2022

Utilizing Tax Incentives to Increase Gender Parity on Corporate Boards

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UTILIZING TAX INCENTIVES TO INCREASE GENDER PARITY ON CORPORATE BOARDS

"Women belong in all places where decisions are being made."

—*Ruth Bader Ginsburg* [1]

INTRODUCTION

Women are drastically underrepresented in positions of power and prominence in the United States. As of 2021, women hold only thirty percent of board seats on the S&P 500.[2] The number is much smaller for private corporations. One study found that in 2020, women occupied only eleven percent of board seats for private corporations.[3] Given these statistics, it is unsurprising that a 2021 study predicts that corporate boards will not reach gender parity until 2032.[4]

This underrepresentation matters for several reasons. First, the lack of gender equity on corporate boards is blatantly sexist. This disparity should matter for anyone who wants to reduce societal inequalities. Second, boards with high female representation are correlated with better outcomes for workers. Notably, there is a positive correlation between boards with high female

1. Mary Kate Cary, *Ruth Bader Ginsburg's Experience Shows the Supreme Court Needs More Women*, U.S. NEWS (May 20, 2009), https://www.usnews.com/opinion/blogs/mary-kate-cary/2009/05/20/ruth-bader-ginsburgs-experience-shows-the-supreme-court-needs-more-women [https://perma.cc/VBW3-GYEE] (quoting Ruth Bader Ginsburg from an interview with *USA Today*).

2. Ashton Jackson, *For the First Time, 30% of All S&P 500 Board Directors Are Women*, CNBC (Oct. 20, 2021, 4:13 PM), https://www.cnbc.com/2021/10/20/30percent-of-all-sp-500-board-directors-are-women-a-new-landmark.html [https://perma.cc/NC49-L3TE].

3. Ann Shepard & Gené Teare, *2020 Study of Gender Diversity on Private Company Boards*, CRUNCHBASE NEWS (Mar. 1, 2021), https://news.crunchbase.com/news/2020-diversity-study-on-private-company-boards/ [https://perma.cc/2SWB-UQBT].

4. Julia Boorstin, *At the Current Rate, Corporate Boards Won't Hit Gender Parity Until 2032, New Report Warns*, CNBC (Mar. 5 2021, 9:08 AM), https://www.cnbc.com/2021/03/05/corporate-boards-wont-hit-gender-parity-until-2032-new-report-warns.html [https://perma.cc/E66W-3292] (discussing a study based off of Russell 3000 companies).

representation and an increased receptiveness to workers' needs.[5] Third, gender-equitable boards help corporate stocks. This is attributed to higher returns on equity and better stock price informativeness.[6] Lastly, having more female-led companies may reduce economic recessions. Research on the 2008 financial crisis indicates that banks run by men took more risks than banks run by women, leading to a financial recession.[7]

There is no consensus among scholars as to the best way to bring about this change. This Comment focuses on three popular proposals. First, this Comment discusses corporate quotas. Quotas are arguably one of the most effective and efficient policy solutions. However, quotas directly clash with the American ideal of a limited government, arguably making quotas infeasible.[8] Second, this Comment discusses disclosures. Disclosures are a popular solution, but they are popular for many other corporate problems as well, leading to reduction in effectiveness.[9] Third, this Comment mentions a Rooney Rule. While studies indicate positive impacts in the short term, the data indicates that the impact decreases over time, making this solution not effective for long term growth.[10]

There is a need for a policy that is both effective and feasible. Tax incentives fit this description. This Comment suggests a federal tax deduction for corporations based on the percentage of women on the corporation's board of directors. For corporations whose board is forty to forty-five percent female, the corporation would get a five percent deduction of their total taxable income. For corporations whose board is greater than forty-five percent

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5. Richard A. Bernardi, Susan M. Bosco & Katie M. Vassill, *Does Female Representation on Boards of Directors Associate with* Fortune's *"100 Best Companies to Work for" List*?, 45 BUS. & SOC'Y 235 (2006).

6. *See* Ferdinand A. Gul, Bin Srinidhi & Anthony C. Ng, *Does Board Gender Diversity Improve the Informativeness of Stock Prices?*, 51 J. ACCT. & ECON. 314 (2011); Linda-Eling Lee, Ric Marshall, Damion Rallis & Matt Moscardi, *Women on Boards: Global Trends in Gender Diversity in Corporate Boards*, MSCI (2015), https://www.msci.com/documents/10199/04b6f646-d638-4878-9c61-4eb91748a82b [https://perma.cc/Y9NZ-4CKU].

7. Ajay Palvia, Emilia Vahamaa & Sami Vahamaa, *Are Female CEOs and Chairwomen More Conservative and Risk Averse? Evidence from the Banking Industry During the Financial Crisis*, 131 J. BUS. ETHICS 577 (2015).

8. Anne L. Alstott, *Gender Quotas for Corporate Boards: Options for Legal Design in the United States*, 26 PACE INT'L L. REV. 38, 45 (2014).

9. CTR. FOR CAP. MKT. COMPETITIVENESS, CORPORATE DISCLOSURE EFFECTIVENESS: ENSURING A BALANCED SYSTEM THAT INFORMS AND PROTECTS INVESTORS AND FACILITATES CAPITAL FORMATION, 3–4, 18.

10. Neil Paine, *The Rooney Rule Isn't Working Anymore*, FIVETHIRTYEIGHT (Jan. 14, 2020, 3:17 PM), https://fivethirtyeight.com/features/the-rooney-rule-isnt-working-anymore/ [https://perma.cc/G66R-GS9G].

female, the corporation would get a ten percent deduction of their total taxable income. These deductions are capped at one million dollars, and the deductions apply to both public and private corporations.

Tax incentives are both effective and feasible. American corporations are highly responsive to tax incentives, as evidenced by fifty-five of the largest corporations paying nothing in federal income taxes in 2020 due to their usage of tax incentives.[11] Further, taxes are arguably more feasible than other policy solutions, because taxes are often misunderstood and easier to pass than traditional policies.[12]

While this Comment proposes tax incentives as a potential solution for gender equitable boards, the concepts in this Comment apply to other types of diversity. It is important to acknowledge that women are surpassing other diverse communities in terms of their board representation. Corporate boards are lacking in essentially every diversity category, most notably people of color.[13] Despite people of color making up forty percent of the United States population, only about thirteen percent of board seats are filled with people of color.[14] Directors from these backgrounds are also less likely to have board positions with a lot of influence.[15] Notably, directors of color are even less likely to serve as the board chair or heads of board committees, highlighting the racial disparity on corporate boards.[16]

Other diverse communities, such as the LGBTQ+ community, have received even less attention. Statistics regarding LGBTQ+ board members are lacking, but one study estimated that only 0.3% of Fortune 500 board members were openly LGBTQ+ in 2020.[17] Corporations need to increase diversity for obviously more than just women. Given time limitations, this Comment focuses

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11. Matthew Gardner & Steve Wamhoff, *55 Corporations Paid $0 in Federal Taxes on 2020 Profits*, INST. OF TAX'N & ECON. POL'Y (Apr. 2, 2021), https://itep.org/55-profitable-corporations-zero-corporate-tax/ [https://perma.cc/6RVU-33DZ].

12. Alstott, *supra* note 8, at 46.

13. Peter Eavis, *Diversity Push Barely Budges Corporate Boards to 12.5%, Survey Finds*, N.Y. TIMES (Sept. 15, 2020), https://www.nytimes.com/2020/09/15/business/economy/corporate-boards-black-hispanic-directors.html [https://perma.cc/TZ2N-FDMK].

14. *Id.*

15. *Id.*

16. *Id.*

17. *Lesbian, Gay, Bisexual, and Transgender Workplace Issues (Quick Take)*, CATALYST (June 1, 2021), https://www.catalyst.org/research/lesbian-gay-bisexual-and-transgender-workplace-issues/ [https://perma.cc/744H-SNEV].

exclusively on women. However, these same principles *can* and *should* be applied to other forms of diversity.

Part I of this Comment discusses the current gender composition on corporate boards. There is no definitive explanation for the lack of gender diversity, but studies generally show positive impacts of having more gender equitable boards. Part II discusses existing proposals, focusing on quotas, disclosures, and a Rooney Rule. Quotas are politically infeasible while disclosures and a Rooney Rule are not highly effective. Part III discusses the structure of the proposed tax incentive, explaining the rationale behind the structure. Although this specific proposal is novel, tax incentives are generally both feasible and effective.

I. CURRENT STATUS OF GENDER EQUITY ON CORPORATE BOARDS IN THE UNITED STATES

Corporate boards are dominated by men, resulting in women having little power in corporate America. Coming up with solutions, however, can be difficult without knowing why these solutions are needed. This Part first focuses on the current state of corporate boards, discussing the slow rate of diversity growth. Then, the common justifications behind the gender disparity are discussed, with a focus on sexism and homophily, a fear of change, and a pipeline issue. Next, this Part discusses the impact of inequitable boards on workers, stocks, and society at large. Lastly, this Part ends with the justification for governmental intervention.

A. *The Current State of Women on Corporate Boards*

Women are historically underrepresented in powerful positions. Given that corporate boards are arguably the most influential and powerful positions in the corporate world, the gender disparity on corporate boards is unsurprising. This section discusses the current statistics on board diversity, focusing on the slow rate of growth.

Starting in the 1970s and continuing into the 1990s, "women made serious progress in the workplace" but the progress has since stalled, "especially at the top."[18] As a result, as of June 2021,

18. Emily Bazelon, *A Seat at The Head of the Table*, N.Y. TIMES MAG. (Feb. 2019), https://www.nytimes.com/interactive/2019/02/21/magazine/women-corporate-america.html [https://perma.cc/98NB-H7QC].

women hold only thirty percent of board seats on the S&P 500.[19] The number is even smaller for private corporations, with women occupying only eleven percent of board seats for private corporations.[20] Some articles celebrate this growth, arguing that this is the result of "positive board trends."[21] Given that in 2015 women occupied only nineteen percent of board seats on the S&P 500, these articles are not wrong.[22] Women *are* gaining more board seats. The problem, however, is the *rate* of growth.

While women gained almost fourteen percentage points in the last six years, this growth is not fast enough. A 2021 study predicts that corporate boards will not reach gender parity until 2032.[23] This is two years later than the firm predicted in 2020.[24] Waiting another ten years is not something that society should celebrate.

B. *The "Justification" for Male-Dominated Corporate Boards*

This section discusses the three main justifications provided for male-dominated corporate boards.[25] First, sexism and homophily filter out women from board positions. Second, directors have a fear of change, reducing diversity hires. Third, there is a pipeline issue, leading to a smaller pool of women in the traditional positions that directors are picked from.

Arguably, the simplest and most persuasive reason for the lack of gender parity is sexism.[26] Sexist ideology likely prevents women from advancing in the corporate world.[27] Homophily—the tendency for like to associate with like—is another likely contributor to the

19. Jackson, *supra* note 2.

20. Shepard & Teare, *supra* note 3.

21. Laura Berger, *The Rise of Women in Corporate Boardrooms*, FORBES (Feb. 13, 2019, 8:30 AM), https://www.forbes.com/sites/forbescoachescouncil/2019/02/13/the-rise-of-women-in-corporate-boardrooms/?sh=3b042cf64085 [https://perma.cc/7WJ3-GGBC].

22. *Id.*

23. Boorstin, *supra* note 4.

24. *Id.*

25. Some studies have also found a correlation between female representation and negative consequences. For instance, one study found that gender diversity is shown to correlate with idiosyncratic volatility. Gul et al., *supra* note 6. However, many more studies indicate positive benefits, which is why this Comment does not focus on this as a justification.

26. *See* Yannick Thams, Bari L. Bendell & Siri Terjesen, *Explaining Women's Presence on Corporate Boards: The Institutionalization of Progress Gender-Related Policies*, 86 J. BUS. RSCH. 130, 133 (2018) ("Research indicates that gender discrimination is a major factor holding women back from leadership positions . . . .").

27. *See id.*

gender disparity.[28] Directors are usually most comfortable with other people that they are similar to, leading to directors favoring and picking new board members who are similar to them.[29] While homophily is not sexist per se, this comfort likely stems from inherent sexism within society.

Another related concept is directors' fear of change. One study conducted on boards found that CEOs fear advocating for board members that are demographically diverse because they are more likely to challenge the CEO.[30] CEOs also tend to advocate for board members that they already know, because they desire to have a good relationship and to know exactly how the new board member will act.[31] Given that most CEOs are men, the preference for a "safe" board member is almost always another man.[32] Female directors are still atypical, and many CEOs appear to have a fear of the unknown, likely driving the gender inequity of boards.

The last common justification for inequitable boards is a pipeline issue. Corporations tend to pick their board members from "particular portions of corporate America."[33] Board members are often corporate officers, either of that corporation or another corporation.[34] As of 2021, only eight percent of CEOs in Fortune 500 corporations are women.[35] This lack of depth of women in executive positions helps explain the relatively low level of women on corporate boards.[36]

However, the lack of depth of women in qualified positions is not due to a lack of ambition or a lack of education. Fifty-four percent of working U.S. women identity as "very ambitious" about their career.[37] Additionally, nearly sixty percent of bachelor's and master's

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28. Martin J. Conyon & Mark R. Muldoon, *The Small World of Corporate Boards*, 33 J. BUS. FIN. & ACCT. 1321, 1324, 1340 (2006).

29. *See id.*

30. Stefanie K. Johnson & Kimberly Davis, *CEOs Explain How They Gender-Balanced Their Boards*, HARV. BUS. REV. (Oct. 6, 2017), https://hbr.org/2017/10/ceos-explain-how-they-gender-balanced-their-boards [https://perma.cc/CR9U-GXFM].

31. *See id.*

32. *See id.*

33. *See* Lisa M. Fairfax, *Clogs in the Pipeline: The Mixed Data on Women Directors and Continued Barriers to Their Advancement*, 65 MD. L. REV. 579, 599 (2006).

34. *Id.* at 600.

35. Katharina Buchholz, *Only 15 Percent of CEOs at Fortune 500 Companies Are Female*, STATISTA (Mar. 8, 2022), https://www.statista.com/chart/13995/female-ceos-in-fortune-500-companies/ [https://perma.cc/MZR9-JWP8].

36. Fairfax, *supra* note 33, at 600.

37. Courtney Connley, *Ambition Is Not the Problem: Women Want the Top Jobs—They Just Don't Get Them*, CNBC (Mar. 5, 2020, 2:12 PM), https://www.cnbc.com/2020/03/05/why-

degrees awarded in the U.S. are to women.[38] Despite this ambition and education, a 2019 study found that for every one hundred men promoted and hired to a manger position, only seventy-two women were hired for the same role.[39] This inequitable promotion system is then filtering up to the CEOs, resulting in an extremely low percentage of female CEOs.[40] Research indicates that the most obvious explanation for this disparity is bias.[41]

This section highlighted that there is no one distinct reason for the gender disparity on corporate boards. Sexism and homophily, a fear of change, and pipeline issues are all related yet distinct causes. Likely, a combination of all these causes is leading to the gender disparity. Despite some uncertainty of the cause, the effect is well known: women lack power in corporate America.

C. *The Impact of Female Directors*

Although the cause of gender inequality on corporate boards is unknown, numerous studies have tried to figure out the impact of female directors. This section will first discuss the impact on workers, arguing that boards with more directors are more receptive to workers' needs. It will then turn to the benefits for corporations, discussing how female directors are correlated with benefits for stock prices. Lastly, this section will discuss the wider societal impact, focusing on banks run by men and their tendency to take risks, leading to the 2008 recession.

1. The Impact on Workers

Gender equitable boards are associated with benefits for workers. For instance, boards with more female representation are more receptive to workers' needs.[42] One study examined *Fortune's* "100 Best Companies to Work For" list and found a link between the degree of women on boards and the firm's receptiveness to worker needs.[43] Essentially, firms with a higher representation of women have an "increased commitment [to] a quality [work]

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women-are-locked-out-of-top-jobs-despite-having-high-ambition.html [https://perma.cc/MCA9-EGB6].

38. *Id.*
39. *Id.*
40. Buchholz, *supra* note 35.
41. *See id.*
42. *See* Bernardi et al., *supra* note 5, at 244.
43. *Id.* at 235.

environment," earning the characteristics necessary to establish a spot on *Fortune's* list.[44]

The study also found that employee perceptions are often more positive at companies with more female board members.[45] These findings suggest that the increased presence of women on corporate boards is correlated to a higher likelihood of guaranteeing a spot on the list.[46] The study speculates that this is because female board members care more about social responsibility, notably family-oriented benefits such as day-care assistance and flexible scheduling.[47]

Other studies have found a correlation between female directors and the number of women in other leadership positions within the corporation.[48] It is hypothesized that female directors inspire lower-ranked women within the corporation to "achieve and stay with [the] firm."[49] Women on boards often network with other women within the corporation and typically serve as speakers for firm events, giving lower-level women in the corporation the opportunity to form role models of their own gender.[50] This enables these women to believe that their own success is possible, as they look to the success already achieved by the women on the board.[51]

2. The Impact on Corporate Stocks

Evidence shows that corporations with more female representation on top management teams experience better financial performance than corporations with the lowest female representation.[52] For instance, return on equity—which is a measure of the profitability of a business in relation to equity—is higher on average for corporations with more female board members.[53] One study estimates that corporations with strong female leadership generate a

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44. *Id.*
45. *Id.* at 244.
46. *Id.*
47. *Id.*
48. Mingzhu Wang & Elisabeth Kelan, *The Gender Quota and Female Leadership: Effects of the Norwegian Gender Quota on Board Chairs and CEOs*, 117 J. BUS. ETHICS 449, 463 (2013). This study found a correlation, not a causation. *Id.*
49. Siri Terjesen, Ruth Sealy & Val Singh, *Women Directors on Corporate Boards: A Review and Research Agenda*, 17 CORP. GOVERNANCE: INT'L REV. 320, 334 (2009).
50. *Id.* at 331.
51. *See id.*
52. *See* Lee et al., *supra* note 6.
53. *Id.*

return on equity of about ten percent per year versus approximately seven percent per year for those without strong female leadership.[54]

Another assessment of firm performance is stock prices. One study identified a positive link between gender diversity on corporate boards and stock price informativeness.[55] Stock price informativeness is the association between stock returns and change in earnings.[56] Corporations with a high informativeness level are more transparent and may entice more people to invest.[57] The rationale offered in the study is that women on corporate boards are more likely to release voluntary public disclosures.[58] The argument is that more public disclosures are associated with higher stock price informativeness, indicating a positive link between gender equity and firm performance.[59]

Female board members are also more likely to see the importance of social issues, such as environmental issues.[60] While support of social issues may not directly benefit a corporation's stock prices, indirectly corporations benefit because it helps improve the corporation's image and legitimacy, potentially enticing more investors. Additionally, having a male-dominated board looks bad in the current political climate, and increasing gender parity helps reduce this stigma and improve the corporation's image.

3. The Impact on Broader Society

Evidence shows that behavioral differences between men and women may affect financial decisions in a professional setting.[61] For instance, banks with female CEOs were less likely to fail during the 2008 financial crisis.[62] By making decisions that can impact recessions, these behavior differences therefore can impact virtually every part of American society.

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54. *Id.*
55. Gul et al., *supra* note 6.
56. *Id.* at 319.
57. *Id.*
58. *Id.* at 329.
59. *Id.*
60. THE COLLEGIALITY CONUNDRUM: FINDING BALANCE IN THE BOARDROOM, PWC'S 2019 ANNUAL CORPORATE DIRECTORS SURVEY 19 (2019) [hereinafter PWC REPORT].
61. Palvia et al., *supra* note 7, at 579.
62. *Id.* at 592.

Female-led banks were less likely to fail because women are generally more conservative and less inclined to take extreme risks than men.[63] Other studies unrelated to the 2008 crisis have found similar results, with these studies showing that women are generally less motivated by empire building and therefore make more cautious decisions.[64] The tendency of men to be overconfident is therefore a liability, leading to risky decisions that have the potential to cause world-wide recessions.

D. *Justification for Policy Intervention*

There is currently no federal law encouraging gender diversity on corporate boards.[65] Corporations have the sole responsibility of reducing the gender disparity. This section will first focus on the slow rate of growth, pointing out that despite recent improvements, growth is still too slow. Next, this section will discuss the growing societal support for diversity. Lastly, this section will turn to the resistance that current directors have to adding more women, showing that despite societal support, directors are resistant to change.

1. The Slow Increase of Diverse Boards

Stating that progress is slow may seem unconvincing given that numerous studies indicate that female representation on boards is increasing.[66] For instance, the Alliance for Board Diversity estimates that 15.7% of Fortune 500 boards were female in 2010 and that this number has grown to 21.9% in 2018.[67] Additionally, major companies, such as Facebook, have recently announced that they are making gender a priority for new board membership.[68]

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63. *Id.*

64. Maurice Levi, Kai Li & Feng Zhang, *Director Gender and Mergers and Acquisitions*, 28 J. CORP. FIN. 185, 198 (2014).

65. As of November 2021, California is the only state to have passed a state corporate quota. *See infra* note 94.

66. ALL. FOR BD. DIVERSITY, MISSING PIECES REPORT: THE 2018 BOARD DIVERSITY CENSUS OF WOMEN AND MINORITIES ON *FORTUNE* 500 BOARDS 34 (2018), https://www.deloitte.com/content/dam/Deloitte/us/Documents/center-for-board-effectiveness/us-cbe-missing-pieces-report-2018-board-diversity-census.pdf [https://perma.cc/QY3R-LR7Q]; Lee et al., *supra* note 6.

67. ALL. FOR BD. DIVERSITY, *supra* note 66, at 34.

68. *See* Rob Price, *Facebook, Which Went Public Without Any Women on Its Board, Now Has 40% Women Directors and Just Added CFO of Estée Lauder and a Former McKinsey Exec*, MARKET INSIDER (Mar. 9, 2020, 6:54 PM), https://markets.businessinsid

Goldman Sachs has taken it a step farther and recently announced that they will only help companies go public if they have at least one diverse board member.[69] The company has indicated that their preference for diversity is women.[70] While these recent initiatives are encouraging, the rate of change is still very slow.[71]

Additionally, the recent growth in female directors may not be as great as it initially seems. There is a worry that the increase in female directors is a result of a few women serving on more boards, rather than an actual increase in the number of new women serving on overall boards.[72] This is known as over-boarding.[73] Over-boarding is the tendency for America's top corporations to select directors who already sit on several other corporate boards.[74] Over-boarding has several problematic implications, one of which is that over-boarding reduces the diversity and inclusiveness of corporate America.[75] This means that a small number of women are serving on several boards, creating a false sense of gender equity.[76]

2. Society's Approval of Diversity Initiatives

Gender equity is increasingly a salient issue to most Americans.[77] While some people may think that it is undemocratic to force gender equity through policy initiatives, the existing underrepresentation of a large section of the population is also undemocratic. Seventy-nine percent of Americans think that it is "very important" for women to have equal rights with men.[78]

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er.com/news/stocks/facebook-appoints-nancy-killefer-tracey-t-travis-board-directors-2020-3 [https://perma.cc/X59Q-EYEU].

69. Hugh Son, *Goldman Won't Take Companies Public Without 'at Least One Diverse Board Candidate,' CEO Says*, CNBC (Jan. 23, 2020, 8:15 AM), 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/NP6Y-USMQ].

70. *Id.*

71. Boorstin, *supra* note 4.

72. Kosmas Papadopoulos, *Director Overboarding: Global Trends, Definitions, and Impact*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 5, 2019), https://corpgov.law.harvard.edu/2019/08/05/director-overboarding-global-trends-definitions-and-impact/ [https://perma.cc/6QNYN-3TED].

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *See* Rachel Minkin, *Most Americans Support Gender Equality, Even If They Don't Identify as Feminists*, PEW RSCH. CTR. (July 14, 2020), https://www.pewresearch.org/facttank/2020/07/14/most-americans-support-gender-equality-even-if-they-dont-identify-as-feminists/ [https://pema.cc/8TH4-VKMW].

78. *Id.*

Further, fifty-seven percent of Americans think that the country has not gone far enough to give women these equal rights.[79] Among those who thinks the country still has work to do regarding gender equality, sixty-four percent think that a major obstacle to achieving gender equality is the lack of women in positions of power.[80]

This increasing support for gender equity has convinced many Americans that women deserve representation in corporate America. This is evident by a poll that found that fifty-nine percent of Americans think that there are too few women in top executive business positions.[81] It seems that most Americans have made the connection that the lack of equal rights has resulted in less women in corporate board seats.

3. Directors' Hesitance to Diversity Initiatives

While society's growing support for diversity initiatives is beneficial, it has also made some board directors start to resent board diversity initiatives.[82] Policy intervention is therefore crucial to achieve gender equity on boards and would show a much-needed commitment by the American government to reduce gender inequality.

According to a study by PwC, ninety-four percent of board directors state that gender diversity brings unique perspectives and eighty-seven percent of board directors thinks diversity enhances board performance.[83] However, these board members are also simultaneously becoming disillusioned by diversity mandates. For instance, in 2019, thirty-eight percent of board directors said that gender diversity is very important, a decrease from 2018 in which forty-six percent of board directors agreed on the high importance of diversity.[84] That was the first time in over five years that this

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79. *Id.*

80. Juliana Menasce Horowitz & Ruth Igielnik, *A Century After Women Gained the Right to Vote, Majority of Americans See Work to Do on Gender Equality*, PEW RSCH. CTR. (July 7, 2020), https://www.pewresearch.org/social-trends/2020/07/07/a-century-after-women-gained-the-right-to-vote-majority-of-americans-see-work-to-do-on-gender-equality/ [https://perma.cc/BD84-SJPW].

81. Juliana Menasce Horowitz, Ruth Igielnik & Kim Parker, *Women and Leadership 2018*, PEW RSCH. CTR. (Sept. 20, 2018), https://www.pewresearch.org/social-trends/2018/09/20/women-and-leadership-2018/ [https//perma.cc/4PPJ-D9ZW].

82. PWC REPORT, *supra* note 60, at 4.

83. *Id.* at 13.

84. *Id.*

question had a decrease in support among board directors.[85] Furthermore, sixty-three percent of directors say that investors "devote too much attention to [board gender diversity]," which is a drastic increase from 2018 in which only thirty-five percent of directors felt this way.[86] Despite most directors realizing the benefits of board diversity, it seems like most directors are tired of the external pressure to increase gender equity on boards.

Even if directors know the importance of diversity, their opinion of an ideal board is not actually gender equitable. For instance, only about two percent of directors think that the optimal percentage of female representation on public boards is greater than fifty percent.[87] About sixty-seven percent of directors also somewhat or very much agree that board will just become naturally diverse over time.[88] Given these opinions, there is no guarantee that women will achieve gender parity when the projections predict.

Therefore, there is a disconnect between what society wants and what directors are willing to do. Directors are slower to change then general society, as evidenced by this resistance to adding more women. This reluctance is ironic, given that female directors are correlated with positive benefits for corporate stocks and corporate workers.[89]

Lastly, it is important to remember that not all Americans support gender diversity initiatives. Some Americans likely oppose gender diversity because of an inherent sexist ideology, and other Americans likely are merely opposed to *policies* that try to increase gender parity. This is because a resistance to policy is surprisingly common in America, causing change to typically occur "almost entirely from private initiatives."[90] This is in direct contrast to Europe, in which change is "predominately driven by public policy."[91] Americans are primed to oppose policies, especially if the policy is seen as an overreach of the government into the business sector.[92] Thus, even if most Americans support gender diversity, this does not mean that most Americans support a gender diversity *policy*.

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85. *Id.*
86. *Id.* at 14.
87. *Id.* at 27.
88. *Id.* at 15.
89. *See supra* Part I.
90. Terjesen et al., *supra* note 49.
91. *Id.*
92. *See id.*

Given the slow progress and the resistance by corporations, government intervention is needed to ensure faster and more reliable progress. By enacting polices that promote female representation on boards, the government is assuming the role of guarantors, rather than "mere promoters" of equality.[93] Governments that enact policies are showing their willingness to achieve equality and empower women. If left up to corporations to make these changes, it is predicted to take several years, during which women's voices will continue to be underrepresented and drowned out by the overrepresentation of men.

II. THE LIMITATIONS OF POPULAR SOLUTIONS

Gender inequitable boards are an old problem that needs new solutions. This Part focuses on current proposals to fix board inequalities. First, this Part discusses quotas, arguing that quotas are effective but not feasible for American society. It will then turn to the disclosures, discussing how disclosures lose effectiveness with the addition of every new disclosure. Lastly, this Part will mention the Rooney Rule, focusing on how this policy is not effective for long term changes.

A. *Corporate Quotas*

One option to increase gender diversity is for the government to impose quotas, requiring that a specific percentage of the board must be female. Quotas have received a lot of attention in the last few years. This section will first focus on application of quotas within society, with a focus on California's quota. Then, this section will focus on why quotas are not an ideal solution for the United States, focusing on the political feasibility and their legality.

1. Quotas in Application

California passed a corporate quota in 2018.[94] Since California's passage of their corporate quota in 2018, no other state in the United States has passed a quota. Quotas are therefore new and rare in the United States. However, internationally, corporate quotas are not quite as novel. Norway enacted the first corporate quota

93. Susan Franceschet & Jennifer M. Piscopo, *Equality, Democracy, and the Broadening and Deepening of Gender Quotas*, 9 POLS. & GENDER 310, 310 (2013).

94. CAL.CORP. CODE § 301.3 (Deering 2021).

in 2003.[95] By the beginning of 2018, ten other countries had enacted a corporate quota.[96]

Countries vary in how they structure their corporate quotas. The differences are mostly in the percentage of women required on the board and the sanctions for failing to comply with the quota. In terms of sanctions, Norway requires dissolution of a corporation if the corporation does not comply with the quota.[97] Italy, on the other hand, requires a fine based on corporate size.[98] A few countries take an "'open seat' approach," meaning that corporations who do not comply with the quota can only fill vacant board seats with women. [99]

California's quota is similar to the approach taken in Italy. California's quota requires publicly held corporations to have at least one female director by the end of 2019.[100] By the end of 2021, the number of female directors is required to increase based on a sliding scale of the total number of directors.[101] For instance, corporations with six or more directors are required to have at least three female directors, while corporations with five directors are required to have two female directors.[102] Corporations that do not comply with the law are fined $100,000 for their first offense and then $300,000 for every repeat offense.[103]

2. Why Quotas Are Not an Ideal Solution

In countries that have adopted quotas, they generally produce positive impacts. For instance, Norway achieved their quota's minimum of forty percent of females in just one year after the law's implementation.[104] Several studies have also found a positive correlation between gender quotas and a benefit to the corporation. For instance, one study examined Norway's gender quota and found that after the quota, Norway had a higher number of female

95. Heike Mensi-Klarbach & Cathrine Seierstad, *Gender Quotas on Corporate Boards: Similarities and Differences in Quora Scenarios*, 17 EUR. MGMT. REV. 615, 616 (2020).
96. *Id.*
97. *Id.* at 619.
98. *Id.*
99. *Id.*
100. CAL. CORP. CODE § 301.3(a) (Deering 2021).
101. *Id.* § 301.3(b).
102. *Id.*
103. *Id.* § 301.3(e).
104. *Id.*

board chairs and CEOs.[105] This indicates that quotas may have a spill-over effect on other top leadership positions.[106]

a. Feasibility

However, the biggest downside of quotas is that they are not a feasible solution for the United States. This is because quotas clash with American culture by directly interfering with the business sector. Unsurprisingly, a study found that eighty-three percent of board directors – including more than fifty percent of female directors – oppose laws, such as quotas, that mandate gender diversity.[107] American businesses idolize the free market and investor choice, meaning that businesses are resistant to the government dictating the gender of their boards.[108] Quotas therefore will "sit uneasily with deeply-held beliefs" about the role of government in regulating businesses.[109]

American culture is heavily influenced by the laissez-faire movement, which is a significant difference from most of the European countries that have passed gender quotas.[110] Given this strong resistance to government interference, gender quotas can easily create resentment and less effective leadership. Some men will inevitably wonder if the females board members are there because of their merit or because of their gender. This may cause men to question the legitimacy of female board members, potentially then causing women on boards to begin doubting their own self-worth. If such an environment of doubt and resentment is fostered, the effectiveness of female leadership is effectively undermined.

b. Legality

Another issue with quotas is that the Supreme Court has not yet decided the legality of corporate quotas. Former California Governor Jerry Brown even acknowledged the serious legal concerns when signing California's quota law into place, admitting that the

105. Wang & Kelan, *supra* note 48.
106. *Id.* at 463.
107. PWC REPORT*, supra* note 60, at 4.
108. *See* Alstott, supra note 8, at 45.
109. *Id.*
110. David R. Howell, *The Great Laissez-Faire Experiment*, CTR. FOR AM. PROGRESS (Dec. 4, 2013), https://www.americanprogress.org/article/the-great-laissez-faire-experiment/ [https://perma.cc/D4VV-QM9T].

"flaws" may "prove fatal to its ultimate implementation."[111] The California Chamber of Commerce staunchly opposed the policy, arguing it lacked Constitutional backing.[112] Despite these legal challenges, Governor Brown signed the law into place, arguing that the law was critical to establishing a government that cares about women.[113]

Several lawsuits have been filed regarding California's quota. *Meland v. Weber* was filed by the Pacific Legal Foundation in 2019 and argues that quotas are discriminatory against men.[114] The Foundation argues that the law violates the Constitution's equal protection clause by forcing corporations to "discriminate on the basis of sex."[115] The district court initially dismissed the case, holding that shareholders lack standing to sue about the state's quota.[116] However, the Ninth Circuit unanimously reversed the district court in June 2021, holding that shareholders have standing.[117] The Foundation is going forward with their equal protection claim, which is currently still pending before the court. Another lawsuit, *Crest v. Padilla*, was filed by Judicial Watch and argues that using the state's money to enforce the law violates the California Constitution.[118] The suit is also currently pending in California state court.

Given the feasibility and legal challenges, corporate quotas are not an ideal solution for the United States. California's quota may encourage other states to pass quotas, but it seems likely that quotas will only pass in states with similar political environments as California.

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111. Jorge L. Ortiz, *California's 'Giant Step Forward': Gender-Quotas Law Requires Women on Corporate Boards*, USA TODAY (Sept. 30, 2018, 7:36 PM), https://www.usatoday.com/story/news/2018/09/30/california-law-sets-gender-quotas-corporate-boardrooms/1482883002/ [https://perma.cc/5FC2-FQV9] (quoting Governor Brown's statement regarding the implementation of California's quota).

112. *See id.*

113. *Id.*

114. 2 F.4th 838 (9th Cir. 2021).

115. *Id.* at 842.

116. *Id.* at 843.

117. *Id.* at 849.

118. Complaint for Declaratory and Injunctive Relief at ¶ 19, *Crest v. Padilla*, No. 19STCV27561, 2019 WL 3771990 (Cal. Super. Ct. Aug. 6, 2019).

B. *Disclosures*

Rather than imposing quotas on companies, a second option is for the government to require companies to publicly disclose information about the diversity of their boards. This section will first focus on the application of disclosures, with a focus on the Securities and Exchange Commission (SEC) requirements and the Nasdaq's new rule for diversity disclosures. Then, this section will focus on why disclosures are not an ideal solution for the United States, discussing how the addition of new disclosures reduces the impact of every existing disclosure.

1. Disclosures in Application

a. Securities and Exchange Commission Requirements

The Securities and Exchange Commission (SEC) governs the federal disclosure requirements of public corporations.[119] In 2009, the SEC approved a rule that requires public corporations to disclose if their board nominating committee has a policy that considers diversity when considering candidates for a board.[120] If there is a policy, this rule requires the disclosure of how the policy is implemented and how the committee assesses the effectiveness of the policy.[121] In 2019, the SEC issued a regulation to clarify that if a board considers an individual's diversity characteristics, the SEC expects corporations to identify the characteristics and how they were considered.[122] However, the rule notably does not require any disclosure regarding the demographics of the board.

Some SEC officials have expressed a desire to expand diversity disclosure requirements. In 2016, then-Chair Mary Jo White said in a conference keynote address that while the SEC cannot mandate board diversity, diversity disclosures are within the SEC's authority.[123] White said that she wanted to include more

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119. *See* 15 U.S.C. § 78m.

120. 17 C.F.R. §§ 229, 239, 240, 249, 274 (2021).

121. *Id.*

122. U.S. SECURITIES AND EXCHANGE COMMISSION, REGULATION S-K (2020), https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm#116-11 [https://perma.cc/FZ53-H3CW].

123. Chair Mary Jo White, Address at International Corporate Governance Network Annual Conference (June 27, 2016).

"meaningful" diversity disclosures in response to the "unacceptable" low-level of board diversity in the United States.[124]

b. State and Nasdaq Applications

A few states have passed statutes requiring diversity disclosures for corporate boards. For instance, New York passed a statute in 2020 requiring all corporations incorporated in New York, or authorized to do business in New York, to report the number of women who serve on their board.[125] A few other states have passed similar disclosure laws, including Maryland.[126]

In 2020, the Nasdaq stock exchange passed a rule (Rule 5605(f)) requiring all Nasdaq-listed corporations to have, or publicly disclose if they do not have, at least one female director and one director from an underrepresented minority or LGBTQ+ group.[127] The rule has some flexibility for small corporations and for corporations with small boards.[128] Unlike a quota, this rule does not require corporations to change their boards. Rather, the rule is written as an option, giving corporations the choice between meeting the diversity requirements and making a disclosure. On August 6, 2021, the SEC approved Nasdaq's rule.[129] A statement released by SEC commissioners stated that: "[the SEC] support[s] the proposal because it represents a step forward for investors on board diversity."[130]

2. Why Disclosures Are Not an Ideal Solution

There is doubt as to the effectiveness of disclosures. Some people worry that disclosures, if not done right, can result in information overload, undermining the effectiveness of the disclosure.[131] The SEC is even aware of this issue, and realizes that more

124. *Id.*

125. Women on Corporate Boards Study Act, S. 4278, 2019–2020 Leg. Sess. (N.Y. 2020).

126. S. 911, 2019 Leg., 439th Sess. (Md. 2019).

127. CORPORATE GOVERNANCE REQUIREMENTS, NASDAQ [hereinafter NASDAQ RULE], https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series [https://perma.cc/82H9-W79M].

128. *Id.*

129. Commissioners Allison Herren Lee & Caroline A. Crenshaw, Statement on Nasdaq's Diversity Proposals (Aug. 6, 2021).

130. *Id.*

131. CENTER FOR CAPITAL MARKET COMPETITIVENESS, CORPORATE DISCLOSURE EFFECTIVENESS: ENSURING A BALANCED SYSTEM THAT INFORMS AND PROTECTS INVESTORS AND FACILITATES CAPITAL FORMATION 3–4, 18.

information, even when accurate, may result in a less effective use of information.[132]

The SEC has spent a lot of time considering how to make disclosures effective, as evidenced by a recommendation report made by the SEC in 2020.[133] The report details all the ways that disclosures are ineffective, showing that disclosures do not always achieve their desired results.[134] However, the report notably does not mention diversity disclosures.[135] Instead, the report focuses on the way information is presented, highlighting that disclosures effectiveness is largely attributed to their format, rather than their substance.[136]

Disclosures have increased in popularity in recent years, for a wide range of topics. For instance, environmental disclosures were at a record high in 2021.[137] Given that disclosures are used for many important topics, disclosures for gender diversity are not an ideal solution because they may attribute to disclosure overload.

C. *Rooney Rule*

A third option is for the government to mandate that companies implement a Rooney Rule, requiring that companies interview at least one woman for director positions. This section will first focus on the applications of Rooney Rules, with a focus on their history within the National Football League (NFL) and the expanded use for corporate boards. Then, this section will focus on why a Rooney Rule is not an ideal solution for the United States, focusing on the diminished effectiveness for long-term growth.

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132. SECURITIES AND EXCHANGE COMMISSION, RECOMMENDATION ON DISCLOSURE EFFECTIVENESS 4 (2020), https://www.sec.gov/spotlight/investor-advisory-committee-2012/disclosure-effectiveness.pdf [https://perma.cc/DM2A-2H95].

133. *See id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *CDP Reports Record Number of Disclosures and Unveils New Strategy to Help Further Tackle Climate and Ecological Emergency*, CDP (Oct. 14, 2021), https://www.cdp.net/en/articles/media/cdp-reports-record-number-of-disclosures-and-unveils-new-strategy-to-help-further-tackle-climate-and-ecological-emergency [https://perma.cc/M5GZ-QGLB].

1. Rooney Rules in Application

a. NFL

The Rooney Rule is originally a NFL policy requiring that teams interview at least one person of color for head coaching and senior operation jobs.[138] The rule is meant to counter the unconscious bias that effects the hiring process.[139] When decision-makers are not exposed to people of color, it is common for decision makers to rely on racial stereotypes, albeit often unconsciously.[140] However, by forcing decision-makers to interview at least one person of color, the hope is that decision-makers will alter their biases, therefore making it more likely that people of color are hired for the position.[141] When applied to corporate boards, a Rooney Rule could require that at least one woman is considered in the hiring process of new board candidates.

The NFL piloted the Rooney Rule in response to the low diversity among their coaches. In 2002, the year before the Rooney Rule was implemented, only about six percent of games were coached by a person of color.[142] In 2011, the number increased to about twenty-seven percent.[143] Although this increase was incremental, several experts thought the increase was primarily attributed to the Rooney Rule.[144] For instance, one study estimates that people of color were twenty percent more likely to fill a NFL head coaching job as a result of the Rooney Rule.[145]

b. Corporate Boards

In response to the success of the Rooney Rule in the NFL, a few corporations began implementing a Rooney Rule for their board. For instance, Amazon attracted attention in 2018 for passing a

138. Brian W. Collins, Note, *Tackling Unconscious Bias in Hiring Practices: The Plight of the Rooney Rule*, 82 N.Y.U. L. REV. 870, 871 (2007).

139. *Id.* at 872.

140. *Id.*

141. *See id.*

142. Paine, *supra* note 10.

142. *Id.*

143. *Id.*

144. *See id.*; Cynthia (CC) DuBois, *What the NFL Can Teach Congress About Hiring More Diverse Staffs*, FIVETHIRTYEIGHT (Mar. 15, 2017, 10:30 AM), https://fivethirtyeight.com/features/what-the-nfl-can-teach-congress-about-hiring-more-diverse-staffs/ [https://perma.cc/9P6Q-2GNJ].

145. DuBois, *supra* note 144.

Rooney Rule for diverse board members.[146] Amazon's Rooney Rule includes both women and people of color.[147] Amazon was initially resistant to the rule, claiming that it would artificially create the appearance of diversity.[148] However, the Rooney Rule was eventually passed and currently five out of the twelve directors (forty-two percent) are women.[149] This is an increase from thirty percent, which was the percentage of female directors on Amazon's board immediately prior to the passage of the rule.[150]

2. Why Rooney Rules Are Not an Ideal Solution

Rooney Rules seems to have short term success but the effectiveness declines after a few years.[151] This is notably seen in the NFL, where the Rooney Rule had immediate success but has since declined.[152] For instance, in 2019, only about thirteen percent of NFL games were coached by people of color.[153] This is down from 2011, which had about twenty-seven percent of games coached by people of color.[154] "NFL coaching diversity seems to have hit a wall in recent years," making people doubt the effectiveness of the Rooney Rule for the long term.[155]

While the Rooney Rule *does* have benefits in the short term, this policy is not ideal for long term growth. Having an initial increase in female directors means nothing if men retake these roles in just a few years. Thus, a Rooney Rule is not ideal solution for increasing gender diversity.

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146. 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), https://www.vox.com/2018/5/14/17353626/amazon-rooney-rule-board-diversity-reversal-shareholder-proposal [https://perma.cc/C38X-EFZR].

147. *See id.*

148. Stefanie K. Johnson, *What Amazon's Board Was Getting Wrong About Diversity and Hiring*, HARV. BUS. REV. (May 14, 2018), https://hbr.org/2018/05/what-amazons-board-is-getting-wrong-about-diversity-and-hiring [https://perma.cc/D7QM-ANTY].

149. *Officers and Directors*, AMAZON, https://ir.aboutamazon.com/officers-and-directors/default.aspx [https://perma.cc/M7NR-YPTC].

150. *Id.*

151. Paine, *supra* note 10.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

III. USING TAX INCENTIVES TO INCREASE BOARD GENDER EQUITY

Tax incentives are often used in the United States to indirectly pass social policies.[156] For policies that have a hard time passing, tax incentives may be a better avenue to pursue instead of the traditional policy path. This Part will first outline the tax deduction proposal. This includes a discussion of the structural considerations behind the proposal. Next, the benefits of using a tax deduction are considered, notably the feasibility and effectiveness. Lastly, this Part will discuss the drawbacks of using tax deductions, with a focus on the public backlash that corporate tax incentives receive.

A. *Tax Deduction Proposal & Structural Considerations*

The are many ways to structure a tax incentive. While this Comment suggests one specific way, there are alternative structures that may work better. This section starts with the basic outline for the proposed tax deduction. Then, the structural considerations behind each specific part of the proposal are discussed.

1. Tax Deduction Proposal

Although this Comment suggests one policy, there are many ways to structure a tax incentive. Ideally, economists and tax lawyers will need to analyze the tax incentive before implementation. This Comment therefore suggests a starting point, acknowledging that experts are needed to perfect the proposed design.

This Comment recommends a federal tax deduction for corporations based on the percentage of women on the corporation's board of directors. For corporations whose board is forty to forty-five percent female, the corporation would get a five percent deduction of their total taxable income. For corporations whose board is greater than forty-five percent female, the corporation would get a ten percent deduction of their total taxable income. These deductions are capped at one million dollars, and the deductions apply to both public and private corporations.

156. Alstott, *supra* note 8, at 45.

2. Federal vs. State Tax

The easiest determination was choosing a federal tax over state tax for two reasons. The first reason is that federal corporate taxes apply to all United States corporations, resulting in a greater impact on board structure nationwide. As determined by 26 U.S.C. § 882, foreign corporations that "engaged in trade or business within the United States" are taxed in addition to businesses incorporated within the United States.[157] This means that foreign corporations that do business within the United States also have to pay corporate taxes to the federal government, showing the far reach of federal taxes.

The second reason is that federal taxes are also preferred because they provide an incentive to all corporations within the United States, regardless of what state the business pays taxes in. Businesses sometimes try to move states because of tax reasons, as evidenced by numerous articles online advising businesses of when to move.[158] This is especially relevant after the COVID-19 pandemic, because it is now easier for businesses and people to move states in response to the increase of remote work.[159] However, federal taxes reduce the incentive to move states, because the tax is applied equally regardless of location.[160] This will likely increase support for the deduction, because a federal tax deduction will not cause a relocation of businesses.

However, this Comment is not trying to suggest that no states should implement a tax deduction. Rather, this Comment is suggesting that a federal deduction would have the greatest impact and therefore is preferred. However, states are encouraged to implement their own deductions if the federal government is unwilling to pass this deduction.

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157. 26 U.S.C. § 882.

158. Nellie Akalp, *How to Move an LLC or Corporation to Another State*, FORBES (Sept. 8, 2021, 6:28 PM), https://www.forbes.com/sites/allbusiness/2021/09/08/how-to-move-an-llc-or-corporation-to-another-state/?sh=28a4726a64f5 [https://perma.cc/9HXF-L6FN]; Darla Mercado, *Why You Should Think Twice Before Moving Your Business to a Low-Tax State*, CNBC (Mar. 17, 2018, 9:00 AM), https://www.cnbc.com/2018/03/16/think-twice-before-moving-your-business-to-a-low-tax-state.html [https://perma.cc/44S2-YMSW].

159. Andrew Osterland, *Pandemic Heats Up State Tax Competition to Attract Businesses and Residents*, CNBC (Feb. 8, 2021, 8:01 AM), https://www.cnbc.com/2021/02/08/pandemic-heats-up-state-tax-competition-to-attract-businesses-residents-.html [https://perma.cc/PX4M-V7YT].

160. *See* Jo Willetts, *The Difference Between Federal vs State Taxes*, JACKSON HEWITT (Feb. 18, 2021), https://www.jacksonhewitt.com/tax-help/jh-tax-talk/difference-federal-state-taxes/ [https://perma.cc/J9G8-GPD6].

3. Type of Business Entity

Another consideration is the type of business entity. Business entities are established by state law. Corporate law in every state requires that corporations have a board of directors.[161] However, in most states, corporations are the only type of business that requires a board. LLCs are not required to have a board but may generally make a board if they want to. There are three exceptions to this: LLC laws of Minnesota, North Dakota, and Tennessee require that LCCs have a board of directors.[162] Given that most states do not require LLCs or any other type of business entity to have a board, the proposed deduction will only apply to corporations.

While every corporation requires a board of directors, corporations are distinctly divided into two categories: public and private corporations. Public corporations are publicly traded on stock markets and tend to be larger and more profitable than private corporations. Notably, California's quota only applies to public corporations.[163] However, limiting the tax deduction to public corporations is a mistake, given that most corporations in the United States are private.[164] Furthermore, as discussed in Part I, the lack of female directors is hypothesized as a result of less qualified female candidates for board positions.[165] By having the deduction apply to private corporations, this will increase the total number of qualified women, creating a greater impact on other boards.

4. Tax Deductions vs. Tax Credits

Another important consideration is whether the tax incentive should take the form of a deduction or a credit. A deduction reduces the amount of taxable income whereas a credit reduces the amount of money owed.[166] Some credits also give a refund even if no taxes

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161. Myles L. Mace, *The President and the Board of Directors*, HARV. BUS. REV. (Mar. 1972), https://hbr.org/1972/03/the-president-and-the-board-of-directors [https://perma.cc/84HM-UK62].

162. MINN. STAT. § 322C.0407(4) (2021); N.D. CENT. CODE § 10-32.1-39(4) (2021); TENN. CODE ANN. § 48-249-401(c) (2021).

163. CAL. CORP. CODE § 301.3 (Deering 2021).

164. Mary Ellen Biery, *4 Things You Don't Know About Private Companies*, FORBES (May 26, 2013, 6:45 AM), https://www.forbes.com/sites/sageworks/2013/05/26/4-things-you-dont-know-about-private-companies/?sh=7eb7e0fb291a [https://perma.cc/6FQY-RUU8].

165. *Supra* Part I.

166. *How Credits and Deductions Work*, IRS, https://www.irs.gov/credits-deductions-for-individuals [https://perma.cc/23S2-WJF4] (Apr. 8, 2022).

are owed.[167] Most tax experts agree that tax credits are more valuable than tax deductions.[168] This is because a tax credit can directly put cash into someone's pocket, unlike a tax deduction.[169] Further, a tax deduction only applies if a corporation makes money, whereas a tax credit may apply regardless of profit. As a result, tax deductions are often easier to pass because tax deductions are cheaper for the government. For ease of passage, this Comment suggests a tax deduction.

5. Percentage vs. Flat Deduction

The proposed deduction is based on a percentage of female directors rather than a flat number. California's quota uses a flat number, albeit a flat number based on a sliding scale of the total number of directors.[170] As stated in Part II, California requires corporations with six or more directors to have at least three female directors whereas corporations with five or fewer directors are required to have at least two female directors.[171] Although this number tries to take board size into consideration, the quota becomes less effective the greater the number of total directors.

In 2019, S&P 500 corporations averaged eleven board directors.[172] This number has been increasing in recent years, which some people attribute as a response to the pressure to diversify boards.[173] If a board has eleven directors, three of which are female, then the percentage of female directors is only about twenty-seven percent. However, this board is in full compliance with California's quota. This is less than the current average of female directors on S&P 500 boards, which is thirty percent.[174] Thus, a deduction based on a flat rate of women is ineffective for larger boards.

A percentage is a better alternative because the size of the board is irrelevant. Furthermore, the deduction has two levels, with a

167. *Id.*

168. Libby Wells, *Tax Credits v. Tax Deductions: What's the Difference*?, BANKRATE (Oct. 5, 2021), https://www.bankrate.com/taxes/tax-credit-vs-tax-deduction/ [https://perma.cc/FUJ8-2LAY].

169. *See id.*

170. CAL. CORP. CODE § 301.3 (Deering 2021).

171. *Id.*

172. Kerie Kerstetter, *S&P 500 Trend Report: Board Composition, Diversity and Beyond*, DILIGENT (Apr. 19, 2019), https://insights.diligent.com/board-composition/sp-500-trend-report-board-composition-diversity-and-beyond/ [https://perma.cc/A3JN-WZKU].

173. *Id.*

174. Jackson, *supra* note 2.

higher percentage of female directors having a higher deduction. The lower deduction reflects an almost seven percentage point increase from the current average of thirty percent of female directors.[175] However, the increase is not so substantial as to discourage corporations from changing their board. The higher deduction reflects a substantial increase but was done to reward corporations that come close or even exceed a board composed of fifty percent women.

6. Size of Deduction and the Cap

The size of the deduction was the hardest choice in determining the structure of the tax incentive. The United States has no diversity tax incentive upon which to base this deduction. If the deduction is too small, then it will not incentivize businesses to add more women. However, if the deduction is too big, the government is unlikely to pass the deduction. 26 U.S. Code § 199(a) allows for some nonincorporated businesses to deduct twenty percent of their gross business income.[176] Although the deduction does not apply to corporations, it provides a standard regarding deductions that the government is willing to pass.[177] Considering that the proposed deduction only applies to a specific diversity initiative, a range smaller than twenty percent is likely needed to ensure the deduction passes. The proposed range of five to ten percent was chosen to balance the feasibility of passage while still trying to adequately incentive businesses.

Some deductions are capped, meaning that the deduction cannot exceed a certain limit. For instance, § 179, which is a deduction for businesses expenses, is capped at one million dollars.[178] Based off this cap, the proposed deduction is also capped at one million. Given how profitable some businesses are, the deduction is meant to limit the lost taxable revenue.

However, the deduction was purposely set high in an attempt to incentive as many businesses as possible. The cap is much bigger than the penalty imposed by California's quota, which is currently set at $100,000 for a first-time violation and $300,000 for any

175. *Id.*
176. 26 U.S.C. § 199(a).
177. *See id.*
178. *Id.* § 179(b)(1).

additional violations.[179] For corporations grossing millions of dollars of profit, a $100,000 penalty is likely not as strong an incentive as a one-million-dollar tax deduction. Although a capped deduction may not incentive the most profitable United States corporations as much as a non-capped deduction, the highest grossing corporations are typically highly publicized in the media and the news. For these corporations, public backlash is arguably a more effective motivation for changing their board structure, as evidenced by recent changes made by highly profitable corporations, such as Amazon and Goldman Sachs, in response to the media.[180]

B. *The Benefits of Tax Incentives*

Most Americans prefer the free market, which means that they want the government to not interfere with businesses.[181] This preference for limited interference makes a lot of policies hard to pass. This section will focus on Americans' preference for a free market and why tax incentives are a good solution around this preference.

A 2019 Gallup poll found that only forty-two percent of Americans want an active government and eighty-seven percent of Americans evaluate the term "free enterprise" positively.[182] As a result, many Americans likely operate under the assumption that the market is better than the government for structuring businesses. This has likely halted the creation of policies that overtly regulate the business sector, such as corporate quotas.

The United States "regulates business pervasively—but distinctively—via [the tax system]."[183] Despite their technicalities, taxes are just a type of public policy.[184] Tax incentives and penalties are used extensively in the United States because they "preserve the appearance of voluntarism" unlike traditional policies.[185] Taxes do

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179. CAL.CORP. CODE § 301.3(e)(1) (Deering 2021).

180. Chana R. Schoenberger, *Boycotts and Corporate Boards*, STAN. SOCIAL INNOVATION REV. (Spring 2021), https://ssir.org/articles/entry/boycotts_and_corporate_boards [https://perma.cc/T8HG-22TC].

181. Jeffrey M. Jones & Lydia Saad, *U.S. Support for More Government Inches Up, but Not for Socialism*, GALLUP (Nov. 18, 2019), https://news.gallup.com/poll/268295/support-government-inches-not-socialism.aspx [https://perma.cc/8D78-XRZF].

182. *Id.*

183. Alstott, *supra* note 8, at 45.

184. B. Guy Peters, THE POLITICS OF TAXATION: A COMPARATIVE PERSPECTIVE 3 (Blackwell 1991).

185. Alstott, *supra* note 8, at 45.

not technically force corporations to act in a particular way.[186] However, tax deductions are monetary incentives.[187] Given that businesses are motivated to maximize profit, taxes can play a role in shaping the decisions of businesses.[188]

Taxes are also preferred because they face less opposition than traditional policies.[189] This is because tax law is so technical that most citizens are unaware that the government uses taxes to achieve policy objectives.[190] For instance, the federal government provides tax incentives to corporations that use alternative fuels and solar power to improve global warming.[191] The government also uses taxes to punish corporate decisions that they deem harmful, such as excessive compensation for top executives and illegal bribes and kickbacks.[192] Although most Americans are ignorant of business-focused tax incentives, the business sector is acutely aware and responsive to changes in the tax law. Many businesses, especially large ones, optimize their tax incentives, making these incentives largely successful in shaping business decisions but unlikely to face public backlash.[193]

C. *The Drawbacks of Tax Incentives*

Although tax deductions are likely an effective way to increase gender equity on boards, they come with a cost. Tax deductions decrease the total taxable income, leading to a higher government deficit. This section will focus on this drawback, highlighting the recent backlash corporations get when they avoid taxes.

In 2021, seventy-seven percent of Americans stated in a Gallup poll that they care about the government deficit a "great deal" or a "fair amount."[194] The government deficit is therefore important to most voters, potentially making it less likely that Congress will pass another tax deduction. Corporate tax deductions also contribute to major corporations getting away with paying little or no

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186. *Id.*
187. *See id.* at 45–46.
188. *See id.* at 46.
189. *See id.*
190. *Id.*
191. *Id.* at 47.
192. *Id.* at 47–48.
193. *Id.* at 46.
194. *Federal Budget Deficit*, GALLUP, https://news.gallup.com/poll/147626/federal-budget-deficit.aspx [https://perma.cc/7VKG-RRVU].

federal taxes despite making millions in profit. In 2020, at least fifty-five major corporations did not pay any federal taxes, due to tax loopholes, deductions, and credits.[195] This list includes well-known corporations, such as FedEx and Nike.[196] Public outrage over this issue may discourage Congress from passing another deduction, although as previously mentioned most Americans are laregely ignorant about technical changes in tax law.

Despite these drawbacks, taxes are still a feasible and practical alternative to a traditional policy. Although tax deductions decrease taxable income, Congress cares about more than just money when they make policy decisions. While the deduction will help corporations pay less in taxes, the deduction is a relatively small amount of the total taxable income.

CONCLUSION

American society has largely grown to favor gender equitable boards, yet most corporations do not make gender a priority. This has resulted in the slow growth of female directors, making it essential for the government to enact a policy.[197] Corporate quotas, disclosures, and a Rooney Rule are frequently floated as potential solutions, yet they either are not feasible or not effective.[198] This Comment proposed a federal tax deduction to encourage the growth of female directors. Taxes are easier to pass than traditional policies and corporations seem motivated to decrease the money they pay in taxes.[199] Although tax deductions have some drawbacks, the benefit of achieving gender equality arguably outweighs the negatives.

Future research should also focus on alternative types of diversity. People of color, veterans, the disabled, and members of the LGBTQ+ community face similar obstacles in achieving representation on corporate boards. Additionally, other types of tax incentives can help achieve gender equity, such as individual tax credits for daycare and tax credits for reproductive and family planning services.[200] Achieving gender parity on boards is a seemingly

195. Gardner & Wamhoff, *supra* note 11.
196. *Id.*
197. *Supra* Part I.
198. *Supra* Part II.
199. *Supra* Part III.
200. Marcello Estevao, Vitor Gaspar, Navid Hanif & Pascal Saint-Amans, *How Tax Reform Can Promote Growth and Gender Equality in the Post-COVID Era*, PLATFORM FOR

straightforward goal but has complex solutions. Tax deductions may not be a perfect solution but there is arguably no perfect way to correct the inequalities of corporate America. Women's voices have gone unheard for too long. Taxes can help change that.

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COLLABORATION ON TAX (June 4, 2021), https://www.tax-platform.org/news/blog/Tax-Reform-Gender-Equality-in-the-Post-COVID-Era [https://perma.cc/YZ8V-8RKH].

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