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Homogeneous Corporate Governance Cultures

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Abstract:

This is chapter 1 of *Challenging Boardroom Homogeneity: Corporate Law, Governance, and Diversity* (Cambridge University Press, forthcoming in 2015).

The lack of gender parity in the governance of business corporations has ignited a heated global debate, leading policymakers to wrestle with difficult questions that lie at the intersection of market activity and social identity politics. *Challenging Boardroom Homogeneity* draws on semi-structured interviews with corporate board directors in Norway and documentary content analysis of corporate securities filings in the United States to investigate empirically two distinct regulatory models designed to address diversity in the boardroom—quotas and disclosure.

The author's study of the Norwegian quota model demonstrates the important role diversity can play in enhancing the quality of corporate governance, while also revealing the challenges diversity mandates pose. His analysis of the US regime shows how a disclosure model has led corporations to establish a vocabulary of "diversity." At the same time, the analysis highlights the downsides of affording firms too much discretion in defining that concept. This book thus deepens ongoing policy conversations and offers new insights into the role law can play in reshaping the gendered dynamics of corporate governance cultures.

Keywords:

Corporate governance, corporate law, securities regulation, gender diversity, quotas, disclosure, socio-legal research, semi-structured interviews, mixed-methods content analysis

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CHAPTER 1

INTRODUCTION: HOMOGENEOUS CORPORATE GOVERNANCE CULTURES

I feel in a couple of situations that were very, very critical, then I saw [the] difference between how men and women behave. . . . I've seen situations where the women were more willing to dig into the difficult questions and to really go to the bottom even if it was extremely painful for the rest of the board, but mostly for the CEO . . . when it comes to the really difficult situations, [where] you think that the CEO has . . . done something criminal . . . [o]r you think that he has done something negligent, something that makes it such that you . . . are unsure whether he's the suitable person to be in the driving seat.

– Interviewee 14
(Norwegian public company board director, woman)

[I]f . . . a new category of society shall be given power, someone will have to give away that power. . . . And that is not an easy thing to do.

– Interviewee 3
(Norwegian public company board director, woman)

Berkshire does not have a policy regarding the consideration of diversity in identifying nominees for director. In identifying director nominees, the . . . Committee does not seek diversity, however defined.

– Annual proxy statements of Berkshire Hathaway Inc. (2010–2013)

The lack of gender parity in corporate boardrooms, and in the governance of economic institutions more generally, has ignited a heated global debate. In 2010, the International Monetary Fund's managing director Christine Lagarde (at the time, France's finance minister) drily quipped that the face of the global financial crisis would have had a very different complexion "if Lehman Brothers had been 'Lehman Sisters.'"¹ While her comment was viewed favorably in some quarters,² it elicited scathing critique from others; some characterized it as "a kind of lazy, sugar-and-spice gender essentialism" and "a tedious slice of benevolent sexism."³ That same year, members of a French feminist direct action group crashed the annual shareholder meeting of the Fortune Global 500 firm Veolia Environnement. Sporting faux beards, they sarcastically asked the CEO whether it was "wise to allow women to define the strategy of a company, a task requiring intelligence, an ability to react, and coolheadedness?"⁴ At the time, just one of the firm's seventeen directors was a woman.⁵

¹ Christine Lagarde, "Women, Power and the Challenge of the Financial Crisis", *The New York Times* (10 May 2010), online: <<http://www.nytimes.com/2010/05/11/opinion/11iht-edlagarde.html?dbk>>. The governance of financial institutions is a distinct issue that is not the focus of this book. I use this example only to illustrate the breadth of the global conversation and as a springboard for the ensuing discussion of corporate board diversity.

² "In Praise of ... Women Bankers", Editorial, *The Guardian* (9 October 2013), online: <www.theguardian.com/commentisfree/2013/oct/09/women-bankers>.

³ Ally Fogg, "Don't Give Me This 'If Lehman Sisters Had Been In Charge ...' Nonsense", *The Guardian* (17 September 2013), online: <www.theguardian.com/commentisfree/2013/sep/17/dont-give-me-lehman-brothers-sisters-nonsense>.

⁴ Tara Patel, "French Women Storm the Corporate Boardroom", *Bloomberg Businessweek* (10 June 2010), online: <http://www.businessweek.com/magazine/content/10_25/b4183015410606.htm>.

⁵ *Ibid.*

Lagarde, and others who have expressed similar sentiments, have contemplated the paucity of women in positions of decision-maker power and helped advance a dialogue over whether regulation might facilitate equality and improve governance.⁶ Her comments, like the French feminists' protests, highlight the key issues that inform conversations currently taking place internationally with respect to gender representation in corporate governance. Why are some groups well represented in corporate leadership positions while others are not? Would increased heterogeneity result in different financial outcomes or differences in how firms are managed? And should global regulators intervene with corrective measures that attempt to diversify corporate hierarchies, or would this represent an unjustified interference with market sovereignty? If intervention is warranted, what form should it take?

Global statistics indicate that women are noticeably underrepresented on the boards of the world's most significant publicly traded corporations,⁷ and that country-level progress generally is "slow" and "incremental."⁸ Regionally, Europe displays the most noteworthy movement toward balanced representation levels. North America lags behind Europe (with Canada trailing the United States), and Asia (especially Japan and China) remains virtually stagnant.⁹ Norway, Sweden, and Finland exhibit the highest percentages of women in global boardrooms, at 40.9 percent, 27 percent, and 26.8 percent, respectively. In comparison, the United States sits at 16.9 percent and Canada at 12.1 percent.¹⁰ Figure 1.1 presents the percentage of board seats women hold in forty-four countries from Europe, North America, Asia, the Middle East, South America, and Africa, as well as Australia.

These statistics have recently become the subject of regulatory attention, with states seeking to diversify the upper echelons of their corporate sectors by pursuing law-based ameliorative strategies. In this book, I evaluate the two primary approaches that states and regulators have adopted to date.¹¹ The first consists of board diversity quotas, imposed by legislators, and related target-based initiatives. In their most potent form, these measures mandate particular levels of gender balance in the boardroom. The second, less interventionist strategy, requires information disclosure. Rather than dictating a predetermined outcome, regulators ask corporations to publicly report on diversity-related governance practices in varying levels of detail.

In global policy dialogues, commentators and policymakers invoke different justifications in support of these diversification efforts. They frequently present economic rationales, the argument being that diversified boards may enhance organizational performance. Also important, though frequently overshadowed, are equality-based arguments. These justifications, in turn, engage some of

⁶ Lagarde herself has endorsed the use of mandatory quotas in the corporate context. See Leyla Boulton & Andrew Hill, "Lagarde Embraces Quotas at FT Conference" *The Financial Times* (16 November 2010), online: <www.ft.com/intl/cms/s/0/a219537c-f1b0-11df-bb5a-00144feab49a.html#axzz2zimxBtYC>.

⁷ My analysis in this book centers on for-profit corporations that issue securities for public distribution and are the subject of securities regulation, though I also make reference to state-owned enterprises and privately held corporations.

⁸ Kimberly Gladman & Michelle Lamb, "GMI Ratings' 2013 Women on Boards Survey" (April 2013) at 1, online: GMI Ratings <<http://www3.gmiratings.com/home/2013/05/gmi-ratings-2013-women-on-boards-survey/>>.

⁹ *Ibid.*

¹⁰ Catalyst, "2013 Catalyst Census: Fortune 500 Women Board Directors" (10 December 2013) at 1, online: <www.catalyst.org/system/files/2013_catalyst_census_fortune_500_women_board_directors.pdf>; Catalyst, "2013 Catalyst Census: Financial Post 500 Women Board Directors" (3 March 2014) at 1, online: <www.catalyst.org/system/files/2013_catalyst_census_financial_post_500_women_board_directors.pdf>.

¹¹ As noted in chapter 3, these two approaches should not be viewed as alternatives—a number of countries contain overlapping regulatory mechanisms.

the most fundamental issues of corporate theory. Questions of whether and how the state should seek to increase corporate governance diversity are strongly linked to competing conceptions of the corporate form. Is the firm's primary purpose to maximize the wealth of shareholders? Does it also exist to promote the general social welfare? While I am primarily concerned with how the regulatory mechanisms noted above operate in practice, I also examine their intersection with these underlying justifications. Most notably, I critically engage with instrumental, market-based reasoning. I argue that state-based intervention is essential to shifting existing norms, but should be based on a combination of factors related to organizational governance and decision making and the goals of democratizing power and equitably distributing access to opportunities.

[Insert Figure 1.1 here: Percentage of board seats women hold globally]

Variance in corporate governance models and the move toward diversity regulation

The purpose of the corporate board and the board's relationship with other actors in corporate governance systems are not singular. Legal cultures in different jurisdictions envision the board playing varied roles. Factors such as the existing shareholder culture, particularly whether it is widely or closely held, and the degree to which the law recognizes the role of nonshareholder stakeholders, such as employees, creditors, and suppliers, inform the construction of these roles.¹² Similarly, boards exhibit structural variance. In the dual system, found in countries such as Germany, the Netherlands, and Austria, distinct supervisory and management boards perform the respective roles of overseeing and monitoring management and managing the firm's day-to-day business affairs. In the more common unitary system, exemplified by the United Kingdom, the United States, and Canada, a single board performs both roles.¹³ Various jurisdictions afford firms the option to choose between a single- or two-tiered form,¹⁴ and some, including the Nordic states, self-identify as lying "between" these regimes.¹⁵

Significant academic debate abounds on whether the forces of globalization will result in a convergence of corporate governance laws and norms toward a single model,¹⁶ and in general "[c]orporate governance is on the reform agenda all over the world."¹⁷ Board diversity-related reform represents an important component of the current dialogue. In all corporate governance cultures, dual or unitary, shareholder- or stakeholder-oriented, the reality is that states have now begun tackling the difficult questions noted above. And in doing so, momentum is building toward the adoption of law-

¹² Paul L Davies & Klaus J Hopt, "Corporate Boards in Europe – Accountability and Convergence" (2013) 61:2 Am J Comp L 301 at 302-03.

¹³ Klaus J Hopt, "Comparative Corporate Governance: The State of the Art and International Regulation" in Andreas M Fleckner & Klaus J Hopt, eds, *Comparative Corporate Governance: A Functional and International Analysis* (New York: Cambridge University Press, 2013) 3 at 29-31.

¹⁴ *Ibid* at 98.

¹⁵ See the 2009 joint paper published by the corporate governance agencies of Norway, Finland, Denmark, Sweden, and Iceland. Danish Corporate Governance Committee et al, "Corporate Governance in the Nordic Countries" (April 2009) at 8, online: Iceland Chamber of Commerce <www.vi.is/files/Nordic%20CG%20-%20web_1472238902.pdf> ("The Nordic corporate governance structure lies between the Anglo-Saxon one-tier and the continental European two-tier model.").

¹⁶ The proconvergence argument is most notably, and controversially, advanced in Henry Hansmann & Reinier Kraakman, "The End of History for Corporate Law" (2001) 89:2 Geo LJ 439 at 468 (arguing "the triumph" and "ideological hegemony" of the Anglo-American shareholder-focused structure).

¹⁷ Jeffrey N Gordon & Mark J Roe, "Introduction" in Jeffrey N Gordon & Mark J Roe, eds, *Convergence and Persistence in Corporate Governance* (Cambridge, UK: Cambridge University Press, 2004) 1 at 1.

based or “law like” structures,¹⁸ in both common and civil law jurisdictions. While such reform has appeared primarily in developed economies, initiatives (or proposed initiatives) in countries such as India, Kenya, Malawi, the United Arab Emirates, and South Africa suggest that this trend has reached developing economies as well.¹⁹

These developments underscore that the dynamics of international economic activity do not exist in isolation, but are integral components of a broader societal landscape.²⁰ In understanding how corporations are situated, it is useful to call to mind the intellectual project of Hungarian economic historian Karl Polanyi, who shows society and the market to be in a state of “related tension.”²¹ The market is embedded within the society, and in order to protect against the risks that follow self-interested gain, “market societies must construct elaborate rules and institutional structures.”²² This dynamic constitutes Polanyi’s “double movement” thesis: as the negative effects of economic activity emerge, protective reactions emanate from society. These reactions resist efforts to decontextualize the economy from societal institutions.²³ Block discusses these themes by invoking the image of a rubber band. Attempts to enhance market sovereignty raise the degree of tension as the band is stretched. As this elongation continues, the band will eventually break, resulting in social dissolution, or retract, resulting in the market going back to an embedded state.²⁴

This analytical structure has obvious applicability to debates on globalization, deregulation, and the financial crisis. But it is also relevant to corporate governance diversity. According to traditional economic theory, the market should eventually address and protect against biases related to socio-demographic status.²⁵ However, this proposition, to date, has not proven true at the highest levels of the corporation. Correspondingly, states have begun to impose regulatory and institutional frameworks that constrict unbridled market movements, thereby grounding the market in the “moral fabric of society.”²⁶ As noted above and as I further discuss in subsequent chapters, the justifications for these

¹⁸ Davies & Hopt, *supra* note 12 at 327. See also Massimo Belcredi & Guido Ferrarini, “Corporate Boards, Incentive Pay and Shareholder Activism in Europe: Main Issues and Policy Perspectives” in Massimo Belcredi & Guido Ferrarini, eds, *Boards and Shareholders in European Listed Companies: Facts, Context and Post-Crisis Reforms* (Cambridge, UK: Cambridge University Press, 2013) 1 at 28 (“[R]egulation is the single most important factor explaining differences in board gender diversity across European countries.”).

¹⁹ Further details are provided below and in chapters 3 and 7.

²⁰ Amanda Perry-Kessaris, “What Does it Mean to Take A Socio-Legal Approach to International Economic Law?” in Amanda Perry-Kessaris, ed, *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (Oxfordshire, UK: Routledge, 2013) 3 at 9.

²¹ Mark Banks, “Karl Polanyi, The Rubberband Man” (12 December 2008), online: The Open University

<<http://www.open2.net/blogs/society/index.php/2008/12/12/karl-polanyi-the-rubberband-man?blog=10>>.

²² Fred Block, “Karl Polanyi and the Writing of *The Great Transformation*” (2003) 32:3 *Theory & Soc’y* 275 at 297.

²³ Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (New York: Farrar & Rinehart, 1944) at 76 (“While on the one hand markets spread all over the face of the globe . . . on the other hand a network of measures and policies was integrated into powerful institutions designed to check the action of the market. . . . Society protected itself against the perils inherent in a self-regulating market system . . .”).

²⁴ Fred Block, “Introduction” in Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, 2d ed (Boston, Mass: Beacon Press, 2001) at xxv.

²⁵ Richard A Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Cambridge, Mass.: Harvard University Press, 1992) at 9 (“Competitive markets with free entry offer better and more certain protection against invidious discrimination than any antidiscrimination law.”).

²⁶ Jens Beckert, “The Great Transformation of Embeddedness: Karl Polanyi and the New Economic Sociology” in Chris Hann & Keith Hart, eds, *Market and Society: The Great Transformation Today* (Cambridge, UK: Cambridge University Press, 2009) 38 at 41.

interventions have not been solely (or even predominantly) predicated on equality-based grounds, but the interventions push in that direction nonetheless.

Roadmap of subsequent chapters

In this book, I focus on the corporate boardroom as a core location of power in the global marketplace.²⁷ I explore the boardroom as a site of contestation over socio-demographic diversity and as a place of social closure and social struggle. I consider who has been granted access to the highest levels of the corporate hierarchy, and, in recognizing the homogeneity of this site, I explore the ameliorative strategies states and regulators employ in an effort to alter the status quo. What shape have these initiatives taken and what has been their effect?

Fundamentally, this is a book about corporate governance—the “system by which companies are directed and controlled.”²⁸ Corporate governance has exploded as a subject of reflection in scholarly, policy, educational, and practitioner-based circles.²⁹ The degree of attention it attracts has only intensified in the wake of the global financial collapse.³⁰ As a field of intellectual inquiry, it is remarkably vast, with a wealth of literature from a range of academic traditions addressing the host “of legal, cultural, and institutional arrangements that determine what public corporations can do, who controls them, [and] how that control is exercised.”³¹

This book is also fundamentally about a set of questions that have received much less attention from legal scholars of the corporation: questions involving the social phenomenon of *diversity*. Diversity itself is an amorphous and heavily contested concept.³² Construed expansively, it might encompass the full array of groups and persons that compose any given community.³³ Sociologists of culture, however, identify it as a “keyword”—a linguistic expression that possesses widely acknowledged connotations but is also “open to local interpretation” and dependent on context and “the social location of the

²⁷ “Boardroom – the word alone conjures up visions of power, wealth, and privilege . . .” Jay W Lorsch & Elizabeth Maclver, *Pawns or Potentates: The Reality of America’s Corporate Boards* (Boston: Harvard Business Review Press, 1989) at 1.

²⁸ Adrian Cadbury, *Report of the Committee on the Financial Aspects of Corporate Governance* (London: Gee, 1992) at para 2.5.

²⁹ Mike Wright et al, “Introduction” in Mike Wright et al, eds, *The Oxford Handbook of Corporate Governance* (Oxford, UK: Oxford University Press, 2013) 1 at 1.

³⁰ Hopt, *supra* note 13 at 5. For a review of the schools of thought on whether corporate governance structures and processes were a significant factor in the financial crisis, see William Sun, Jim Stewart & David Pollard, “Introduction: Rethinking Corporate Governance – Lessons from the Global Financial Crisis” in William Sun, Jim Stewart & David Pollard, eds, *Corporate Governance and the Global Financial Crisis: International Perspectives* (New York: Cambridge University Press, 2011) 1 at 4-7.

³¹ Margaret M Blair, *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century* (Washington, DC: The Brookings Institution, 1995) at 3.

³² Joyce M Bell & Douglas Hartmann, “Diversity in Everyday Discourse: The Cultural Ambiguities and Consequences of ‘Happy Talk’” (2007) 72:6 Am Soc Rev 895 at 896 (“However defined, the concept of diversity has come under heavy scrutiny from public intellectuals.”).

³³ Faisal Bhabha, “Towards a Pedagogy of Diversity in Legal Education,” 52:1 Osgoode Hall LJ [forthcoming in 2014] at 9.

speaker.”³⁴ As Schuck observes, diversity “means different things to different people” and can “mean different things even to the same person at a single point in time.”³⁵

Because I am concerned with the socio-demographic homogeneity of corporate boards, this book focuses primarily on identity-based markers of diversity. In the field of corporate governance, international regulatory efforts aimed at diversification have largely involved gender. For that reason, much of this book necessarily considers the lack of women in the upper echelons of business corporations and the relationship between gender and economic governance.³⁶

Chapter 2 lays the foundation for understanding recent regulatory innovations in three ways. I begin by considering why the international spotlight is focused on boards of directors in particular as sites for diversification. With an emphasis on the United States and Canada, I then consider possible explanations for existing low levels of representation. I question the narrative of a supply problem that often originates from firms and suggest that a more appropriate explanation lies in the coupling of implicit cognitive biases with the fact that the networks of existing directors are limited in scope and restrict entry. I close by evaluating the rationales for diversification. How has the reform-based discourse, to date, justified the push toward increased boardroom heterogeneity? I unpack the difficulties of the dominant “business case” for diversity and advocate an approach that centers on social equality, as well as on governance effectiveness and decision making, rather than on a consequentialist view of shareholder wealth maximization.

As noted, regulators have turned to formal remedial measures in an effort to curb the ubiquity of male-dominated corporate leadership structures. In chapters 3 through 7 I present and situate the core original research of the book, focusing on the two primary modes of legal regulation adopted to date. Chapter 3 introduces corporate board quotas. I provide an overview of existing quota and target-based regimes, teasing out their key characteristics and elucidating how these systems work. I then turn to corporate reporting. In 2009, the US Securities and Exchange Commission (“SEC”) adopted a diversity disclosure rule that, among other things, asks publicly traded firms to report on whether they consider diversity in identifying director nominees. I examine the rule’s details and explore its conceptual underpinnings. I also address reactions to the rule and contend that, despite the controversy, the SEC did not stray significantly from its mandate when promulgating it.

Chapter 3 concludes by contextualizing these initiatives within wider bodies of regulatory thought. I present quotas as a form of command-and-control regulation, according to which the relationship between the regulator and the regulated is hierarchical and predicated on a deterrence-based logic. In contrast, disclosure represents a form of decentered, new governance regulation where the state no longer serves as the sole or primary regulator. Rather, it forms but one part of a pluralistic regulatory environment where the regulated entity and other nonstate actors also contribute to the formulation of an overall normative ordering. In the case of quotas, the regulation of corporate

³⁴ Ellen Berrey, “Bottom-Line Diversity: Race and Productive Pluralism in the Post-Civil Rights Era” (September 2012) at 27, online: SUNY-Buffalo <www.acsu.buffalo.edu/~eberrey/index_files/Berrey-%20Bottom-Line%20Diversity-%20Intro,%20Chap%201,%20Chap%205,%20Sept%202012.pdf>.

³⁵ Peter H Schuck, *Diversity in America: Keeping Government at a Safe Distance* (Cambridge, Mass: Harvard University Press, 2003) at 19.

³⁶ In choosing to focus this book on gender diversity at the highest levels of the firm, I acknowledge that I am concentrating on a small, privileged group that draws advantage from class differentials.

governance diversity takes place at the state's behest; with disclosure, it takes place more in the state's shadow.³⁷

Chapters 4 and 5 investigate the quota-based approach in greater depth. Using a qualitative, interview-based methodology, I study Norwegian corporate directors' lived experiences with mandated gender balance. The stories of Norwegian board members offer particularly rich sources of insight, given that Norway was the first jurisdiction to pursue the quota path and thus has the most mature quota regime. Because corporate law does not traditionally concern itself with matters related to identity-based representation, it is rather striking that Norway's quota is located not in human rights or equality-related regulations, but rather in the heart of the legal regime that gives life and personality to corporations—Norwegian corporate law. While highly contentious when adopted, the Norwegian quota project unquestionably set the stage for subsequent legislative developments in countries such as Iceland, Italy, France, and Belgium,³⁸ each of which passed its own quota provision in 2010 or 2011.³⁹

Fundamentally, boards of directors are social groups. As in any such group, complicated relational dynamics inform their interactions. Boards establish behavior-centered practices that they believe will facilitate the optimal performance of their duties. They thrive on cohesion. Their established norms are easily entrenched and not easily displaced.⁴⁰ And yet, the spread of diversity quotas has accomplished precisely that. The forced repopulation of boards along gender lines has disturbed the traditional order of corporate governance systems, dislocating established hierarchies of power and privilege in key market-based institutions. Norway represents the paradigmatic case of this disturbance and has set in motion a wave of corporate governance reform unlike any other. As such, it constitutes a fascinating and appropriate case study through which to consider the implications of quota regimes.

Chapters 6 and 7 critically examine the United States' experiment with diversity disclosure. I rely on the United States as a second case study for three principal reasons. First, similar to the Norwegian law, the site that houses the US rule is noteworthy. Once again, it is not found in regulation that focuses on antidiscrimination, but rather in the center of the legal regime that governs the public issuance of shares—US securities law. The US rule has thus been controversial, with some painting it as being inconsistent with the underlying purpose of securities regulation. Second, US markets represent the biggest share of overall global market capitalization.⁴¹ American reform efforts have thus inevitably attracted attention and warrant scrutiny. And third, I am mindful of the argument that scholars such as Schuck make that there is something special—something unique—about the United States' recent

³⁷ The shadow metaphor is recently used to great effect in Marc T Moore, *Corporate Governance in the Shadow of the State* (Oxford, UK: Hart Publishing, 2013).

³⁸ European Network of Legal Experts in the Field of Gender Equality, "Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards" (2011) at 1, online: European Commission <<http://bookshop.europa.eu/en/positive-action-measures-to-ensure-full-equality-in-practice-between-men-and-women-including-on-company-boards-pbDS3112694/?CatalogCategoryID=cOwKABstC3oAAAEjeJEY4e5L>>.

³⁹ Catalyst, "Legislative Board Diversity" (August 2013), online: <http://www.catalyst.org/legislative-board-diversity#footnote10_7ftls5m>.

⁴⁰ Rakesh Khurana & Katharina Pick, "The Social Nature of Boards" (2005) 70:4 Brook L Rev 1259 at 1265-70.

⁴¹ See "Top 20 Nations Listed by Stock Market Cap (In Billions)" (25 August 2013), online: Will Banks' Blog - A Weblog of Business, Strategy, Politics, Competitive Insights and the Economy <<http://blogs.law.harvard.edu/willbanks/2013/08/25/top-20-nations-listed-by-company-market-cap/>> (presenting compiled World Bank statistics).

pursuit of diversity as an affirmative value,⁴² which makes evaluating its experiment with diversity within corporate governance potentially fruitful. In chapter 6, I use a mixed-methods content analysis to investigate the US approach. I examine the microdynamics of how corporations have responded to the SEC rule during the first four years. The rule does not define “diversity,” leaving it to corporations to give this term meaning; firms accordingly have adopted different interpretations. Chapter 7 situates the findings within the literature on social norms and the expressive function of law and offers recommendations that might serve to strengthen the US approach.

Chapter 8 concludes by drawing out key lessons from the analysis conducted in the previous chapters and then engaging two sets of questions. First, I consider how and to what extent the two regulatory models I study should inform the future development of diversity initiatives in North American corporate governance. I turn my attention to Canada, where reform is nascent as of this writing. Second, I identify future lines of research and inquiry that my case studies suggest. I emphasize that the underlying theoretical basis for inclusion must be further developed and augmented with equity-based arguments. This work will necessitate continued efforts to connect diversification initiatives to contemporary debates regarding corporate theory and to broaden the focus of most jurisdictions to include underrepresented socio-demographic groups other than women. Finally, I highlight that law offers but one mechanism for reform and that legal authority will act in concert with other important extralegal and voluntary dynamics and programs. That said, law will be an integral part of achieving diversity, and the legal regulations adopted to serve this end require sustained analysis.

Methodological approach

Langevoort notes that the fields of corporate governance and antidiscrimination barely speak with one another.⁴³ In attempting to forge such a dialogue,⁴³ this book’s overall approach and research design are decidedly socio-legal. Schmidt and Halliday observe that “[t]he complex arenas of corporate law . . . remain ripe for exploration by Law and Society scholars,”⁴⁴ while Berrey notes that “[s]urprisingly few studies have examined empirically how legal ideas of diversity get put to use into everyday organizational practices.”⁴⁵ I am mindful of these observations: while I devote substantial time to the black-letter text of quota and disclosure laws, I primarily focus on interrogating the social meanings that these laws convey. I explore the legal regulation and discourse surrounding corporate board diversity in action and in its institutional and socio-political contexts.⁴⁶

I empirically investigate two jurisdictions’ regulatory experiments with boardroom diversification, alert to the fact that “[t]he evidence from multiple cases is often considered more compelling, and the overall study is therefore regarded as being more robust.”⁴⁷ As such, while I do not

⁴² As it relates to race and ethnicity, in particular. See Schuck, *supra* note 35 at 14 (“The belief in the diversity ideal, then, appears to be a distinctively, if not uniquely, American (or at least North American) theme. Even in the United States . . . this ideal is a very recent invention.”).

⁴³ Donald C Langevoort, “Overcoming Resistance to Diversity in the Executive Suite: Grease, Grit, and the Corporate Promotion Tournament” (2004) 61:4 Wash & Lee L Rev 1615 at 1615.

⁴⁴ Patrick Schmidt & Simon Halliday, “Doreen McBarnet and ‘Whiter than White Collar Crime’” in Simon Halliday & Patrick Schmidt, eds, *Conducting Law and Society Research: Reflections on Methods and Practices* (New York: Cambridge University Press, 2009) 152 at 152.

⁴⁵ Ellen Berrey, “Diversity’s Hold: How the Drive for Diversity Defines the Post-Civil Rights Era” (July 2013) at 34, online: SUNY-Buffalo <www.acsu.buffalo.edu/~eberrey/index_files/Chap%20-%20Intro,%20July%202013.pdf>.

⁴⁶ See Perry-Kessaris, *supra* note 20 at 6 (“Socio-legal approaches consider not only legal texts, but also the contexts in which they are formed, destroyed, used, abused, avoided and so on.”).

⁴⁷ Robert K Yin, *Case Study Research: Design and Methods*, 5th ed (Thousand Oaks, Cal: SAGE, 2014) at 57.

attempt to provide a direct comparative analysis, I employ a multiple-case research design that examines each of the primary approaches jurisdictions have taken to address boardroom homogeneity, rather than focusing on one approach over the other.⁴⁸

With respect to quotas, in order to understand this form of regulation, I open up the typically closed doors of the boardroom. Fanto, Solan, and Darley note that most commentators must resort to conjecture about boardroom dynamics, “since boards are an elite, closed environment accessible to few persons (and few academics).”⁴⁹ I therefore break into the “black box”⁵⁰ of boardroom conduct and practice. I delve into the personal experiences of Norwegian directors who gained appointments as a result of Norway’s quota law, as well as those who held appointments before the law was enacted. Several questions frame my investigation. How have these individuals subjectively experienced, and made sense of, this intrusive form of regulation? How does legally required gender diversity affect their economic and institutional lives? And how has it shaped boardroom cultural dynamics and decision making, as well as the overall governance fabric of the board?

Scholars do not typically use qualitative inquiry in corporate law and corporate governance research.⁵¹ The preference for an instrumental approach to analyzing corporate dynamics has rendered corporate law a sort of “erasing discourse” that considers personal stories inside the corporate form immaterial.⁵² And yet interview-based research, which draws from personal identity narratives, can highlight important dynamics in the operation of the corporation. It is only through collecting primary data on how the law has translated into the day-to-day existence of directors that we can begin to answer the big-picture questions surrounding the viability of positive discrimination in corporate governance. As Huse argues, “The missing ingredient in understanding and researching boards of directors is the *human* side of governance.”⁵³

Exploring these questions will also help us to understand the dynamics of identity politics within corporate leadership. The sociologist Puwar explores the realities of marginalized groups who are granted access to positions and spaces from which they have traditionally been excluded, referring to these groups as “space invaders.” Focusing on the specific site of the UK Parliament, she writes:

[W]hat happens when those bodies not expected to occupy certain places do so[?] And most specifically . . . what happens when women and racialised minorities take up ‘privileged’ positions which have not been ‘reserved’ for them, for which, they are not,

⁴⁸ Similarly, see Benjamin J Richardson, *Socially Responsible Investment Law: Regulating the Unseen Polluters* (New York: Oxford University Press, 2008) at 40.

⁴⁹ James A Fanto, Lawrence M Solan & John M Darley, “Justifying Board Diversity” (2011) 89:3 NCL Rev 901 at 914.

⁵⁰ Daniel P Forbes & Frances J Milliken, “Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups” (1999) 24:3 Academy Mgmt Rev 489 at 502.

⁵¹ Terry McNulty, Alessandro Zattoni & Thomas Douglas, “Developing Corporate Governance Research Through Qualitative Methods: A Review of Previous Studies” (2013) 21:2 Corp Governance: Int’l Rev 183 at 190 (“Qualitative research represents only a very small proportion of the entire corpus of published articles on corporate governance.”); Pratima Bansal, “Inducing Frame-Breaking Insights Through Qualitative Research” (2013) 21:2 Corp Governance: Int’l Rev 127 at 127 (“The present knowledge system in corporate governance is . . . out of balance: there is too much deductive theorizing and too little inductive.”).

⁵² Mae Kuykendall, “No Imagination: The Marginal Role of Narrative in Corporate Law” (2007) 55:2 Buff L Rev 537 at 540-41. While Kuykendall’s observation is made in a different context, the “erasing discourse” idea is equally applicable here.

⁵³ Morten Huse, *Boards, Governance and Value Creation* (Cambridge, UK: Cambridge University Press, 2007) at 209 [emphasis added].

in short, the somatic norm[?] What are the terms of coexistence? This is an encounter that causes disruption, necessitates negotiation and invites complicity. Here we have the paradox of the increasing proximity of the hitherto outside with the inside proper, or, should I say, with the somatic norm. While they now exist on the inside, they still do not have an undisputed right to occupy the space.⁵⁴

Flowing from this, what has performing the role of “space invader” meant to the women who have gained access to the boardroom—a space historically defined by men?⁵⁵ How have these women navigated these gendered corporate borders? Overall, what are the “master narratives,” or dominant recurring perceptions, of those who have direct experience with the socio-legal phenomenon at issue?⁵⁶ How is gender constructed, reconstructed, and ultimately performed in the boardroom?

With regard to disclosure, the data derived from the first four years of the SEC rule provide a unique window into the potential meanings of “diversity” in the corporate setting, as well as the limits of a strategy that permits corporations to give the term their own definition. Here, I shift my focus from the lived experiences of directors to the text of corporate reports. I culled the relevant data from corporate disclosure documents, which, to varying degrees, constitute “cultural products”⁵⁷ that reveal a firm’s behaviors, practices, and assumptions.⁵⁸ They are written presentations of organizational identity,⁵⁹ or “that which is central, enduring, and distinctive about an organization.”⁶⁰

Engle Merry writes that “law consists of a complex repertoire of meanings and categories understood differently by people depending on their experience with and knowledge of the law.”⁶¹ In mining these documents, I am interested in learning how firms, in responding to the diversity disclosure rule, construct the concept of diversity through their public discourse. What does diversity, viewed through the prism of legal regulation, mean to market participants? How do they interpret and understand this socio-political idea in the absence of a regulatory definition? How is it constituted and discursively performed, and what vocabularies of diversity have emerged? In other words, I am

⁵⁴ Nirmal Puwar, *Space Invaders: Race, Gender and Bodies Out of Place* (Oxford, UK: Berg, 2004) at 1.

⁵⁵ Sinikka Pesonen, Janne Tienari & Sinikka Vanhala, “The Boardroom Gender Paradox” (2009) 24:5 *Gender Mgmt* 327 at 333 (“We are interested in how women in influential positions ‘do gender’ when they talk about their experiences and viewpoints.”).

⁵⁶ John M Conley & Cynthia A Williams, “Global Banks as Global Sustainability Regulators?: The Equator Principles” (2011) 33:4 *Law & Pol’y* 542 at 557.

⁵⁷ Yvonne Benschop & Hanne E Meihuizen, “Reporting Gender: Representations of Gender in Financial and Social Annual Reports” in Iris Aaltio & Albert J Mills, eds, *Gender, Identity and the Culture of Organizations* (London: Routledge, 2002) 160 at 161 (discussing annual reports, specifically).

⁵⁸ *Ibid* at 162. Singh and Point provide a similar characterization of diversity statements on corporate websites: “They may be viewed as artefacts that reveal information about the corporate culture and play a dynamic role in the realisation of values.” See Val Singh & Sébastien Point, “(Re)Presentations of Gender and Ethnicity in Diversity Statements on European Company Websites” (2006) 68:4 *J Bus Ethics* 363 at 363.

⁵⁹ *Ibid*.

⁶⁰ Dennis A Gioia & Shubha Patvardhan, “Identity as Process and Flow” in Majken Schultz et al, eds, *Constructing Identity In and Around Organizations* (New York: Oxford University Press, 2012) 50 at 50, citing Stuart Albert & David Whetten, “Organizational Identity” in Larry L Cummings & Barry M Staw, eds, *Research in Organizational Behavior*, vol 7 (Greenwich, Conn: JAI Press, 1985) 263.

⁶¹ Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (Chicago: University of Chicago Press, 1990) at 5.

concerned with “[t]he ways people understand and use law[,] . . . their habitual patterns of talk and action, and their commonsense understanding of the world.”⁶²

The Norwegian quota law and the US reporting rule came into effect either through formal legislation or regulation. Yet diversity measures, such as international disclosure provisions, are often found in so-called soft law mechanisms, including corporate governance codes, guidelines, best practice principles, and stock exchange listing rules. While these may not be rooted in “formal” law, they play an integral role in influencing corporate action and represent “the changing face of legal regulation in globally integrated marketplaces.”⁶³ As such, in referring to “regulatory” or “legal” initiatives and measures throughout this book, I take a legal pluralist approach and intend this to refer to both hard and soft forms of economic governance. Such an approach appreciates that legal authority stems from a range of different social locations.⁶⁴ Indeed, the reality of contemporary regulatory governance is that both forms exert normative influence on firm behavior and, in some cases, are in conversation with one another.⁶⁵

The findings

The corporate governance world is in the midst of an important transition. Countries such as Norway have adopted bold, potentially transformative initiatives aimed at creating gender balance in boardrooms. The United States, by contrast, has taken a less interventionist regulatory approach. But in both places, diversity has become an important part of the policy conversation. In these early stages of regulation, it remains difficult to predict the full consequences of either approach. While the boardroom’s equilibrium has been unsettled, it still carries “the weight of the sedimented past.”⁶⁶ The constitutive borders of diversity-related regulatory governance are still being drawn as regulators engage with fundamental questions that implicate both the market and social identity politics. Still, much can be learned from this initial period of international regulatory experimentation.

A. *The quota approach*

With its combination of mandated gender balance and severe sanctions for noncompliance in the form of forced corporate dissolution, the Norwegian quota model represents the boldest assault on

⁶² *Ibid.*

⁶³ Peer Zumbansen, “‘New Governance’ in European Corporate Law Regulation as Transnational Legal Pluralism” (2009) 15:2 *Eur LJ* 246 at 254.

⁶⁴ See Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Aldershot, England: Ashgate, 2006) at 161-62.

⁶⁵ Under German corporate law, for example, listed firms are required to set out their compliance with the German Corporate Governance Code and to furnish explanations for any deviations. See *Stock Corporation Act* (6 September 1965) BGBl I p 1089, FNA 4121-1, § 161. Merkt notes that the legal authority of the German Corporate Governance Code “is doubtful.” See Hanno Merkt, “Germany: Internal and External Corporate Governance” in Fleckner & Hopt, *supra* note 13, 521 at 523. The interaction between state and non-state business regulation mechanisms is a topic of increasing focus in governance literature. For a recent discussion, see Burkard Eberlein et al, “Transnational Business Governance Interactions: Conceptualization and Framework for Analysis” (2014) 8:1 *Reg & Governance* 1.

⁶⁶ Puwar, *supra* note 54 at 1.

traditional market sovereignty. If we measure progress by the rapid increase in sheer numbers of women on boards, Norway unquestionably leads all other jurisdictions.⁶⁷

Norway's achievement, however, does not stem solely from the mere *presence* of more women in its boardrooms. Seen through the eyes of the participants in my study, the particular design of Norway's law appears to have drawn out the substantive benefits that may flow from diversity. The dominant narrative my interviewees conveyed was that quota-induced gender diversity has positively affected boardroom work and firm governance. Generally, respondents emphasized the range of perspectives and experiences that women bring to the boardroom, as well as the value of women's independence and outsider status to the work of the board. They also stressed women's greater propensity to engage in more rigorous deliberations, risk assessment, and monitoring.

One might expect that feminist principles and thinking would form key motifs in the interviews. Rosenblum considers the Norwegian quota law, and quotas more broadly, under the tent of what Halley et al. term "governance feminism,"⁶⁸ or "the installation of . . . feminist ideas in actual legal and institutional sites of power."⁶⁹ Very few of my interviewees explicitly invoked feminism. But the quota law does appear to have had broader social effects by redistributing power in Norwegian society. Many respondents discussed how the quota compelled boards and nominating committees to extend their searches for new directors beyond the usual, traditional spheres of comfort. Boards had no choice but to look outside of their existing networks. This forced action was perceived to be necessary to combat the structural inequalities resulting from in-group favoritism and network-based barriers to positions of power.

The presence of a critical mass of women, as required by the quota law, appears to have mattered to the achievement of diversity-related outcomes. With a critical mass, women need not acclimate to male-dominated corporate governance environments;⁷⁰ rather, their presence can effectuate deeper cultural change. Importantly, in part because of their critical mass, female respondents overall reported that they did not feel stigmatized or marginalized as quota beneficiaries and that they felt comfortable on their boards. Though their stories are complex, the majority characterized the quota as a positive mechanism that had democratized access to a previously unavailable space. It seems that the legal imposition of gender balance may thus carry the potential to address what Guinier and Torres refer to as "walking backwards up a cheese grater"—the concern that breaking into spaces of traditional exclusion may result in the space invader having integral parts of her identity shaved away.⁷¹

My results suggest that female directors, present in substantial numbers, may enhance the level of cognitive diversity and constructive conflict in the boardroom. They are more apt to critically analyze,

⁶⁷ Marit Hoel, "The Quota Story: Five Years of Change in Norway" in Susan Vinnicombe et al, eds, *Women on Corporate Boards of Directors: International Research and Practice* (Cheltenham, UK: Edward Elgar, 2008) 79 at 86 ("The result . . . is stunning, compared to international developments.").

⁶⁸ Darren Rosenblum, "Loving Gender Balance: Reframing Identity-Based Inequality Remedies" (2008) 76:6 Fordham L Rev 2873 at 2878, citing Janet Halley et al, "From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism" (2006) 29:2 Harvard J L & Gender 335.

⁶⁹ *Ibid* at 2878, n 30.

⁷⁰ John O Ogbor, "Critical Theory and the Hegemony of Corporate Culture" (2001) 14:6 J Org Change Mgmt 590 at 602 ("The monolithic nature of corporate culture . . . is averse to diversity, pluralism and non-conformity.").

⁷¹ Lani Guinier & Gerald Torres, *The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy* (Cambridge, Mass: Harvard University Press, 2002) at 91-92 (in the context of race).

test, and challenge received wisdom. In doing so, they appear to have harnessed for their boards the value of dissent, a key driver of effective governance.⁷² That said, the lived reality of the quota law also gives rise to a number of interesting and difficult questions for future research and of particular relevance to other countries contemplating the adoption of a quota regime. I identify two sets of issues that merit further inquiry. First, are there potential costs to the quota model, and will the law continue to produce the advantages that have arisen thus far? For example, do the benefits that directors claim women have brought to the boardroom reflect gendered assumptions about women's behavior? And will some of the benefits of women's outsider status diminish over time, as women gradually assimilate onto boards and into the networks of male directors? Second, can the Norwegian experience be translated to other national contexts, and what factors must be taken into account when attempting to replicate it? How, for example, do particular features of different countries' socio-political and corporate governance cultures inform the viability of quota legislation?

B. The disclosure approach

The SEC's disclosure rule has caused US corporations to establish a vocabulary of diversity. My study shows that "diversity" carries multiple connotations for these firms. My most salient finding, however, is that when interpreting this concept in the absence of regulatory guidance, the dominant corporate discourse is experiential rather than identity-based. Firms most frequently define diversity with reference to a director's prior experience or other nonidentity-based factors rather than his or her socio-demographic characteristics.

How are we to receive this finding? What are its broader implications? For firms, directors who bring a range of experiences to their positions will be attractive candidates who may possess relevant knowledge and skills. Candidates with industry experience, for example, may be more likely to grasp industry processes and patterns, have knowledge of the competition, be attuned to sources of strategic advantage, and have a helpful network of contacts.⁷³ Industry expertise has also been linked to meaningful boosts in firm value.⁷⁴ Further, certain studies that find a positive relationship between firm value and board diversity broadly defined suggest that experiential diversity may result in more robust positive financial outcomes as compared with socio-demographic diversity.⁷⁵ Most significantly, unlike identity-based characteristics, experience is a predictable, traditional variable that fits within most standard conceptions of what it means to be qualified.

That said, for many observers of the SEC's rule, including a number of large institutional investors, whether the rule will stimulate consideration of socio-demographic representation, and eventually increase levels of identity-based diversity on corporate boards, represents a significant source of concern. In the future, when the rule has been in effect for a longer period of time, a comprehensive study on the causal or correlative relationship between the rule and actual diversity levels will be possible in order to evaluate the effectiveness of disclosure as a means of promoting socio-

⁷² Jeffrey A Sonnenfeld, "What Makes Great Boards Great", *Harvard Business Review* 80:9 (September 2002) 106 at 111 (noting that "the highest-performing companies have extremely contentious boards that regard dissent as an obligation").

⁷³ Olubunmi Faleye, Rani Hoitash & Udi Hoitash, "Industry Expertise on Corporate Boards" (5 July 2013) at 1, online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2117104>.

⁷⁴ *Ibid* at 35. See also Wolfgang Drobetz et al, "Is Director Industry Experience a Corporate Governance Mechanism?" (16 January 2014) at 46, online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2256477> ("we document a robust positive association between industry experience of corporate directors and firm value.").

⁷⁵ Ronald C Anderson et al, "The Economics of Director Heterogeneity" (2011) 40:1 *Fin Mgmt* 5 at 27.

demographic diversity.⁷⁶ In the meantime, my study's preliminary finding—that, to date, other factors in the disclosures overshadow social identity categories—serves as an initial caution that the SEC rule as currently formulated may not produce diversity-enhancing results along socio-demographic lines. I argue that the rule can be expected to produce meaningful socio-demographic results only if corporate governance cultures internalize diversity as a social norm. Since that has not yet occurred, the results of my content analysis can be expected to replicate themselves going forward in the absence of some sort of change.

That said, I posit that the rule, if redesigned, would have greater potential than it does now to alter existing norms and therefore to possibly modify behavior. Officially, the SEC disavows any desire to affect firms' conduct or to encourage any particular type of diversity. As I explain, however, I believe this claim should be viewed with skepticism. I recommend revisiting the rule's underlying architecture and offer two recommendations that may improve its effectiveness: providing normative content for the term "diversity," and moving to a "comply-or-explain" disclosure design buttressed by targeted reviews of issuers' diversity filings.

Disclosure is attractive as a regulatory tool to the extent that it moves important issues into the light and catalyzes a process of internal self-reflection on the part of the reporting party that can prompt behavioral change. If well designed, a disclosure regime may yield important benefits. But its use may also be called into question if it allows the regulated entity too much discretion in defining a core feature of the regime.

Real world policy implications

I am cognizant of the dynamism of diversity-related corporate governance reform. At the time of this writing, policymakers around the world are debating what, if any, regulatory paths to pursue to facilitate boardroom heterogeneity.

Quotas and related target-based provisions for publicly traded firms are currently at different stages of consideration in Canada,⁷⁷ the EU,⁷⁸ Germany,⁷⁹ Scotland,⁸⁰ South Africa,⁸¹ and the United Arab

⁷⁶ See also Thomas Lee Hazen & Lissa Lamkin Broome, "Board Diversity and Proxy Disclosure" (2011) 37:1 U Dayton L Rev 39 at 73-74.

⁷⁷ Bill S-217, *An Act to modernize the composition of the boards of directors of certain corporations, financial institutions and parent Crown corporations, and in particular to ensure the balanced representation of women and men on those boards*, 2nd Session, 41st Parl, 2013 (second reading and referral to committee 19 June 2014).

⁷⁸ Discussed in chapter 3.

⁷⁹ "Deutschlands Zukunft Gestalten: Koalitionsvertrag Zwischen CDU, CSU und SPD" [Forging Germany's Future: Coalition Agreement Between the CDU, CSU and SPD] (November 2013) at 102-03, online: Christian Democratic Union <<https://www.cdu.de/sites/default/files/media/dokumente/koalitionsvertrag.pdf>>;

"Corporate Compromise: Coalition Talks Yield Plan for Gender Quota", *Spiegel International* (18 November 2013), online:<<http://www.spiegel.de/international/germany/cdu-and-spd-agree-on-gender-quota-in-german-boardrooms-a-934155.html>>; Social Democratic Party of Germany, "Mehr Frauen in Führungspositionen – Fortschritt statt Stillstand" [More Women in Senior Positions - Progress Instead [of] Standstill] (25 March 2014), online: <http://www.spd.de/presse/Pressemitteilungen/117800/20140325_ferner_frauenquote.html>.

⁸⁰ The Scottish Government, "Scotland's Future: Your Guide to an Independent Scotland" (26 November 2013) at 106, online: <<http://scotgov.publishingthefuture.info/publication/scotlands-future>>; The Scottish Government, "Women On Board: Quality Through Diversity, Scottish Government Consultation on the Introduction of Gender Quotas on Public Boards" (30 April 2014) at 16-17, online: <<http://www.scotland.gov.uk/Resource/0044/00449552.pdf>>.

Emirates.⁸² The same is true for government-owned enterprises in Brazil⁸³ and the Philippines.⁸⁴ Other states have signalled that they may resort to positive discrimination in the future, as a measure of last resort. The UK government, for example, opposes quotas. After a 2013 report indicated that female appointments to FTSE 100 boards had slowed, however, UK Business Secretary Vince Cable cautioned firms that it may become increasingly difficult for the government to adhere to its voluntary plan and that the shadow of quotas looms large over the market.⁸⁵ Similarly, the Swedish minister of finance recently expressed frustration with the slow pace of voluntary corporate action and stated that Sweden may “gradually move towards being forced to launch quota legislation” in the near future if the situation does not improve.⁸⁶

New disclosure provisions are presently the subject of regulatory conversation in the European Union and in Canada. In addition, some jurisdictions with reporting measures already in place are currently reevaluating their efforts and contemplating reform. In 2012, Singapore updated its Code of Corporate Governance to include a diversity disclosure provision.⁸⁷ In 2013, a joint industry-government Diversity Task Force took shape to study gender representation in the governance structures of Singaporean companies and make recommendations to both the corporate sector and government.⁸⁸ Similarly, the Kenyan Capital Markets Authority has recently put under the microscope that country’s Guidelines on Corporate Governance Practices. While the Guidelines have contained a diversity element

⁸¹ Lianne Labossiere & Lisa Nowlin, “South Africa” in Paul Hastings LLP, “Breaking the Glass Ceiling: Women in the Boardroom”, 3d ed (2013), 50 at 51-53, online:

<http://www.paulhastings.com/genderparity/pdf/Gender_Parity_Report.pdf>; Bahai, Press Release, “The Women Empowerment and Gender Equality (WEGE) Bill – Gender Balancing In Action” (5 August 2013) online: <http://www.link2media.co.za/index.php?option=com_content&task=view&id=21313&Itemid=12>.

⁸² Sara Hamdan, “U.A.E. Promotes Women in the Boardroom”, *The New York Times* (19 December 2012), online: <http://www.nytimes.com/2012/12/20/world/middleeast/uae-requires-women-board-members.html?_r=1&>; Louisa Peacock, “Compulsory Women on Boards Quotas for Dubai”, *The Telegraph* (9 December 2012), online: <<http://www.telegraph.co.uk/women/womens-business/9733465/Compulsory-women-on-boards-quotas-for-Dubai.html>>.

⁸³ Projeto de Lei do Senado No 112, 2010 (Braz), arts 1, 2; Isabel Afonso, “Brazil” in Paul Hastings LLP, *supra* note 81, 34 at 35-36.

⁸⁴ Republic of the Philippines, House of Representatives, House Bill No 2100, *An Act Strengthening Women's Participation and Representation in Elective and Appointive Positions in the Government, Including Government-Owned and Controlled Corporations, the Armed Forces of the Philippines, the Philippine National Police and Other Law Enforcement Agencies, and for Other Purposes*, 1st Reg Sess, 15th Cong, 2010, s 4.

⁸⁵ Brian Groom, “Cable Warns of Women Director ‘Quotas’”, *The Financial Times* (10 April 2013), online: <<http://www.ft.com/intl/cms/s/0/47922fbc-a128-11e2-990c-00144feabdc0.html#axzz2rVpmfj8K>>. See also Vince Cable, “Companies Still Not Doing Enough To Get Women On Boards”, *The Guardian* (3 February 2014), online: <<http://www.theguardian.com/women-in-leadership/2014/feb/03/vince-cable-women-on-boards>>

(“Our approach is voluntary, but with the possibility of a mandatory approach if voluntary measures don't work.”).

⁸⁶ Johan Carlstrom & Niklas Magnusson, “Sweden Threatens Businesses with Sex Quotas as Women Snubbed”, *Bloomberg Businessweek* (13 February 2014), online: <www.businessweek.com/news/2014-02-12/sweden-threatens-businesses-with-sex-quotas-after-women-snubbed>.

⁸⁷ Annabelle Yip, “Developments in Governance: Revisions to the Singapore Code of Corporate Governance”, *The Director's Bulletin* 2012:4 (2012), 5 at 5-7, online: Singapore Institute of Directors <http://www.sid.org.sg/uploads/bulletin/documents/827_SID1235-FA_lores.pdf>.

⁸⁸ Ministry of Social and Family Development, Joint Media Release, “Diversity Task Force to Launch Survey on Gender Diversity on Boards and in Senior Management” (11 July 2013) online: <<http://app.msf.gov.sg/Portals/0/Media%20Release%20on%20DTF%20Survey%20110713.pdf>>.

for quite some time,⁸⁹ the regulator is considering stronger measures to combat the “lethargy in appointing women to . . . boards.”⁹⁰

As the debate continues and evolves, it is my hope that the original research I present here will inform ongoing international policy discussions and deepen our understanding of the complexities associated with corporate governance diversification. Though my analyses are suggestive, rather than conclusive, they offer valuable insights into the role of law in reshaping the gendered fabric of corporate governance cultures and thereby advance socio-legal discourse on the contemporary business corporation. Of course, the experiences of my two case studies may not be easily transferred to other jurisdictions. In contemplating regulatory design, no one-size-fits-all solution will be available to achieve desired outcomes. Much depends on a complex web of interactions between a given jurisdiction’s socio-political culture, its corporate governance culture, and industry- and firm-particular characteristics. That said, important points of commonality can be discovered, and valuable lessons can be learned, from peering outside of sovereign borders.⁹¹ The case studies I present here provide insights that concretize some of the most salient issues under debate around the world. In-depth consideration of these experiences will help policymakers and scholars determine what regulatory measures can reasonably be expected to accomplish and assess the factors that inform the success or failure of different approaches to a crucial set of social and political debates.

⁸⁹ Capital Markets Authority, “Guidelines on Corporate Governance Practices by Publicly Listed Companies in Kenya” (14 May 2002) at 485, online:

www.cma.or.ke/index.php?option=com_docman&task=doc_download&gid=4&Itemid=102.

⁹⁰ Humphrey Liloba, “Kenyan Women to Get Corporate Lift”, *East African Business Week* (17 March 2014), online:

www.busiweek.com/index1.php?Ctp=2&pl=809&pLv=3&srI=75&spI=116&cl=10&utm_content=bufferc1490&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer.

⁹¹ Christopher M Bruner, *Corporate Governance in the Common-Law World: The Political Foundations of Shareholder Power* (New York: Cambridge University Press, 2013) at 5 (“[E]xcessive ‘contextualism’ threatens to render meaningful comparison impossible by focusing heavily or exclusively on idiosyncrasies of history, culture, and politics.”).