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**Me, Too and #MeToo:
Women in Congress and the Boardroom**

Joan MacLeod Heminway

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Me, Too and #MeToo: Women in Congress and the Boardroom

*Joan MacLeod Heminway**

ABSTRACT

The “Year of the Woman” (1992) and the year of #MeToo (2018) were landmark years for women in federal congressional elections. Both years also represent significant milestones for women’s roles as U.S. public company directors. In each of these two years, social context was interconnected with these political and corporate gender changes. The relevant social context in 2018 is most clearly defined by public revelations of sexual misconduct involving a significant number of men in positions of political and business power. The relevant social context in 1992 similarly involved specific, highly public disclosures and allegations of sexual misconduct.

These parallels beg many questions. In particular, one may ponder whether the correlation between social context and congressional or public company board elections is coincidence or something more. Apropos of the current era, those of us who focus on corporate board diversity may wonder whether looking at the election of women to Congress and corporate boards in the #MeToo era provides any insights or lessons about female corporate board representation.

This brief Essay examines and comments on possible gender effects of the #MeToo movement on public company board composition in relation to the possible gender effects of the #MeToo movement on the composition of legislative bodies. Although #MeToo has clarified, and perhaps expanded, the salient connections between business issues and women’s issues, those who have the power to elect corporate directors may not fully recognize this connection or other factors as unique values of female corporate board participation. Until additional female membership on corporate boards is substantively valued, swift sustainable changes in the gender makeup of corporate boards may not be realizable without specific, enforceable legal mandates. Although California’s state legislature has taken a bold step in this direction in the #MeToo era, it seems unlikely that additional state legislatures will follow its lead. As a result, the pace of change in corporate board gender composition is likely to continue to be more evolutionary than revolutionary.

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INTRODUCTION

1992 was dubbed the political “Year of the Woman.” The appointment of Clarence Thomas to the U.S. Supreme Court in 1991 after hearings focused on sexual harassment allegations, together with revelations of Bill Clinton’s extramarital sexual conduct during his first campaign for U.S. President, have been credited with the extraordinary number of women elected to federal legislative positions in 1992.¹ That year, “[w]hen the ballots were counted, America had elected a record-breaking four women as senators and 24 women as representatives to Congress.”² In 1992, 494 of the boards of directors of Fortune 500 and Service 500 companies included female directors.³ That number climbed to 526 in 1993, a 6.5% increase.⁴ This, however, represented only 721—or 6.2%—of the 11,715 seats on the boards of directors of those firms.⁵

2018 was, again, a hallmark year for women in politics. It also represented a banner year for the U.S. public company boardroom. Amazingly, the socio-political milieu of 2018 included another U.S. Supreme Court appointment tinged with allegations of sexual miscon-

¹ See Emma Hinchliffe et al., *2018 Is the Second ‘Year of the Woman.’ An Oral History of the Women Who Gave Rise to the First*, FORTUNE (Oct. 30, 2018), <http://fortune.com/longform/oral-history-year-of-the-woman-2018-midterm-elections/> [<https://perma.cc/L5DX-LDBA>]; Sarah Pruitt, *How Anita Hill’s Testimony Made America Cringe—and Change*, HISTORY (Sept. 26, 2018), <https://www.history.com/news/anita-hill-confirmation-hearings-impact> [<https://perma.cc/92B7-LL9C>]; Li Zhou, *The Striking Parallels Between 1992’s “Year of the Woman” and 2018, Explained by a Historian*, VOX (Nov. 2, 2018, 7:10 AM), <https://www.vox.com/2018/11/2/17983746/year-of-the-woman-1992> [<https://perma.cc/275Q-Y9T2>] (interview with Georgetown University professor Michele Swers).

² Zhou, *supra* note 1.

³ See CATALYST, WOMEN ON CORPORATE BOARDS 5 (1993).

⁴ See *id.*

⁵ See *id.* at 7.

duct⁶ and a sitting U.S. President with a publicly reported history of philandering and lechery.⁷ These and other examples frame the #MeToo movement,⁸ which undoubtedly was a factor in both the unprecedented number of women seeking political office in 2018 and a simultaneous renewed interest in gender diversity on corporate boards of directors. Perhaps this is not surprising. #MeToo largely emanates from the abuse of gendered power in government and business firms—the sectors in which congressional and public company director elections occur. Moreover, government and business, especially public companies (which are largely corporations), are together re-

⁶ See, e.g., Nancy Chi Cantalupo, *Dog Whistles and Beachheads: The Trump Administration, Sexual Violence, and Student Discipline in Education*, 54 WAKE FOREST L. REV. 303, 338 (2019) (stating that “then-Judge Kavanaugh was accused of sexually harassing and assaulting multiple teenage girls when he was in high school and college”); Michele Goodwin & Mariah Lindsay, *American Courts and the Sex Blind Spot: Legitimacy and Representation*, 87 FORDHAM L. REV. 2337, 2338 (2019) (noting and describing the testimony of Dr. Christine Blasey Ford during Justice Kavanaugh’s confirmation hearings); Marla N. Greenstein, *Addressing Sexual Harassment in the Courts*, 57 JUDGES’ J. 1, 1 (2018) (mentioning “the additional hearing addressing allegations of attempted sexual assault against Supreme Court nominee Brett Kavanaugh”); Dara E. Purvis, *Trump, Gender Rebels, and Masculinities*, 54 WAKE FOREST L. REV. 423, 449 (2019) (noting the revelation of “multiple allegations of sexual assault arose from his years in high school and college” during Justice Kavanaugh’s nomination hearings).

⁷ See, e.g., Brooke D. Coleman & Elizabeth G. Porter, *Reinvigorating Commonality: Gender and Class Actions*, 92 N.Y.U. L. REV. 895, 905 (2017) (mentioning “rampant and credible sexual assault allegations against Donald Trump” in the 2016 presidential election); Sally J. Kenney, *Toward a Feminist Political Theory of Judging: Neither the Nightmare nor the Noble Dream*, 17 NEV. L.J. 549, 553 (2017) (noting “Donald Trump’s propensity toward sexual assault”); Emily A. Robey-Phillips, *Federalism in Campus Sexual Violence: How States Can Protect Their Students When a Trump Administration Will Not*, 29 YALE J.L. & FEMINISM 373, 391–92 (2018) (pointing out that “then-candidate Trump’s campaign was nearly derailed when a video of him bragging about committing sexual assault went viral”); Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 J. LEGAL EDUC. 739, 757 (2017) (mentioning “the airing of Donald Trump’s ‘grab ‘em by the pussy’ remarks” during the 2016 presidential campaign).

⁸ This Essay uses the term “#MeToo movement” in an expansive way to refer to cohesive—and, in some cases, coordinated—responses to recent increased and continuing disclosures of sexual assault and harassment, especially sexual misconduct in workplaces and in working relationships. It should be acknowledged, however, that the moniker “Me Too” was actually coined in the sexual misconduct context more than a decade ago in efforts “to help survivors of sexual violence, particularly Black women and girls, and other young women of color from low wealth communities, find pathways to healing.” *History & Vision*, ME TOO, <https://metoomvt.org/about/#history> [<https://perma.cc/6S3M-MTT9>]; see also Chicago Tribune, *#MeToo: A Timeline of Events*, CHI. TRIB. (Sept. 18, 2018, 8:37 AM) <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htm1story.html> [<https://perma.cc/G6S9-S8AY>] (“In 2006, Tarana Burke coined the phrase ‘Me Too’ as a way to help women who had survived sexual violence. Fast-forward more than 10 years, and the phrase has been reignited as the slogan of the anti–sexual harassment movement.”).

sponsible for the fundamental regulation of our economic and social lives.⁹

Given these parallels, there may be some value to looking at both the political and business management reactions to #MeToo, taken together. As a female transactional business lawyer and business law scholar whose work often intersects with corporate governance, I have long been interested in board composition from a gender viewpoint. In my years of law practice, I often sat in client conferences, management meetings, and boardrooms in which I was one of few, if any other, women. From time to time, my published work has touched on aspects of the issue of women in corporate management.¹⁰ Yet, to date, I have not explored connections between political and corporate governance through a gender lens. This Essay preliminarily undertakes that task in the hopes that it will lead to new observations about the prospects for the increased gender diversity of corporate boards of directors and additional related research.

Specifically, in this Essay, I am interested in briefly comparing, contrasting, and reflecting on the possible gender effects of the #MeToo movement on public company board composition in relation to the possible gender effects of the #MeToo movement on the composition of legislative bodies. Any actual effects of the #MeToo movement will only be observable and verifiable through an engaged research agenda comprised of quantitative and qualitative empirical studies. As a result, this Essay merely promises to scratch the surface—begin a conversation—by identifying salient issues and suggesting possible avenues for further inquiry. Although it must be acknowledged that empirical and theoretical research on the value of gender diversity and inclusion on corporate boards is incomplete and

⁹ *E.g.*, CATALYST, *supra* note 3, at 1 (“[T]he decisions made in corporate boardrooms affect the lives of hundreds of thousands of employees and consumers, as well as the performance and policies of other corporations, the ebb and flow of economic activity, the dealings of the global marketplace and international business strategies.”).

¹⁰ *See, e.g.*, Joan MacLeod Heminway, *Sex, Trust, and Corporate Boards*, 18 HASTINGS WOMEN’S L.J. 173 (2007); Joan MacLeod Heminway, *The Last Male Bastion: In Search of a Trojan Horse*, 37 U. DAYTON L. REV. 77 (2011); Joan MacLeod Heminway & Sarah White, *Wanted: Female Corporate Directors*, 29 PACE L. REV. 249 (2009) (reviewing DOUGLAS M. BRANSON, *NO SEAT AT THE TABLE* (2007)); Joan MacLeod Heminway, *Women in the Crowd of Corporate Directors: Following, Walking Alone, and Meaningfully Contributing*, 21 WM. & MARY J. WOMEN & L. 59 (2014) [hereinafter Heminway, *Women in the Crowd*].

mixed,¹¹ this Essay assumes there is value in board diversity and inclusion, including gender diversity and inclusion.¹²

To achieve these limited objectives, this Essay begins by briefly describing and contextualizing the #MeToo movement and highlighting trends and developments in the gender composition of legislatures and public company boards before making observations about the potential gender effects of the #MeToo movement on public company board composition. These observations include both short-term and long-term potentialities regarding the election of women to, and the service of women on, corporate boards. A summary conclusion is offered to provide closure.

I. THE #METOO MOVEMENT

The #MeToo movement likely needs little introduction for the presumed readers of this Essay. The basic background facts are relatively simple and clear. In response to increasing public revelations of sexual harassment and assault among women across professional spheres—initially and perhaps most famously among women working in the entertainment and media industries¹³—a grassroots coalition developed to focus on encouraging public discourse and political, so-

¹¹ See, e.g., Terry Morehead Dworkin & Cindy A. Schipani, *The Role of Gender Diversity in Corporate Governance*, 21 U. PA. J. BUS. L. 105, 140 (2018) (“Overall, the evidence regarding female board representation and firm performance has strengthened over recent years, but any direct relationship remains ambiguous.”); Darren Rosenblum, *When Does Sex Diversity on Boards Benefit Firms?*, 20 U. PA. J. BUS. L. 429, 484 (2017) (noting and assessing various potential values of gender diversity on corporate boards of directors and urging “contextually accurate work” in the area); Mildred Woryk, *Women in Corporate Governance: A Cinderella Story*, 37 U. DAYTON L. REV. 21, 25 (2011) (“Despite many researchers’ attempts to make the business case for female representation on boards, results are inconclusive.”).

¹² See generally Heminway, *Women in the Crowd*, *supra* note 10 (exploring possible benefits of gender diversity, among other things, in board decisionmaking); Rosenblum, *supra* note 11 (same).

¹³ See, e.g., Margaret E. Johnson, *Feminist Judgments & #MeToo*, 94 NOTRE DAME L. REV. ONLINE 51, 51–52 (2018) (offering the public revelations of Matt Lauer and Garrison Keillor as exemplars of the early public narratives in the #MeToo movement); Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J.F. 105, 106 (2018) (averring that “the #MeToo movement exploded onto the popular media stage” after a 2017 tweet posted by actress Alyssa Milano); Lesley Wexler et al., *#MeToo, Time’s Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 47 (“Allegations against movie mogul Harvey Weinstein and the ensuing #MeToo movement opened the floodgates to a modern-day reckoning with sexist behavior.”); Chicago Tribune, *supra* note 8 (crediting actress Ashley Judd’s accusations about sexual transgression involving media mogul Harvey Weinstein as a catalyst of the #MeToo movement); Susan Chira & Catrin Einhorn, *The #MeToo Moment: Blue-Collar Women Ask, ‘What About Us?’*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/us/the-metoo-moment-blue-collar-women-ask-what-about-us.html> [<https://perma.cc/GTT2-BV2K>]; David Gelles, *Wall Street Has Been Unscathed by MeToo. Until Now.*, N.Y. TIMES (Mar. 16,

cial, and economic responses.¹⁴ Although this movement has attracted significant public attention,¹⁵ it is yet to be adopted by a political elite and converted into a populist uprising.¹⁶ Politicians—especially from the Democratic party—have embraced #MeToo and used it—and continue to use it—in political campaigns;¹⁷ yet, #MeToo has not yet been fully embraced by political actors who are empowered to control the social agenda for the masses.¹⁸

The phrase “Me Too” used in this context has deeper, more long-standing roots.¹⁹ Coined in 2006 by activist and changemaker Tarana Burke, Me Too originally focused on supporting the needs of sexual

2019), <https://www.nytimes.com/2019/03/16/business/metoo-wall-street-tcw-tirschwell-ravich.html> [<https://perma.cc/R3RC-JMGX>].

¹⁴ See, e.g., Barbara Stark, *Mr. Trump's Contribution to Women's Human Rights*, 24 ILSA J. INT'L & COMP. L. 317, 329 (2018) (noting several social responses); Wexler et al., *supra* note 13, at 52–53 (detailing a variety of employment-related responses).

The combination of #MeToo's shift to the outing of specific wrongdoers, investigative journalism, and enhanced public scrutiny has led to the firing, suspension, or resignation of high-level and high-profile individuals across industries, including government and politics, acting and producing, comedy, media, food, music, photography, and venture capital. Even a few individuals in fields with extensive workplace protections such as academia and the judiciary have been brought low.

Wexler et al., *supra* note 13, at 52–53.

¹⁵ E.g., Onwuachi-Willig, *supra* note 13, at 106 (“Combined, more than 12 million users of Twitter, Facebook, Snapchat, and other social media platforms offered posts and reactions to Milano's #MeToo challenge.”); Dalvin Brown, *19 Million Tweets Later: A Look at #MeToo a Year After the Hashtag Went Viral*, USA TODAY (Oct. 13, 2018, 10:12 PM), <https://www.usatoday.com/story/news/2018/10/13/metoo-impact-hashtag-made-online/1633570002/> [<https://perma.cc/6S5C-EGD6>].

¹⁶ Populist uprisings may be distinguished from movements. Specifically, “[a]lthough both forms of popular subjectivity contest established elites, social movements mobilize such contestation from the bottom-up, whereas populism typically mobilizes mass constituencies from the top-down behind the leadership of a counter-elite.” Kenneth M. Roberts, *Populism, Social Movements, and Popular Subjectivity*, in *THE OXFORD HANDBOOK OF SOCIAL MOVEMENTS* 682 (Donatella Della Porta & Mario Diani eds., 2015).

¹⁷ See Alex Daugherty, *A Miami Congressional Candidate Shares Her #Metoo Moment*, Miami Herald (Nov. 29, 2017, 4:42 PM), <https://www.miamiherald.com/news/politics-government/article187076533.html> [<https://perma.cc/22UN-TH22>]; Jane C. Timm, *In #MeToo Era, Women Are Campaigning with Personal Stories of Sexual Abuse and Harassment*, NBC News (July 8, 2018, 7:00 AM), <https://www.nbcnews.com/politics/politics-news/metoo-era-women-are-campaigning-personal-stories-sexual-abuse-harassment-n889416> [<https://perma.cc/E4WL-3VR3>].

¹⁸ See *id.* at 681–82 (“[P]opulism typically involves an appropriation of popular subjectivity by dominant personalities who control the channels, rhythms, and organizational forms of social mobilization.”). One academic commentator notes that “while the #MeToo movement has harnessed the power and potential of social media and public opinion, it lacks the market power and capital that . . . corporations were able to bring to bear on the issue of LGBTQ equality.” Melissa Murray, *Consequential Sex: #MeToo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 NW. U. L. REV. 825, 874 (2019).

¹⁹ See, e.g., Wexler et al., *supra* note 13, at 52 (“The seeming apoliticism of #MeToo collided almost immediately with activist Tarana Burke's pre-existing ‘Me Too’ social movement

violence survivors. From the outset, Me Too's "vision . . . was to address both the dearth in resources for survivors of sexual violence and to build a community of advocates, driven by survivors, who will be at the forefront of creating solutions to interrupt sexual violence in their communities."²⁰ Many credit Burke and her work in founding the current #MeToo movement.²¹

The #MeToo movement is part of a larger effort to change norms around women, workplaces, and the distribution of authority, discretion, and accountability. Also notable in this regard is "the related #TimesUp movement, which seeks to create awareness not only of sexual harassment but just as significantly on gender equity, parity and pay in every industry."²² For many, the two movements—#MeToo and #TimesUp—constitute key distinct components of a greater societal awareness of and concern about issues at the intersection of gender and established power structures, including political and business management and leadership.

II. TRENDS AND DEVELOPMENTS IN THE GENDER COMPOSITION OF LEGISLATURES AND PUBLIC COMPANY BOARDS OF DIRECTORS

Women, historically omitted from political and corporate governance bodies, have made significant incursions into federal and state legislatures, among other political roles, and into corporate boardrooms and C-suites. The Pew Research Center devotes an entire webpage to data on female leaders that textually and visually captures and conveys the nature and extent of these and other changes in female governance in the United States.²³ A September 2018 report offers related information and observations.²⁴

which focuses on women of color and people in marginalized communities and uses self-identification as a way to build bridges among survivors.").

²⁰ *History & Vision*, *supra* note 8.

²¹ See, e.g., Murray, *supra* note 18, at 875 n.227 (citing to Burke as founder of the #MeToo movement); Len Niehoff, "Catch and Kill": Does the First Amendment Protect Buying Speech to Bury It?, 34 COMM. LAW. 4, 4 n.7 (2019) ("The #MeToo movement is generally understood to have begun in 2006 when Tarana Burke coined the phrase in an effort to help women and girls of color who, like her, were survivors of sexual assault."); Onwuachi-Willig, *supra* note 13, at 106–07 (noting the recognition of Burke's work in response to Alyssa Milano's tweet).

²² Alka Patel, *Women in the Law Division: Let's Make 2018 a Year to End Workplace Inequality*, 20 LAW. J. 3 (2018).

²³ *The Data on Women Leaders*, PEW RES. CTR. (Sept. 13, 2018), <http://www.pewsocialtrends.org/fact-sheet/the-data-on-women-leaders/> [<https://perma.cc/8HFJ-E6GL>].

²⁴ Juliana Menasce Horowitz et al., *Women and Leadership 2018*, PEW RES. CTR. (Sept. 20, 2018), <http://www.pewsocialtrends.org/2018/09/20/women-and-leadership-2018/> [<https://perma.cc/37A5-5MKT>].

Female representation in the U.S. Congress is at an all-time high.²⁵ Both houses gained women in the 2018 midterm elections.²⁶ Overall trends in female participation in the Senate and the House of Representatives have been upward for more than 40 years.²⁷

Twenty-five women—seventeen Democrats and eight Republicans—currently serve in the U.S. Senate, constituting 25% of this legislative body.²⁸ In 1965, the earliest year for which the Pew Research Center reports data, a mere two percent of U.S. Senators were women.²⁹ In 1993, after the “Year of the Woman,” women constituted six percent of the U.S. Senate.³⁰

The House of Representatives currently includes 102 women as voting members—89 Democrats and 13 Republicans—constituting 23.4% of its total membership.³¹ Four women, representing American Samoa, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, serve as nonvoting participants.³² By contrast—but trending in parallel with U.S. Senate representation—2.3% of House members were women in 1965 and 10.8% were women in 1993.³³

Female representation on corporate boards of directors has similarly increased in a relatively slow and steady fashion. In 1993, Catalyst reported that 500 women served on Fortune 500/Service 500 boards, up from 46 women on top U.S. corporate boards in 1977.³⁴ Nevertheless, women occupied only 721 or 6.2% of the seats on those boards of directors in 1993.³⁵ In 1995, 9.6% of the members of Fortune 500 boards of directors were women.³⁶ That number climbed to 22.2% in 2017.³⁷

In and after the “Year of the Woman” and during the pendency of the #MeToo movement, female members of Congress and female

²⁵ See *The Data on Women Leaders*, *supra* note 23.

²⁶ See *id.*

²⁷ See *id.*

²⁸ See *id.*

²⁹ See *id.*

³⁰ See *id.*

³¹ See *id.*

³² See *id.*; see also *Directory of Representatives*, U.S. HOUSE REPRESENTATIVES, <https://www.house.gov/representatives> [<https://perma.cc/R253-N8UE>] (“Currently, there are five delegates representing the District of Columbia, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. A resident commissioner represents Puerto Rico.”).

³³ See *The Data on Women Leaders*, *supra* note 23.

³⁴ CATALYST, *supra* note 3, at 1.

³⁵ See *id.*

³⁶ See *The Data on Women Leaders*, *supra* note 23.

³⁷ See *id.*

corporate board members increased at a somewhat greater rate than the norm. Specifically, documented increases in female senators—four percent from 1991 to 1993, three percent from 1993 to 1995, and four percent from 2017 to 2019—and House members—4.4% from 1991 to 1993 and 4.3% from 2017 to 2019—exceed more typical election-over-election percentage increases between 1965 and 2019.³⁸ By way of contrast, for example, between 1965 and 1991, the number of female House members did not increase more than 0.7% between two consecutive election cycles—and decreased on a few occasions.³⁹ Similarly, recorded increases in the percentage of female directors following the “Year of the Woman”—approximately 3.4% from 1993 to 1995—and during the rise of the recent #MeToo movement—two percent from 2016 to 2017—are somewhat higher than the norm, with more typical increases being plus-or-minus one percent per year.⁴⁰

In a bold, original move that may (or may not) be trendsetting in the United States,⁴¹ California enacted legislation in 2018 that compels each corporation with a California principal executive office—regardless of its state of incorporation—to have at least one female director on its board of directors by the end of 2019.⁴² By the end of 2021, a corporation having principal executive offices in California and a board of directors comprising five or more members must appoint two female directors.⁴³ A corporation having principal executive offices in California and a board of directors comprising six or more members

³⁸ *See id.*

³⁹ *See id.*

⁴⁰ *See id.*; CATALYST, *supra* note 3, at 1.

⁴¹ *See* Felix von Meyerinck et al., *As California Goes, So Goes the Nation?* 3–4 (Feb. 22, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3303798> [<https://perma.cc/7736-AGAB>] (“In recent years, California has frequently been the first state to enact progressive legislation that was later adopted by other states in the U.S. as well. . . . It is reasonable to assume that California’s actions on a mandatory gender quota may increase the likelihood that certain other states will follow.”). Indeed, some additional states have introduced new legislative measures designed to increase the gender diversity of corporate boards. *See, e.g.*, Joan Helwig, *More States Promote Gender Diversity on Corporate Boards*, COGENCY GLOBAL (June 2, 2019), <https://www.cogencyglobal.com/blog/more-states-promote-gender-diversity-on-corporate-boards>; Laura Weiss, *California Board Diversity Mandate Spreads to Other States*, WASHINGTON, ROLL CALL, <https://www.rollcall.com/news/congress/california-board-diversity-mandate-spreads-states-washington> (July 19, 2019, 5:31 PM). Illinois enacted a disclosure-based law in 2019. 805 ILL. COMP. STAT. ANN. §§ 5/8.12, 5/14.05(1) (2019).

⁴² CAL. CORP. CODE § 301.3(a) (2019) (“No later than the close of the 2019 calendar year, a publicly held domestic or foreign corporation whose principal executive offices, according to the corporation’s SEC 10-K form, are located in California shall have a minimum of one female director on its board.”); *see id.* § 301.3(b)(3) (“If its number of directors is four or fewer, the corporation shall have a minimum of one female director.”).

⁴³ *See id.* § 301.3(b)(2).

must appoint three female directors.⁴⁴ This legislation follows earlier nonbinding resolutions adopted by legislatures in California and a number of other states.⁴⁵

III. OBSERVATIONS ABOUT THE POTENTIAL GENDER EFFECTS OF THE #MeToo MOVEMENT ON PUBLIC COMPANY BOARD COMPOSITION

It seems apparent from the 2018 congressional election cycle and California's striking legislation fostering female board inclusion that there currently is a renewed attention on gender participation in governance—both political and corporate. This gender inclusion focus follows closely on the rise of the #MeToo movement. Whether the #MeToo movement is a direct, indirect, or contributing cause of these recent occurrences may be in the eye of the beholder, but some academic commentators have begun to make claims in this regard.⁴⁶ Two posit a seemingly broad and inclusive effect of #MeToo on political and corporate governance. These academics note that “[t]he #MeToo Movement . . . resonates with both politicians and business. The movement has strong support in Congress, in state legislatures, and in the business community.”⁴⁷

Scholars observe or assume political ramifications of the #MeToo movement.⁴⁸ However, there has been especial interest in the connection between the #MeToo movement and corporate governance. A

⁴⁴ See *id.* § 301.3(b)(1).

⁴⁵ See Darren Rosenblum, *California Dreaming?*, 99 B.U. L. REV. 1435, 1456 (2019) (noting “California’s 2013 voluntary quota”); von Meyerinck et al., *supra* note 41, at 6.

⁴⁶ See, e.g., Helen Hershkoff & Elizabeth M. Schneider, *Sex, Trump, and Constitutional Change*, 34 CONST. COMMENT. 43, 45 (2019) (“[W]omen have mobilized about sexual harassment through the social media campaign called #MeToo, and companies and government offices have felt compelled to clean house.”). Professor Darren Rosenblum draws a causal connection with respect to the California board quota initiative when he states that “California, when confronted with the shocking sex inequality in Hollywood and Silicon Valley exposed by the #MeToo movement, followed the transnational corporate board quota movement by converting its voluntary quota into a hard quota.” Rosenblum, *supra* note 45, at 1437.

⁴⁷ Stephanie Greene & Christine Neylon O’Brien, *Epic Backslide: The Supreme Court Endorses Mandatory Individual Arbitration Agreements, #TimesUp on Workers’ Rights*, 15 STAN. J. C.R. & C.L. 41, 81 (2019); see also *id.* at 82–83 (“The #MeToo Movement, however, resonates with both politicians and business. The movement has strong support in Congress, in state legislatures, and in the business community.”).

⁴⁸ See, e.g., Jamie R. Abrams, *The #MeToo Movement: An Invitation for Feminist Critique of Rape Crisis Framing*, 52 U. RICH. L. REV. 749, 767 (2018) (“#MeToo seems to be quite a political turning point and a decisive moment of upheaval.”); Nancy Chi Cantalupo & William C. Kidder, *Systematic Prevention of a Serial Problem: Sexual Harassment and Bridging Core Concepts of Bakke in the #MeToo Era*, 52 U.C. DAVIS L. REV. 2349, 2382 (2019) (noting “recent political and social shifts associated with the #MeToo movement”).

pair of academic commentators asserts that, in light of the #MeToo and #TimesUp movements and the activism they promote, “boards and companies need to change their thinking and actions around diversity and equal treatment.”⁴⁹ Another researcher observes, along similar lines, that:

[S]hareholder tastes for diversity may not be the most important factor in motivating business leaders to pursue diversity and anti-discrimination efforts. . . . Business leaders must consider their firms’ reputations and potential public outrage in reaction to misconduct at their firms. This is an important lesson that is illustrated by the expression of public outrage to workplace sexual harassment and abuse that ignited the #MeToo and #TimesUp movements.⁵⁰

The news media and other pundits, as well as primary actors in this reality play, also have linked the #MeToo movement to recent political and corporate governance changes.⁵¹

Notwithstanding the corporate governance buzz created by the #MeToo movement, it is hard to imagine that other states will follow California’s lead and adopt statutes that mandatorily diversify corporate boards of directors. California is often seen to be more progressive on social and environmental issues,⁵² and quotas are not broadly favored in American lawmaking on diversity and inclusion.⁵³ But a

⁴⁹ Dworkin & Schipani, *supra* note 11, at 127.

⁵⁰ Cheryl L. Wade, *Corporate Compliance that Advances Racial Diversity and Justice and Why Business Deregulation Does Not Matter*, 49 *LOY. U. CHI. L.J.* 611, 634–35 (2018).

⁵¹ See, e.g., Emily Shugerman, *The #MeToo Movement Takes Office After Winning Elections Across the U.S.*, *DAILY BEAST* (Nov. 7, 2018, 10:52 AM), <https://www.thedailybeast.com/the-metoo-movement-takes-office-after-winning-elections-across-the-us> [<https://perma.cc/N4J3-KD7Q>] (“For more than a year now, the #MeToo movement has been a cultural force, spurring thousands of women to share their experiences of sexual abuse and ousting hundreds of alleged abusers from positions of power. Now, that force has a vote.”); Elizabeth C. Tippet, *How the ‘Wave of Women’ Entering Congress Could Turn the #MeToo Movement into Concrete Action*, *BUS. INSIDER* (Nov. 17, 2018, 9:12 AM), <https://www.businessinsider.com/women-entering-congress-could-turn-the-metoo-movement-into-action-2018-11> [<https://perma.cc/EZ29-7LHB>] (“The 2018 midterm elections represented the first electoral referendum of the #MeToo era.”).

⁵² See, e.g., Lisa R. Pruitt & Marta R. Vanegas, *Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law*, 30 *BERKELEY J. GENDER L. & JUST.* 76, 119 n.217 (2015) (referring to “an arguably progressive California legislature”); Jon H. Sylvester, *How California Governs the News Media*, 26 *SANTA CLARA L. REV.* 381, 381 (1986) (noting that “California legislation is generally regarded as progressive”); Alex Lemberg, Comment, *Hackers Made Me Lose My Job!: Health Data Privacy and Its Potentially Devastating Effect on the LGBTQ Population*, 47 *GOLDEN GATE U. L. REV.* 175, 183 (2017) (noting that “California . . . has a history of leadership in passing progressive legislation” and citing laws governing transgender bathroom usage and public education).

⁵³ See, e.g., Anne L. Alstott, *Gender Quotas for Corporate Boards: Options for Legal Design in the United States*, 26 *PACE INT’L L. REV.* 38, 40 (2014) (“[G]ender quotas may seem a

continued and strengthened attention to the inclusion of women on corporate boards may occur, nevertheless. The #MeToo movement may be causing and interacting with both changes in political governance and other factors in ways that contribute to—and may have the capacity to sustain—significant interest in securing a greater presence for women on corporate boards.

Now, unlike in 1992's "Year of the Woman," there is a greater sense that women's issues are not merely political issues, but also business issues. In 1993, Catalyst found that women on corporate boards were hesitant to bring women's issues forward in the boardroom for fear of being marginalized.⁵⁴ Accordingly, in its report, it exhorted board leadership to action, recommending that "[c]orporate board chairmen who recognize women as an important business resource . . . must . . . communicate to male board members that addressing such issues is a legitimate and necessary role for the corporate board."⁵⁵ The #MeToo movement has clearly exposed women's issues as both political and business issues. The very fact that sexual misconduct of the kind laid bare by the #MeToo movement more specifically implicates power dynamics prevalent in politics and business makes this a reality.

Movements like #MeToo can foster change. But questions arise as to the lasting nature of that change.⁵⁶ The power of movements to make change may diminish as time passes. It has been observed that

cultural and legal oddity in the United States; a European transplant unlikely to take root here."); *id.* ("[E]ven if a quota could survive constitutional scrutiny, gender quotas for corporate boards seem to represent the kind of intrusive state regulation of business that our nation's laissez faire ideology seems to reject."); Angela R. Foster, *A Quest to Increase Women in Corporate Board Leadership: Comparing the Law in Norway and the U.S.*, 26 WASH. INT'L L.J. 381, 381 (2017) (averring that gender quotas on board of directors are "highly unlikely in the United States"); *id.* at 412 ("[A] quota law is not a palatable solution in the U.S."); Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L.J. 145, 193–94 (2019) ("As a practical matter, quotas are an unlikely regulatory avenue in the United States, as they would face legal hurdles and are unlikely to garner investor or regulatory support." (footnotes omitted)); Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L. REV. 1119, 1186 (2006) ("In the United States, quotas are widely condemned, and gender and racial discrimination law operate in orthogonal dimensions."); Debbie A. Thomas, *Bias in the Boardroom: Implicit Bias in the Selection and Treatment of Women Directors*, 102 MARQ. L. REV. 539, 545 (2018) (noting in the corporate board context that "[u]nlike other countries whose regulatory approaches employ quotas or the stronger 'comply or explain' disclosure approach, U.S. law imposes no affirmative obligation to consider diversity, and only requires disclosing whether or not the company considers it").

⁵⁴ CATALYST, *supra* note 3, at 58.

⁵⁵ *Id.*

⁵⁶ See Wexler et al., *supra* note 13, at 53 ("[M]any worry that #MeToo's victories will be short-lived in the absence of deeper structural and cultural changes.").

the effects of parallel movements in other countries have dissipated over time.⁵⁷

The Pew Research Center reports, based on survey data obtained in July 2018, that 59% of adults believe there are too few women in both high political offices and in top executive business positions.⁵⁸ Moreover, close to a majority of adults surveyed (49%) believes that discrimination is a major reason why there are not more women in high political offices, and a majority (54%) believes that discrimination is a major reason why women do not occupy more top executive business positions.⁵⁹ If action follows from thoughts and words, this data superficially suggests that increases in female participation in these roles may continue, although the authors of the report note an important political divide.

Both “Republicans and Democrats have widely different views about where things stand today and what factors are holding women back.”⁶⁰ Yet, the views of Republicans and Democrats differ in key areas. For example, “Democrats and Democratic-leaning independents are more than twice as likely as Republicans and those who lean Republican to say there are too few women in high political offices (79% vs. 33%).”⁶¹ Republicans and Democrats also disagree on the role that gender discrimination plays in political underrepresentation. Democrats believe in far greater numbers that gender discrimination is the major reason for political underrepresentation.⁶² These differences, together with similar political party differences revealed by parallel data on the reasons for female underrepresentation in top executive business positions,⁶³ signal that the traction of one political party or another may determine whether sustained gains, if any, are achieved in the numbers and percentages of women on corporate boards.

Overall, signals from the Pew Research Center report are quite mixed when it comes to an assessment of the sustainability of in-

⁵⁷ See Somini Sengupta, *The #MeToo Moment: What Happened After Women Broke the Silence Elsewhere?*, N.Y. TIMES (Dec. 22, 2017), <https://www.nytimes.com/2017/12/22/us/the-metoo-moment-what-happened-after-women-broke-the-silence-elsewhere.html> [https://perma.cc/NG5S-N3WB].

⁵⁸ Horowitz et al., *supra* note 24.

⁵⁹ *See id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See id.* (“[W]hile 64% of Democrats say gender discrimination is a major reason why women are underrepresented in these positions, only 30% of Republicans agree.”).

⁶³ *See id.*

creased female participation in leadership, including business leadership and more particularly, board representation. For example, the report notes that “[d]espite the surge of female candidates this year, women are increasingly doubtful that voters are ready to elect more female leaders.”⁶⁴ Yet, the authors also note that “[m]ajorities say having more women in top positions in business and government would improve the quality of life at least somewhat for all Americans (69%) and for women (77%) and men (57%) specifically.”⁶⁵ Major distinctions across data categories hold based on political party, gender, and age differences.⁶⁶

This may mean that sustainable changes in the gender composition of boards of directors will depend on who is nominating or voting to elect corporate directors. In a corporation, existing directors typically nominate directors for election or re-election by shareholders—acting as a committee, often with input from the chief executive officer of the corporation—and, as permitted, may appoint directors to vacancies when they occur between elections. The political and gender composition of those nominating, voting, and appointing individuals to directorships may significantly impact the gender composition of boards.⁶⁷ Professor Yaron Nili advocates looking beyond numbers to board process in diversifying boards of directors.⁶⁸ The observations made here support that approach. The inclusion or different treatment of women, Republicans, or Democrats on boards of directors or nominating committees of boards of directors, for example, may contribute to or detract from board diversity. Moreover, a recent article suggests more generally that “[i]mplicit gender bias affects both the director nomination process and the challenges women directors face in the boardroom.”⁶⁹ Hypotheses based on observations made here may help identify markers or sources of implicit biases. Much research remains to be done in this area.

Change often does not—and sometimes should not—wait, however, for researchers to fully explore every aspect of a given construct.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *See id.*

⁶⁷ Cf. Seletha R. Butler, *All on Board! Strategies for Constructing Diverse Boards of Directors*, 7 VA. L. & BUS. REV. 61, 80 (2012) (“The entrenched beliefs of individuals often function to prohibit or slow diversity advancements.”).

⁶⁸ Nili, *supra* note 53, at 202 (“[I]nvestors and regulators must turn their attention beyond the numbers to the systematic disparities between women and men on boards. If women are not moving into positions of power on boards or are otherwise treated differently on boards, we need to know why, and we need to understand the cost.”).

⁶⁹ Thomas, *supra* note 53, at 541.

Economic, social, and political forces can supervene or function in parallel with research processes. Change momentum, however short-lived or limited, has been generated around corporate boards of directors coincident with change momentum in Congress. The source of the change momentum may be unclear. But its existence is discernable.

Widespread public disclosures and perceptions of gender discrimination and repression correlate with overall increased percentages of women in the boardroom. It has been observed that “policy change is typically enacted in the aftermath of crises.”⁷⁰ California’s gender quota legislation, which prompted near immediate changes in the diversity of the boards of directors of firms regulated under the law,⁷¹ may be seen in this light. Whether that initiative or any other interventions designed in the wake of—and perhaps to capitalize on—the #MeToo movement can result in sustained and sustainable change is unclear. Assuming, as I do here, the value of increased gender diversity on public company boards of directors, it would be unfortunate, however, if increases in female representation on public company boards of directors can only be obtained after appreciable social suffering, especially if those increases may not be sustainable over time.

CONCLUSION

While the efficacious exercise of political governance authority and corporate governance authority undoubtedly are directed to the achievement of different outcomes, serve different interests, and require different skill sets, the gender composition of key political and corporate governance bodies—Congress and public company boards of directors—reflect certain similarities over time. These similarities provoke thought about, among other things, the pace of change in the gender mix of these important governance institutions. Change has generally been slow, as it often is when entrenched historical power centers threaten to shift.

Yet, both the events creating 1992’s “Year of the Woman” and the similar catalysts of the 2018 midterm congressional election results capture parallel political and corporate moments for gender diversity and inclusion. Those events and catalysts represent significant social

⁷⁰ Jonathan R. Macey & Maureen O’Hara, *Regulation and Scholarship: Constant Companions or Occasional Bedfellows?*, 26 YALE J. ON REG. 89, 115 (2009).

⁷¹ See von Meyerinck et al., *supra* note 41, at 41 (“California-headquartered firms that require one (two) female directors to comply with the quota on average increased female board representation by 0.58 (0.69) percentage points relative to the control firms three months after the quota introduction.”).

forces that drive change and would benefit from further study. To the extent that positive social forces can be harnessed and their effects prolonged—perhaps through legislation, regulation, or other mechanisms designed to encourage and support more lasting changes in social norms related to gender diversity and inclusion—significant, sustained increases in the gender diversity of public company corporate boards of directors may be possible.

In this regard, California's gender quota legislation adds an interesting option to the mix of available alternatives. While the overall effects of the statute remain to be seen, early compliance and the prospect—however improbable—of a proliferation of statutes of this kind offer a hope that faster, greater gender diversification may be possible in coming years. Regardless, it seems probable that nonlegislative alternatives to capitalize on what the #MeToo movement has catalyzed will continue to be dominant avenues for long-term change. Changing board processes to better engage diverse directors in core corporate governance—including those involved in director nominations and appointments—and address implicit biases may hold special promise in this regard.

In parallel with these possible changes at the firm level, research on the substantive aspects of board diversity can and should continue. The more we can learn about the barriers to board diversity and the causal roots of those barriers, the more creative and targeted our responses can become. Additional and more consistent benefits of gender diversification then should be realizable and more identifiable.