

A Real Seat at the Table: Identity Capitalism and State Law Efforts to Diversify Corporate Boards

ELLEN E. FARWELL*

INTRODUCTION

In January 2020, Goldman Sachs announced that it would no longer underwrite initial public offerings for companies without at least one “diverse” board member, “with a focus on women.”¹ Goldman CEO David Solomon described the new policy “as the best advice for companies that want to drive premium returns for their shareholders” because new public companies with a female director performed “significantly better than those without a woman on their board.”² Like new state corporate laws requiring corporations to diversify their boards of directors, Goldman’s policy came in the context of a growing consensus that businesses are more profitable when their leaders and workers have diverse life experiences.³ It

* Faculty Fellow at New England Law | Boston. J.D., Boston College Law School; B.A., Columbia University. Many thanks to Kyle Sutton, the *New England Law Review* staff, and Natasha Varyani for the opportunity and encouragement to participate in the Spring 2022 Symposium.

¹ *Goldman’s Playbook for More Diverse Corporate Boards*, N.Y. TIMES (Jan. 24, 2020), <https://perma.cc/G2HM-VR9P>. Goldman is not alone in driving change through investor-focused policies. In 2017, both Blackrock and State Street Global Advisors announced they would each vote against boards that were not making progress in diversifying their membership. Anthony Goodman & Rusty O’Kelley, *Institutional Investors Lead Push for Gender-Diverse Boards*, HARV. L. SCH. F. CORP. GOVERNANCE (Apr. 26, 2017), <https://perma.cc/429Q-MJA2>. Both firms made their expectations more concrete in the years since 2017. *See, e.g.*, BLACKROCK, BLACKROCK INVESTMENT STEWARDSHIP: PROXY VOTING GUIDELINES FOR U.S. SECURITIES (2022), <https://perma.cc/5U7Z-98G5>; Billy Nauman, *State Street to Insist Companies Disclose Diversity Data*, FIN. TIMES (Jan. 10, 2021), <https://perma.cc/6XME-AZ76>.

² Squawk Box, *Goldman CEO Says Firm Won’t Take Companies Public that Don’t Have at Least One Diverse Board Member* (CNBC video Jan. 23, 2020), <https://perma.cc/4GP4-XDVP>.

³ *See, e.g.*, SUNDIATU DIXON-FYLE ET AL., DIVERSITY WINS: HOW INCLUSION MATTERS (2020), <https://perma.cc/R5UL-4RDW> (describing an increased likelihood of above-average

makes good business sense to include women and people of color at the table, including the board table.⁴ There is a risk, though, that policies and new state laws that mandate a minimum number of diverse board members create the appearance of diversity without necessarily leading to meaningful change in the decisions made at the highest levels.

In *Identity Capitalists: The Powerful Insiders Who Exploit Diversity to Maintain Inequality*, Professor Nancy Leong makes a compelling, detailed, and personal argument that the commodification of diversity demands a high price of diverse “outgroup” members, while reaping a distinct profit for “ingroup identity capitalists” who leverage the identities of others.⁵ Professor Leong explains that by “showcasing their affiliations with members of . . . outgroups” for their own benefit, identity capitalists hinder “deeper and more authentic relationships among members of different groups” and impede “real substantive reform.”⁶ After laying bare the countless (and now seemingly omnipresent) ways in which businesses, schools, and individuals exploit the identities of racial, gender, and sexual orientation outgroup members, Professor Leong describes with painful clarity ways in which existing U.S. laws enable the harms of identity capitalism.⁷ Professor Leong’s forceful explanation of the law’s embrace and propping up of identity capitalism begins with antidiscrimination laws, but extends into affirmative action, copyright and trademark law, jury selection, abortion, and free speech.⁸ In each context, Professor Leong argues convincingly that the law should be changed to protect against ingroup manipulation of the identity capital of outgroup members. The law, Professor Leong argues, can be reformed to “provide a foundation for replacing superficial identity capitalism with deeper, more substantive progress toward equality.”⁹

In this brief response, I extend Professor Leong’s analysis to the issue of corporate board membership, suggesting that here too the law can either enable harmful identity capitalism or be a powerful tool for real progress. While Professor Leong primarily focuses on areas where the law could better protect outgroup members, in the area of corporate board membership there

profitability for companies across the globe in the top quartile of gender diversity within their boards compared to those companies with the least gender diverse boards).

⁴ See Goodman & O’Kelley, *supra* note 1.

⁵ NANCY LEONG, *IDENTITY CAPITALISTS: THE POWERFUL INSIDERS WHO EXPLOIT DIVERSITY TO MAINTAIN INEQUALITY* (2021).

⁶ *Id.* at 5–6.

⁷ See, e.g., *id.* at 17, 108–10, 115–17, 121–25, 130–33.

⁸ *Id.* at 135, 138, 140, 143, 147–48, 154.

⁹ *Id.* at 159.

is an opportunity for the law to go beyond protection. At the corporate board table where such great power resides, the law could instead generate greater “returns” for outgroups by ensuring that their members have seats of meaningful power and influence. I begin by describing current trends relating to the composition of public company boards of directors. Next, I turn to recent statutory efforts, specifically in California, to move the needle on the diversity of these boards. Finally, through the lens of identity capitalism, I argue that lawmakers have a chance to proactively solidify the power and influence of outgroup directors of corporate boards and limit the inadvertent reinforcement of identity capitalism.

I. Corporate Board Composition and the Push for Change

The size and composition of a public company’s board of directors is shaped, among other things, by the law in its state of formation and the standards of the stock exchange on which it is listed. The American Bar Association’s Model Business Corporation Act, which has been adopted in some form by the majority of states, requires only that a business corporation have at least one director.¹⁰ The same is true in Delaware,¹¹ the state in which the greatest number of corporations are formed.¹² The scant membership requirements of the New York Stock Exchange and Nasdaq focus largely on there being at least three independent members of a company’s audit committee.¹³ Governance experts suggest that corporate boards should include between nine and twelve directors and should limit director tenure.¹⁴ While the standards are limited, there is a great deal of consistency in the size and composition of public company boards. In May 2021, the average size of the board of directors of S&P 500 corporations was 10.8.¹⁵ The boards of the Top 100 companies had between seven and seventeen

¹⁰ MODEL BUS. CORP. § 8.03(a) (AM. BAR. ASS’N 2021); see Am. Bar Ass’n, *Corporate Laws Committee*, ABA, <https://perma.cc/7H2E-YJF7> (last visited Apr. 6, 2022) (regarding enactment by states).

¹¹ DEL. CODE ANN. TIT. 8, § 141(b) (2020).

¹² Elaine Zelby, *How Delaware Became the State Where Companies Incorporate*, MEDIUM (Jan. 30, 2019), <https://perma.cc/FG8B-EFK4>.

¹³ See Nasdaq, *5600. Corporate Governance Requirements*, LISTING CENTER: NASDAQ IM-5605-3, IM-5605-4, <https://perma.cc/5G8Y-599H> (last visited April. 6, 2022); *Listed Company Manual: 303A.07 Audit Committee Additional Requirements*, NYSE § 303A.07(a), <https://perma.cc/MZM8-YYSN> (last visited Apr. 6, 2022).

¹⁴ See, e.g., Robert Reiss, *The 10 Best Practices for an Effective Board*, FORBES (Nov. 25, 2015, 8:47 AM EST), <https://perma.cc/7XZ7-7BY7>.

¹⁵ SPENCER STUART, 2021 U.S. SPENCER STUART BOARD INDEX 9, 43 (2021), <https://perma.cc/4B6D-E6ZD> [hereinafter BOARD INDEX].

members, with over 70% of those companies having boards with ten to thirteen directors.¹⁶ The question is then, who is sitting in those board seats?

According to a 2020 analysis by the Environmental Social and Governance (“ESG”) division of Institutional Shareholder Services, Black directors made up 4% of the membership of boards of the Russell 3000, with Black women making up just 1.5%.¹⁷ In the same year, 13.4% of those companies still did not have a single woman on their board.¹⁸ At the same time, less than 15% of board leaders, including in this case the independent board chair, audit committee chair, and compensation committee chair, identified as being from historically underrepresented racial or ethnic groups.¹⁹ These somber statistics are, regrettably, signs of progress.

Between 2019 and 2020, the number of new Black directors joining Fortune 500 company boards tripled.²⁰ The following year the percentage of directors within the Russell 3000 who identified as Black, Asian, Hispanic, Middle Eastern or from another nonwhite ethnic group increased from 14% to 17%.²¹ For women, the glass ceiling in Fortune 500 companies finally broke in 2019 when for the first time there were no all-male boards.²² This notable benchmark came near the end of a decade of significant, but inconsistent, progress.²³ Between 2011 and 2021, the percentage of women serving as directors of S&P 500 companies increased from 16% to 30%.²⁴

This progress, admittedly insufficient and inconsistent, has been demanded by shareholders, employees, customers, and the broader community.²⁵ In many cases, spurred by protests that followed the murder

¹⁶ SHEARMAN & STERLING LLP, CORPORATE GOVERNANCE AND EXECUTIVE COMPENSATION SURVEY 2021 33 (2021), <https://perma.cc/UG72-FKXN>.

¹⁷ Peter Eavis, *Diversity Push Barely Budes Corporate Boards to 12.5%, Survey Finds*, N.Y. TIMES (Sept. 15, 2020), <https://perma.cc/P83U-79ZS> [hereinafter Eavis, *Diversity Push*].

¹⁸ Matteo Tonello, *Corporate Board Practices in the Russell 3000 and S&P 500*, HARV. L. SCH. F. CORP. GOVERNANCE (Oct. 18, 2020), <https://perma.cc/3G38-VWUD>.

¹⁹ BOARD INDEX, *supra* note 15, at 23.

²⁰ Jeff Green, *Black Directors Gained Ground in the Boardroom as Others Slipped*, BLOOMBERG (June 18, 2021, 7:00 AM EDT), <https://perma.cc/ES8K-VY5J>.

²¹ Peter Eavis, *Board Diversity Increased in 2021. Some Ask What Took So Long.*, N.Y. TIMES (Jan. 3, 2022), <https://perma.cc/T6YG-AEEN>.

²² Vanessa Fuhrmans, *The Last All-Male Board on the S&P 500 Is No Longer*, WALL ST. J. (July 24, 2019, 5:20 PM EST), <https://perma.cc/D3HF-REUC>.

²³ See Tonello, *supra* note 18.

²⁴ BOARD INDEX, *supra* note 15, at 4.

²⁵ See Chauncey Alcorn, *George Floyd’s Death Was a Wake-up Call for Corporate America. Here’s What Has—And Hasn’t—Changed*, CNN, <https://perma.cc/NGN3-LC47> (last updated Oct. 7, 2021, 7:00 PM EDT).

of George Floyd in June 2020, companies have made and acted on commitments to add Black directors to their boards.²⁶ We can construe efforts by companies to make changes to the composition of their boards in a number of ways. At best, these changes reflect meaningful, purposeful, and earnest efforts to expand and enhance the representation and influence of historically underrepresented groups in a company's leadership. At worst, some companies may be checking a box, and in doing so leveraging the identity capital of outgroup directors to avoid potential scorn (and financial penalties) for holding onto their all-white or all-male boards.²⁷ Blatant identity capitalism, as described by Professor Leong, exists at every level and in every realm of our society.²⁸ To the extent that some public companies are exploiting the identities of their directors, the law may be part of the solution.

II. State Corporate Law as an Invitation to the Table

In laying out principles for undermining the power of identity capitalism, Professor Leong explains that “the law itself is . . . a powerful tool for addressing identity capitalism.”²⁹ This notion, that the law can help to dismantle and then reconstruct racist and sexist structures that permeate business, education, and society, is evident in recent legislative efforts to increase board diversity. The question though, as Professor Leong insists we ask, is whether these new legal tools are weakening or buttressing the power of identity capitalism.

In 2018, California enacted SB-826 with the worthy goals of accelerating gender parity and gender equity in the workplace.³⁰ The means of achieving

²⁶ For example, in September 2020, three Silicon Valley executives founded The Board Challenge, “a movement to improve the representation of Black directors in corporate U.S. boardrooms . . .” Approximately twenty-five companies joined The Board Challenge, committing to add one Black director to their board in the next year. *About Us*, THE BOARD CHALLENGE, <https://perma.cc/MR6T-MZDG> (last visited Apr. 6, 2022). Others, like Best Buy, Merck, Southwest, and Verizon, which each already had at least one Black director, joined as Charter Pledge Partners and committed to using their resources to accelerate change more generally. See *The Board Challenge Mission Is Clear*, THE BOARD CHALLENGE, <https://perma.cc/FJM9-US72> (last visited Apr. 6, 2022).

²⁷ See LEONG, *supra* note 5, at 7 (defining identity capitalism as “an effort to gain the [benefit] associated with diversity without doing any of the difficult work to make substance racial progress a reality”).

²⁸ See, e.g., LEONG, *supra* note 5, at 4, 13–16, 24, 32 (describing acts of identity capitalism by Senator Bernie Sanders, the University of Wisconsin, Facebook, and Nike).

²⁹ LEONG, *supra* note 5, at 157.

³⁰ See CAL. CORP. CODE §§ 301.3(a), 2115.5 (West 2021) (codifying the bill); SB 826: *Women on*

these goals was to require that public companies whose principal executive offices were in California have at least one woman on their board by the end of the following year or be subject to a fine of \$100,000.³¹ This initial requirement was followed by an expectation that by the end of 2021 any public companies with five board members would have at least two women on their boards and that companies with six or more board members would have at least three women serving as directors.³² SB-826 specifically allows for companies to increase the size of their board in conjunction with satisfying the law's requirements.³³ According to at least one initial report, SB-826 appears to have succeeded in spurring an increase in the number of women on the boards of public companies based in California.³⁴ Between 2018 and the end of 2021, the number of women serving on public company boards in California increased from 766 to 1844, decreasing the percentage of boards without a single woman director from 30% to 1%.³⁵

Two years after adopting SB-826, California enacted AB-979, which required that by the end of 2021 public companies headquartered in the state include on their boards at least "one director from an underrepresented community," defined as an individual who self-identifies as Black, Latino, Hispanic, Asian, Pacific Islander, Native American, Native Hawaiian or Alaska Native or as lesbian, gay, bisexual, or transgender ("LGBT").³⁶ In 2022, AB-979 requires companies with four or more board members to have minimum of two directors from underrepresented communities and those with nine or more board members to have a minimum of three directors from underrepresented communities.³⁷

Corporate Boards, NAWBO: NAT'L ASSOC. WOMEN BUS. OWNERS, <https://perma.cc/6YP7-2K9D> (last visited Apr. 6, 2022).

³¹ CAL. CORP. CODE §§ 301.3(a),(e), 2115.5.

³² CAL. CORP. CODE § 301.3(b).

³³ *Id.* at 301.3(a).

³⁴ See Samantha Burdick et al., *Legal or Not, It's Working: Mandatory Board Diversity for Publicly-held Companies Headquartered in the Golden State*, JD SUPRA, (Apr. 15, 2021), <https://perma.cc/5BRH-Z97Q>.

³⁵ *Women on Boards: Just the Facts*, CAL. PARTNERS PROJECT, <https://perma.cc/XY77-TVGV> (last visited Apr. 6, 2022). While this data suggests there has been substantial change since the law was passed, a March 2021 report from the California Secretary of State's office tells a less clear picture—less than half of the corporations subject to the law submitted their statutorily required filings. See *Women on Boards: March 2021 Report 3* (Cal. Sec'y of State Mar. 2021), <https://perma.cc/GQS3-QLDL>.

³⁶ CAL. CORP. CODE § 301.4(a), (e)(1) (codifying the language of the bill); 2020 Cal. Stat. ch. 316.

³⁷ CAL. CORP. CODE § 301.4(b).

Though not the first legislative efforts to impact board diversity,³⁸ SB-826 and AB-979 have prompted significant attention—both positive and negative. Several states followed California’s lead by adopting resolutions and statutes that urge or require companies to diversify the membership of their boards.³⁹ Others passed or are considering bills that, like recently approved Nasdaq diversity disclosure rules,⁴⁰ require companies to disclose the racial and gender composition of their boards.⁴¹ Washington state combined the two approaches, requiring that public companies that do not “have a gender-diverse board of directors” with women constituting at least 25% of directors must provide a report to shareholders on the company’s plans and policies relating to the development and maintenance of board diversity.⁴²

At the same time, SB-826 and AB-979 have faced various and anticipated legal challenges.⁴³ The first challenge, *Crest v. Padilla*, was filed on behalf of

³⁸ In 2013, California’s legislature adopted a resolution encouraging public companies to increase the number of women on their boards by the end of 2016. S. Con. Res. 62, 2013–2014 Legislature, Reg. Sess. (Cal. 2013). This non-binding resolution failed to convince more than one-quarter of public companies based in California to add women to their boards. 2018 Cal. Stat. ch. 954, § 1(b), (e)(2). In 2017, Colorado passed a similar non-binding resolution encouraging companies to include a minimum number of women on their boards. H.R.J. Res. 17-1017, 71st Gen. Assemb., 1st Reg. Sess. (Colo. 2017).

³⁹ See, e.g., 805 ILL. COMP. STAT. 5/8.12 (2022); 805 ILL. COMP. STAT. 5/14.05(k) (2021); WASH. REV. CODE § 23B.08.120 (2020); S. 2080, 192d Gen. Court, Reg. Sess. (Mass. 2021).

⁴⁰ See Allison Herren Lee & Caroline A. Crenshaw, *Statement on Nasdaq’s Diversity Proposals – A Positive First Step for Investors*, U.S. SEC. & EXCHANGE COMMISSION (Aug. 6, 2021), <https://perma.cc/SJ9G-LNZR> (announcing Securities Exchange Act Release No. 34-92590).

⁴¹ See, e.g., *Gender Diversity in the Boardroom – Annual Report*, 2019 Md. Laws ch. 513, <https://perma.cc/9QNV-WEWU> (requiring domestic corporations to report the number of women on their board on their personal property tax filing); S. Res. 4278, 2019-2020 Legislature, Reg. Sess. (N.Y. 2019) (requiring domestic and foreign companies, whether public or private, to report on the number of women serving on their board of directors to facilitate a study by Departments of State and Taxation and Finance).

⁴² WASH. REV. CODE § 23B.08.120.

⁴³ See, e.g., *Meland v. Weber*, 2 F.4th 838, 849 (9th Cir. 2021) (reversing District Court dismissal for lack of standing of challenge by shareholder of SB-826); *Compl. for Declaratory & Injunctive Relief, Nat’l Ctr. for Pub. Policy Research v. Weber*, <https://perma.cc/KEA4-CD6F> (E.D. Cal. Nov. 22, 2021) (No. 2:2021CV02168); *Compl. for Declaratory & Injunctive Relief, Crest v. Padilla*, <https://perma.cc/Q3QW-5X39> (Ca. Super. Ct. Aug. 6, 2019) (No. 19STCV27561) (hereinafter *Crest I Complaint*). Both the legislature and Governor Brown acknowledged in adopting these laws that they would likely be challenged. See, e.g., Michael Burdick, *SB 826*, Assemb. Floor Analysis No. 0004503, 2017–2018 Legislature, Reg. Sess. 4 (Cal. 2018), <https://perma.cc/7XZD-NQYK>; S. Rules Comm., *AB 979*, S. Floor Analyses, 2019–2020 Legislature, Reg. Sess. 6–7 (Cal. 2020), <https://perma.cc/M8HF-4PNH>; Letter from Edmund G.

three California taxpayers who claim that enforcement of SB-826 requires the state to illegally use taxpayer funds to enforce a law that discriminates on the basis of gender in violation of the California constitution.⁴⁴ More recently, the Alliance for Fair Board Recruitment filed a complaint in July 2021 arguing that SB-826 and AB-979 violate the Equal Protection Clause of the 14th Amendment, 42 U.S.C. § 1981, and the internal affairs doctrine.⁴⁵ Interestingly (and perhaps not surprisingly), the Alliance for Fair Board Recruitment (the “Alliance”) was formed by Edward Blum,⁴⁶ who Professor Leong describes as being “on a crusade to reshape laws relating to race” by assuming “the mantle of a crusader for racial justice,” all the while usurping the voice of outgroup members.⁴⁷ Here again we see Blum’s strategy of forming straw organizations to speak on behalf of those allegedly disadvantaged by laws that aim to create greater equality and opportunity. With respect to SB-826 and AB-979, the Alliance argues that it represents a “former corporate board director,” who by virtue of these laws and his being a white male is being “deprived of an equal playing field on which to compete for board positions at corporations headquartered in California.”⁴⁸ Unlike his attacks on university affirmative action programs, in the argument against SB-826 and SB-797 Blum does not deploy window dressing (in the form of outgroup member plaintiffs) around his opposition to these laws that take prior racial and sex discrimination and disadvantage into account. Despite not recruiting them as plaintiffs, the Alliance makes brief mention in its complaint of theoretical outgroup allies⁴⁹, who might

Brown, Jr., Governor of Cal., to the Members of the California State Senate (Sept. 30, 2018), <https://perma.cc/JPN7-ZMR6>.

⁴⁴ See Crest I Complaint, *supra* note 43, at ¶19. In April 2022, the same plaintiffs were granted summary judgment by the Los Angeles County Superior Court in a challenge to SB-979 based on similar grounds. See Ct. Order, *Crest v. Padilla*, <https://perma.cc/RZL4-PSRQ> (Ca. Super. Ct. Apr. 1, 2022) (No. 20STCV37513). This decision is expected to be appealed to California Court of Appeal. See John P. Stigi III, Alejandro E. Moreno & Chloe Chung, *Los Angeles Superior Court Invalidates California Board Diversity Statute, Rendering It Ripe for Review by the California Court of Appeal*, NAT. L. REV. (Apr. 8, 2022), <https://perma.cc/EK69-XZT8>.

⁴⁵ Compl. for Declaratory and Injunctive Relief ¶¶45–65, *Alliance for Fair Bd. Recruitment v. Weber*, <https://perma.cc/7NDC-FXPY> (C.D. Cal. July 12, 2021) (No. 2:21CV05644) (hereinafter *Alliance Complaint*).

⁴⁶ Jody Godoy, *Activist Behind Harvard Race Case Takes Aim at Calif. Board Laws*, REUTERS (July 13, 2021, 5:56 PM EDT), <https://perma.cc/KEU8-LLYJ>.

⁴⁷ LEONG, *supra* note 5, at 137, 139–40.

⁴⁸ *Alliance Complaint*, *supra* note 45, at ¶10.

⁴⁹ See *Alliance Complaint*, *supra* note 45, at ¶¶ 38–39 (noting that the definition of underrepresented communities does not include certain ethnic groups or gender non-conforming individuals).

improve the optics of “white people complaining that groups they have systematically disadvantaged for decades or centuries might now have that disadvantage taken into account.”⁵⁰ According to the Alliance, the California laws fail to include Arabs, Armenians, those who identify as gender non-conforming or intersex, and others within the definition of those from underrepresented communities.⁵¹ Whether members of these groups were unwilling to participate in the Alliance or if Blum did not have the gall to seek them out is of little importance. The interests of these outgroup members is not, we can be sure, Blum’s real fight. Instead, the Alliance’s prime argument against SB-826 and AB-979 focuses on the harm to white men who have long sat at the most powerful tables in our country.

While analysis of the legal arguments offered by the parties in these cases (and in the other pending challenges) is beyond the scope of this response, Professor Leong’s identity capitalism framework poses a different and compelling question about whether laws like SB-826 and AB-979 are structured to effectively dismantle inequities or instead carry the risk of encouraging identity capitalism at the highest corporate levels.⁵²

III. A Voice at the Table

Getting seats at the corporate board table for women, Black people, and other outgroup members is a necessary step in the direction of true equity in corporate America. But it is not enough.⁵³ If complying with a new state law by adding more diverse members to a company’s board of directors is a mere “business strategy,” further commodification of outgroup member identity may be an unintended side effect.⁵⁴ Authentic efforts to include outgroup members will require that relevant laws and policies acknowledge the risks

⁵⁰ Cf. LEONG, *supra* note 5, at 138–39 (discussing a similar “optical improvement” in Blum’s affirmative action case where Blum is ostensibly advocating for “hardworking Asian Americans who suffered discrimination at the hands of elite universities”).

⁵¹ Alliance Complaint, *supra* note 45, at ¶39.

⁵² For scholarly discussion of SB-826, see, e.g., Christopher J. Riley, *An Equal Protection Defense of SB 826*, CALIF. L. REV. ONLINE (2020), <https://perma.cc/3P8X-75FV>; Joseph A. Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California’s SB 826* 1 (Rock Ctr. for Corp. Governance, Working Paper No. 232, Sept. 12, 2018), <https://perma.cc/HF7V-ATNM>. For a thoughtful piece on alternatives to state corporate law changes, see Sunitha Malepati, *The Future (Public Company Boardroom) Is Female: From California SB 826 to a Gender Diversity Listing Standard*, 28 AM. U. J. GENDER SOC. POL’Y & L. 493 (2020).

⁵³ See LEONG, *supra* note 5, at 25 (addressing the incremental value and inadequacy of mandates to diversify).

⁵⁴ LEONG, *supra* note 5, at 23 (describing identity capitalism as a business strategy for counteracting negative publicity).

of tokenism and proactively ensure that outgroup directors are sitting in seats of real power. To extend Professor Leong's analogy of capital, we should ask whether new efforts and evolving laws leverage the capital of outgroup members to increase their principal or if they instead subject that capital to unnecessary or excessive risk.

By requiring a fixed number of diverse board members, SB-826 and AB-979 may allow for the perception by some that female, LGBT, and racially diverse board members have been selected primarily for their outgroup identity and secondarily for their expertise and knowledge.⁵⁵ This has the potential to limit the power of these laws to undermine the stronghold of identity capitalism. Even beyond the risk of their substantive contributions being dismissed or undervalued, there is the risk that, without a critical mass, outgroup directors will not be positioned to meaningfully impact the boards on which they sit.⁵⁶ The California legislature acknowledged this reality, describing that "going from one or two women directors to at least three women directors, creates an environment where women are no longer seen as outsiders and are able to influence the content and process of board discussions more substantially."⁵⁷ And yet, a company with a small board may comply with SB-826 and AB-979 with only one woman and one person from an underrepresented community on its board. Alternatively, a larger board may expand significantly and inadvertently (or intentionally) dilute the critical mass achieved by meeting the laws' minimum requirements.⁵⁸ For example, the influence of three women on a nine-member board is potentially quite different from their influence on a board of fifteen or more members. While it is clear the California legislature intended to address the issue of tokenism, the thresholds in laws like SB-826 and AB-979 should be monitored and adjusted as needed to ensure that new directors do not become isolated or find their power diluted. One simple approach to the

⁵⁵ See Mariateresa Torchia, Andrea Calabrò & Morten Huse, *Women Directors on Corporate Boards: From Tokenism to Critical Mass*, 102 J. OF BUS. ETHICS 299, 301 (2011).

⁵⁶ See VICKI W. KRAMER, ALISON M. KONRAD & SUMRU ERKUT, *CRITICAL MASS ON CORPORATE BOARDS: WHY THREE OR MORE WOMEN ENHANCE GOVERNANCE (EXECUTIVE SUMMARY)* 2-4 (2006), <https://perma.cc/8WQ7-NXDZ>; Torchia et al., *supra* note 55, at 311.

⁵⁷ 2018 Cal. Stat. ch. 954. Assembly Bill 979 did not include similar language addressing the need for a critical mass among directors from underrepresented communities. See 2020 Cal. Stat. ch. 316. Presumably, the same theory applies, but is perhaps more difficult to demonstrate when the pool of potential board members and the variety of their lived experiences is so much broader than in the context of gender.

⁵⁸ See CAL. CORP. CODE §§ 301.3(a), 301.4(a) (West 2021) (outlining the requirements); see also Maria Moats & Paul DeNicola, *You Say You Want a More Diverse Board. Here's How to Make it Happen.*, HARV. BUS. REV. (Mar. 11, 2021), <https://perma.cc/5LX6-DUZ8>.

dilution challenge would be setting minimum numbers to address the actual number of the largest companies subject to any particular law.

In conjunction with monitoring the relative number of outgroup directors serving on corporate boards, attention must be paid to the seats in which those directors sit.⁵⁹ According to the ESG division of Institutional Shareholder Services:

directors from underrepresented groups [are] much less likely to have positions with the most influence over the direction of companies and their boards. Nine out of 10 people in those positions — the board chair, the head of the committee that recruits top executives and new board members, and the head of the committee that sets compensation for senior executives — are white.⁶⁰

Women, and other outgroup directors, who are not occupying the board or committee chair seats risk being sidelined while providing those in power with an arguable claim that diversity matters to them.⁶¹ As legislatures consider corporate diversity threshold and disclosure laws, turning attention beyond simple membership numbers to the specific roles played by board members has the potential to undercut the ability of identity capitalists to tell a story of diversity without real substance. More detailed disclosure requirements relating to leadership positions and to director tenure, while not necessarily ensuring the ascendance of outgroup directors to committee and board chair positions, have the potential to shed additional light on this issue and in so doing to create greater power in the hands of outgroup directors.

CONCLUSION

The drumbeat for representation and inclusion in the corporate board room has been building for some time and rightly is not getting any quieter. Investors, employees, and customers—and in the passage of laws like California’s SB-826 and AB-979 lawmakers and citizens—are expecting progress. As outlined by Professor Leong, real progress, rather than identity

⁵⁹ Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L.J.145, 196 (2019) (asserting need for more substantive diversity disclosure requirements, including the leadership roles played by men and women).

⁶⁰ Eavis, *Diversity Push*, *supra* note 17.

⁶¹ Professor Leong artfully demonstrates this risk in her description of the treatment by the Senate Republicans of Rachel Mitchell, the prosecutor retained to interrogate Christine Blasey Ford during the hearings on the nomination of Supreme Court Justice Brett Kavanaugh. See LEONG, *supra* note 5, at 177.

capitalism in the cloak of progress, will require both legal and social reform. Laws aimed at reshaping corporate boards to better reflect the expertise and experiences of the nation's best leaders have shown initial success in increasing the number of individuals from traditionally underrepresented groups. The true test of our will to topple identity capitalism at the corporate board table will depend on the vision of policymakers in crafting standards that generate meaningful representation of and engagement with outgroup corporate directors.