-of-the-corporation/ [https://perma.cc/7CEH-85Y9]; Amir N. Licht & Reneé Adams, *Shareholders and Stakeholders Around the World: The Role of Values, Culture, and Law in Directors' Decisions*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 12, 2019), https://corpgov.law.harvard.edu/2019/07/12/shareholders-and-stakeholders-around-the-world-the-role-of-values-culture-and-law-in-directors-decisions/ [https://perma.cc/Y88V-G5XY].

[66] Stefanie K. Johnson, David R. Hekman & Elsa T. Chan, *If There's Only One Woman in Your Candidate Pool, There's Statistically No Chance She'll Be Hired*, HARV. BUS. REV. (Apr. 26, 2016), https://www.researchgate.net/publication/303003812_If_There's_Only_One_Woman_in_Your_Candidate_Pool_There's_Statistically_No_Chance_She'll_Be_Hired [https://perma.cc/P9HF-EQMD].

[67] *Cf.* Katherine B. Coffman, Christine L. Exley & Muriel Niederle, *The Role of Beliefs in Driving Gender Discrimination*, 67 MGMT. SCI. 3551 (2021), https://www.hbs.edu/faculty/Pages/item.aspx?num=60385 [https://perma.cc/P36W-L4RA] (explaining how experiments show that discrimination against female workers seem to be driven by in-group preferences).

[68] *See* PRYCE, *supra* note 48, at 147, 151.

Within a gender homogeneous group, such biases become more commonplace.[69] Within orchestras, experiments revealed blind auditions led to more inclusion.[70] The corporate world, with its widespread notions of "fitness," cannot easily adapt. These factors have led to a market failure of widespread exclusion that mandates legislation.[71]

B. Rationales for Gender Equality in Corporate Boardrooms

There are several arguments in favor of gender equality on boards. The first is that it enhances equality and contributes to a better society. The second is that a diverse board sends an important signal to investors and both current and potential women employees: the firm is sensitive to gender equality issues and the women the firm employs can achieve their ambitions just like their male counterparts. The third is that a heterogeneous board is more effective and improves decision making.[72]

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[69] CAROLINE CRIADO PEREZ, INVISIBLE WOMEN: DATA BIAS IN A WORLD DESIGNED FOR MEN 269-70 (2019).

[70] For instance, there used to be a significant gender gap between women and men in symphony orchestras. Following a lawsuit, auditions were held behind a curtain, with members of the selecting body only *hearing* the musicians. As a result, the number of women in orchestras soon reached 45%. *See* Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 AM. ECON. REV. 715, 719, 738 (2000).

[71] PEREZ, *supra* note 69, at 93-95.

[72] Laura Liswood, *Women Directors Change How Boards Work*, HARV. BUS. REV. (Feb. 17, 2015), https://hbr.org/2015/02/women-directors-change-how-boards-work [https://perma.cc/M333-CEFF]; *see* Katherine W. Phillips, Katie L. Lijenquist & Margaret A. Neale, *Better Decisions Through Diversity*, KELLOGGINSIGHT (Oct. 1, 2010), https://insight.kellogg.northwestern.edu/article/better_decisions_through_diversity [https://perma.cc/5DPA-BEQ3] ("In the study, diverse groups outperformed more homogeneous groups, not because of an influx of new ideas, but because diversity triggered more careful information processing that is absent in homogeneous groups."). The appeal of the different rationales for gender equality explored in this Article varies according to one's conception of corporate entities' purpose. Those who take the stand that the sole purpose of the company is to maximize the profits of its members will focus on the arguments that without equality on the board, the business reputation will suffer and, therefore, business financial prospects will as well. See *infra* Part I.B for a discussion on reputational harm and high costs of monitoring labor. Others, who believe that a company's role is also to promote greater social good (with variable boundaries), believe that gender equality should be promoted generally and specifically within the board of directors, as long as it does not directly harm profitability.

1. The Advancement of Women's Rights Contribute to a More Equal and Better Society

Equality is a fundamental principle at the base of any democratic society. The right to equality is protected in many international conventions, including The Convention on the Elimination of All Forms of Discrimination against Women.[73] It requires us to treat all human beings equally unless there is a relevant difference between them.[74] Countless books and articles in various fields have been written on what the reference group is, who is equal, what is the relevant difference, and what is the equal ratio.[75] This Article does not purport to analyze these complex questions.

On the one hand, it is generally accepted that sex does not constitute a relevant difference regarding service on the board of directors. In other words, equality requires that a person's sex not be considered when appointing a director to the board, as this is an irrelevant difference.

On the other hand, *promoting equality* for women on the board of directors requires gender-based considerations. This follows the principle of affirmative action, which states that candidates from historically discriminated groups should be preferred for positions in bodies where seats are limited, such as boards of directors.[76] Quotas, preferential treatments (such as an additional point on a scoring chart

[73] In 1979, the United Nations adopted the Convention on the Elimination of Discrimination against Women ("CEDAW"), which is also known as "the international women's bill of rights." *Gender Equality*, UNITED NATIONS, https://www.un.org/en/global-issues/gender-equality (last visited Feb. 9, 2021) [https://perma.cc/6W36-2V9S]. "[A]ll but seven countries of the 193-member states have ratified it. The holdouts include some you might expect — Iran, Palau, Somalia, North and South Sudan and Tonga — and one that might surprise. The United States." *International Women's Rights,* EQUAL MEANS EQUAL, https://equalmeansequal.com/international-womens-rights/ (last visited Feb. 9, 2021) [https://perma.cc/KAE2-8QK7].

[74] According to Aristotle: "equality consists in the same treatment of similar persons." ARISTOTLE, POLITICS 286 (Benjamin Jowett trans., 1943). If one is the same, one is to be treated the same; if one is different, one is to be treated differently (as to Aristotle theory today, see CATHARINE A. MACKINNON, SEX EQUALITY 6 (3d ed. 2016)). In order to establish discrimination, one must relate to the existence of an unjustified distinction. Distinguishing between groups based on relevant differences does not, in itself, constitute discrimination.

[75] *See, e.g.*, Dhirendra Prakash Saxena, *The "Reference Group" Concept*, 46 SOC. SCI. 155 (1971) (searching critically into the theory of "reference group"); *Groups and Individuals*, STAN. UNIV. EQUAL. OPPORTUNITY & EDUC., https://edeq.stanford.edu/sections/groups-and-individuals (last visited July 15, 2021) [https://perma.cc/V3FC-3S3Z] (providing a list of readings about equality and opportunity in education).

[76] On discrimination and affirmative action, see TARUNABH KHAITAN, A THEORY OF DISCRIMINATION LAW 80, 215 (2015); MACKINNON, *supra* note 74, at 133-145.

for those in the preferred group), or a change in the threshold requirements for members of such groups have served this purpose.[77]

The primary social importance of gender equality in the boardrooms is its promotion of promoting social equality. Women are entitled to enjoy the same human rights and fundamental freedoms as men.[78] Women comprise half of the population, half of high school and higher education graduates, and now half of the workforce. As such, they should occupy a similar proportion on boards of directors.[79] Furthermore, a gender-heterogeneous board of directors signals that women can aspire to hold high-level positions and may help fight the belief that boards constituted mostly of white men are more responsible and serious. Therefore, there are strong arguments that promoting equality in the board of directors will also contribute to the social good.[80]

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[77] Christopher McCrudden, *A Comparative Taxonomy of "Positive Action" and "Affirmative Action" Policies*, *in* NON-DISCRIMINATION IN EUROPEAN PRIVATE LAW 157, 163-65 (Reiner Schulze ed., 2011).

[78] International human rights treaties require states to take proactive steps to ensure that women's human rights are respected by law and to eliminate discrimination, inequalities, and practices that negatively affect women's rights. There are few decisions regarding the participation of women in decision-making forums. *See* Meetings Coverage, Security Council, Security Council Unanimously Adopts Resolution 2242 (2015) to Improve Implementation of Landmark Text on Women, Peace, Security Agenda, U.N. Meetings Coverage SC/12076 (Oct. 13, 2015), https://www.un.org/press/en/2015/sc12076.doc.htm [https://perma.cc/K8NL-WA3V]. On participating in health-related decision-making, see Rep. of the Global Health Crises Task Force, ¶ 78, U.N. Doc. A/72/50 (2017); as well as the board of the World Health Organization, and Clare Wenham, Julia Smith & Rosemary Morgan, Comment, *Covid-19: The Gendered Impacts of the Outbreak*, 395 LANCET 847, 847 (2020). *See generally* United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979 (noting that "the Chapter of the United Nations reaffirms faith in fundamental human rights, in the dignity and growth of the human person and in the equal rights of men and women").

[79] Tara Law, *Women Are Now the Majority of the U.S. Workforce — Working Women Still Face Serious Challenges*, TIME (Jan. 16, 2020), https://time.com/5766787/women-workforce/ [https://perma.cc/BT6J-4MU7]; *Population, Female (% of Total Population)*, WORLD BANK (2019), https://data.worldbank.org/indicator/SP.POP.TOTL.FE.ZS [https://perma.cc/8879-U2ZR]; Carlie Porterfield, *Women — More Than Half of U.S. Population — Only See Themselves on Screen 38% of the Time, Study Finds*, FORBES (Dec. 3, 2020), https://www.forbes.com/sites/carlieporterfield/2020/12/03/women-more-than-half-of-us-population-only-see-themselves-on-screen-38-of-the-time-study-finds/?sh=43ebe7797108 [https://perma.cc/6A33-B7SG]; Hannah Ritchie & Max Roser, *Gender Ratio*, OUR WORLD IN DATA (2019), https://ourworldindata.org/gender-ratio [https://perma.cc/MR4Q-Q4MY].

[80] *Cf. International Women's Rights*, *supra* note 73 (discussing how vast majority of countries have ratified "the international women's bill of rights," pointing out the

2. Reputation Signaling

Striving for gender equality can result in reputational benefits: gender equal boards can be used as a signaling tool to investors about a firm's commitment to recruit the best people as directors.[81] Indeed, an increase in board gender equality keeps investors apprised of firm preferences. Investors should note that a gender-diverse board must be interpreted as a sign of preference for equality and a strong commitment to shareholder value.

Logically, if a board is composed entirely of individuals from a given demographic subcategory (as of now not very young white men), it seems clear that the company has not sought to recruit the best. It signals to investors that the board's nominations and governance committee and the firm's top management team may not be seeking the right candidates to help lead the enterprise. Indeed, in most western countries, women constitute half of the university's business administration, economics, accounting, and law graduates, as well as half of those who graduate with distinctions.[82] Statistically, women should also constitute close to half of the people with the skillsets required to become among the best directors.

3. Good Governance and Group-Think

While womanhood's shared identity does not create a monolithic experience, the historical exclusion of women implies that women's inclusion in corporate boards will bring experiential diversity. This, in turn, brings new and different perspectives to corporate decision-making table.[83] Diverse experiences lead to distinct cognitive processes.

United States is not one of those countries as it never made it to the Senate floor for voting, and that Congress is comprised of only twenty percent women).

[81] Stephen Bear, Noushi Rahman & Corinne Post, *The Impact of Board Diversity and Gender Composition on Corporate Social Responsibility and Firm Reputation*, 97 J. BUS. ETHICS 207, 211 (2010) (showing how it impacts firm reputation); Lisa Wardell, *Board Diversity Propels Performance*, CORP. BOARD MEMBER, https://boardmember.com/board-diversity-propels-performance/ (last visited Jan. 12, 2021) [https://perma.cc/75ST-RJ99].

[82] Elizabeth Olson, *Women Make Up Majority of U.S. Law Students for First Time*, N.Y. TIMES (Dec. 16, 2016), https://www.nytimes.com/2016/12/16/business/dealbook/women-majority-of-us-law-students-first-time.html [https://perma.cc/WHG6-ZPRZ]; Matt Symonds, *Inspiring the Next Generation of Women at Business School*, FORBES (May 20, 2021), https://www.forbes.com/sites/mattsymonds/2021/05/20/inspiring-the-next-generation-of-women-at-business-school/?sh=146f80181367 [https://perma.cc/ZM74-QU3V].

[83] SCOTT PAGE, THE DIVERSITY BONUS: HOW GREAT TEAMS PAY OFF IN THE KNOWLEDGE ECONOMY 229-33 (Earl Lewis & Nancy Cantor eds., 2017). Indeed, it is their experience,

It is here that having diverse people on a board (or in any group decision-making process) makes a difference.[84] Women may pose more challenging questions, leading to better information for the board, as various studies have shown they often follow more methodical reasoning.[85] Other studies assert that women may have more risk awareness.[86] In bringing distinct perspectives to board debates, resulting decisions will be more robust. Howard Gardner argues that women bring a different sort of intelligence to their engagements.[87] Finally, women's presence on boards of directors may help break issues of "group-think"[88] that exist in homogeneous groups in which everyone concurs on key issues.

Furthermore, men's domination of corporate boards appears to exacerbate the risks of entrenchment. Scholars have demonstrated how male dominance reproduces itself.[89] Male incumbents have a double

not their identity, that makes a difference in analyzing problems and making decisions about them. 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. *See also* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991) (explaining how identity politics problematically does not focus on differences within groups).

[84] 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. *See generally* Crenshaw, *supra* note 83, at 1242 (discussing the intersectionality of race and sex in many contexts).

[85] *See* Darren Rosenblum & Daria Roithmayr, *More than a Woman: Insights into Corporate Governance After the French Sex Quota*, 48 IND. L. REV. 889, 910-11 (2015).

[86] *See* Christine R. Harris, Michael Jenkins & Dale Glaser, *Gender Differences in Risk Assessment: Why Do Women Take Fewer Risks than Men?*, 1 JUDGEMENT & DECISION MAKING 48, 48-50 (2006).

[87] Different strengths in certain areas of intelligence correlate with sex. Gardner defined the first seven intelligences in *Frames of Mind* in 1983. He added the last two in *Intelligence Reframed* in 1999. Gardner's multiple intelligence theory began as an attempt to define what intelligence is. According to Gardner's theory, humans have multiple intelligences. Gardner has identified nine distinct intelligences. Among them, mathematical logical intelligence which is the ability to use numbers effectively and to think logically and orderly, which is attributed mainly to men; and interrelation intelligence, which is the ability to discern and respond to other people's needs, motives and emotions. This intelligence is attributed mainly to women. *See generally* HOWARD GARDNER, FRAMES OF MIND (1983); HOWARD GARDNER, INTELLIGENCE REFRAMED (1999).

[88] *See* STEPHEN BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 155 (2008) (detailing the role of the board monitoring management); Jill E. Fisch, *Taking Boards Seriously*, 19 CARDOZO L. REV. 265, 266-67 (1997); Rosenblum & Nili, *supra* note 24, at 223.

[89] To understand this phenomenon, it is relevant to turn to political science literature on male overrepresentation in politics, which sheds light on this issue in the corporate context. It is for this reason that Bjarnegård (2013) and Murray (2014) in the

advantage over outsiders (women often being outsiders): firstly, they often come from socio-economically privileged backgrounds and benefit from privileged educations, which lead to presumptions of competence for highly ranked jobs. Secondly, once in those positions, they can leverage the situation to "acquir[e] [the] skill[s], asset[s], or talent[s]" understood to be required to succeed as a director or executive.[90] Through hard work *and* advantageous placement, one can acquire abilities that have a market value. Not only do firms hesitate to force out these incumbents, but incumbents themselves think their contributions to the firm are unique and essential.[91]

Lastly, nominating committees tend to choose people who have skills familiar and similar to theirs.[92] Leaders find replacements for themselves in a process of corporate elite reproduction.[93] As firms recruit and promote people, "forces [exist] which lead the men who manage to reproduce themselves in kind."[94] The corporation's leaders view themselves as the standard-bearers for success; their skills prove essential for the firm's continued profitability. These leaders, in turn, identify for promotion those subordinates whose skills mirror their own.[95] It is no coincidence that men dominate such elites, frequently leading to entrenchment issues such as those mentioned previously.

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tradition of Eveline (1994; 1998) call for a shift in how gender inequality is problematized. *See* NATALIE GALEA & LOUISE CHAPPELL, THE POWER OF MASCULINE PRIVILEGE: COMPARING MALE OVERREPRESENTATION IN THE AUSTRALIAN POLITICAL AND CONSTRUCTION SECTORS 8 (2015); Joan Eveline, *Heavy, Dirty and Limp Stories: Male Advantage at Work*, *in* GENDER AND INSTITUTIONS: WELFARE, WORK AND CITIZENSHIP 90, 90-106 (Moira Gatens & Alison Mackinnon eds., 1998); Joan Eveline, *The Politics of Advantage*, 9 AUSTL. FEMINIST STUD. 129, 129-54 (1994). *See generally* ELIN BJARNEGÅRD, GENDER, INFORMAL INSTITUTION AND POLITICAL RECRUITMENT: EXPLAINING MALE DOMINANCE IN PARLIAMENTARY REPRESENTATION (2013).

90 Alison Bailey, *Privilege: Expanding on Marilyn Frye's "Oppression"*, 29 J. SOC. PHIL. 104, 109 (1998).

91 Interview transcript is on file with the authors.

92 *See generally* ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION (2d ed. 1993) (explaining that as men recruit and promote people, they find candidates that are reproductions of themselves, having the same skills as they do, which they view as valuable to the company).

93 *Id.* at 68.

94 *Id.* at vii.

95 "The greater the tendency for a group of people to try to reproduce themselves, the more constraining becomes the emphasis on conformity." *Id.* at 68; *see also* Amanda K. Packel, *Government Intervention into Board Composition: Gender Quotas in Norway and Diversity Disclosures in the United States*, 21 STAN. J.L., BUS. & FIN. 192, 198 (2016) (reviewing AARON DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY (2015)) (explaining that "[t]he board nomination process relies very heavily on social networks . . . which tends to result in newly appointed

C. Current Efforts

Current legislative efforts vary significantly.[96] In the past seventeen years, significant legislation has become increasingly widespread.[97] After summarizing quotas, we will describe softer remedies that have been brought to bear on inclusion.

Many European countries, including the Scandinavian countries, as well as France, Belgium, and Italy, have enacted laws requiring between one-third and 40% of board members to be women.[98] These laws led to major changes. According to the Organisation for Economic Co-operation and Development ("OECD"), at of the end of 2019, the proportion of women on the boards of the listed companies in Iceland was 46%; in Norway, which passed the law in 2009, the proportion reached 40%; the proportion in France was 45%; Sweden was 38%; Italy was 36%; and Belgium was also 36%.[99] Within a decade, all affected companies located in countries with diversity quotas reached the targets set by law.[100] Despite the success shown in countries that have implemented these laws, the average representation of women on corporate boards in other OECD countries hovers around 21%.[101]

directors with sociodemographic characteristics similar to those of existing directors"). *See generally* DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE (2014).

96 *See* Heike Mensi-Klarbach & Cathrnie Seierstad, *Gender Quotas on Corporate Boards: Similarities and Differences in Quota Scenarios*, 17 EUR. MGMT. REV. 615, 622 (2020).

97 *See* Ruth V. Aguilera, Venkat Kuppuswamy & Rahul Anand, *What Happened When India Mandated Gender Diversity on Boards*, HARV. BUS. REV. (Feb. 5, 2021), https://hbr.org/2021/02/what-happened-when-india-mandated-gender-diversity-on-boards [https://perma.cc/6P84-LDPV].

98 *See* 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/BK7A-YNN2]; Margarethe Wiersema & Marie Lousie Mors, *What Board Directors Really Think of Gender Quotas*, HARV. BUS. REV. (Nov. 14, 2016), https://hbr.org/2016/11/what-board-directors-really-think-of-gender-quotas [https://perma.cc/PR9Z-2RCH].

99 *Employment: Female Share of Seats on Boards of the Largest Publicly Listed Companies*, ORG. FOR ECON. CO-OPERATION & DEV., https://stats.oecd.org/index.aspx?queryid=54753 (last visited July 28, 2021) [https://perma.cc/QP5P-5JLD] [hereinafter *Female Share*] (data extracted as of Aug. 17, 2020).

100 Mensi-Klarbach & Seierstad, *supra* note 96; Helena Vieira, *Quotas Have Led to More Women on Corporate Boards in Europe*, THE LONDON SCH. OF ECON. AND POL. SCI. (Sept. 30, 2016), https://blogs.lse.ac.uk/businessreview/2016/09/30/quotas-have-led-to-more-women-on-corporate-boards-in-europe/ [https://perma.cc/Y7TD-AQ76].

101 *See Achieving Gender Balance in Corporate Leadership*, ORG. FOR ECON. CO-OPERATION & DEV., https://www.oecd-ilibrary.org/sites/bac3ebfa-en/index.html?itemId=/content/component/bac3ebfa-en (last visited July 15, 2021) [https://perma.cc/

California passed a similar law in 2018 that has faced substantial challenges in courts[102] but has nonetheless inspired widespread compliance.[103] While quotas may prove effective, they involve the state's heavy intervention into governance. Next, we will consider softer remedies for women inclusion.

Corporate governance codes, or best practice codes, may inspire firms to comply. Civil society or administrative organizations, cohorts of public companies, or institutional investors may set up standards for

K5LB-ZMBX] (data as of 2019); *Female Share*, *supra* note 99; *What Big Data Can Tell Us About Women on Boards,* ORG. FOR ECON. CO-OPERATION & DEV., https://www.oecd.org/gender/data/what-big-data-can-tell-us-about-women-on-boards.htm (last visited July 15, 2021) [https://perma.cc/H3LL-GM9E] (data as of Mar. 2020).

102 *See* Meland v. Padilla, No. 2:19-cv-02288-JAM-AC, 2020 WL 1911545 (E.D. Cal. Apr. 20, 2020), *rev'd sub nom.* Meland v. Weber, 2 F.4th 838 (9th Cir. 2021). The main argument against the quota system is that the state should not interfere with the shareholders' ownership of their company. Recently, in *Meland v. Padilla*, a federal district court dismissed a lawsuit attempting to invalidate this new law on such grounds. *Id.* The decision "suggests that courts will not be eager to interfere with legislative efforts to promote diversity among directors of public companies." William Savitt, Ryan A. McLeod & Anitha Reddy, *Federal District Court Dismissal of Challenge to Board Diversity Statute*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 24, 2020), https://corpgov.law.harvard.edu/2020/04/24/federal-district-court-dismissal-of-challenge-to-board-diversity-statute/ [https://perma.cc/N6WG-WHWG]. Note that there is an interest group behind this lawsuit and another suit in California state court (see discussion below). Their main arguments are: "Treating people according to immutable characteristics like sex violates the very notion of equality before the law. People should be treated as individuals, not as members of a group they did not choose; The government's attempt to dictate the percentage of men and women on corporate boards is discriminatory and violates the Constitution's equal protection guarantee; A government that can meddle with the composition of corporate boards can enlist shareholders to run companies according to the state's preferred social policies." Creighton Meland Jr. v. Shirley N. Weber, Secretary of State of California*: Fighting California's Discriminatory Woman Quota Law,* PAC. LEGAL FOUND., https://pacificlegal.org/case/creighton-meland-v-alex-padilla-secretary-of-state-of-california/ (last visited Jan. 12, 2021) [https://perma.cc/SKM7-TE98].

The other case that was filed first is Crest v. Alex Padilla (as amended), filed in California State Court, was framed as a "taxpayer suit" that sought to enjoin Padilla, the California Secretary of State, from expending taxpayer funds and taxpayer-financed resources to enforce or implement the statute, claiming violations of the equal protection provisions of the California constitution. *See* Crest v. Padilla, No. 19STCV27561, 2019 WL 3771990 (Cal. Super. Ct. Aug. 16, 2019). We will relate to these arguments on the part regarding affirmative action.

103 *See* Rosenblum, *California Dreaming?*, *supra* note 60, at 1440. The statute requires public companies with headquarters in the state to have at least one woman on their boards by the end of 2019, and at least two or three women by the end of 2021 (two women in companies with at least five board members, and three women on the board with six members or more). Companies that do not meet this goal will face $100,000 and $300,000 fines.

firms to follow. Countries with large public company sectors such as Germany and the Netherlands have adopted comply-or-explain legislation.[104] For example, the U.K.'s independent regulator, the Financial Reporting Council, ("FRC"), drafted a proposed corporate governance code.[105] The UK Stewardship Code, as it is called, added a responsibility to strive toward gender diversity by advocating for women's appointments to corporate boards, executive positions, and the workforce.[106] Such efforts achieved mixed results, as was the case in California, where a largely ineffective voluntary quota was in place prior to the state's 2018 mandate.[107] United States disclosure rules also proved to be largely unsuccessful.[108]

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[104] Virginia Harper Ho, *"Comply or Explain" and the Future of Nonfinancial Reporting*, 21 LEWIS & CLARK L. REV. 317, 321 (2017).

[105] FIN. REPORTING COUNCIL, THE UK CORPORATE GOVERNANCE CODE (2018), https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf [https://perma.cc/3EMC-M3SP].

[106] FIN. REPORTING COUNCIL, THE UK STEWARDSHIP CODE 4-5 (2020), https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Final2.pdf [https://perma.cc/HJ2Q-5HAZ].

[107] *See* Rosenblum, *California Dreaming?*, *supra* note 60.

[108] With regards to disclosures, it should be noted that in the United States, for example, under applicable SEC disclosure rules, public companies are already required to disclose whether they consider diversity in identifying nominees to the board of directors. However, there is no mandate that the disclosure include identity-based diversity factors, such as gender (or race or ethnicity). Therefore, in practice, public companies have the flexibility to define diversity as they see fit, and according to studies, such definitions typically include a wide range of factors, such as a director's prior professional experience. *See* 17 C.F.R. § 229.407 (2021); Proxy Disclosure Enhancements, Securities Act Release No. 33-9089, 74 Fed. Reg. 68,334 (Dec. 23, 2009); FENWICK, CORPORATE GOVERNANCE PRACTICES AND TRENDS: A COMPARISON OF LARGE PUBLIC COMPANIES AND SILICON VALLEY COMPANIES 17 (2019), https://www.fenwick.com/FenwickDocuments/Corporate_Governance_Survey_2019.pdf [https://perma.cc/9CDD-FCVR] ("[O]ne study found that during the four years after the enactment of the SEC's diversity disclosure rule, only half of the companies defined diversity to include traditional factors such as gender, race, and ethnicity while over 80% used a definition of diversity that referenced a director's prior professional experience or other nonidentity-based factors. The report noted that to the extent the disclosure rule was intended to produce more diversity on boards along socio-demographic lines, it would be more effective to require companies to include disclosure about identity-based diversity factors such as gender, race, and ethnicity rather than allowing companies to define diversity for themselves."); *Want to Join a Corporate Board? Here's How*, FENWICK (Feb. 10, 2020), https://www.fenwick.com/insights/publications/want-to-join-a-corporate-board-heres-how [https://perma.cc/EX9W-36W3]; *see also* Aaron A. Dhir, *Corporate Reporting Under the U.S. Securities and Exchange Commission's Diversity Disclosure Rule: A Mixed-Methods Content Analysis* 4 (Osgoode Hall L. Sch., Working Paper No. 66, 2014).

Market solutions may also play an important role. Some of the world's largest and leading institutional investors have begun to consider boards' gender composition to foster greater inclusion.[109] Each of these institutional investors operates differently, but in aggregate, they have come to exert substantial pressure.

D. The Limitations of Current Solutions

While some jurisdictions have adopted hard quotas and others pursue softer measures, these efforts often rely on state intervention or on some ownership structure, such as institutional investors' corporate structure. Yet, it is argued in this Article that the authority required to effectively increase gender equality on corporate boards lies with private actors, notably institutional investors.[110] Shareholders do, after all, elect the board. Institutional shareholders, such as public retirement funds, hold the influence required to pressure firms to improve gender equality at the board level.

While these efforts have already fostered some improvement in sex diversity, this progress empowers critics to declare that only the private sector should create, foster, and implement remedies for sex inequality.[111] Even so, every few years, efforts focus on women's ability to step up their own representation.[112] This pressure to *lean in* falls generally short.[113] It presumes that women on their own can secure

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[109] *See Mandated Board Diversity*, *supra* note 19.

[110] Public retirement funds are some of the largest investors in the United States, and their support for stakeholders could prove central toward shifting corporate norms. David Webber et al. claim that 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. Barzuza et al., *supra* note 12, at 1243.

[111] *See* Joseph A. Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826*, at 8 (Rock Ctr. for Corp. Governance, Stan. L. Sch., Working Paper No. 232, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3248791 [https://perma.cc/S75B-SPJE].

[112] Joe Coscarelli, *Grammys President Faces Backlash After Saying Women Need to 'Step Up'*, N.Y. TIMES (Jan. 30, 2018), https://www.nytimes.com/2018/01/30/arts/music/grammys-step-up-neil-portnow-backlash.html [https://perma.cc/2KH8-X82W]; *see* Sarah Coury, Jess Huang, Ankur Kumar, Sara Prince, Alexis Krivkovich & Lareina Yee, *Women in the Workplace 2020*, MCKINSEY (Sept. 20, 2020), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace [https://perma.cc/TZ8D-7YR6].

[113] 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. SHERYL SANDBERG, LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD 11 (1st ed. 2013). This push to get women to *lean in* promotes a notion of individualized autonomy to general social change.

more representation even though male elites have little incentive to yield their *droit de seigneur* over corporate leadership.[114]

Yet, private efforts — whether those of shareholder activists or motivated individuals — cannot on their own generate structural transformation of this nature. This limitation exists both within firms and more broadly.[115] Voluntary measures come and go as new controversies draw activist shareholder attention. Activists, whether institutional shareholders or nongovernmental organizations, ebb and flow in their influence. *Leaning in* is an excellent form of consciousness-raising among market actors, but for such efforts to take root, the state's norm-setting authority plays an essential role.

It is for that reason that we suggest the creation of a fiduciary duty to diversify corporate boards. Institutional investors could require social policies for investee companies, notably relating to gender equality. This could take the form of a duty to seek the development and implementation of diversity policies among investee companies by requiring them to disclose diversity policies (and the degree of their implementation) in their annual reports.[116]

II. A FIDUCIARY DUTY TO DIVERSIFY AND PUSH FOR GENDER EQUALITY

The following section seeks to redefine the fiduciary duty to include gender equality. We redefine it to emphasize the board's responsibilities to change the "old boys' club" culture and support diversity and organizational inclusion. We will first define the concept of fiduciary duty in the context of diversity and gender equality, before offering a comparative analysis of its usage in corporate law in both international and national jurisdictions.

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114 *Id.* at 8; *see also Women in the Workplace*, LEANIN, https://leanin.org/women-in-the-workplace-report-2020 (last visited July 15, 2021) [https://perma.cc/ZK8T-E7HY].

115 *See* KANTER, *supra* note 92, at 291.

116 *See* INT'L CORP. GOVERNANCE NETWORK, ICGN GUIDANCE ON DIVERSITY ON BOARDS 14 (2016), https://www.icgn.org/sites/default/files/ICGN%20Guidance%20on%20Diversity%20on%20Boards%20-%20Final.pdf [https://perma.cc/5U4E-382D]. With regards to voting, institutional investors must further disclose their expectations on board diversity from investee companies in their governance and proxy voting guidelines. They can do so by disclosing their proxy voting guidelines to investee companies, particularly with regards to how diversity factors may affect shareholder votes for board candidates. *See id.*

A. Fiduciary Duty

> *Fiduciary relationships are crucial to any individual in any society. That is because few individuals are self-sufficient, and fewer, if any, can live alone.*
>
> —Tamar Frankel[117]

Fiduciary relationships have an important norm-setting role in many legal fields[118] and have a long history.[119] The fiduciary duty is imposed upon people or organizations in a position of trust or confidence to deal with agency costs, asymmetric information, and conflict of interest when they exercise "some discretionary power in the interests of another person."[120]

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117 Frankel, *The Rise of Fiduciary Law*, *supra* note 58.

118 *See id.* at 1-2. *See generally* EVAN J. CRIDDLE & EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY, chs. 1 & 7 (2016) (discussing the fiduciary duty a sovereign may owe to a subject and the fiduciary duties owe to refugees); Aditi Bagchi, *Fiduciary Principles in Employment Law*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 187 (Evan J. Criddle et al. eds., 2019) (discussing fiduciary duties of employees and employers); Deborah A. DeMott, *Fiduciary Principles in Agency Law*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra*, at 23 (exploring fiduciary duties in common law agency relationships); Nina A. Kohn, *Fiduciary Principles in Surrogate Decision-Making*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra*, at 249 (discussing fiduciary principles in a surrogate decision- making relationship); Lloyd Hitoshi Mayer, *Fiduciary Principles in Charities and Other Nonprofits*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra*, at 103 (discussing the application of fiduciary duties to charities and nonprofits); Dana M. Muir, *Fiduciary Principles in Pension Law*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra*, at 167 (discussing fiduciary duties in pension law); Elizabeth S. Scott & Ben Chen, *Fiduciary Principles in Family Law, in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra*, at 227 (discussing the relationships between family members as a fiduciary relationship); Emily L. Sherwin, *Formal Elements of Contract and Fiduciary Law*, *in* CONTRACT, STATUS, AND FIDUCIARY LAW 167 (Paul B. Miller & Andrew S. Gold eds., 2016) (discussing the conflict between the rules of contract law and the fluid nature of fiduciary duty); Howell E. Jackson, *Regulation in a Multisectored Financial Services Industry: An Exploration Essay*, 77 WASH. U. L.Q. 319 (1999) (discussing fiduciary duty as a regulatory structure in the financial services industry); Andrew Tuch, *Investment Banks as Fiduciaries: Implications for Conflicts of Interest*, 29 MELBOURNE U. L. REV. 478 (2005) (discussing the idea of fiduciary duties in the banking industry); Julian Velasco, *A Defense of the Corporate Law Duty of Care*, 40 J. CORP. L. 647 (2015) (defending the fiduciary duty of care).

119 Frankel, *supra* note 117.

120 FIDUCIARY DUTY IN THE 21ST CENTURY, *supra* note 57, at 11.

1. What Role Does Fiduciary Duty Play Within Corporate Law?

According to traditional common law, there are limits on the discretion of institutional investors' decision-making powers.[121] Currently, in the United States,[122] the tendency is to follow the "all things being equal rule," which means that institutional investors can invest assets in such a way as to "generate collateral benefits, but only if such an investment was 'equal to or superior' in risk, return, and soundness to other alternatives."[123] The Modern Portfolio Theory has influenced fiduciary duty since the last decades of the 20th century and, accordingly, directed institutional investors to act "rationally" in the sole financial interest of the firm.[124] At times, this creates incongruous situations where institutional investors will not consider other factors, such as the well-being of their investors or beneficiaries, or the ability to allocate benefits impartially between current and future generations.

According to Lydenberg, this approach ignores the previous interpretation of fiduciary duty that drew on a conception of prudence, which was "characterized by wisdom, discretion and intelligence — one that accounted to a greater degree for the relationship between one's investments and their effects on others in the world."[125] The main question that stems from this Article is whether the United States will change its approach to fiduciary duty in the near future.

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[121] *Contra* RORY SULLIVAN, WILL MARTINDALE, ELODIE FELLER, MARGARITA PIROVSKA & REBECCA ELLIOT, FIDUCIARY DUTY IN THE 21ST CENTURY: FINAL REPORT 11, https://www.unepfi.org/wordpress/wp-content/uploads/2019/10/Fiduciary-duty-21st-century-final-report.pdf [https://perma.cc/M3UY-FKDF] [hereinafter FIDUCIARY DUTY IN THE 21ST CENTURY: FINAL REPORT] ("In jurisdictions where civil law applies – Brazil, China, the EU, France, Germany and Japan – any obligations equivalent to 'fiduciary duties' will be set out in statutory provisions regulating the conduct of investment decision makers and in the governmental and other guidelines that assist in the interpretation of these provisions. The content of each of these statutory provisions differs slightly between jurisdictions and depends on the type of institutional investor . . . .").

[122] *See id.* ("In the US, for example, the decision maker's duty is to exercise reasonable care, skill and caution in pursuing an overall investment strategy that incorporates risk and return objectives reasonably suitable to the trust.").

[123] Christopher Geczy, Jessica S. Jeffers, David K. Musto & Anne M. Tucker, *Institutional Investing When Shareholders Are Not Supreme*, 5 HARV. BUS. L. REV. 73, 85 (2015); *see also* Jayne Elizabeth Zanglein, *Protecting Retirees While Encouraging Economically Targeted Investments*, 5 KAN. J.L. & PUB. POL'Y 47, 49 (1996) ("The Department of Labor's position under the direction of Lanoff became known as the 'all things being equal' test.").

[124] Steve Lydenberg, *Reason, Rationality, and Fiduciary Duty*, 119 J. BUS. ETHICS 365, 365 (2014).

[125] *Id.*

2. Fiduciary Duty and the Purpose of the Corporation

There is an old debate over the purpose of the corporation and board fiduciary duty. This is part of a 1930s Harvard Law Review debate between two notable corporate law scholars — Adolfe A. Berle, Jr.[126] and Merrick E. Dodd.[127] The debate includes a dispute about the roles and responsibilities of corporate managers and directors and continues to this day.[128]

Is the main purpose of the company to increase its profits (financial gains), and by doing so to increase the value of its shares (or bonds) to the benefit of its members or shareholders, so to increase their financial gains? Lynn Stout called for a radical change in the theory and philosophy of current corporate governance theory.[129] The short-term

[126] *See* Adolf A. Berle, Jr., *For Whom Corporate Managers* Are *Trustees: A Note*, 45 HARV. L. REV. 1365 (1932) (arguing in favor of profit as a corporation's sole purpose).

[127] *See* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932) (arguing that a corporation has both profit-making and social service purposes).

[128] *See, e.g.,* Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423 (1993) (addressing the debate over corporate responsibility set off by the growing prominence of corporations and the increasing independent power of managers); Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385 (2008) (observing a debate in the contemporary corporate governance space); Barnali Choudhury, *Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm*, 11 J. BUS. L. 631, 633 (2009) (discussing "the ambiguities of corporate law by challenging corporate governance models that favor only one view of corporate purpose, and by identifying the differing norms that corporate case law and statutes impose"); Ian B. Lee, *Corporate Law, Profit Maximization, and the "Responsible Shareholder"*, 10 STAN. J.L., BUS. & FIN. 31, 40 (2005) (exploring the nexus between shareholder ethical responsibility and corporate law); Roberta Romano, *Less Is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, 18 YALE J. ON REGUL. 174, 174 (2001) (reviewing "corporate finance literature on institutional investors' activities in corporate governance and us[ing] the findings of the empirical literature to inform normative recommendations for the proxy process"); Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1189 (2002) ("suggest[ing] that we have made at least some intellectual progress over the intervening decades on the question of the proper role of the corporation"); Leo E. Strine, Jr., *Lecture and Commentary, The Social Responsibility of Boards of Directors and Stockholders in Charge of Control Transactions: Is There Any "There" There?,* 75 S. CAL. L. REV. 1169 (2002).

[129] Anat Alon-Beck, *The Law of Social Entrepreneurship — Creating Shared Value Through the Lens of Sandra Day O'Connor's iCivics*, 20 U. PA. J. BUS. L. 520, 540 (2017); Anat Alon-Beck, *Times They Are a-Changin'*, *supra* note 33, at 146.

focus of investors and corporate boards continues to be a highly contested issue in the corporate governance debate.[130]

Today, this debate continues with different prominent actors, which are represented generally by Lucian Bebchuck[131] on the one hand, versus Martin Lipton[132] and Ed Rock[133] on the other. Rock is currently the *Reporter* and working on introducing stakeholder elements into the restatement, under the American Law Institute Council's *Restatement of Corporate Law* project.[134] Rock's undertaking is extremely important due to the recent pressure on corporate boards and managers to take stakeholder interests into account.[135]

The debate is relevant today because the pandemic highlights a new movement in corporate law, which calls on companies and institutional investors to adopt a new theory of the purpose of the corporation.[136] Amongst the notable spokespeople of the movements are Martin Lipton, Colin Mayer, and Alex Edmans.

Lipton calls on companies, asset managers, and investors to embrace the principles of his new corporate governance framework, *The New Paradigm*, which takes stakeholder interests into account to achieve

130 For discussion on shareholder value, see MAYER, *supra* note 57; *see also* Ira M. Millstein, *Re-examining Board Priorities in an Era of Activism*, CLS BLUE SKY BLOG (Mar. 11, 2013), https://clsbluesky.law.columbia.edu/2013/03/11/re-examining-board-priorities-in-an-era-of-activism/ [https://perma.cc/HJM8-W58D]("[C]orporate boards around the country should re-examine their priorities and figure out to whom they owe their fiduciary duties . . . . Some activists are using their newfound power to sway and bully management to focus on the short term, meet the quarterly targets and disgorge cash in extra dividends or stock buy backs in lieu of investing in long-term growth.").

131 *See* Lucien A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 91 (2020).

132 *See* Martin Lipton, Steven A. Rosenblum & Karessa L. Cain, *Thoughts for Boards of Directors in 2020*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 10, 2019), https://corpgov.law.harvard.edu/2019/12/10/thoughts-for-boards-of-directors-in-2020/ [https://perma.cc/8K98-42BV].

133 *See* Edward B. Rock, *Institutional Investors in Corporate Governance*, FAC. SCHOLARSHIP AT PENN L., July 21, 2015, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2459&context=faculty_scholarship [https://perma.cc/Y7RP-5DK4] (discussing the roles of institutional investors in corporate governance).

134 *Laying Down the Law: Edward Rock Will Oversee Drafting of the First ALI Restatement on Corporate Governance*, N.Y.U. L. (Apr. 5, 2019) https://www.law.nyu.edu/news/ideas/edward-rock-ALI-corporate-governance-restatement [https://perma.cc/7ZNQ-QX8Z].

135 Alon-Beck, *Times They Are a-Changin'*, *supra* note 33, at 147-48.

136 *See id.* at 148.

long-term value and resist short-termism.[137] Mayer is collaborating with the British Academy's Future of the Corporation Project, and who calls for a more radical reform. In his recent book, Prosperity: Better Business Makes the Greater Good, Mayer proposes a new theory of the purpose of business: "[t]he purpose of business is to produce profitable solutions to the problems of people and planet, and in the process it produces profits." [138] Edmans offers a new financial theory "*pieconomics*" in his book *Grow the Pie*, which shows that "the most successful companies don't target profit directly but are driven by purpose — the desire to serve a societal need and contribute to human betterment."[139]

Other scholars are advocating for a "third way," whereby the duty of loyalty also runs to the corporate form as a separate entity. Leo Strine, for example, calls for "bridging the conceptual divide" between the shareholder and stakeholder theories.[140] Whereas Asaf Raz[141] suggests that directors owe their duties neither to shareholders, nor to stakeholders. Instead, their loyalty is to the corporation as a separate legal person. When they act, directors have a duty to advance the corporation's purpose. That purpose, dictated by state corporate law (such as Delaware's *Time* decision[142]), is first to act lawfully: by definition, the corporation is legally required to meet all of its obligations to stakeholders. The corporation is then free to pursue its own profit. The following re-examines the old question of shareholder oversight over corporate boards, in the context of the nature of institutional investors with their own corporate governance issues and incentive structures.

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137 Martin Lipton, *It's Time to Adopt the New Paradigm*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 11, 2019), https://corpgov.law.harvard.edu/2019/02/11/its-time-to-adopt-the-new-paradigm/ [https://perma.cc/5556-6K9A].

138 MAYER, *supra* note 57, at 109; THE BRITISH ACADEMY, PRINCIPLES FOR PURPOSEFUL BUSINESS 8, 16 (2019); THE BRITISH ACADEMY, REFORMING BUSINESSES FOR THE 21ST CENTURY: A FRAMEWORK FOR THE FUTURE OF THE CORPORATION 16 (2018).

139 EDMANS, *supra* note 57, at 1.

140 William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide*, 69 U. CHI. L. REV. 1067, 1067 (2002); *see also* Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy*, 106 Iowa L. Rev. 1885, 1886 (2021).

141 Asaf Raz, *A Purpose-Based Theory of Corporate Law*, 65 VILL. L. REV. 523, 529 (2020) https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=3457&context=vlr [https://perma.cc/9KFU-SGN8].

142 Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1154 (Del. 1989).

3. Why Is Fiduciary Duty the Central Repository of the Link Between Individuals and the Firm?

Institutional investors, and the financial institutions that they represent, are known as fiduciaries. As such, institutional investors are trusted with managing money (or other assets) on behalf of their investors or beneficiaries. The relationship between the two is asymmetrical.[143] Investors or beneficiaries depend on institutional investors because they "cannot acquire the knowledge and expertise necessary for all the services that all fiduciaries can, and do, offer."[144] In return, they reward fiduciaries for their services.

Institutional investors acquire power over their investors or beneficiaries primarily because, more often than not, they have the discretion to decide how to invest the funds they control.[145] Investors or beneficiaries generally cannot exercise oversight (monitoring) over the institutional investor. [146] They might not possess the expertise needed to be able to "fully evaluate and judge the value, quality and reliability of services, and whether it satisfies their needs."[147] Fiduciary

[143] *See generally* Michael C. Jensen & William H. Meckling*, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure,* 3 J. FIN. ECON. 305, 309 (1976) ("Since the relationship between the stockholders and manager of a corporation fit the definition of a pure agency relationship it should be no surprise to discover that the issues associated with the 'separation of ownership and control' in the modern diffuse ownership corporation are intimately associated with the general problem of agency."). For further discussion on agency problems and strategies to reduce them, see also George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 493 (1970) (explaining what is considered an asymetric relationship); John Armour, Henry Hansmann & Reinier Kraakman, *Agency Problems and Legal Strategies*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 29, 35-53 (Reinier H. Kraakman et al. eds., 2d ed. 2009).

[144] Frankel, *supra* note 117, at 3.

[145] FIDUCIARY DUTY IN THE 21ST CENTURY: FINAL REPORT, *supra* note 121, at 10 ("In practice, these fiduciaries have discretion as to how they invest the funds they control. The scope of that discretion varies. It may be narrow, for example, in the case of tailored mutual funds where the beneficiary specifies the asset profile and only the day-to-day stock selection and other management tasks are left to the investment decision maker. It may be wide, as with many occupational pension funds. Further, some public funds are subject to considerable state control and the discretion afforded to these decision makers may be further narrowed by parameters set by government.").

[146] *Id.* ("These duties are of particular importance in relationships where there is vulnerability (e.g. . . . where the ability of the beneficiary to monitor or oversee the actions of the person or entity acting in their interests is limited), power to act or discretion. The manner in which these duties are framed differs between countries and between common and civil law jurisdictions").

[147] Frankel, *supra* note 117, at 3.

duties, therefore, are vital to curtail the institutional investor's powers, so that it is not "abused and misused, intentionally or negligently."[148]

How does one become a fiduciary? In the corporate law context, a person becomes a fiduciary by serving as a director or officer.[149] To whom do corporate fiduciary duties run? The answer can change depending on the state or nation in question. According to Velasco, in Delaware, "the answer is straightforward: it is ultimately to the shareholders alone."[150] For other views on Delaware, see the Part above on the Purpose of the Corporation and Fiduciary Duty. In other states or nations, the fiduciary duty may be extended more broadly.[151]

It might be permissible to take equality factors into account when investing under United States corporate fiduciary law and trust fiduciary law if the jurisdiction in question also takes environmental, social, and governmental ("ESG") factors into account. For example, Delaware recently changed its trust law to incorporate ESG.[152] Additionally, according to Sitkoff et al., if the following two conditions are satisfied, trustees can take ESG into account: (1) the trustee reasonably concludes that taking such factors into account will benefit the beneficiary directly by improving risk-adjusted return; and (2) the trustee's sole motive for taking the factors into account when investing is to obtain this direct benefit.[153] As discussed below, significant progress could come from making it mandatory and not merely permissible to take gender equality into account.

The following chart illustrates various fiduciary duty sources from different jurisdictions and in specific contexts.

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148 *Id.*

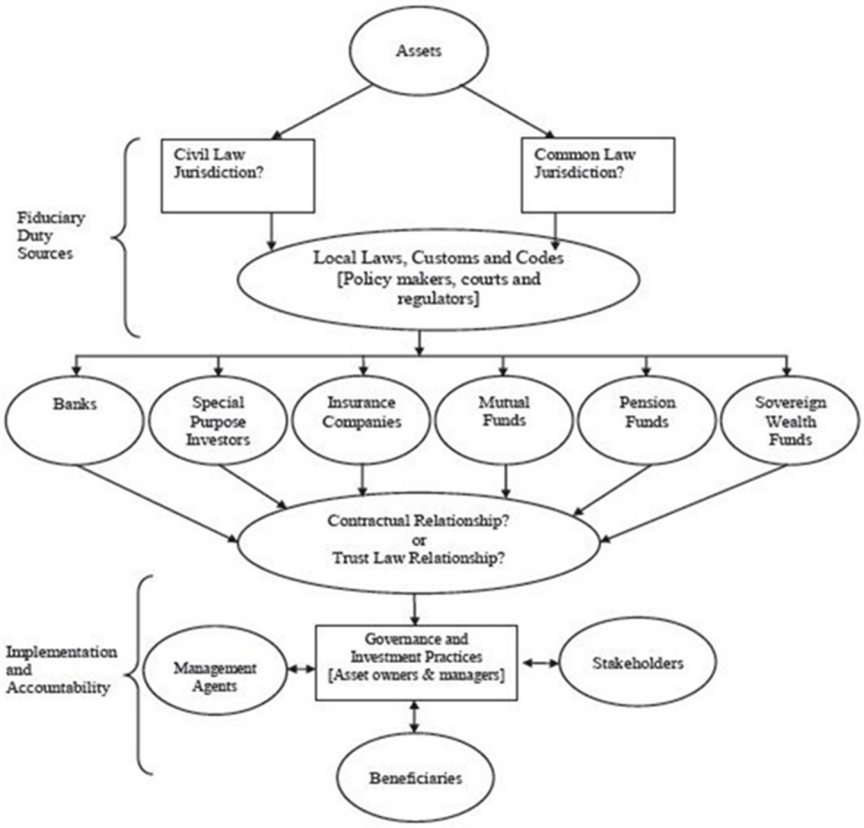
149 *See* Julian Velasco, *Fiduciary Principles in Corporate Law*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 61 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019). It should be noted that employees and other agents of the corporation are also fiduciaries, but that is more properly understood as an aspect of agency law rather than corporate law. *See* Bagchi, *supra* note 118; DeMott, *supra* note 118. In addition, shareholders with a controlling interest in the corporation may be held to have fiduciary duties.

150 *See Velasco, supra* note 149, at 64; Lawrence A. Hamermesh & Leo E. Strine, Jr., *Delaware Corporate Fiduciary Law: Searching for the Optimal Balance, in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 118; *see e.g.*, Malone v. Brincat, 722 A.2d 5, 9 (Del. 1998) ("The board of directors has the legal responsibility to manage the business of a corporation for the benefit of its shareholder owners.").

151 *See* Velasco, *supra* note 149, at 64 (discussion on constituency statutes).

152 Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 387 (2020).

153 *Id.* at 390.



Fiduciary duty and governance flow chart (Weng, 2011)

4. Why Focus on the Fiduciary Duty to Strive for Gender Equality?

This article focuses on fiduciary duties because there is an ongoing debate as to whether fiduciaries (trustees) perceive the law as limiting their discretion to consider other factors when making investment decisions. Some even perceive fiduciary duties as barriers to the adoption of ESG principles.[154] This position seems to stem from a misconception about the concept of the fiduciary duty.[155]

[154] *See id.* at 433.

[155] *See* FIDUCIARY DUTIES, *supra* note 11, at 5 ("[T]here remains a widespread assumption that fiduciary duty only permits the consideration of ESG factors insofar as they affect profits at an individual company level. This is at odds with the conclusion of the Freshfields Report, and the dictates of modern portfolio theory, that investors'

In most common law jurisdictions, fiduciary duty may limit the discretion of the institutional investors as investment decision makers.[156] Investment decision makers have duties because they are in a position of trust, confidence, and are required to act in the best interest of their beneficiaries. As fiduciaries, investment decision makers have to deal with agency costs, asymmetric information, and conflicts of interest.[157]

Recently, there has been growing support for allowing trustees to consider financially material ESG principles to further the best interests of their beneficiaries. [158] The 2005 *Freshfields Report* is credited with helping to build this support among legal scholars.[159] Institutional investors could thus be free to follow a wide range of diversified investment strategies, as long as they are rational and economically justifiable.[160] Therefore, institutional investors would not be required to maximize the return of individual investments; instead, the prudence of any specific investments would be assessed holistically within the context of their total investment strategy.[161]

However, the support for this position is not universal.[162] Moreover, we argue that the fiduciary duty (of loyalty) should be extended and declared publicly by our policymakers to require that institutional investors take equality factors into account. By building on the duty of loyalty, any investment that incorporates equality can be perceived as being motivated by the best interests of the fund's beneficiaries. Such a strategy can then be expected to impact the overall investment portfolio positively. One way to extend fiduciary duty is to encompass the sole interest rule under ERISA.[163]

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fiduciary duties entail seeking good returns across their portfolios, rather than on a stock by stock basis.").

156 UNEP FINANCE INITIATIVE, A LEGAL FRAMEWORK FOR THE INTEGRATION OF ENVIRONMENTAL, SOCIAL AND GOVERNANCE ISSUES INTO INSTITUTIONAL INVESTMENT 8 (2005), https://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf [https://perma.cc/7LCC-QQMG] [hereinafter THE FRESHFIELDS REPORT].

157 *See* FIDUCIARY DUTY IN THE 21ST CENTURY: FINAL REPORT, *supra* note 121, at 12.

158 *See* Schanzenbach & Sitkoff, *supra* note 152, at 422.

159 *See* THE FRESHFIELDS REPORT, *supra* note 156, at 8; *see also* Joakim Sandberg, *Socially Responsible Investment and Fiduciary Duty: Putting the Freshfields Report into Perspective*, 101 J. BUS. ETHICS 143, 144 (2010).

160 THE FRESHFIELDS REPORT, *supra* note 156, at 8.

161 *Id.*

162 *See* Schanzenbach & Sitkoff, *supra* note 152, at 390.

163 As noted above, the duty of loyalty, requires that institutional investors, as fiduciaries, advance the best interests of their beneficiaries. Under U.S. trust fiduciary law, the duty of loyalty prevents fiduciaries from acting for the betterment of their own or third-party interests. It is referred to as a "sole interest rule." *See* RESTATEMENT

We recognize that this argument is novel and not the current law in most United States jurisdictions. Therefore, we are advocating for the law in the United States to change to allow for such an extension of fiduciary duties.

5. Fiduciary Duties, ESG, and Codifying Gender Equality

There is a global movement towards the acknowledgment that fiduciary duties of institutional investors require incorporating ESG norms.[164] This Article recommends codifying this surfacing norm to encourage universal attention to gender equality, diversity, and inclusion. Currently, the discussion on legal and regulatory frameworks within which institutional investors operate revolves around the "consideration of how ESG issues affect the investment decision . . . ."[165] Institutional investors must perform a balancing act between

(THIRD) OF TRUSTS § 78(1) (AM. L. INST. 2007); *see also* UNIF. TR. CODE § 802(a) (UNIF. L. COMM'N 2000); *see, e.g.*, Daniel Fischel & John H. Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1108 (1988) (noting that the sole interest rule is the default in trust law but is mandatory under section 404(a)(1)(A) and (B) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").).

The difference between ERISA and trust law is that ERISA codifies the sole interest rule by making it mandatory. *See* Schanzenbach & Sitkoff, *supra* note 152, at 401. According to the Supreme Court, this means that the pension trustee must act in a way that will benefit the beneficiaries *financially*. Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 420-21 (2014) (quoting 29 U.S.C. § 1104(a)(1)(A)(i)-(ii)); Schanzenbach & Sitkoff, *supra* note 152, at 404. This is where the United States and other jurisdictions differ. Under U.S. law, if a pension trustee considers other interests or acts in a way that will not necessarily benefit the beneficiaries financially, then she is breaching the duty of loyalty. That is why it is important to differentiate between risk-return equality factors and collateral benefits equality factors.

For reference, we can also build on the literature of ESG investing. According to Schanzenbach and Sitkoff, if the fiduciary's sole motive is to benefit the beneficiary, then risk-return ESG can be consistent with the duty of loyalty under ERISA, even with the Supreme Court's strict "financial benefits" analysis. Schanzenbach & Sitkoff, *supra* note 152, at 406. The same analysis can be applied here. As long as the fiduciary's sole motive is to benefit the beneficiary, the fiduciary can be protected by the duty of loyalty when engaging with companies and pushing for equality.

Until recently, the U.S. Department of Labor's ("DOL") position on a pension trustee's ability to make decisions on risk-return (not collateral) ESG investing was largely in agreement with the above analysis. Currently, the U.S. government wants pensions out of ESG. Recently, the DOL announced a proposed rule that would limit the consideration of ESG factors in investment decisions.

164 *See* FIDUCIARY DUTY IN THE 21ST CENTURY: FINAL REPORT, *supra* note 121, at 12.

165 *Id.* at 9.

the boundaries of their fiduciary duties and attractive ESG principles.[166] For example, the United Nations ("U.N.") Principles for Responsible Investment Initiative goes further, calling upon companies to focus on how these decisions can affect ESG-related issues.[167]

Similarly, in some jurisdictions, the fiduciary duty is interpreted to require institutional investors to incorporate ESG issues into their overall investment analysis.[168] Taking such factors into account is viewed as a decision that contributes to the company's financial growth and overall long-term value creation.[169]

We suggest that institutional investors incorporate gender equality factors into their investment analysis and decision-making processes. This would be consistent with a long-term investment timeline. This

166 *See* MORGAN, LEWIS & BOCKIUS LLP, THE REGULATORY OVERLAY ON ESG INVESTING 2 (2020), http://documents.jdsupra.com/17320f46-4634-4952-b0c7-83f71474611f.pdf [https://perma.cc/Z399-9EVV]; *see also* Allison Herren Lee, Comm'r, U.S. Sec. & Exch. Comm'n, "Modernizing" Regulation S-K: Ignoring the Elephant in the Room (Jan. 30, 2020); Allison Herren Lee & Caroline Crenshaw, Comm'rs, Sec. & Exch. Comm'n, Joint Statement on the Failure to Modernize the Accredited Investor Definition (Aug. 26, 2020); Hester M. Peirce, Comm'r, Sec. & Exch. Comm'n, Remarks at Meeting of the SEC Investor Advisory Committee (May 21, 2020).

167 *About the PRI*, PRINCIPLES FOR RESPONSIBLE INV., https://www.unpri.org/pri/about-the-pri (last visited June 29, 2021) [https://perma.cc/PE7Q-BD69].

168 ESG refers to the environmental, social and governance factors. Tyler Payne, Nathalie Sadler, Mikhaelle Schiappacasse & Carol Widger, *Dechert on ESG, Diversity and Inclusion in Asset Management*, JDSUPRA (Dec. 18, 2019), https://www.jdsupra.com/legalnews/dechert-on-esg-diversity-and-inclusion-85053/ [https://perma.cc/A4DW-BFVM] ("One significant ESG factor is diversity and inclusion ("D&I") which is, of course, also a broad topic in its own right. Indeed, a number of ESG texts focus on D&I, including the United Nations Sustainable Development Goals (which cover both reducing inequality in general and improving gender equality more specifically). D&I impacts the asset management industry at a number of pressure points and managers should expect it to arise with increasing frequency and in different guises. This is due to a long-term shift in culture (as demonstrated by the recent #MeToo campaign, for example), coupled with factors such as more millennials (who have grown up versed in these issues) moving into more senior, decision-making roles in the industry, both as investors and managers. Key areas where the issue of D&I particularly impacts the asset management industry include: (i) investor-level focus on the issue, (ii) D&I's potential impact on a fund's downstream activities, and (iii) D&I's impact on the ongoing management of the manager's business (including as relates to economic return, legal obligations and human resource management).").

169 *See* WITOLD HENISZ, TIM KOLLER & ROBIN NUTTALL, FIVE WAYS THAT ESG CREATES VALUE 2 (2019), https://www.mckinsey.com/~/media/mckinsey/business%20functions/strategy%20and%20corporate%20finance/our%20insights/five%20ways%20that%20esg%20creates%20value/five-ways-that-esg-creates-value.pdf?shouldIndex=false [https://perma.cc/WJ7U-4JM2]; Thibaut Millet, *How ESG Creates Long Term Value*, ERNST & YOUNG (Oct. 25, 2019), https://www.ey.com/en_ca/climate-change-sustainability-services/how-esg-creates-long-term-value [https://perma.cc/CQS4-QLSF].

objective is achievable by codifying the duty to strive for gender equality theorized in this paper. Furthermore, institutional investors could be required to report on how they have implemented these gender equality commitments. In this way, institutional investors that fail to implement these measures also fail their fiduciary duties and could be subject to legal action.[170]

We believe that this suggested extension is consistent with a director's fiduciary duties, as long as the decision positively contributes to the financial growth and overall long-term value creation of the company.[171]

Moreover, such a decision could be considered a business decision and is thus likely protected under the business judgment rule ("BJR").[172] The BJR is a common law defense developed by courts and an important concept to understanding fiduciary duties in corporate law.[173] It is (and has been for decades) the most important protection against personal liability for directors and officers. It allows directors

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[170] *Cf.* FIDUCIARY DUTY IN THE 21ST CENTURY: FINAL REPORT, *supra* note 121, at 10 ("The manner in which these duties are framed differs between countries and between common and civil law jurisdictions. . . .").

[171] *See generally* HENISZ ET AL., *supra* note 169, at 3 (expanding on ESG's five links to value creation); Millet, *supra* note 169 ("ESG disclosures are becoming increasingly valuable for investors as they look to drive value for the company.").

[172] *See* Joshua Fershée, *On Corporate Purpose, Director Primacy, and the Business Judgment Rule*, CLS BLUE SKY BLOG (Dec. 4, 2020), https://clsbluesky.law.columbia.edu/2020/12/04/on-corporate-purpose-director-primacy-and-the-business-judgment-rule/ [https://perma.cc/S75B-G8F5]; David A. Katz & Laura A. McIntosh, *The Broadening Basis for Business Judgment*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 28, 2020), https://corpgov.law.harvard.edu/2020/09/28/the-broadening-basis-for-business-judgment/ [https://perma.cc/82K6-VLYD]; *see also* William T. Allen, *Modern Corporate Governance and the Erosion of the Business Judgment Rule in Delaware Corporate Law*, 4 COMPAR. RSCH. L. & POL. ECON. 1, 17 (2008), https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1182&context=clpe [https://perma.cc/DHY6-QXAZ] ("The human actors who pull the strings of the institutional investors and the governance entrepreneurs are agents too. We have not thought enough about how the actual incentives of those who act for these institutions may differ from the social interest in long-term wealth creation.").

[173] "The two primary underpinnings of the BJR are: 1. Courts should not substitute their inexperienced business decisions for the good-faith decisions of independent and diligent business executives, who have a far greater ability to make appropriate business decisions based on their extensive commercial knowledge, experience and training. 2. Executives should be encouraged to take prudent risks for the benefit of the company and its constituents, and should not be stymied by the fear of personal liability if a decision ultimately harms the company." DAN A. BAILEY, THE BUSINESS JUDGMENT RULE UNDER ATTACK 1, http://baileycav.com/site/assets/files/1455/the_business_judgment_rule_under_attack.pdf [https://perma.cc/QRP9-W9VR].

and officers in a corporation to take calculated business risks and prevents the courts from second-guessing such business decisions.[174]

For comparative analysis, the following is a short survey on the development of fiduciary duties around the world.

B. Comparative Analysis — Current Developments and the Global Debate over Fiduciary Duties and the Purpose of the Corporation

The United States is not the only place where the scope of fiduciary duty and the integration of ESG metrics is contested. Despite the vast progress in ESG integration and responsible investment practices, there currently are variations among countries on the fundamental legal requirements and national priorities. The following is a survey of the most prominent developments.

1. United Nations

In 2006, the United Nations adopted six global principles for social investment called "PRI" (principles for responsible investment).[175] These principles promote the incorporation of ESG factors into investment decision-making, have increased investor awareness of corporate social responsibility ("CSR"), and have increased involvement in applying these principles to companies in which they invest.[176] In January 2016, the United Nations Environment Program Finance Initiative ("UNEP FI") and the Generation Foundation Financial Initiative launched a project to clarify investors' obligations and duties, their duty of trust in the context of ESG investments, decision-making, and governance.[177] The United Nations Report on Social Investment Recommendations perceived ESG investments as an obligation included in the institutional investors' fiduciary duty.[178]

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[174] Velasco, *supra* note 149, at 64. Delaware courts interpret the BJR as "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (citing Kaplan v. Centex Corp., 284 A.2d 119, 124 (Del. Ch. 1971)), *overruled by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

[175] Press Release, U.N. Secretary-General, Secretary-General Launches 'Principles for Responsible Investment' Backed by World's Largest Investors, U.N. Doc. SG/2111-ECO/106 (Apr. 27, 2006) (on file with author).

[176] *See id.*

[177] *Explanatory Notes*, FIDUCIARY DUTY, https://www.fiduciaryduty21.org/explanatory-notes.html (last visited Oct. 3, 2021) [https://perma.cc/63UU-QFSW].

[178] "Based on in-depth assessment in eight countries (US, Canada, Germany, UK, Japan, Australia, South Africa and Brazil), Fiduciary Duty in the 21st Century concluded

In their last report, published in October 2019, they concluded that as part of the institutional investor's fiduciary duty, they should consider social investments and incorporate them into their investment plan, encourage ESG activity in companies in which they invest, and report on their goals and their progress in achieving them.[179] The key reasoning is that these investments have economic value — even more so when considering long-term returns — and therefore ignoring these considerations is detrimental to investors.[180]

2. Israel

The Israeli Company Law, which was enacted in 1999, explicitly addressed the issue of stakeholders.[181] Under the section relating to the purpose of the company, the law states that: "The purpose of a company shall be to operate in accordance with business considerations in realizing its profits, and within the scope of such considerations, the interests of its creditors, its employees and the public; may inter alia be taken into account[.]"[182] This section, which defines the purpose of the company, serves as its compass that directors and officers must follow. Considering the interests of society or various communities while generating profit is explicitly sanctioned by the legislation.

3. United Kingdom

The United Kingdom is leading the charge on the redefinition of the purpose of the corporation and the implementation of a stakeholder corporation governance model. We will focus our attention on Section 172 of the Companies Act,[183] along with the UK Corporate Governance

that 'Failing to consider long-term investment value drivers, which include ESG issues, . . . is a failure of fiduciary duty.' It also acknowledged that despite significant progress, many investors have yet to fully integrate ESG issues into their investment decision-making processes." *Id.*

179 *See* FIDUCIARY DUTY IN THE 21ST CENTURY: FINAL REPORT, *supra* note 121, at 15.

180 *See id.* at 17; *see, e.g.*, Fiona Reynolds, *Retrograde Australian Proxy Advice Reforms Impede the Rise of Global Stewardship*, PRINCIPLES FOR RESPONSIBLE INVESTMENT (June 30, 2021), https://www.unpri.org [https://perma.cc/JBA2-AM7A] ("Institutional investors echoed global outrage at the weak response from Rio Tinto following their destruction of sacred Aboriginal caves . . . .").

181 Israeli law is primarily based on a common law legal system. *See* Amir Licht & Itai Fiegenbaum, *Corporate Law of Israel*, UNIV. OXFORD FAC. OF L. (Dec. 18, 2017), https://www.law.ox.ac.uk/business-law-blog/blog/2017/12/corporate-law-israel [https://perma.cc/D5BK-3MLB].

182 § 11(a), Companies Law, 5759-1999, LSI 1711 189 (Isr.).

183 The law states (in section 172): "Duty to promote the success of the company

Code, and new reporting requirements that are now connected with these developments. The British Companies Act of 2006 adopted a similar position to Israel: Officers must act in good faith to promote the company's success and the benefit of its shareholders while taking stakeholder interests into account.[184] Section 172 makes sure that officers and directors must consider stakeholder interests.[185] It remains that if an officer or director does not advance the company's purpose, they have breached their legal obligations.[186]

Additionally, the new UK Stewardship Code identifies the primary purpose of stewardship as looking after the assets of the beneficiaries.[187] It also broadens the Code's scope to include investment decision-making processes and adds investment in assets other than listed equity.[188] This new Code ensures that the professional activities and standards of institutional investors and the overall operations of the capital market will serve as a growth engine for the economy.

> (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
>
> (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company.
>
> (2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes." Companies Act 2006, c. 46, § 172 (Eng.).

184 *See id.*; FIN. REPORTING COUNCIL, THE UK STEWARDSHIP CODE 4 (2020), https://www.wlrk.com/docs/TheUKStewardshipCode2020.pdf [https://perma.cc/TW7V-BKBY].

185 *See* Companies Act 2006, c. 46, § 172 (Eng.).

186 *See id.* § 178.

187 "Stewardship is the responsible allocation, management, and oversight of capital to create long-term value for clients and beneficiaries leading to sustainable benefits for the economy, the environment and society." FIN. REPORTING COUNCIL, *supra* note 184.

188 *See id.*

4. Canada

In Canada, the duty of loyalty is owed to the corporate entity itself rather than to its shareholders. In 2004, the Supreme Court of Canada ruled that when the law provides that the board must act in the best interests of the company, the board may take into account additional communities or constituencies.[189] The Court explicitly cited shareholders, employees, suppliers, creditors and consumers, as well as the government and the environment as factors that could be considered within the best interests of the company.[190] The Supreme Court of Canada reiterated this ruling in 2008 in the case of *BCE Inc. v. 1976 Debentureholders*, where it was expressly held that acting in favor of the company means the company is "viewed as a good corporate citizen." [191] Therefore, according to this decision, when the board considers the best interests of the corporation, the board may consider the interests of shareholders and stakeholders that will be affected by the decision.[192]

5. USA

In 2018, the U.S. Department of Labor ("DOL") issued a bulletin regarding pension funds with much stricter rules than the above examples.[193] According to these trust rules, if an investment can cause a plan to forego other investment opportunities, then plan fiduciaries are not permitted to sacrifice investment return or take on additional investment risk as a means of using plan investments to promote collateral social policy objectives.[194] But the DOL also stated that when competing investments serve the plan's overall economic interests

189 Peoples Dep't Stores Inc. v. Wise, [2004] 3 S.C.R. 461, 482 (Can.).

190 *Id.*

191 BCE Inc. v. 1976 Debentureholders, [2008] 3 S.C.R. 560, 593 (Can.).

192 Following the decision, there were amendments to the CBCA, which were intended to codify certain elements of that interpretation.

193 *See* DEP'T. OF LABOR, FIELD ASSISTANCE BULLETIN NO. 2018-01 - SUPERSEDED BY 85 FR 72846 AND 85 FR 81658, at 1 (2018), https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-01 [https://perma.cc/2M6A-2C5M]; Stephen Miller, *DOL Affirms Fiduciary Standards for 'Socially Responsible' Funds*, SHRM (May 7, 2018), https://www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/dol-affirms-fiduciary-standards-for-esg-funds.aspx [https://perma.cc/3WZG-7LUK].

194 *See* Anat Alon-Beck, *Department of Labor, Fiduciary Duty and the Future of Environmental, Social & Corporate Governance*, FORBES (Sept. 14, 2020), https://www.forbes.com/sites/anatalonbeck/2020/09/14/department-of-labor-fiduciary-duty-and-the-future-of-environmental-social—corporate-governance/?sh=687a1f2d4beb [https://perma.cc/XY4C-H48W].

equally, then plan fiduciaries can use such collateral considerations as tiebreakers for an investment choice.[195] On June 23, 2020, the DOL announced a new proposed rule intended to provide a clear regulatory guide for plan fiduciaries in light of new trends in ESG investing.[196] According to the new proposal, it is clear that ERISA plan fiduciaries may not invest in ESG vehicles if their investment strategies subordinate returns or increase risk.[197]

In parallel, some jurisdictions, such as Delaware, the law has recently evolved to allow fiduciaries to consider collateral interests of the

[195] Nevin Adams, *DOL Pulls Back on ESG Guidance*, AM. SOC'Y PENSION PROS. & ACTUARIES (Apr. 25, 2018), https://www.asppa.org/news/browse-topics/dol-pulls-back-esg-guidance [https://perma.cc/YT5D-X6YC].

[196] News Release, U.S. Dep't of Labor, U.S. Department of Labor Proposes New Investment Duties Rule (June 23, 2020) (on file with author), https://www.dol.gov/newsroom/releases/ebsa/ebsa20200623 [https://perma.cc/AP2U-PNS7].

[197] Secretary of Labor Eugene Scalia stated, "Private employer-sponsored retirement plans are not vehicles for furthering social goals or policy objectives that are not in the financial interest of the plan." *Id.*

"The proposal would make five core additions to the regulation:

- New regulatory text to codify the Department's longstanding position that ERISA requires plan fiduciaries to select investments and investment courses of action based on financial considerations relevant to the risk-adjusted economic value of a particular investment or investment course of action.
- An express regulatory provision stating that compliance with the exclusive-purpose (i.e., loyalty) duty in ERISA section 404(a)(1)(A) prohibits fiduciaries from subordinating the interests of plan participants and beneficiaries in retirement income and financial benefits under the plan to non-pecuniary goals.
- A new provision that requires fiduciaries to consider other available investments to meet their prudence and loyalty duties under ERISA.
- The proposal acknowledges that ESG factors can be pecuniary factors, but only if they present economic risks or opportunities that qualified investment professionals would treat as material economic considerations under generally accepted investment theories. The proposal adds new regulatory text on required investment analysis and documentation requirements in the rare circumstances when fiduciaries are choosing among truly economically "indistinguishable" investments.
- A new provision on selecting designated investment alternatives for 401(k)-type plans. The proposal reiterates the Department's view that the prudence and loyalty standards set forth in ERISA apply to a fiduciary's selection of an investment alternative to be offered to plan participants and beneficiaries in an individual account plan (commonly referred to as a 401(k)-type plan). The proposal describes the requirements for selecting investment alternatives for such plans that purport to pursue one or more environmental, social, and corporate governance-oriented objectives in their investment mandates or that include such parameters in the fund name." *Id.*

beneficiaries, such as employment status. With regards to Delaware, in 2018 its legislature amended its trust code to provide:

> [W]hen considering the needs of the beneficiaries, the fiduciary *may* take into account the financial needs of the beneficiaries as well as the beneficiaries' personal values, including the beneficiaries' desire to engage in sustainable investing strategies that align with the beneficiaries' social, environmental, governance or other values or beliefs of the beneficiaries.[198]

The Delaware amendment departs from established trust fiduciary law. Under traditional trust law, a beneficiary may waive its rights and specifically authorize conduct by a trustee that would otherwise constitute a breach of trust (by means of ratification, advance consent, or subsequent release).[199] Delaware courts will be required to resolve several issues of legal uncertainty: What about the specific terms and purpose of the trust as prescribed by the settlor? What if there is disagreement on values and purpose between the various beneficiaries? What is the effect of a beneficiary release?[200]

These discussions are not limited to states, nations, regulators and policymakers. Recently, in the United States, there are voices on these developments from the business community itself, as evidenced by the Business Roundtable Statement.[201] Leading American businessmen are responding to public pressures to take ESG into account and investor demands for change by broadening the purpose of the corporation. The CEOs of Amazon, Apple, UPS, Wal-Mart, and nearly 200 of the world's largest companies recently agreed that in order to promote a thriving economy, businesses require a long-term strategy for success.[202] This statement may reflect a shift from shareholder primacy to a commitment to all stakeholders. Perhaps today's business leaders have

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198 DEL. CODE ANN. tit. 12, § 3302(a) (2019).

199 Schanzenbach & Sitkoff, *supra* note 152, at 418.

200 *See id.* at 420.

201 *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/US62-YFNR].

202 *See* David Gelles & David Yaffe-Bellany, *Shareholder Value Is No Longer Everything, Top C.E.O.s Say*, N.Y. TIMES (Aug. 19, 2019), https://www.nytimes.com/2019/08/19/business/business-roundtable-ceos-corporations.html [https://perma.cc/55XS-YE7L].

figured out that putting aside stakeholder interests is bad for business.[203]

a. Conclusions

Despite the disagreement and growing political tension over ESG integration, one thing remains largely undisputed: the company's primary purpose is to maximize profits. However, a strict focus on short-term profits may no longer be sufficient. The current prevailing worldview sees the company as a citizen whose operations must positively contribute to its community and society at large.

Therefore, we emphasize the centrality of corporate purpose in how we understand the duties of directors and officers of the company in general, and of institutional investors in particular. As a result, executives must consider corporate governance as well as socio-environmental considerations in their deliberations. As noted above, we view institutional investors as "universal owners";[204] thus, their long-term maximization is not limited to increasing returns on a firm by firm basis, but also to productivity in the economy as a whole.

Institutional investors are stewards. The stewardship principles reflect a commitment from asset managers and institutional investors to be accountable to the beneficial owners whose money they invest, and to use their power as shareholders to foster sustainable, long-term value creation. In embracing stewardship principles, asset managers and investors should develop an understanding of a company's governance, its long-term business strategy, and pursue constructive dialogue as the primary means for addressing suboptimal strategies or operations.

The following is our proposal.

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[203] Alon-Beck, *supra* note 33, at 120-21; *see also* Bebchuk & Tallarita, *supra* note 131, at 94-95.

[204] The concept of "universal ownership" was pioneered by James Hawley and Andrew Williams, who argue that such owners should engage with the implications of their decisions on their portfolios as a whole, and that they have an interest in the stability and sustainability of the financial system as a whole. However, in practice, these days most institutional investors do not perceive fiduciary duty to allow this or act this way. Specifically, they do not seek good returns across their entire portfolios, but rather still focus on a stock by stock analysis. This must change. FIDUCIARY DUTIES, *supra* note 11, at 5 ("[T]here remains a widespread assumption that fiduciary duty only permits the consideration of ESG factors insofar as they affect profits at an individual company level. This is at odds with the conclusion of the Freshfields Report, and the dictates of modern portfolio theory, that investors' fiduciary duties entail seeking good returns across their portfolios, rather than on a stock by stock basis.").

III. A PROPOSAL TO PROMOTE BOARD GENDER EQUALITY

Our suggestion is that institutional investors, as stewards, should actively seek to promote gender equality on the board. It should not simply be a voluntary action on their part, but rather a duty embedded within corporate law.

Institutional investors should push for gender equality and diversity in the boardroom, and, ideally, support their public statements with actions in two distinct ways. First, they could lead by example and take steps to ensure that their boardrooms are diverse. Second, they could privately engage in a year-round dialog with investee companies. If they cannot persuade investee companies to change voluntarily, they could turn to public avenues. These more radical strategies could include putting pressure on the portfolio investee companies. For example, they could do so by issuing guidance, using proxy voting against individual directors, or filing shareholder proposals.

Institutional investors influence the actions of their portfolio investee companies. They should look holistically at their board composition and processes, and consider whether they are implementing new policies to foster gender equality and, more generally, diverse and inclusive cultures. The institutional investor could be in breach of its fiduciary duties, including their duty of oversight, if they fail to recognize and address the problem of "old boys' club" culture at their portfolio investee companies.[205]

To help institutional investors achieve these goals, we propose two main practical ways to remove the current barriers concerning the selection processes, investment analysis, and due diligence. *First*, pertaining to the search committees and selection processes, we suggest that companies adopt several new policies.[206] *Second*, concerning the lack of data on diversity, we propose creating an obligation to report on boards' diversity composition in proxy statements.

The following proposals may help set clear goals for institutional investors, primarily when deciding on their investment policy, as well as in their investee companies.

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[205] We focus on the concept of gender equality, which includes all the different forms of gendered life and inequality in our analysis. We recognize that there is intersectionality between gender, class, sexuality, race, and ethnicity, which affects a human's gendered experience. However, these distinctions and the differences between the different forms of gendered life and inequality are beyond the scope of this Article.

[206] *See infra* Parts III.A.1–2.

A. Institutional Investors' Duty to Consider Gender Representation on Boards

1. Main Principles

In light of the board of directors' duties, the current regulatory framework, and shifts in institutional investors' market and legal powers, we suggest that institutional investors might have a fiduciary duty to consider issues of gender equality and representation in the boardrooms of the corporations in which they invest.

Institutional investors could publicly commit to implement gender equality and diversity policies for their current and future investments, including explanations of how these commitments align with fiduciary duties. They can hold investee companies accountable for making progress on gender equality policies. Institutional investors could seek the development and implementation of gender equality policies among investee companies by calling on investee companies to disclose gender equality policies and their implementation in their annual reports. Those policies would specifically include identity-based diversity factors such as gender (or race, ethnicity, sexual orientation, or disability).

When it comes to voting, institutional investors should perhaps disclose their expectations on board diversity, including identity-based diversity factors, such as gender, from investee companies in their governance and proxy voting guidelines. They could disclose their proxy voting guidelines to investee companies, particularly with regard to how gender equality factors may affect shareholder votes for board candidates.

They could also consider how they vote on board director appointments, and adopt a clear process to achieve this goal, such as the one suggested below. They should provide robust, credible, and detailed accounts to their beneficiaries or investors on the implementation of diversity measures as well as their efficacy.

To bring about equal opportunities, they should proactively reach out to women from existing or purposefully prepared pools. Women who want to be directors should be included in lists made for this purpose. They could set an allocation procedure that will end with the same number of men and women candidates to each position on the board.

Finally, when there are equal numbers of women and men candidates, there could be affirmative action on an individual basis. That is, if a woman and a man have the same abilities, the woman should be preferred, until sex equality is achieved.

2. Process

We believe that process is critical. There are currently initiatives by large corporations to adopt a process that is akin to the Rooney Rule, first adopted by the National Football League ("NFL").[207] It mandates that an NFL team must interview at least one minority candidate for head coach or manager positions.[208]

However, the rule has two serious flaws: one, the temptation to substitute sham interviews in place of a search for real diversity, and two, important positions such as coordinator-level positions, a crucial step to head-coaching jobs, are not under the umbrella.

The NFL did recently expand the rule to include women: "For all executive openings in the commissioner's office, a woman must be interviewed."[209] The San Francisco 49ers were the first team to formally adopt the practice, but the Rooney Rule's flaws — like including token interviewees — still plague this attempt at including women.[210]

Despite these flaws, the league did provide a blueprint for corporate America to improve its poor hiring record with respect to diversity and gender equality. Facebook, Pinterest, Intel, Xerox, and Amazon are among the major companies that have instituted their own version of

[207] *See, e.g.*, Jason Del Rey, *Amazon Will Adopt a "Rooney Rule' to Increase Board Diversity After Its Initial Opposition Sparked Employee Outrage*, VOX (May 14, 2018, 4:49 PM EDT), https://www.vox.com/2018/5/14/17353626/amazon-rooney-rule-board-diversity-reversal-shareholder-proposal [https://perma.cc/3JZF-3ADF] ("Amazon said . . . it would adopt a policy whereby women and people of color are included in the pool of candidates for all board openings. . . .").

[208] Press Release, Nat'l Football League, NFL Expands Rooney Rule Requirements to Strengthen Diversity (Dec. 12, 2018), https://nflcommunications.com/Pages/NFL-EXPANDS-ROONEY-RULE-REQUIREMENTS-TO-STRENGTHEN-DIVERSITY.aspx [https://perma.cc/4SR5-QMB3].

[209] Jason Reid, *NFL Effectively Shows It Will No Longer Enforce Rooney Rule*, THE UNDEFEATED (Jan. 22, 2018), https://theundefeated.com/features/nfl-shows-it-will-no-longer-enforce-rooney-rule/ [https://perma.cc/S7XH-627H]; *see also* Brakkton Booker, *NFL Announces New Rules to Tackle Lack of Diversity in Its Coaching, Executive Ranks*, NPR (May 19, 2020), https://www.npr.org/2020/05/19/858702029/nfl-announces-new-rules-to-tackle-lack-of-diversity-in-its-coaching-executive-ra [https://perma.cc/M3A4-4K44].

[210] *See* Jane McManus, *San Francisco 49ers Adopt Rooney Rule for Women in Business-Side Positions*, ESPN (Apr. 26, 2016), https://www.espn.com/espnw/sports/story/_/id/15385274/san-francisco-49ers-adopt-rooney-rule-women-business-jobs [https://perma.cc/2GEP-PG9M].

the rule.[211] Even the Pentagon has explored using some form of the rule to diversify its officer corps.[212]

Due to these flaws, we suggest a change to the rule — companies should add more than one woman to their pool of candidates and nominees. According to research by Johnson, Hekman, and Chan, when there is only one woman in the candidate pool, there is statistically no chance of her being hired.[213] However, this statistical result changes dramatically if there is more than one woman in the candidate pool.[214]

Unfortunately, each additional woman that is added to the pool does not automatically increase the probability of hiring a woman.[215] Johnson, Hekman, and Chan found that having an equal number of men and women candidates makes a significant difference rather than just token interviewees.[216] Therefore, we propose that board members should be elected from an approximately equal number of men and women candidates.

B. Requiring Policymakers and Regulators to Take Action

Policymakers and regulators could publicly declare that institutional investors have a fiduciary duty to account for gender equality in their investment processes, active ownership activities, and public policy engagement.

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[211] Charlotte Carroll, *What Is the Rooney Rule? Explaining the NFL's Diversity Policy for Hiring Coaches*, SPORTS ILLUSTRATED (Dec. 31, 2018), https://www.si.com/nfl/2018/12/31/rooney-rule-explained-nfl-diversity-policy [https://perma.cc/53GL-G2KH]; *Del Rey*, *supra* note 207; Richard Feloni, *Facebook Is Using the Same Approach the NFL Took to Increase Diversity in the League*, BUS. INSIDER (Jan. 24, 2016, 7:35 AM), https://www.businessinsider.com/facebook-is-using-the-rooney-rule-to-increase-diversity-2016-1 [https://perma.cc/E5E6-ZGEF]; Emily Peck, *Intel Now Hiring Way More Women and You Can, Too!*, HUFFPOST (Aug. 13, 2015, 11:14 AM EDT), https://www.huffpost.com/entry/intel-hiring-more-women-minorities_n_55cca7f5e4b0cacb8d3311fb [https://perma.cc/JE9T-8ZBX]; Erin Spencer, *You'll Want to Pin This, Learnings from Pinterest's Diversity Successes*, FORBES (Sept. 11, 2018, 9:42 AM EDT), https://www.forbes.com/sites/erinspencer1/2018/09/11/transparency-at-pinterest-is-leading-to-a-more-diverse-team/?sh=5768e153ee89 [https://perma.cc/K6LS-R56U]. *See generally* JAIME B. HANSEN, EXPANDING THE CONVERSATION (2017).

[212] Tom Vanden Brook, *Pentagon Proposal on 'Rooney Rule' for Minority Officers Raising Internal Concerns*, USA TODAY (Apr. 13, 2016), https://www.usatoday.com/story/news/politics/2016/04/13/pentagon-proposal-rooney-rule-minority-officer-internal-concerns/82953928/?siteID=je6NUbpObpQ-Vyidn96wl.PGDxCWjyhHSA [https://perma.cc/5G56-KP82].

[213] Johnson et al., *supra* note 66.

[214] *Id.*

[215] *Id.*

[216] *Id.*

Institutional investors could require their investee companies to disclose information on the following: workforce composition (including workforce demographics on hiring, promotion, compensation, layoffs, furloughs, employment policies and practices) broken down by major job categories; workforce compensation; with regards to layoffs and furloughs, additional disclosures on demographics of employees, such as rehires, training, healthcare and other benefits; and best practices to ensure employee health and well-being during the pandemic.

Policymakers and regulators could clarify the following. First, that institutional investors have a duty to seek the development and implementation of diversity policies among investee companies. They would do so by calling investee companies to disclose diversity policies, which specifically include identity-based diversity factors, and the degree of implementation in their annual reports.

Second, that institutional investors must disclose their expectations on board diversity, including identity-based diversity factors, from investee companies in their governance and proxy voting guidelines. Third, that they must further provide robust, credible, and detailed accounts on how these equality commitments have been implemented and the outcomes that have resulted from such implementations.

Lack of representation for women at the board level directly affects the rights and bargaining power of the workforce. For example, there are many calls from civil rights activists and other actors to improve the representation of women and minorities in public corporations on the board level and to improve their workplace conditions and environments to be more inclusive and equitable.[217]

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[217] *See, e.g.*, Lee, Diversity Matters, *supra* note 23 (calling on the SEC to do more regarding diversity and inclusion); June D. Bell, *Corporate Board Diversity: Moving Beyond Lip Service*, SHRM (Jan. 16, 2021), https://www.shrm.org/hr-today/news/all-things-work/pages/boosting-corporate-board-diversity.aspx [https://perma.cc/N3AK-AZUD] (discussing calls to diversify corporate leadership); Michael Hatcher, Weldon Lathan & Jackson Lewis, *States Are Leading the Charge to Corporate Boards: Diversify!*, HARV. L. SCH. F. CORP. GOVERNANCE (May 12, 2020), https://corpgov.law.harvard.edu/2020/05/12/states-are-leading-the-charge-to-corporate-boards-diversify/ [https://perma.cc/Q3TF-X333] (commenting on how states are leading efforts to impose board diversity requirements); Jared Landaw & Barington Capital, *Maximizing the Benefits of Board Diversity: Lessons Learned from Activist Investing*, HARV. L. SCH. F. CORP. GOVERNANCE (July 14, 2020), https://corpgov.law.harvard.edu/2020/07/14/maximizing-the-benefits-of-board-diversity-lessons-learned-from-activist-investing/ [https://perma.cc/D5LR-GC3Y] (commenting on why board diversity matters to activist investors); *Women and Minorities on Fortune 500 Boards: More Room to Grow*, DELOITTE (Mar. 12, 2019), https://deloitte.wsj.com/riskandcompliance/2019/03/12/women-and-minorities-

Employees, especially women and minority groups, are disadvantaged because they do not have proper representation on the board or access to information on their employers' "workforce demographics and on hiring, promotion, compensation, and employment policies and practices."[218]

As postulated by Jamillah Williams, employers deliberately conceal information on employment practices and workforce demographics.[219] They do so by using a strategy of "diversity as a trade secret" in order to block access to this sort of data and control the outcome of lawsuits by diversity advocates.[220]

Proprietary, confidential, or privileged information, such as trade secrets, is extremely important to companies, large and small, public and private, to prevent competitive harm to the business. However, the fact that companies use "trade secret" strategy as a shield to prevent the public and their employees from getting information on their diversity policies and practices seems inappropriate.[221]

Public companies could be mandated to disclose diversity information on recruitment, hiring, retention, and firing to the public. Directors could require this information and make it available. More information would allow institutional investors to monitor the management and better evaluate whether the CEO and management team are practicing purpose-driven leadership and stakeholder capitalism.[222]

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on-fortune-500-boards-more-room-to-grow/ [https://perma.cc/VFV5-QQ9T] (calling for continued efforts to create more diverse corporate boards).

218 Williams, *supra* note 39, at 1687.

219 *Id.*; *see also* JENNY R. YANG & JANE LIU, ECON. POL'Y INST., STRENGTHENING ACCOUNTABILITY FOR DISCRIMINATION: CONFRONTING FUNDAMENTAL POWER IMBALANCES IN THE EMPLOYMENT RELATIONSHIP 10-15 (2021), https://www.epi.org/unequalpower/publications/strengthening-accountability-for-discrimination-confronting-fundamental-power-imbalances-in-the-employment-relationship/ [https://perma.cc/SPR4-PVML].

220 Williams *supra* note 39, at 1687 ("For example, Microsoft used the argument in *Moussouris v. Microsoft*, an ongoing sex discrimination lawsuit filed in 2015, to prevent public disclosure of Microsoft's internal diversity data. More recently, IBM brought suit in 2018 against its former Chief Diversity Officer to prevent her from taking a similar job at Microsoft.").

221 According to Williams, tech companies use "Exemption 4 of the Freedom of Information Act, which covers 'trade secrets' and 'commercial information,' to prevent exposure of diversity data collected by the government." *See id.* at 1688.

222 *Cf. The COVID-19 Corporate Response Tracker: How America's Largest Employers Are Treating Stakeholders Amid the Coronavirus Crisis*, JUSTCAPITAL, https://justcapital.com/reports/the-covid-19-corporate-response-tracker-how-americas-largest-employers-are-treating-stakeholders-amid-the-coronavirus-crisis/ (last visited Jan. 12, 2021) [https://perma.cc/WQY2-78HD] (explaining how tracking such

We recognize that the U.S. Congress could amend the securities laws to require disclosure of diversity workforce information on hiring, promotion, compensation, firing, and other employment policies and practices. It can empower the Securities and Exchange Commission ("SEC") to promote gender equality, diversity and inclusion in the workforce, notably by adopting policies to ensure employee health and well-being during the current Covid pandemic.

Institutional investors can promote such initiatives in the workforce by taking meaningful steps to advance diversity and inclusion. They can play a central role in developing uniform and agreed-upon standards to assess the diversity policies and practices of the entities they invest in.

If disclosure is made mandatory, portfolio investee companies will comply. It should be noted that this will not add significant additional costs for public companies because most of this data is already collected by large companies and is already required by other agencies, but is not made public.[223]

Now, more than ever, directors could step up, make sure that their interests are represented in governance decisions, and integrate culture and "human capital considerations into the overarching strategy to create long-term value."[224] Large public companies are repeat players in competitive markets, where there is a shortage in skilled labor that contributes to a "war for talent."[225] Employees contribute their sweat

information can allow institutional investors to monitor the management and better evaluate corporate decisions).

[223] Unfortunately, rather than *mandating* regulated entities (such as financial service firms) disclose efforts to increase workplace diversity, the SEC has allowed voluntary disclosures on such efforts. *See* Luis A. Aguilar, *Failing to Advance Diversity and Inclusion*, HARV. L. SCH. F. CORP. GOVERNANCE (June 11, 2015), https://corpgov.law.harvard.edu/2015/06/11/failing-to-advance-diversity-and-inclusion/ [https://perma.cc/G6PP-YASC]. Voluntary disclosure is ineffective and as a result, "[t]he Securities and Exchange Commission [has] failed to take meaningful steps to advance diversity and inclusion in the financial services industry, as required by Section 342 of the Dodd-Frank Act." *See id.*

[224] Stephen Klemash, Jennifer Lee & Jamie Smith, *Human Capital: Key Findings from a Survey of Public Company Directors*, HARV. L. SCH. F. CORP. GOVERNANCE (May 24, 2020), https://corpgov.law.harvard.edu/2020/05/24/human-capital-key-findings-from-a-survey-of-public-company-directors/ [https://perma.cc/W5ZK-CVHF]; *see also* Anat Alon-Beck, *Stakeholder Capitalism: Should Employees Demand Change?*, FORBES (June 11, 2020, 7:50 AM EDT), https://www.forbes.com/sites/anatalonbeck/2020/06/11/stakeholder-capitalism-should-employees-demand-change/#69b05f193b7d [https://perma.cc/MDE7-E6PV].

[225] *See, e.g.*, Anat Alon-Beck, *Unicorn Stock Options — Golden Goose or Trojan Horse*, 2019 COLUM. BUS. L. REV. 107, 114-15 (2019) (exploring "how U.S. technology companies engage in a 'war for talent'"); Anat Alon-Beck, *Insight: When Unicorn Employees Revolt and Push for IPO*, BLOOMBERG (Sept. 30, 2019, 1:01 AM),

equity "human capital" in order to benefit from the gains of their firm's success. Companies that cannot provide their workers with equal opportunities regardless of their gender will not be able to continue to attract or retain the talent that will help them grow and compete.

C. Requiring Intermediaries to Take Action

Intermediaries, such as legal advisors, investment consultants (actuaries), stock exchanges, brokers, and data providers could also make an effort to engage with their clients (through advising, training, or integrating professional ethics codes) and other market participants to integrate gender diversity practices into conventional financial practices. They can achieve that goal by publicly expressing their views to their clients. They can educate their clients and demand that they commit to implementation of identity-based diversity factors and policies, including explanations of how these commitments align with fiduciary duties.

The following further explains why we decided to focus on representation in the boardroom.

IV. INSTITUTIONAL INVESTORS: GREAT POWER CARRIES GREAT RESPONSIBILITY

A. Power in the Corporate World

Institutional investors' influence on corporate governance is hard to overstate, as they are "universal owners."[226] The financial world has recently observed a rise in the number of assets that are controlled and managed by these players.[227] This gives them extraordinary powers. In

https://news.bloomberglaw.com/securities-law/insight-when-unicorn-employees-revolt-and-push-for-ipo [https://perma.cc/NYV2-Z52N] (explaining why "unicorn firms have a high turnover rate and experience difficulties with attracting, engaging and retaining talent"); Anat Alon-Beck, *The Unicorn War for Talent: The Employees Fire Back. WeWork Is the Latest Example*, FORBES (Jan. 29, 2020, 12:12 PM EST), https://www.forbes.com/sites/anatalonbeck/2020/01/29/the-unicorn-war-for-talent-the-employees-fire-back-wework-is-the-latest-example/#1f178def35da [https://perma.cc/6FTZ-SDXC] (discussing how the "war for talent" has led to a lawsuit).

226 FIDUCIARY DUTIES, *supra* note 11, at 5.

227 Francesco Franzoni, *The Effects of Concentration in the Asset Management Industry on Stock Prices*, PROMARKET (June 7, 2019), https://promarket.org/2019/06/07/the-effects-of-concentration-in-the-asset-management-industry-on-stock-prices/ [https://perma.cc/4KA9-R5F]; Julie Segal, *The Asset Management Industry Is Getting More Concentrated*, INSTITUTIONAL INV. (Oct. 29, 2018), https://www.institutionalinvestor.com/article/

the past seventy years, institutional investors have increased their market dominance and overall influence over the public equity markets thanks to their extensive investments.[228] To illustrate, note that in the United States, the proportion of "public equities managed by institutions has risen steadily over the past six decades, from about 7 or 8% of market capitalization in 1950, to about 67% in 2010."[229] In 2016, they held about 63% of the outstanding public corporate equity.[230]

In the United States and United Kingdom, institutional investors gained such dominance thanks to an increase in the number of households that participate in the capital markets through pooled-investment vehicles (such as mutual funds and exchange-traded funds), rather than direct investments.[231] Bebchuk et al. further explain that the rise of institutional investors was driven "by investor recognition of the

b1bk8n82qcc0kt/The-Asset-Management-Industry-Is-Getting-More-Concentrated [https://perma.cc/L2HQ-66M3].

228 They hold a significant portion of shares and bonds in public companies. *See* BEN W. HEINEMAN, JR. & STEPHEN DAVIS, ARE INSTITUTIONAL INVESTORS PART OF THE PROBLEM OR PART OF THE SOLUTION?: KEY DESCRIPTIVE AND PRESCRIPTIVE QUESTIONS ABOUT SHAREHOLDERS' ROLE IN U.S. PUBLIC EQUITY MARKETS 1 (2011), https://web.law.columbia.edu/sites/default/files/microsites/millstein-center/80235_CED_WEB.pdf [https://perma.cc/932Y-YU92]; Stuart L. Gillan & Laura T. Starks, *Corporate Governance, Corporate Ownership, and the Role of Institutional Investors: A Global Perspective,* J. OF APPLIED FIN., Fall/Winter 2003, https://www.fma.org/assets/docs/JAF/2003/jaf2003_13_2_1.pdf [https://perma.cc/U3T6-V6MC]; Luis A. Aguilar, Comm'r., U.S. Sec. & Exch. Comm'n, Speech at Georgia State Univ., Institutional Investors: Power and Responsibility (Apr. 19, 2013) (transcript available at https://www.sec.gov/news/speech/2013-spch041913laahtm [https://perma.cc/77WR-S5UU]).

229 Aguilar, *supra* note 228; *see also* MATTEO TONELLO & STEPHAN RABIMOV, THE 2010 INSTITUTIONAL INVESTMENT REPORT: TRENDS IN ASSET ALLOCATION AND PORTFOLIO COMPOSITION 4 (2010); Marshall E. Blume & Donald B. Keim, Institutional Investors and Stock Market Liquidity: Trends and Relationships 4 (Aug. 21, 2012) (unpublished manuscript) (available at http://finance.wharton.upenn.edu/~keim/research/Changing InstitutionPreferences_21Aug2012.pdf [https://perma.cc/L56W-PRXX]).

230 Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSPECTIVES 89, 91 (2017) (referencing 2016 data from the Board of Governors of the Federal Reserve System).

231 *See* Aguilar, *supra* note 228 ("The growth in the proportion of assets managed by institutional investors has been accompanied by a dramatic growth in the market capitalization of U.S. listed companies. For example, in 1950, the combined market value of all stocks listed on the New York Stock Exchange (NYSE) was about $94 billion. By 2012, however, the domestic market capitalization of the NYSE was more than $14 trillion, an increase of nearly 1,500%. This growth is even more impressive if you add the $4.5 trillion in market capitalization on the NASDAQ market, which did not exist until 1971. The bottom line is, that as a whole, institutional investors own a larger share of a larger market.").

value of low-cost diversification and encouraged by favorable regulatory and tax treatment."[232]

As noted, there are different forms, governance structures, and investment strategies of institutional investors.[233] Depending on the form, institutional investors are typically subject to distinct legal and regulatory requirements, where some forms are regulated while others are not.[234] For the purposes of this Article, institutional investors are those that invest most of the general public's funds, including savings, pensions, and insurance.

B. Institutional Investors Play an Important Role in Activism

As similarly stated by Churchill, but perhaps more recently by Spiderman's Uncle Ben: "with great power comes great responsibility."[235] The investment policies and decisions made by institutional investors have a considerable impact on corporate governance, firm performance, and the companies' overall behavior in our market.[236] It could be argued that the most successful companies do not target profit directly but are driven by purpose — the desire to serve a societal need and contribute to human betterment. Their long-term maximization is not limited to an increase in returns but rather by a contribution to a more productive economy. Responsibility, therefore,

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[232] Bebchuk et al., *supra* note 230.

[233] *See generally* Rock, *supra* note 133 (discussing the roles of institutional investors in corporate governance).

[234] *Id.*

[235] *With Great Power Comes Great Responsibility*, QUOTE INVESTIGATOR https://quoteinvestigator.com/2015/07/23/great-power/ (last visited Oct. 3, 2021) [https://perma.cc/Z4JP-8A7Q] ("Voltaire? Spider-Man? Winston Churchill? Theodore Roosevelt? Franklin D. Roosevelt? Lord Melbourne? John Cumming? Hercules G. R. Robinson? Henry W. Haynes?").

[236] *See e.g.*, Barzuza et al., *supra* note 12, at 1244 (arguing that the "three-dimensional millennial effect- as investors, customers, and employees . . . [can] provide a counterweight to the wealth-maximization paradigm of corporate governance"); Bebchuk & Hirst, *supra* note 12, at 2029-30 (discussing how the decisions of index fund managers have "profund impact[s] on the governance and performance of public companies and the economy"); Fisch et al., *supra* note 12, at 17 (noting that passive investors "are the most important development in modern-day capital markets, dictating trillions of dollars in capital flows and increasingly owning much of corporate America"); Gilson & Gordon, *supra* note 12, at 864 (positing that "shareholder activists should be seen as playing a specialized capital market role of setting up intervention proposals for resolution by institutional investors"); Kahan & Rock, *supra* note 12, at 1772 (noting that "[b]ecause high profile contests between activist shareholders and boards often have a significant effect on firm value, the Big Three have strong direct incentives to acquire information and vote intelligently").

in the context of institutional investors, means fiduciary duty with societal ramifications.

C. Potential for Activism

1. Investors are Making Changes

Following the financial crisis of 2000, there were, and still are, increased calls for institutional investors to change their investment policies, exercise oversight, curtail excessive risk, act as "stewards," and "engage" with current and prospective investee companies to "achieve long-term sustainable value."[237] Due to a fear of regulation, institutional investors responded to these calls for action, and accordingly increased their activism since the beginning of the 2000s.[238] Despite the challenges associated with stewardship, as discussed further below, institutional investors are calling their investee companies to strengthen corporate governance and enhance corporate value.[239]

We postulate that the responsibility of institutional investors to exercise oversight over current and prospective investee companies stems not only from the large volume of assets that they manage for the general public, but also from their fiduciary nature and the fact that in the last two decades most of the public's savings are held in their hands.[240] Note that institutional investors manage the savings and

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[237] HEINEMAN & DAVIS, *supra* note 228, at 4-5; Ben W. Heineman, Jr. & Stephen Davis, *Institutional Investors: The Next Frontier in Corporate Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 7, 2011), https://corpgov.law.harvard.edu/2011/10/07/institutional-investors-the-next-frontier-in-corporate-governance/ [https://perma.cc/8GBC-A3AC].

[238] *See* HEINEMAN & DAVIS, *supra* note 228, at 4-5; Granville Martin, *Reporting Threshold for Institutional Investment Managers*, HARV. L. SCH. F. CORPORATE GOVERNANCE (Oct. 14, 2020), https://corpgov.law.harvard.edu/2020/10/14/reporting-threshold-for-institutional-investment-managers/ [https://perma.cc/6GSA-NMNH]. *See generally* Mary Ann Cloyd, *Shareholder Activism: Who, What, When, and How?*, HARV. L. SCH. F. CORP. GOVERNANCE (Apr. 7, 2015), https://corpgov.law.harvard.edu/2015/04/07/shareholder-activism-who-what-when-and-how/ [https://perma.cc/AX8H-JLVU] (providing a general overview of activist shareholders including hedge fund activism).

[239] *See* Romano, *supra* note 128, at 174.

[240] There are several explanations for this as noted above. One of them is that banks, for example, are not an attractive option for investors, because of the low, even negative interest rate that they offer. *See Macro Risks: Universal Ownership*, PRINCIPLES FOR RESPONSIBLE INV. (Oct. 12, 2017), https://www.unpri.org/sdgs/the-sdgs-are-an-unavoidable-consideration-for-universal-owners/306.article [https://perma.cc/5V9C-UTP3].

retirement accounts of millions of workers, retirees and other investors, who trust them and entrust their futures in their hands.[241]

Can institutional investors promote additional social or environmental issues other than the financial return on their investment? This question has been debated for a long time. The following is a discussion of the fiduciary duties of institutional investors. We believe that institutional investors' investment policies and decisions have a significant impact on corporate governance, firm performance, and overall behavior in our markets.

a. Initiatives Taken by Institutional Investors to Favor Gender Equality and Their Potential

There are many new types of private initiatives. The United Nations, for example, launched an initiative on promoting social investments with 2,500 companies from all over the world.[242] Although these are social investments and not explicitly gender equality, social investments include gender equality, or can be included for better governance.

In October 2016, multinational corporations managing a total of £10.5 trillion supported an initiative to promote more women in the management and boards of British companies in which they invest.[243] These institutional investors include some of the world's largest such as Japan's Government Pension Fund, JPMorgan Asset Management, Standard Life, and BlackRock.[244] The goal was to reach 30% of women on the FTSE 350 board of directors by the end of 2020.[245] The intention

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241 *See* Robert H. Sitkoff, *Fiduciary Principles in Trust Law*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 118 at 41.

242 Press Release, Secretary General, *supra* note 175.

243 DELOITTE GLOB. CTR. FOR CORP. GOVERNANCE, *supra* note 2; 30% CLUB, 30% CLUB INVESTOR GROUP: *STATEMENT OF INTEREST* (2016), https://30percentclub.org/assets/uploads/UK/Investor_Group/30__Club_Investor_Group_Statement_of_Intent_2016_FINAL.pdf [https://perma.cc/8HJD-YKKX] [hereinafter STATEMENT OF INTEREST]; Sarah Gordon, *Big Investors Back Push for 30% Target for Female Executives*, FIN. TIMES (Feb. 1, 2018), https://www.ft.com/content/4793c798-0742-11e8-9650-9c0ad2d7c5b5 [https://perma.cc/F9QX-9BYN]. *See generally* Coury et al., *supra* note 112 (noting the value of having women in the workplace).

244 Gordon, *supra* note 243.

245 30% CLUB, STATEMENT OF INTEREST, *supra* note 243; *see also* Press Release, 30% Club, All Male Boards Disappear Across FTSE 350 (Feb. 19, 2021), https://30percentclub.org/press-releases/view/30-club-exclusive-all-male-boards-disappear-across-ftse-350 [https://perma.cc/YBG5-8P9D]; Press Release, Dep't for Bus., Energy, & Indust. Strategy & The Rt Hon Alok Sharma MP, Women Make up More Than a Third of All Board Members Across the FTSE 350 for the First Time (Sept. 22, 2020), https://www.gov.uk/government/news/women-make-up-more-than-a-third-of-

is to oppose the appointment of directors when companies fail to meet this target.[246] For example, Aviva Investors opposed 82 resolutions between 2016 and 2018 at a general meeting for gender diversity considerations on the board of directors and the executive management of the companies in which it invests.[247]

In the United States, as noted, institutional investors are actively promoting gender diversity in the board of directors.[248] For example, the CEO of BlackRock, one of the largest institutional investors in the world, has warned companies that BlackRock will not invest in them unless during the next three years they would come up with a satisfactory plan to promote gender diversity and meet the goals it set for gender equality.[249] State Street Global Advisors, the third largest institutional investor in the United States, adopted a similar policy.[250]

In the United Kingdom, The Investment Association, incorporating £7.7 trillion under asset management, warned 94 traded companies in 2019 that had only one woman director (when 20 of them had no

all-board-members-across-the-ftse-350-for-the-first-time [https://perma.cc/2KTQ-C4JR].

246 30% CLUB, STATEMENT OF INTEREST, *supra* note 243.

247 Cheryl Cole, *Aviva Investors: Striving to Tackle Racial Inequality in the Investment Industry*, DIVERSITYQ (Feb. 19, 2021), https://diversityq.com/aviva-investors-striving-to-tackle-racial-inequality-in-the-investment-industry-1511492/ [https://perma.cc/9PBT-3YMM]; *see also* SHAREACTION, VOTING MATTERS 2020: ARE ASSET MANAGERS USING THEIR PROXY VOTES FOR ACTION ON CLIMATE AND SOCIAL ISSUES? 4 (2020), https://shareaction.org/wp-content/uploads/2020/11/Voting-Matters-2020.pdf [https://perma.cc/R929-8E37]; Marie-Anne Birken & Gian Piero Cigna, *Gender Diversity on Boards: A Cause for Multilateral Organizations,* 1 AIIB YEARBOOK OF INT'L L. 16, 25 (2018), https://pdfs.semanticscholar.org/e834/1cda4c1f01e69eddf7f2b47708142703986b.pdf [https://perma.cc/N6WL-VZQP]; *Economics and Ethics*, AVIVIA INVS. (July 21, 2020), https://www.avivainvestors.com/en-gb/views/aiq-investment-thinking/2020/07/economics-ethics-diversity/ [https://perma.cc/J628-NP5Q].

248 Kevin Douglas, Tyler Huseman, Eric Knox & Sehrish Siddiqui, *A Summary of Certain Proxy Advisory Firm and Institutional Investor Board Diversity Policies*, JDSUPRA (Mar. 26, 2021), https://www.jdsupra.com/legalnews/a-summary-of-certain-proxy-advisory-8652646/ [https://perma.cc/5PT7-24HS].

249 *See* BLACKROCK, *supra* note 10, at 3; Ryan Cole, *BlackRock Calls for Greater Gender Diversity on Director Boards,* THE RACE TO THE BOTTOM (Aug. 30, 2019), https://www.theracetothebottom.org/rttb/2019/8/30/blackrock-calls-for-greater-gender-diversity-on-director-boards [https://perma.cc/2XNV-SH8W].

250 STATE STREET GLOBAL ADVISORS, STATE STREET GLOBAL ADVISORS' GUIDANCE ON ENHANCING GENDER DIVERSITY ON BOARDS IN THE GULF COOPERATION COUNCIL (GCC) COUNTRIES 4 (2020), https://www.ssga.com/content/dam/ssmp/library-content/products/esg/guidance-on-enhancing-gender-diversity-on-boards.pdf [https://perma.cc/67VU-MHZJ].

woman on the board at all) that unless a plan to change the status quo is set, it will reconsider its investment in these companies.[251]

b. The Current Factors Limiting the Impact of These Initiatives

In recent years, corporations have been pressured by institutional investors and other market participants to incorporate in their charters an obligation to act for the benefit of society at large.[252] Many companies and investors have increased an emphasis on ESG as a result; however, market participants are still struggling with what role gender equality plays in integration into investment decisions and overall company frameworks.[253] Additionally, while many companies have made significant progress in disclosure on their environmental impact and governance standards, the same cannot be said of social impact, especially with regards to disclosures on the company's own human capital management.[254]

Large market participants, such as asset managers and institutional investors, are now urging the U.S. Securities and Exchange Commission to improve consistency in public company disclosures on how these businesses are addressing social concerns like gender equality and diversity in the workforce.[255] These market participants, which include

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[251] Kalyeena Makortoff, *Investor Group Warns Almost 100 Firms Over Lack of Gender Diversity*, GUARDIAN (May 12, 2010, 7:01 PM EDT), https://www.theguardian.com/business/2019/may/13/investor-group-warns-almost-100-firms-over-lack-of-gender-diversity [https://perma.cc/KTU8-4HMY]. *See generally* Maitane Sardon, *U.K. Investment Managers Push for More Diversity on Boards*, THE WALL ST. J. (Feb. 24, 2021), https://www.wsj.com/articles/u-k-investment-managers-push-for-more-diversity-on-boards-11614200970 [https://perma.cc/JTD5-6XXS].

[252] *See* Lynn S. Paine & Suraj Srinivasan, *A Guide to the Big Ideas & Debates in Corporate Governance*, HARV. BUS. REV. (Oct. 14, 2019), https://hbr.org/2019/10/a-guide-to-the-big-ideas-and-debates-in-corporate-governance [https://perma.cc/2Z98-BGBY].

[253] *See* UNITED NATIONS, WORLD SURVEY ON THE ROLE OF WOMEN IN DEVELOPMENT, GENDER EQUALITY AND SUSTAINABLE DEVELOPMENT 93 (2014), https://sustainabledevelopment.un.org/content/documents/1900unwomen_surveyreport_advance_16oct.pdf [https://perma.cc/57UM-4NX9].

[254] *See* Alon-Beck, *Times They Are a-Changin'*, *supra* note 33, at 159-60; George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TULANE L. REV. 639, 676 (2021); Maj Vaseghi, Pamela Marcogliese & Elizabeth Bieber, *Incorporating Human Capital Management Disclosures into a Company's Annual Report*, HARV. L. SCH. F. CORP. GOVERNANCE (Oct. 31, 2020), https://corpgov.law.harvard.edu/2020/10/31/incorporating-human-capital-management-disclosures-into-a-companys-annual-report/ [https://perma.cc/6HFS-LGW4].

[255] Tom Zanki, *SEC Urged to Upgrade Disclosures On COVID-19, Diversity*, LAW360 (June 30, 2020, 10:10 PM), https://www.law360.com/compliance/articles/1288058/sec-urged-to-upgrade-disclosures-on-covid-19-diversity [https://perma.cc/2BC9-BSLZ] ("SEC Chairman Jay Clayton led a virtual roundtable on Tuesday, querying investors and asset

international organizations[256] and global institutional investors,[257] are also engaging with the business community in order to encourage a responsible response to the pandemic. They publicly urge businesses to take all stakeholder interests into account when making decisions that affect employees, communities, and markets.[258] For example, Barbara Novick, co-founder of asset management BlackRock, said that "investors are also watching how companies are responding to social unrest that has escalated over the past month following mass demonstrations protesting racism and police brutality."[259]

BlackRock's call for more disclosures and transparency is not surprising given the fact that many large institutional investors have recently been pushing for social agendas, likely in order to improve their public relations and accord with a new generation of investors — millennials. Larry Fink, the Chairman and CEO of BlackRock, for example, repeatedly implored investee companies to appoint at least two women to serve on the board of directors.[260] Fink further stated that BlackRock will continue to engage with investee companies and warned

managers as to what they would like to see in public companies' second-quarter disclosures given fallout from the coronavirus pandemic and related economic uncertainty.").

256 *See, e.g.*, UNITED NATIONS, SHARED RESPONSIBILITY, GLOBAL SOLIDARITY: RESPONDING TO THE SOCIO-ECONOMIC IMPACTS OF COVID-19 7 (Mar. 2020), https://unsdg.un.org/sites/default/files/2020-03/SG-Report-Socio-Economic-Impact-of-Covid19.pdf [https://perma.cc/4C5Z-9LP4] ("The United Nations calls on all businesses and corporations to take three primary actions: (a) Adhere to health, safety guidelines and provide economic cushions to workers, including through ensuring worker safety and social distancing and secure wages for those working from home. (b) Provide financial and technical support to governments by contributing to the COVID-19 Solidarity Response Fund. (c) Repurpose their facilities and business plans to focus on meeting the needs of this crisis. Some have begun to do so; we need many more to follow in suit.").

257 See *Investor Statement on Coronavirus Response*, which was supported by 336 long-term institutional investors representing over $9.5 trillion USD in assets under management with global exposure across capital markets. *Investor Statement on Coronavirus Response*, INTERFAITH CTR. ON CORP. RESPONSIBILITY, https://www.iccr.org/investor-statement-coronavirus-response (last visited July 12, 2021) [https://perma.cc/BDF6-D5WQ].

258 *See id.*

259 Zanki, *supra* note 255.

260 Sarah Krouse, *BlackRock: Companies Should Have at Least Two Female Directors*, WALL ST. J. (Feb. 2, 2018, 2:06 PM), https://www.wsj.com/articles/blackrock-companies-should-have-at-least-two-female-directors-1517598407 [https://perma.cc/9VG7-FZG8]; *see also Study Finds Women Representation on Boards Affects Gender Inequality in Firms*, MIRAGE NEWS (June 3, 2021, 2:58 PM AEST), https://www.miragenews.com/study-finds-women-representation-on-boards-570932/ [https://perma.cc/M9QX-5DLF].

that it will hold them accountable if they fail to make progress "within a reasonable time frame."[261]

The public statements on diversity policy made by Barbara Novick and Larry Fink have a large impact on investee companies and our society in general. Their statements could affect every public company CEO's decision, especially if he might face a demand to increase gender diversity. The statements might even have more robust consequences and motivate the attorneys, auditors, and accountants to ask their CEOs if gender diversity is correctly reflected in the public company's SEC filings. That being said, it must be noted that even BlackRock itself is not the best example for gender equality — there are only five women on BlackRock's board of directors, out of a total number of sixteen directors.[262] So, even in BlackRock's own example, women only account for 27% of the total board members, not 50%.

If we look at the other large institutional players — Vanguard and State Street Global Advisors, for example — we will find that they are not the best illustrations of gender equality either. Gender diversity data is generally measurable. There are only three women on Vanguard's board of directors, out of a total number of ten directors.[263] There are only four women on State Street Global Advisors' board, out of a total number of eleven directors,[264] representing 36% women on the board. While they do not reach 50% women on board, or even close, they are still above the market average.

The Big Three are not the only institutional players who recently decided to elevate the issue of board diversity on their agenda. As noted above, a few years ago, in Davos, Goldman Sachs ("Goldman") decided to share its new initiatives with the world and was also able to attract the media's attention. David Solomon, Goldman's CEO, announced that

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261 Anthony Goodman & Rusty O'Kelley, *Institutional Investors Lead Push for Gender-Diverse Boards*, HARV. L. SCH. F. CORP. GOVERNANCE (Apr. 26, 2017), https://corpgov.law.harvard.edu/2017/04/26/institutional-investors-lead-push-for-gender-diverse-boards/ [https://perma.cc/3VPP-DDX7].

262 *Board Diversity at BlackRock*, BLACKROCK, https://ir.blackrock.com/governance/board-of-directors/Board-Diversity-at-BlackRock/#:~:text=The%20Board%20includes%20five%20women,non%2DU.S.%20or%20dual%20citizens (last visited July 12, 2021) [https://perma.cc/CQ68-M2CP].

263 *See Our Leaders*, VANGUARD, https://about.vanguard.com/who-we-are/our-leaders/ (last visited July 12, 2021) [https://perma.cc/P8PX-25HT].

264 *See Board of Directors*, STATE ST., https://investors.statestreet.com/corporate-governance/board-of-directors/default.aspx (last visited July 12, 2021) [https://perma.cc/QUC4-QLW2].

"we're not going to take a company public unless there's at least one diverse board candidate, with a focus on women."[265]

While this announcement has implications for any new company that wants to go public with the firm, Goldman, like BlackRock, does not have full equality on its board. Only four of its board members are women, out of the total number of eleven directors.[266] Women account for only 36% of Goldman's board members, not 50%.

Perhaps these initiatives are part of a larger global "paradigm shift" in thinking about corporate governance, human capital and culture, and the role that these factors play in attracting, engaging and retaining talent.[267] Various groups of very influential stakeholders, including the Global Reporting Initiative, the Embankment Project for Inclusive Capitalism, the Business Roundtable, the Sustainability Accounting Standards Board ("SASB"), and the SEC are pursuing projects that are intended to identify or create new metrics to measure and demonstrate long-term value to financial markets.[268]

These groups have publicly identified human capital and culture as important parts of a company's intangible assets, which "are now estimated to comprise on average 52% of a company's market value," according to Ernst & Young.[269] These groups are pushing management to modernize corporate decision-making and strategize to foster innovation and create long-term value.[270] These efforts are welcomed, but there are many challenges with how they are implemented and the outcomes that they produce.

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265 Mehnert, *supra* note 32; *see also* Son, *supra* note 32.

266 *See Board of Directors*, GOLDMAN SACHS, https://www.goldmansachs.com/about-us/people-and-leadership/leadership/board-of-directors/ (last visited July 12, 2021) [https://perma.cc/E2KY-W432].

267 *See* Alon-Beck, *Times They Are a-Changin'*, *supra* note 33, at 120.

268 Klemash et al., *supra* note 224.

269 ERNST & YOUNG, HOW AND WHY HUMAN CAPITAL DISCLOSURES ARE EVOLVING 1, https://assets.ey.com/content/dam/ey-sites/ey-com/en_us/topics/cbm/ey-how-and-why-human-capital-disclosures-are-evolving.pdf [https://perma.cc/3GFB-JBBG]. See *Embankment Project for Inclusive Capitalism (EPIC)*, a project intended "to identify and create new metrics to measure and demonstrate long-term value to financial markets" by the Coalition for Inclusive Capitalism and Ernst & Young, participated in by more than 30 asset owners (such as Allstate, CalPERS and MetLife), asset managers (like Vanguard, State Street and Fidelity) and companies (three of which are in the Top 100 Companies). COAL. FOR INCLUSIVE CAPITALISM, EMBANKMENT PROJECT FOR INCLUSIVE CAPITALISM 4 (2018), https://www.coalitionforinclusivecapitalism.com/wp-content/uploads/2021/01/coalition-epic-report.pdf [https://perma.cc/V39K-DZZA].

270 *See generally* ERNST & YOUNG, *supra* note 269 (providing a broad overview of the traditional fiduciary duty analysis).

Although these initiatives have had some impact, it can be seen from the final outcome that it is very slow and relies on the goodwill of the directors or CEOs of institutional investors, which can choose other agendas in the future. The following are our proposals for a different solution based on the existing laws and regulations.

Today, we believe that the tide is turning among scholars, executives, and policymakers on the fact that companies must act as good citizens in the community, and, moreover, to contribute to society. Large corporations make large amounts of profits from the public — is it inconceivable to ask them to be accountable to the public? What about institutional investors that hold large amounts of the public's funds?

2. The Impact of the Purpose of the Corporate Entity on the Directors' Fiduciary Duty

There is an ongoing debate among scholars of the traditional view of fiduciary duty,[271] who claim that management is responsible for protecting the interests of the shareholders,[272] and scholars of the stakeholder approach, who claim that management is responsible for protecting the interest of all stakeholders.[273] The stakeholder approach is a "strategic management process" and not merely a strategic planning process.[274] The strategic management process allows management to actively design a new direction for the firm, which will take into account

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[271] *See generally* Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595, 600 (1997) (discussing the traditional fiduciary duty analysis).

[272] *See* OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 18-19 (1984) (Williamson [1984] used a transaction cost framework to show that shareholders deserved special consideration over other stakeholders because of "asset specificity." He argued that a shareholder's stake was uniquely tied to the success of the firm and would have no residual value should the firm fail, unlike, for example, the labor of a worker).

[273] *See* R. Edward Freeman & John McVea, *A Stakeholder Approach to Strategic Management* 97-98 (Darden Graduate Sch. of Bus. Admin., Working Paper No. 01-02, 2001) ("Freeman and Evan [1990] have argued, to the contrary, that Williamson's approach to corporate governance can indeed be used to explain all stakeholders' relationships. Many other stakeholders have stakes that are, to a degree, firm specific. Furthermore, shareholders have a more liquid market (the stock market) for exit than most other stakeholders. Thus, asset specificity alone does not grant a prime responsibility towards stockholders at the expense of all others."); *see also* William M. Evan & Edward R. Freeman, *A Stakeholder Theory of the Modern Corporation: Kantian Capitalism*, *in* ETHICAL THEORY AND BUSINESS 97, 98 (Tom Beauchamp & Norman E. Bowie eds., Prentice Hall 5th ed. 1996).

[274] Freeman & McVea, *supra* note 273, at 11 ("Strategic planning focuses on trying to predict the future environment and then independently developing plans for the firm to exploit its position.").

how the firm can have an effect on the environment and on society, in addition to how the environment and society possibly will affect the firm.[275]

Until recently, institutional investors were initially reluctant to embrace this concept, arguing that their fiduciary duty was limited to the maximization of shareholder values irrespective of environmental or social impacts, or broader governance issues such as corruption.[276] But as evidence has grown that ESG issues have financial implications, the tide has shifted. In many important markets, including the United States and the European Union, ESG integration is increasingly seen as part of their fiduciary duty.[277]

The question remains on how corporations should accomplish these goals, and what the main purpose for their existence should be. We argue that institutional investors ought to balance the boundaries of their fiduciary duties with regards to how to invest the funds that they control. They have the power and discretion in determining how to invest and manage funds. It is likely that they will not be violating their fiduciary duty by taking gender equality factors (any non-economic policy that promotes economic benefits for the long run) into account. As explained in further detail above, an investment decision is a business decision and as such is likely protected under the business judgment rule.

CONCLUSION

Fiduciary duties reflect the central role of leaders in corporate governance. Those with the most responsibility benefit the most from corporate success, but also bear commensurate fiduciary responsibilities. Diversifying for gender inclusion may seem an odd fit among other fiduciary duties. Fiduciary duties are where governance imposes the burden of "doing the right thing." Fiduciary duties involve normatively good behavior that proves essential to ensuring responsible decision-making and achieving positive outcomes for firms.

Gender equality fits squarely in this normative framework. Sex equality and diversity in leadership, it is now widely agreed, helps

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275 *Id.*

276 Sebastian Sharpe, *The Rise of ESG*, INVENTURE (Mar. 8, 2019), https://inventurerecruitment.com/news/2019/3/8/the-rise-of-esg [https://perma.cc/KPV6-9QXD].

277 *Id.*; Brian Tomlinson, *ESG and Fiduciary Duties: A Roadmap for the US Capital Market*, HARV. L. SCH. F. CORP. GOVERNANCE (Nov. 1, 2016), https://corpgov.law.harvard.edu/2016/11/01/esg-and-fiduciary-duties-a-roadmap-for-the-us-capital-market/ [https://perma.cc/49RV-M4U4].

ensure effective and good governance.[278] It prevents "groupthink," the reliance on a solitary group as the sole arbiters.[279] In this sense, gender equality may reduce the risk of bad governance or even a crisis. For this reason, diversification figures among the fiduciary duties that institutional investors hold.

Furthermore, institutional investors also bear this responsibility because of their unique and dominant role within the firm. While mandatory state quotas may realize quick gains related to gender equality, institutional investors have a unique understanding of the firms they invest in, which empowers them to diversify effectively.

Relatively static fiduciary duties have guided institutional investors for many decades, and for that reason, we anticipate this proposal will evoke some controversy. The novelty of placing equality among the hidebound area of fiduciary duties alone will ruffle feathers. A more holistic understanding of good governance reveals that gender equality and diversity constitute a universally agreed-upon imperative for firm governance.

A fiduciary duty of diversification with regard to gender may open up other conversations about the benefits of using private ordering to advance inclusion.

Not only does it seem appropriate to ask institutional investors to carry this fiduciary duty, but imposing this duty on them may prove far more effective than other efforts. As a new generation of leaders rise to lead, the resulting changes may prove revolutionary, both for firms and investors.

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[278] Nicholas J. Price, *The Importance of Diversity for Good Governance*, DILIGENT INSIGHTS (Apr. 9, 2018), https://insights.diligent.com/corporate-governance/the-importance-of-diversity-for-good-governance/ [https://perma.cc/HZT4-EF8R]; *see* STEPHANIE J. CREARY, THE CONF. BOARD, LEADERSHIP, GOVERNANCE, AND ACCOUNTABILITY: A PATHWAY TO A DIVERSE AND INCLUSIVE ORGANIZATION 6 (2018), https://ideas.wharton.upenn.edu/wp-content/uploads/2018/07/Leading-Diversity-in-Organizations-Creary2008.pdf [https://perma.cc/5YW3-358K]; Cynthia Dow, Jacob Martin, Jean Lee, Sophia Piliouras, Tina Shah Paikeda & Russell Reynolds, *Unleashing the Power of Diversity Through Inclusive Leadership*, HARV. L. SCH. F. CORP. GOVERNANCE (May 20, 2019), https://corpgov.law.harvard.edu/2019/05/20/unleashing-the-power-of-diversity-through-inclusive-leadership/ [https://perma.cc/9DC5-CH49]; Phillips et al., *supra* note 72.

[279] *See* Price, *supra* note 278.