

THE LEGALITY OF GENDER QUOTAS IN THE UNITED STATES: AN ANALYSIS OF
CURRENT LITIGATION CHALLENGING CALIFORNIA'S CORPORATE BOARD
GENDER QUOTA

by

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I. Introduction

According to Catalyst research, in 2017 women held 15% of corporate board seats across 7,000 companies in 60 different countries.¹ This number is an increase over 2015, when women held only 12% of corporate board seats.² Although the number of women on corporate boards is slowly rising, this lack of female representation is still quite pervasive. Women comprise 50.04% of the workforce and receive 57.3% and 59.4% of bachelor's and master's degrees, respectively.³ Despite the reality that women matriculate with more higher education degrees than men and compose nearly half of the workforce, they remain underrepresented at the highest corporate level.

This is somewhat surprising, given the prevalence of industry studies⁴ and management literature suggesting that women board members help boost firm performance.⁵ While there is also contrary research regarding the correlation of women on boards and firm performance⁶, the dominant wisdom is that the presence of women on boards is either net neutral or at least marginally beneficial.⁷ In order to bridge this gender gap and potentially bolster corporate performance, there has been a movement to impose gender quotas. Gender quotas for corporate

¹ *Women on Corporate Boards: Quick Take*, CATALYST (Mar. 13, 2020), <https://www.catalyst.org/research/women-on-corporate-boards/> (last visited Apr. 25, 2020).

² *Id.*

³ Jack Kelly, *Women Now Hold More Jobs Than Men in The U.S. Workforce*, FORBES (Jan. 13, 2020), <https://www.forbes.com/sites/jackkelly/2020/01/13/women-now-hold-more-jobs-than-men/#3c80c7818f8a> (last visited Apr. 25, 2020).

⁴ See, *Gender Diversity and Corporate Performance*, CREDIT SUISSE: RESEARCH INSTITUTE (August 2012), <http://www.tinyurl.com/y4alwomo>, (last visited on Aug. 10, 2020). See also, the 2014 follow up by Credit Suisse, *The CS Gender 3000: Women in Senior Management*, CREDIT SUISSE: RESEARCH INSTITUTE (September 2014), <https://directwomen.org/sites/default/files/news-pdfs/9.pdf>; the 2016 report, *The CS Gender 3000: The Reward for Change*, CREDIT SUISSE: RESEARCH INSTITUTE (September 2016), https://evolveetfs.com/wp-content/uploads/2017/08/Credit-Suisse-Reward-for-Change_1495660293279_2.pdf; and the most recent report from Credit Suisse, *The CS Gender 3000 in 2019: The Changing Face of Companies*, CREDIT SUISSE: RESEARCH INSTITUTE (October 2019), <https://www.credit-suisse.com/about-us-news/en/articles/news-and-expertise/cs-gender-3000-report-2019-201910.html>.

⁵ See, for example, Corinne Post & Kris Byron, *Women on Boards and Firm Financial Performance: A Meta-Analysis*, 58 ACAD. MGMT. J. 1546 (2015). See also, Jenny M. Hoobler, Courtney R. Masterson, Stella M. Nkomo & Eric J. Michel, *The Business Case for Women Leaders: Meta-Analysis, Research Critique, and Path Forward*, 44 J. MGMT. 2473 (2018).

⁶ See, Jan Luca Pletzer, Romina Nikolova, Karina Karolina Kedzior, & Sven Constantin Voelpel, *Does Gender Matter? Female Representation on Corporate Boards and Firm Financial Performance - A Meta-Analysis*, 10 Plos One 1 (2015). See also, María del Carmen Triana, Toyah L. Miller & Tiffany M. Trzebiatowski, *The Double-Edged Nature of Board Gender Diversity: Diversity, Firm Performance, and the Power of Women Directors as Predictors of Strategic Change*, 25 ORG. SCI. 609 (2014).

⁷ See, Shreya Sharda, *Promoting Gender Diversity in the Boardroom: Exploring Multiple Perspectives*, 18 AM. J. MGMT. 50 (2019). See also, Kevin T. Wayne & Jonathan G. McCosh, *Diversity as a Problematic Predictor of Organizational Performance: Issues of Context and Expectations*, 5 J. MGMT. & TRAINING INDUSTRIES 31 (2018). It is also interesting to note that many studies have also identified a positive correlation between women on boards and improvements in corporate social responsibility efforts. See, for example, Kris Byron & Corinne Post, *Women on Boards of Directors and Corporate Social Performance: A Meta-Analysis*, 24 CORP. GOVERNANCE: AN INT'L REV. 428 (2016).

boards were first adopted in Europe and have more recently been implemented in the United States via California's SB-826.⁸ It is on this legislation that we will focus.

A thorough analysis of this recent California legislation requires an assessment of the efficacy of gender quotas in those countries where the quotas have been imposed, so we will start by examining some of the notable management literature that has looked at this issue. An examination of the law review literature is also in order, to get a sense of scholarly activity regarding the legality of gender quotas in the United States. An overview of the adoption of SB-826 in California, along with a discussion of gender quota legislative initiatives in other states, will then be undertaken. This will be followed by an analysis of the legal barriers that might result in the invalidation of these quotas by the courts, along with a discussion of current litigation challenging SB-826. Lastly, the conclusion will include some thoughts about how to remedy the gender imbalance on corporate boards if quota legislation is ruled invalid, along with ideas for future research.

II. Gender Quota Legislation in Europe

Gender quotas for corporate boards first emerged in Norway in 2005. The quota legislation adopted in Norway required all public limited firms to have, by 2008, boards with 40% women. Spain followed Norway's lead and required corporations to increase female board membership to 40% by 2015.⁹ Today, Germany, Finland, Iceland, and France also have corporate board gender quotas. The overall goal of these laws is to improve corporate board gender parity. We have seen evidence of successful achievement of this goal. However, there also have been significant drawbacks associated with gender quota laws. Both the benefits and disadvantages of gender quotas will be further discussed.

A. Evidence in Support of Gender Quotas

In terms of increasing the number of women on boards, gender quotas have been a success. Looking at Norway, 46.7% of corporate board members are women - the highest percentage of female board members in any country. This makes sense, given that Norway was the first mover in imposing gender quotas. In Norway before 2002 only 2-4% of board members were women. This number rose to 6% in 2002, to 9% in 2004, to 36% in 2008, and then to 40% in 2009.¹⁰ The number continued to grow from 2013 to 2019 when Norway experienced a 7% positive change in the number of women on corporate boards.¹¹ Given these numbers, one could argue that gender quotas were very successful in achieving the goal of increasing female representation on corporate boards. A study of 104 Norwegian firms after gender quota legislation was passed discusses the immediate results of the change in board gender composition. This study finds that the new female directors were younger on average than male board members; however, the younger female directors often replaced young male board members.¹² Additionally, female directors were 9% less likely to have experience in engineering but 2-5% more likely to have experience in education and

⁸ California Senate Bill 826, Published Oct. 1, 2018, https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB826.

⁹ Sharda, *supra* note 7.

¹⁰ Aagoth Storvick & Mari Teigen, *Women on Board: The Norwegian Experience*, FRIEDRICH EBERT STIFTUNG (June 2010). To access the report online go to: <https://library.fes.de/pdf-files/id/ipa/07309.pdf> (last visited Apr. 27, 2020).

¹¹ Sharda, *supra* note 7.

¹² David A. Matsa & Amalia R. Miller, *A Female Style in Corporate Leadership? Evidence from Quotas*, 5 AMER. ECON. J. APPLIED ECON. 136 (2013).

industry, pointing to different work backgrounds between women and men.¹³ Moreover, the researcher, Matsa, found that, once boards were required to add women, there was a decrease in company layoffs. This difference suggests that the female directors had a different style of doing business, which, arguably, could be a benefit to other workers throughout the organization because with fewer layoffs there would be better job security. Relating this back to the female directors' different prior experiences, "the fact that the quota increased labor costs but did not affect revenue or non-labor costs suggests that the effects of the quota are not simply due to an overall decrease in director quality."¹⁴ Although the female directors added to boards in Norway were younger and had less technical experience than their male board counterparts, this study argues that this lack of technical experience did not necessarily negatively impact firms; instead, it allowed a different style of management to be revealed.

However, this study by Matas was not uncontested. Additional studies have found that gender quotas hurt firm performance overall, suggesting that gender quotas can negatively impact the value of corporations. Interestingly, these findings suggest that, when diversification is mandated via a law, the effects may be different than when women board members are added without a mandate. This difference may arise because the shareholder choice of whom to appoint is diminished; shareholders must choose candidates from a certain gender, thereby limiting the pool of available candidates.

Taking a closer look at this possibility, another study of Norwegian boards from 2001-2009 conducted by Ahern and Dittmar provides some clarity.¹⁵ This assessment looked at 248 publicly-listed firms and assessed stock price and Tobin's Q to test the relationship between gender quotas and financial performance.¹⁶ When the gender quota law was first announced in Norway, firms with no female board members had a stock return drop of -3.45%, whereas those firms that had at least one woman on the board of directors experienced a stock return drop of only -0.02%. Firms that already had a woman on their boards before the law was passed continued to perform better than those forced to add women. Additionally, Tobin's Q values in 2007 were 0.26 higher for firms that already had a female director on the board before the quota compared to firms that did not have a female director prior to the quota. The researchers explain that, after testing for confounding variables, these "results suggest that the constraint imposed by the law had a large negative effect on firm value, commensurate with the massive reorganization of corporate boards imposed by the gender quota."¹⁷

Having established that imposing gender quotas may negatively impact firm value, the Ahern and Dittmar study sought to better understand this relationship by hypothesizing the cause. Looking at data on the characteristics of board members pre- and post-quota, it possible to discern that board member characteristics like age, education, and the professional experience changed once the gender quota went into play. The study found that new female directors were younger, more highly educated, and more likely to previously have been employed as a non-executive compared to male directors.¹⁸ Specifically, of the new female directors, only 31.2% had previous CEO experience, compared to 69.4% of male directors, and women were on average eight years

¹³ *Id.* at 156.

¹⁴ *Id.*

¹⁵ Kenneth R. Ahern & Amy K. Dittmar, *The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation*, 127 Q. J. ECON. 137, note 1 (2012).

¹⁶ *Id.*

¹⁷ *Id.* at 140.

¹⁸ *Id.* at 141.

younger than the male directors.¹⁹ It therefore could have been the lack of experience in the C-suite or the different backgrounds of the new directors that ultimately resulted in disjointed board decision-making processes because studies show that the board sizes did not usually change in response to the quotas. In other words, when firms opted to replace male board members with women rather than opting to increase board size to add women directors, board meetings underwent upheavals.

Despite their different conclusions, Matsa's study and Ahern and Dittmar's study both highlighted that many of the new female members replaced their male peers on boards rather than increasing board size to add women. Thus, a plausible concern would be the loss of skill from previous male board members. However, a study performed in 2014 revealed that this may not be an issue. This 2014 study takes a different approach to assessing the benefits of gender quotas by looking at it from the "supply-side" of human capital. It argues that people take jobs based on the potential for them to advance and get higher-paying positions.²⁰ Without gender quotas, women view their chances of getting these positions as limited, thus discouraging them from applying to jobs. As a result, the different skill sets and perspectives that female employees may bring to companies, the human capital, is lost. The authors conclude that the human capital gained from gender quotas outweighs lost human capital that results from having fewer males on boards of directors.²¹ If this is indeed the case, then swapping the female directors required by quotas with male directors is not an issue and helps improve human capital prospects.

B. An Analysis of the Problems Gender Quotas Pose

Although gender quotas in European countries like Norway have significantly increased the number of women on boards, some literature argues that this increase in parity comes with associated costs. This literature posits that a series of problems are perpetuated through the implementation of gender quotas including tokenism, the advancement to board positions of unqualified candidates, and the consolidation of career opportunities in a discrete group of women.

1. Tokenism

Tokenism is the first main difficulty that supposedly comes se with gender quotas. Tokenism may arise when is a small number of women or just one woman on a board, who is often identified as the "token" woman.²² Treating new female directors as token women can hinder their ability to influence firm decision-making, which may void the benefits of board gender diversity that gender quotas aim to achieve. Thus, tokenism can hurt firm performance. The problem of tokenism is exacerbated when the women on boards are mandated to be there, allowing the proliferation of beliefs that the women are there to meet a gender quota and are just a "token." According to a study performed by Kanter in 1997, the theory of tokenism suggests that when women are in the minority in groups, then they "are subject to discriminating behavior, and hence face barriers in influencing group decisions."²³ These negative behaviors leave women added to boards through

¹⁹ *Id.*

²⁰ Oded Stark & Walter Hyll , *Socially Gainful Gender Quotas*, 71 LEIBNIZ-INFORMATIONSZENTRUM WIRTSCHAFT/LEIBNIZ INFORMATION CENTRE FOR ECONOMICS 1 (2014).

²¹ *Id.* at 7.

²² Beate Elstad & Gro Ladegard, *Women on Corporate Boards: Key Influencers or Tokens?*, 17 J. MGMT. GOV. 1 (2011).

²³ *Id.* at 5. Referring to R. M. Kanter, *MEN AND WOMEN OF THE CORPORATION* (New York's Basic Books 1977).

quotas unable to influence board decisions to the best of their ability, undermining their efforts to fully participate in board meetings. However, “when the size of the subgroup reaches a certain threshold, or critical mass, the subgroup’s degree of influence increases.”²⁴

To further explain the concept of tokenism, Torchia, and co-authors Andrea Calabro and Morten Huse, introduce Asch’s studies and experiments that found that, when an individual is faced with a unanimous decision in a group, they feel a pressure to conform with the group’s opinion when three individuals have the same opinion. Therefore, the commonly recognized threshold for a critical mass of women on boards is three.²⁵ The critical mass theory of three is often referenced throughout the management literature as the “magic number” for women being able to have an effect on board practices and decisions.

A study of Norwegian firms conducted in 2011 facilitates a better understanding of the impact of tokenism when gender quotas are introduced on a wide scale. This study conducted by Torchia, Calabro, and Huse, seeks to find a relationship between the number of women on a board and their ability to influence firm decision making through firm innovation. Norway’s history of implementing gender quotas before other countries is important for the study. As the authors note “Norway is one of the few countries in the world with a sufficient number of companies where gender diversity can be said to have been taken beyond tokenism and thus enabling us to select a good number of companies in the independent variables of one, two or three women directors.”²⁶ A total of 328 firms with boards ranging from 6-12 members were selected for data collection. The number of women on the boards of directors was the independent variable and included boards with no women, one woman, two women, and three women. To assess board strategic tasks, CEOs were asked to complete a survey rating of how involved the board was in each of the following areas on a 1-7 scale:

- (a) making proposals on long-term strategies and main goals; (b) making decisions on long term strategies and main goals; (c) putting decisions on long-term strategies and main goals into action; (d) controlling follow up of decisions on long-term strategies and putting main goals into action.²⁷

The results of the study found that, when two or fewer women were on a board, they conformed to the majority. However, when “the number of women directors increases from a few tokens (one woman, two women) to a consistent minority (‘at least three women’), they are able to effectively influence the level of organizational innovation.”²⁸ Therefore, from this study we understand that a gender quota may not be effective if it mandates only one or two women on boards when a critical mass of women is needed to overcome tokenism.

2. Problems Related to Qualifications and Unequal Treatment of Women on Boards of Directors

The next issue with gender quotas is that, although they result in more women on boards, this does not mean that the women are treated equally in the board of director role or that women are

²⁴ Mariateresa Torchia, Andrea Calabrò & Morten Huse, *Women Directors on Corporate Boards: From Tokenism to Critical Mass*, 102 J. BUS. ETHICS 299, note 2 (2011).

²⁵ *Id.* at 302 citing S. E. Asch, *Opinions and Social Pressure*, 193 SCI. AM. 31, note 5 (1955).

²⁶ *Id.* at 300.

²⁷ *Id.* at 307.

²⁸ *Id.* at 310.

allowed opportunities across organizations. Looking to France, another country that adopted gender quotas, we can see from a study in 2019 that the women brought onto boards after the quotas were mandated have less experience in executive positions than their male counterparts.²⁹ As a result of the new laws, firms “hired women with no prior board experience and who would not have been appointed absent the regulation.”³⁰ Because these women were considered “rookie female directors”, they did not have as many committee memberships or chairmanships, highlighting how a second “glass barrier” was created once the women had entered board positions. This phenomenon is called positional segregation.³¹

Although gender quotas aim to make opportunities the same for men and women board members, they do not specify how the women must participate in corporate decision-making once appointed to the board, allowing boards to leverage the male members and discount the rookie female directors. Rebérioux and Roudaut interpret these 2019 findings as a result of “various stereotypes regarding the preferences, values, and behavior of women in leadership positions.”³² Although Rebérioux and Roudaut do not have any direct evidence of the impact of these stereotypes given the positional segregation observed and the number of rookie female directors with less experience than men, they believe that stereotypes about women in leadership can also affect how the new female board members are integrated onto boards.

3. The Golden Skirts Phenomenon

The final significant drawback to mandated gender quotas is the golden skirts phenomenon. First identified in Norway, this is the phenomenon whereby the same group of women is used to fill seats among multiple boards of directors. Thus, this suggests that quotas are not contributing to the improvement of opportunities for new women but are, rather, furthering career advances for women already at the board level. The old boys' network (a group of men who were board members together at various firms) was a recognized practice in pre-quota Norway.³³ In 2000, only men served as multi-board directors. However, in a Norwegian study by Gröschl and Takagi from 2011 looking at data from 2007-2010, it was observed that this trend shifted. During this time-period, 1,309 women held one board position for at least one year in a public stock company. The study predicted that, because women are only 40% of board members, there should theoretically be more multi-board member men than such women. However, the findings of Gröschl and Takagi's proved these hypotheses false. The 2011 research found that 8 women and only 2 men had more than four positions on ASA boards, and 21 women and only 9 men had more than three board memberships over the studied time period.³⁴ Therefore, the gender quotas led to an influx of golden skirts becoming board members at multiple firms.

One explanation regarding why the golden skirts occurred in Norway is offered by Huse, who discusses the Gröschl and Takagi study in a chapter of a book focusing on golden skirts. Huse posits that, because the general “criteria for becoming a board member is to have previous board experience, the few women holding such experience are more likely to be offered these positions.”

²⁹ Antoine Rebérioux & Gwenaél Roudaut, *The Role of Rookie Female Directors in a Post-Quota Period: Gender Inequalities Within French Boards*, 58 INDUS. REL. 423 (2019).

³⁰ *Id.* at 425.

³¹ *Id.*

³² *Id.* at 460.

³³ Morten Huse, *The ‘Golden Skirts’: Lessons from Norway about Women on Corporate Boards of Directors*, DIVERSITY QUOTAS, DIVERSE PERSPECTIVES 11-23 (looking at the 2011 study by Gröschl and Takagi).

³⁴ *Id.* at 17.

³⁵ Thus, it is logical that the few women with the proper experience would be chosen for director positions multiple times. It is also noteworthy that, although the golden skirts network exists, it is in no way as interlocked as was the old boys' network. In the previous old boys' network in Norway, many of the same men were on many of the same boards together. However, women board members in Norway post-mandate had significantly less board overlap than their male counterparts. For example, only two women were on three boards together. Additionally, for those women on more than three boards, they only overlapped with other multi-board member women on one board, which was in contrast to the many overlapping connections common among male board members.³⁶

Not only have gender quotas potentially failed at providing many women more opportunities at board director positions, but they have also not been linked to increased career opportunities throughout other layers of organizations. As Maria Saab puts it in her *Time* opinion piece, when looking at the influence of gender quotas in Norway, they seem to have had little effect on improving participation by women in corporate leadership positions; “female leadership at the managerial level is low and virtually nonexistent at the executive level.”³⁷ Specifically, as of 2014, only 3% of large Norwegian companies had female CEOs, even though the gender quotas had been in effect for a number of years. Gender quotas do not seem to have allowed opportunities to “trickle-down” to other layers of the organization. Gender disparity in top executive positions in the U.S. is also no better than in Norway. Catalyst research in 2012 found that only 14.3% of top executive officers in Fortune 500 companies were women.³⁸ More recent research from Catalyst shows that women are just 26.5% of executive and senior officials and managers, 11% of top earners, and 5.8% of CEOs in S&P 500 companies.³⁹

Although the numbers show a stark gap between increased women on boards of directors and a small effect on female representation throughout the rest of the organization, little research has been done on this relationship. One of the only studies found on the topic focused on Norwegian firms and the impact of gender quotas on female CEOs. To assess this relationship, 667 firm-year observations were made from 2001 to 2010.⁴⁰ This study found that the effect of gender quotas increases the probability of having a female CEO on firms by 1.01%. Therefore, the probability of having a female CEO only slightly increases with the presence of female board directors.⁴¹ Explaining why this might be the case, Ibarra claims that female executives require mentorship that male executives may not be willing to provide. However, having more female board members and CEOs makes it more likely for female managers to find the support they need to climb the

³⁵ *Id.* at 18.

³⁶ *Id.* at 18.

³⁷ Maria Saab, *The Surprising Countries With More Women in Corporate Leadership Than the U.S.—Or Even Scandinavia*, *TIME*, (June 12, 2014) <https://time.com/2861431/female-executives-gender-quotas/> (last visited Aug. 8, 2020).

³⁸ *Report: 2012 Catalyst Census: Fortune 500 Women Executive Officers and Top Earners*, CATALYST (Dec. 11, 2012), <https://www.catalyst.org/research/2012-catalyst-census-fortune-500-women-executive-officers-and-top-earners/> (last visited Apr. 27, 2020).

³⁹ Judith Warner, Nora Ellmann, & Diana Boesch, *The Women's Leadership Gap: Women's Leadership by the Numbers*, CENTER FOR AMER. PROGRESS (November 20, 2018), <https://www.americanprogress.org/issues/women/reports/2018/11/20/461273/womens-leadership-gap-2/> (last visited on June 1, 2020) and *Pyramid: Women in S&P 500 Companies*, CATALYST (January 15, 2020), <https://www.catalyst.org/research/women-in-sp-500-companies/> (last visited on June 1, 2020).

⁴⁰ 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, note 3 (2013).

⁴¹ *Id.* at 460.

corporate ladder.⁴² Ultimately, the impact that gender quotas have on female CEOs is marginal, but there may exist a relationship between gender quotas and more career development at certain levels of the organization.

The management literature, as discussed above, shows that, while gender quotas do increase the number of women on corporate boards, this may not translate into increases in firm performance, one of the dominant arguments used by policy-makers in the United States in favor of corporate board quotas. Additionally, quotas may not provide increased opportunities for women on a widespread basis and quotas may not result in improvements for other gender disparities in organizations, another common rationale advanced in support of gender quotas. While Europe's mandated quotas ultimately may prove to be beneficial, the mixed results researchers have observed thus far may not be sufficient justification necessary to overcome some of the legal impediments faced by quotas in the United States.

III. A Look at Law Review Articles on Gender Quotas

Given the widespread adoption of corporate board gender quotas in Europe, it would seem that a review of the legal scholarship in the area of gender diversity on corporate boards would yield a number of results. However, an early search on Westlaw for "gender quotas" and "corporate boards" in November of 2019 yielded only nine law review articles.⁴³ The articles which we initially discovered looked at the issue of board diversity in general but did not significantly address the legalities of corporate board gender quotas in the United States.⁴⁴ Moreover, none of them discussed California's SB-826, which is the first gender quota law passed in the United States. In April of 2020, we took another look at the Westlaw Law Review database and discovered two law reviews that had been written directly about California's SB-826. Additionally, an August 2020 search of HeinOnline revealed four additional articles we had previously overlooked that specifically addressed California's gender quota law.⁴⁵ While this newer scholarship explores some of the same issues raised in this analysis, none of these more recent articles include a detailed exploration of the lawsuits raised in opposition to SB-826 nor do they closely examine the

⁴² *Id.* at 464 citing H. Ibarra et al., *Why Men Still Get More Promotions Than Women*, HARV. BUS. REV. (2010).

⁴³ A recent check regarding law reviews available as of November 1, 2019 on Westlaw using the terms "gender quotas" and "corporate boards" yielded ten articles. When quotations around the search terms were not used, then the search yielded 3997 articles. However, a review of the top 100 articles sorted by relevance reinforces the finding that the implications of the adoption in of gender quota mandates for corporate boards in the United States has not been widely discussed in the law review literature. Additionally, a recent check of HeinOnline yielded 37 results searching for "gender quota*" and "corporate boards*" and "California" in the Law Journal Library and 94 results when "California" was omitted. A similar check on August 10, 2020 showed 33 results and 68 results, respectively. A review of those articles revealed that only a few addressed the issue of the legality of California's gender quota legislation. Moreover, the recent litigation challenging the California law was not discussed.

⁴⁴ *See, generally*, Anne L. Alstott, *Gender Quotas for Corporate Boards: Options for Legal Design in the United States*, 26 PACE INT'L L. REV. 38 (2014)(which was featured in the Symposium on Comparative Sex Regimes and Corporate Governance and which explores, among other issues, the impact of board gender diversity on firm performance, referring to the Kenneth Ahern and Amy Dittmar study we discussed in our brief review of the relevant management literature).

⁴⁵ Geeta Tewari, Emma DeCourcy & Shirley Urena, *The Ethics of Gender Narratives for United States' Corporate Boards*, 16 N.Y.U.J.L. & BUS. 221 (2019); Leanne Fuith, *Achieving Diversity on Corporate Boards: Engagement and Education; Not Legislation*, 45 MITCHELL HAMLIN L. REV. 112 (2019); Darren Rosenblum, *California Dreaming*, 99 B.U. L. REV. 1435 (2019)(part of the Symposium: Institutional Investor Activism in the 21st Century: Responses to a Changing Landscape) and Teal N. Trujillo, Note, *Do We Need to Secure a Place at the Table for Women: An Analysis of the Legality of California Law SB-826*, 45 J. LEGIS. 324 (2018).

widespread legislative developments taking place at the state level. These are emerging areas of legal analysis, to which we can make additional contributions.

The law review literature regarding gender quotas on corporate boards, like that of other disciplines, looks critically at the issue of gender disparities, generally, and gender disparities in the context of corporate boards, more specifically.⁴⁶ One area of inquiry in the law review literature that mirrors that of the management literature, as discussed above, focuses on the gender quota approach taken in Norway, with an emphasis on the strengths and weaknesses of that approach.⁴⁷ Another emphasis in the law literature focuses on the role of diversity reporting in narrowing the gender gap on corporate boards and in the workplace more generally.⁴⁸ The importance of fairness and equity when addressing the issue of gender diversity on boards has also emerged as a significant area of inquiry in the law review literature.⁴⁹ Another interesting line of thought focuses on the importance of providing women board members meaningful opportunities to contribute, suggesting that structural issues in corporate decision-making, rather than the number of women on boards, may be the most important factor in promoting gender equity.⁵⁰ These articles provide insightful context for a more targeted discussion of the legality of gender quotas in the United States and the implications for California's SB-826.

The first law review article we encountered regarding California's SB-826 comes from the Florida State University Business Review. The article, written by Ben Taylor, discusses the lead-up to SB-826 and goes on to offer criticism that reveals that Taylor believes that gender quotas and California's Senate Bill 826 are unconstitutional. The author begins by introducing the equal protection issues that gender quotas pose because they facially discriminate on the basis of gender.⁵¹ Taylor posits that California's SB-826 creates a classification by gender, which cannot be supported under the Constitution (a position with which we agree).⁵² The motivation for SB-826 was to advance the interest of California businesses and enhance performance. However, the criticisms of gender quotas articulated in this law review connect to observations made regarding

⁴⁶ For example, the George Washington Law Review published an issue focused on Women and Corporate Governance, with a forward by Lisa M. Fairfax entitled *Fall 2018 Symposium: All on Board; Board Diversity Trends Reflect Promise and Concern*, 87 GEO. WASH. L. REV. 1031 (2019). Other essays in that collection provide helpful insights regarding gender diversity on corporate boards, including, among others: Joan MacLeod Heminway, *Me, Too and #MeToo: Women in Congress and the Boardroom*, 87 GEO. WASH. L. REV. 1079 (2019); Kellye Y. Testy, *From Governess to Governance: Advancing Gender Equity in Corporate Leadership*, 87 Geo. Wash. L. Rev. 1095 (2019); and Cinday A. Schipani & Terry Morehead Dworkin, *The Need for Mentors in Promoting Gender Diverse Leadership in the #MeToo Era*, 87 GEO. WASH. L. REV. 1272 (2019).

⁴⁷ See Anne Sweigart, *Women on Board for Change: The Norway Model of Boardroom Quotas As a Tool for Progress in the United States and Canada*, 32 NW. J. INT'L L. & BUS. AMBASSADOR 81A (2012); Catherine M. A. McCauliffe & Catherine A. Savio, *Gender Considerations on the Boards of European Union Companies: Lesson for US Corporations or Cautionary Tale?*, 16 GEO. J. GENDER & L. 505 (Summer 2015); 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 (2017).

⁴⁸ See Christopher Byrnes, *Something for (Almost) Everybody in Dodd-Frank: Racial, Gender, and Diversity Considerations in the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 12 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 115 (September 2011) and Akshaya Kamalnath, *Corporate Diversity 2.0: Lessons from Silicon Valley's Missteps*, 20 OR. REV. INT'L L. 113 (2018). See also Mutter, *supra* note 45 and Tewari, et al., *supra* note 45.

⁴⁹ See, e.g., Ruth Rubio-Marin, *A New European Parity-Democracy Sex Equality Model and Why It Won't Fly in the United States*, 60 AM.J. COMP. L. 99 (Winter 2012). See also Tewari, et al., *supra* note 45.

⁵⁰ Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L.J. 145 (2019).

⁵¹ Ben Taylor, *Why California Senate Bill 826 and Gender Quotas are Unconstitutional: Shareholder Activism as a Better Path to Gender Equality in the Boardroom*, 18 Fla. St. U. Bus. Rev. 117 (2019).

⁵² *Id.* at 3.

the Norwegian experience. As previously discussed, the management literature suggests that gender quotas have had neither a positive nor negative effect on firm performance. In fact, some studies have shown that the addition of women to corporate boards hurt firm performance.⁵³ Therefore, the business case for gender quotas used to rationalize SB-826 may not be justified and cannot further legal justifications for the quotas.⁵⁴

A second law review article that directly addresses California's gender quota law was published in the *Journal of Business Entrepreneurship and Law* in 2019.⁵⁵ Written by Diane Mutter, this article compares and contrasts Canada's more delayed reaction to board gender diversity with the reactive approach taken in the United States.⁵⁶ Mutter points out that one of the first regulatory attempts here in the United States to promote diversity at the board of director level was through the Sarbanes-Oxley Act passed in 2002.⁵⁷ For instance, item 407(c) of Regulation S-K requires publicly-traded companies to disclose if a nominating committee "considers diversity in identifying nominees for directors."⁵⁸ The legal tool of reporting has often been used as an effective mechanism for change and this approach has long-standing support in the U.S. legal community. Canada did not start requiring company disclosure of corporate board diversity numbers and practices until the Canadian Securities Administrators introduced reporting requirements in 2015. Other law reviews have also focused on reporting regarding board gender diversity as a mechanism for correcting the disproportionately low numbers of women on boards.⁵⁹ Diversity reporting has been a required feature of the securities laws⁶⁰, not only under Sarbanes-Oxley, but also pursuant to the Dodd-Frank legislation passed in the wake of the financial crisis.⁶¹ However, Mutter argues that the reporting initiatives in both the United States and Canada have not been as effective as originally envisioned, thus necessitating greater clarity in the goals and objectives for diversity and a clearer link between those goals and objectives and the regulation being advanced.

As part of her discussion, Mutter looks at the business case rationales that focus on firm performance benefits for gender diversity initiatives. This business case emphasis has traditionally been promoted by regulators, and is a significant feature of the reporting requirement rationale included in Sarbanes-Oxley. Mutter also looks at the governance case for gender diversity on corporate boards, which says women will promote better board decision-making processes. Finally, she explores the normative case for diversity, which argues that it is simply the right thing to do. That is, because women compose half of the world's population, it, therefore, only makes sense for them to represent half of the board members.⁶² Mutter describes California's implementation of SB-826 that relies on a business case rationale for improved board gender diversity. Interestingly, Mutter points out that the proponents of SB-826 believe that fair representation is the best practice for business. Senator Hannah-Beth Jackson is quoted stating that corporate boards are "one of the last bastions of total male domination. . . . We know that the public

⁵³ *Id.* at 5.

⁵⁴ *Id.*

⁵⁵ Diana C. Nicholls Mutter, *Crashing the Boards: A Comparative Analysis of the Boxing Out of Women on Boards in the United States and Canada*, 12 *J. Bus. Entrepreneurship & L.* (2019).

⁵⁶ *Id.*

⁵⁷ *Id.* at 287-289.

⁵⁸ *Id.*, referencing 117 C.F.R. § 229.407© (2010); SEC, Proxy Disclosure Enhancements; 74 Fed. Reg. 68, 334 (Dec. 23, 2009).

⁵⁹ *Supra* note 49.

⁶⁰ *Id.*

⁶¹ Byrnes, *supra* note 49.

⁶² *Id.* at 5.

and business are not being well-served by this level of discrimination.”⁶³ These observations support her conclusion that the business case and the normative arguments for board diversity are often conflated, which she suggests needs to be addressed if further progress toward diversity is to be made.⁶⁴

As for arguments in opposition to gender quotas, Mutter’s article provides an overview of some of the dominant legal criticisms of SB-826.⁶⁵ She briefly mentions the equal protection concerns, but primarily focuses on the Internal Affairs Doctrine. She also takes a look at the rights of shareholders to choose board members without interference and the argument advanced by the California Chamber of Commerce that gender quotas undermine this autonomous decision-making.⁶⁶ This argument seems to specify that, pursuant to traditional notions of corporate governance, shareholders have the right to elect whom they would like to serve as board members. Gender quotas infringe on shareholders’ ability to choose who they want to be a board member because shareholders must now vote for a certain number of female board members even if they would rather vote for male members instead of the female candidates.

Mutter also looks at some of the business case problems with gender quotas on corporate boards, echoing similar concerns of Taylor, as previously discussed. For example, Mutter’s article cites studies showing that when diversity is imposed it is less beneficial than when it is chosen by the group. Therefore, gender quotas may not be as effective at improving firm performance when diversity is required rather than chosen.⁶⁷ This may prove problematic for SB-826, as one of the most significant arguments used in favor of its adoption was the business case rationale. Ultimately, Mutter acknowledges that SB-826 may not withstand legal challenges. Nevertheless, Mutter contends that diversity remains an important goal. She concludes that efforts toward diversity must continue to be made, using not only the business case, but also, normative rationales.

There are a few additional articles that directly explore California’s SB-826. In his 2019 Boston University Law Review article, *California Dreaming?*, Darren Rosenblum looks at the California gender quota law in comparison with efforts internationally.⁶⁸ He briefly touches on the legal challenges faced by SB-826, similar to those already discussed, above. He then proposes public-private synergies that might help move us close to gender diversity. He recognizes that California’s quota legislation may be struck down, but argues that SB-826 will have a positive impact on the movement toward gender diversity.⁶⁹

Geeta Tewari, Emma DeCourcy and Shirley Urena highlight the California quota law as part of a longer discussion regarding state efforts (which they contrast to federal reporting initiatives, as discussed above.⁷⁰) As in the other articles previously discussed, these authors note the significant legal concerns raised by SB-826. However, the primary emphasis in their analysis is on a comparison of the United States with international diversity efforts, including that in Norway. The authors explore the limits of the participatory parity theory that is at the root of gender quotas,

⁶³ *Supra* note 56, citing Sophia Bollag, *California is First State to Require Women on Corporate Boards*, The Globe and Mail, (Oct. 1, 2018), <https://www.theglobeandmail.com/world/article-california-is-first-state-to-require-women-on-corporate-boards/> (last visited May 7, 2020).

⁶⁴ *Supra* note 56.

⁶⁵ *Id.* citing Joseph Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California’s SB 826*, SSRN Scholarly Paper ID 3248791 (2018).

⁶⁶ *Supra* note 64.

⁶⁷ *Id.* at 16.

⁶⁸ Rosenblum, *supra* note 45.

⁶⁹ *Id.*

⁷⁰ Tewari, et al., *supra* note 45.

particularly the concern that “[s]uch quotas do not...address the informal social norms and structural inequalities that result in the ‘exclusion of some citizens from some domains of participation.’”⁷¹ Additionally, the authors posit that gender quotas as a path to participatory parity also pose problems when “viewed through the lens of intersectionality.”⁷² The authors suggest that the gender quota law does little to address other significant disparities that exist in the context of corporate board membership. Tewari and her colleagues argue that we need more women on corporate boards not only because of the ethical arguments that support that position but also based “on the premise that the presence of women and under-represented groups in corporate boardrooms fosters narrative inclusivity and impact.”⁷³ Their conclusion is that we need to adopt policies “that address the underlying causes of unequal gender representation through the inclusion of diverse narratives in positions of authority.”⁷⁴

After a brief overview of the California quota legislation and a overview of the legal issues posed by SB-826, Leanne Fuith focuses on some of the significant problems posed by quotas, including the perpetuation of gender stereotypes by quotas, the propensity of gender quotas to promote “box-checking”, and the failure of quotas to achieve the necessary “critical mass” that is needed to enjoy the benefits of board diversity.⁷⁵ Fuith also mirrors the concerns of Tewari, DeCourcy and Urena regarding the deficiencies of quotas with regard to intersectionality.⁷⁶ Fuith concludes that education about the value of diversity, in conjunction with other corporate efforts, is preferable to quotas.⁷⁷

Finally, Teal Trujillo’s note, *Do We Need to Secure a Place at the Table for Women: An Analysis of the Legality of California Law*, takes an in-depth look at the Equal Protection Clause arguments surrounding SB-826, concluding that the legislation is likely to be ruled unconstitutional under an equal protection analysis.⁷⁸ Trujillo also discusses the Commerce Clause arguments and touches on the Internal Affairs Doctrine, which could also undermine the legality of SB-826. One novel argument raised by Trujillo analyzes SB-826 under Title VII jurisprudence, particularly *Ricci v. Destefano*.⁷⁹ The author posits that SB-826 may very well be ruled unlawful under Title VII, although it may also be that Title VII is not applicable to legislation involving gender quotas on corporate boards, because board directors might not properly qualify as employees under Title VII.⁸⁰ Touching on intersectionality themes that have emerged in other articles, Trujillo points out that female is defined in SB-826 as “an individual who self-identifies her gender as a woman, without regard to the individual’s designated sex at birth.”⁸¹ She points out that “the bill is inclusive of transsexuals or all other persons self-identifying as female.”⁸² This may help the bill to avoid claims that the law is beneficial toward only one protected class of persons, people of the female sex.”⁸³ Trujillo also underscores that the legislation does not cap

⁷¹ *Id.* at 249, citing Ruth Rubio Marin, *A New European Parity-Democracy Sex Equality Model and Why It Won’t Fly in the United States*, 60 Am.J. Comp. L. 99 (Winter 2012).

⁷² Tewari, et al., *supra* note 45.

⁷³ *Id.* at 255.

⁷⁴ *Id.*

⁷⁵ Fuith, *supra* note 45.

⁷⁶ *Id.* at 130.

⁷⁷ *Id.*

⁷⁸ Trujillo, *supra* note 45.

⁷⁹ *Id.* at 339, referring to *Ricci v. Destefano*, 557 U.S. 557 (2009).

⁸⁰ *Id.* at 341

⁸¹ *Id.* at 328, quoting CAL. CORP. CODE §301.3(F)(1)(West 2018).

⁸² Trujillo, *supra* note 45, at 328.

⁸³ *Id.*

the number of seats a corporate board could have. Thus, SB-826 does not require removal of male directors as a condition of compliance with the law. As with other commentators, Trujillo suggests that SB-826 is unlikely to survive the many possible legal challenges, but ends with the recommendation that California “create a more legitimate framework to carry out its well-intended purposes.”⁸⁴

These law review articles all conclude that it is likely that SB-826 will be ruled legally invalid. Many of these articles also introduce us to the intersection of the business case for women on corporate boards and law that relies on arguments like this to justify why gender quotas may be imposed in the United States, which we will explore in more detail as we consider the recent legal challenges to the California quota mandate for corporate boards. The literature on SB-826 and gender quotas is limited, allowing our work to be one of the early contributions to a growing legal subject. We next turn to a further exploration of what U.S. states have done to promote board gender diversity and whether or not California’s SB-826 is legal according to California and federal law.

IV. Overview of Gender Quota Legislation in the United States

A. Background on the U.S. Legal System

After examining the implementation of gender quotas in European countries, let us now turn our attention to the United States to see if gender quotas are legal, plausible solutions to gender disparity on corporate boards here in this country. Unlike in Norway, the Constitution, statutes, and corporate governance laws make passage of gender quotas difficult to navigate in the United States.

Specifically, the United States has a system of shared governance because of federalism. This federalist approach makes the legal process complex due to the division between the federal and state governments. It is important to remember that the nation as a whole must follow the U.S. Constitution. Additionally, each state must also honor its own State Constitution. According to the Supremacy Clause, if a law is passed by the federal government, it is considered supreme. This means that states may also pass their own laws, but states do not have the authority to pass laws in conflict with federal laws.⁸⁵ Therefore, state laws must adhere to the constitutions of both state and federal governments.⁸⁶

As a result of this system of shared governance, the U.S. court system also allocates responsibility to hear legal claims between state and federal courts. State courts have primary authority to hear and rule on state law and the vast majority of cases are decided in state courts. Federal courts cannot interfere with state court interpretation of state law. Likewise, federal courts have primary authority to rule on federal law and state courts must defer to federal court decisions. Ultimately, the Supreme Court of the United States has the final authority regarding federal or U.S. constitutional law. Moreover, decisions made by the Supreme Court of the United States on

⁸⁴ *Id.* at 346.

⁸⁵ Pre-emption doctrine may also prevent states from regulating at all in certain areas where the federal government has pre-empted the field. That is, there are some areas of law where the federal regulatory regime is so comprehensive that any attempts by the states to regulate in those areas are precluded. A typical example of this is the Employee Retirement Income Security Act of 1974 (ERISA), a federal law that sets minimum standards for most voluntarily established retirement and health plans in private industry to provide protection for individuals in these plans. *ERISA*, U.S. DEPARTMENT OF LABOR, <https://www.dol.gov/general/topic/health-plans/erisa> (last visited Aug. 10, 2020).

⁸⁶ U.S. Const. art. II, § 2, cl. 2.

federal or U.S. constitutional law bind all states and all courts must comply with the U.S. Constitution as interpreted by the Supreme Court.⁸⁷

In the United States, gender quotas have recently been introduced by the State of California through Senate Bill 826. Therefore, lawsuits regarding the gender quotas may potentially be heard in state or federal court because the gender quotas are imposed under California state law. There are two avenues for civil claims to be heard in federal court.⁸⁸ A civil case may be filed in a federal court under diversity of citizenship jurisdiction or federal question jurisdiction. Diversity of citizenship arises when the plaintiff and defendant in a lawsuit are citizens of two different states and the amount in controversy is over \$75,000.00. However, if both the plaintiffs and the defendants are from the same state, then the case would have to be heard in state court, unless federal question jurisdiction were available.⁸⁹

The other avenue that parties to civil suits can use to access federal courts is federal question jurisdiction. This form of jurisdiction allows civil cases to be brought in federal court if the case arises under federal law.⁹⁰ As a result, a state-based legal complaint may be heard in federal court when the issue has alleged a violation of the U.S. Constitution, federal law, or a national treaty.⁹¹ Although there are some cases involving federal law that must be heard in federal court (for example, bankruptcy cases), the determination to use the federal courts is often a choice made by the litigants themselves. That is, if federal jurisdiction exists, then either party can decide to have the case heard in federal court. Therefore, these different avenues for hearing civil claims show that state courts may hear federal issues and federal courts may hear state issues.⁹²

As a result of these relationships between federal and state courts, navigating gender quotas in the U.S. poses a number of difficulties. These obstacles can be explored in detail by looking closely at California's first-in-the-nation gender quota legislation.

California Senate Bill 826 is the first attempt by a U.S. state to enforce gender quotas on corporate boards. After introducing the content of this Bill, we will explore the efforts of other states working on legislation similar to that of SB-826. Next, pending lawsuits against California regarding the legality of the quotas imposed by SB-826 will be examined. Finally, to get a sense of how these cases might be decided, a legal analysis of Equal Protection precedent, Commerce Clause rulings, and corporate governance law as they relate to the legal issues created by SB-826 will be conducted.

B. California's Senate Bill 826

California is the fifth largest economy in the world according to U.S. Department of Commerce statistics, and, as such, legislators cite this as a reason to ensure that "women are included in the

⁸⁷ *Judicial Power and Jurisdiction-Cases and Controversies*, CORNELL LAW SCHOOL (May 6, 2020), <https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1>.

⁸⁸ This paper will only discuss civil claims.

⁸⁹ 28 U.S.C. § 1332.

⁹⁰ See 28 U.S.C. 1331. *See also*, Article III of the Constitution which states that federal courts may hear "all cases, in law and equity, arising under this Constitution, [and] the laws of the United States." Additionally, *see Osborn v. Bank of the United States*, 9 Wheat. (22 U.S.) 738 (1824).

⁹¹ *Federal Question Jurisdiction*, LEGAL INFORMATION INSTITUTE, <https://www.google.com/search?q=federal+question+jurisdiction&oq=federal+question+&aqs=chrome.0.0j69i57j0l6.3163j0j7&sourceid=chrome&ie=UTF-8> (last visited Apr. 26, 2020).

⁹² For basic review of these ideas see Roger LeRoy Miller, *BUSINESS LAW TODAY: TEXT AND SUMMARIZED CASES* (11th Edition, Standard Edition, Cengage Learning 2017).

discussions and decisions that affect corporate actions and profitability.”⁹³ To meet this goal, Senate Bill 826 was introduced by Senators Jackson, Atkins, and Leyva. The Bill reached the California Senate in January 2018 and was signed into law by Governor Jerry Brown September 30, 2018. This law requires that, by the end of 2019, each publicly-held corporation headquartered or incorporated in California has at least one woman on its board of directors. To further gender representation, the law requires a minimum of two women directors on boards with five or more people and at least three women on boards of six or more people by July 2021.⁹⁴ The Secretary of the State of California is responsible for reporting on how many firms subject to this law complied with it or failed to comply. This information must be posted on the State’s website.⁹⁵ The first report required under the law became available as of March 1, 2020.⁹⁶

If publicly-held corporations fail to meet these requirements, the Secretary of the State of California can impose a fine of \$100,000 the first time the company violates the law, and a fine of \$300,000 upon further failure to cooperate.⁹⁷ As noted above, Bill 826 was signed into effect by Governor Jerry Brown on September 30, 2018. He explained his main motivation for passing the gender quota law was his review of alarming empirical evidence that highlighted gender disparity on corporate boards. Governor Brown noted that, in 2018, of the 446 publicly-traded corporations in California, only 15% of board members were female and 25% of boards failed to have even one woman as a member.⁹⁸

1. Data Driving California’s Senate Bill 826

The text of Bill 826 begins by stating the benefits of having women on corporate boards. It explains that having female directors “will boost the California economy, improve opportunities for women in the workplace, and protect California taxpayers, shareholders, and retirees, including retired California state employees and teachers whose pensions are managed by CalPERS and CalSTRS”⁹⁹; therefore, ultimately making the business case for how women improve profits. California’s SB-826 relies on a MSCI study conducted in 2017 that found boards with at least three female directors outperformed companies without any women on their boards by 45% per earnings per share. Next, the Bill cites a six-year global research study by Credit Suisse that revealed a number of financial benefits to having women on boards of directors, and, further, claimed that “companies with women on their boards tend to be somewhat risk averse and carry less debt, on average.”¹⁰⁰ The final study the Bill uses to support passage of gender quotas is Berkeley’s

⁹³ See Cal. S.B. 826 (Cal. 2018). This bill was introduced in 2018 and became effective January 1 of 2019. The bill is now codified in West’s Ann.Cal.Corp.Code § 301.3^[P]_[SEP].

⁹⁴ *Id.* To access the bill online go to:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB826

⁹⁵ *Id.* § 301.3(c&d).

⁹⁶ Alex Padilla, Cal. Sec’y of State, *Past Reports*, WOMEN ON BOARDS, <https://www.sos.ca.gov/business-programs/women-boards/past-reports/>.

⁹⁷ Cal. S.B. 826 (Cal. 2018) § 301.(e1-4).

⁹⁸ Patrick McGreevy, *Gov. Jerry Brown Signs Bill Requiring California Corporate Boards to Include Women*, LOS ANGELES TIMES (September 30, 2018), <https://www.latimes.com/politics/la-pol-ca-governor-women-corporate-boards-20180930-story.html> (last visited Apr. 26, 2020).

⁹⁹ Sec.1 of Stats.2018, c. 954 (S.B.826)^[P]_[SEP].

¹⁰⁰ *Id.* Citing the CREDIT SUISSE study. For internet access see:

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB826.

“Women Create a Sustainable Future” study published in 2012.¹⁰¹ This Berkeley study concluded that “companies with more women on their boards are more likely to ‘create a sustainable future’ by, among other things, instituting strong governance structures with a high level of transparency.”¹⁰² Given these social and financial benefits of having gender diversity on corporate boards, California legislators and the governor believed that passage of Bill 826 would improve business practices.

2. Reports required by California’s Senate Bill 826

On July 1, 2019, California Secretary of the State, Alex Padilla, published the first report required by SB-826.¹⁰³ This report was meant to show the current number of women on corporate boards, providing information about the status of firms prior to the time when firms would have to comply with Bill 826’s gender quotas (the quotas were to take effect at the end of 2019). The report was compiled via a search of the Securities and Exchange Commission’s Electronic Data Gathering, Analysis, and Retrieval system. Gender data was compiled for companies “listing a California address for the principal executive offices on the annual report they filed with the United States Securities and Exchange Commission (SEC).”¹⁰⁴ The final version of the report includes 537 companies, of which 185 of these companies had at least one female board of director.¹⁰⁵

Looking ahead to March 1, 2020, Alex Padilla posted the second report required by SB-826. This second report was compiled to see which corporations were complying with the gender quotas and had at least one woman on their board of directors. A total of 625 firms were impacted by SB-826 and 330 of these firms filed 2019 Corporate Disclosure Statements with California.¹⁰⁶ We can already see that just over half of the firms required to report actually took action and compiled the necessary data. This suggests that the law is difficult to enforce at this stage. Of the 330 firms that did report gender statistics, 282 companies were in compliance and reported having at least one female board director.¹⁰⁷ In the interval between the July 2019 report and the March 2020 report, at least 145 more women were added to corporate boards.¹⁰⁸ California’s Senate Bill 826 has had an impact on some of these companies that chose to add female directors and has had some success with its goal of stimulating board gender diversity.

Although the initial numbers on how many firms reported in accordance with SB- 826 appear less effective than we assume legislators had hoped it would be, additional studies have found that the data on the women who were added to California boards in 2019 is overwhelmingly positive and a stride for women’s progress in the workplace. In February 2020, KPMG conducted a study on the 138 women who joined all-male boards of directors in California in 2019. A fear that comes with gender quotas is the notion of over-boarding where one woman serves on multiple firms’

¹⁰¹ *Id.* Citing the UNIVERSITY OF CALIFORNIA BERKELEY study. For internet access see: https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB826.

¹⁰² *Id.*

¹⁰³ Padilla, Cal. Sec’y of State, WOMEN ON BOARDS, <https://www.sos.ca.gov/business-programs/women-boards/>.

¹⁰⁴ Alex Padilla, California Secretary of State, *July 1, 2019 Report Methodology*, WOMEN ON BOARDS, <https://bpd.cdn.sos.ca.gov/women-on-boards/report-methodology.pdf>.

¹⁰⁵ Padilla *supra* note 95.

¹⁰⁶ Alex Padilla, Cal. Sec’y of State, *Women on Boards Report*, WOMEN ON BOARDS, <https://bpd.cdn.sos.ca.gov/women-on-boards/WOB-Report-04.pdf>.

¹⁰⁷ Note that the Secretary of State’s website with the relevant reports uses the term woman or women, rather than female. Indeed, the statute defines female as “an individual who self-identifies her gender as a woman, without regard to the individual’s designated sex at birth.” *Supra* note 82.

¹⁰⁸ *Id.*

board of directors to meet the gender requirement (which was previously discussed, above, as the Golden Skirts phenomenon).¹⁰⁹ However, the study conducted by KPMG found that only four of the new female board members joined more than one all-male board. Additionally, the majority of the women who joined boards last year were first-time board of director members as seen in the figure below, showing that the gender quotas have created opportunities for women not previously on boards.¹¹⁰ Appointing 86 first-time board members is a huge success for Bill 826! The KPMG study also showed that 23% of these women are also serving as CEOs, and half of the women hold other C-suite positions such as Chief Financial Officer and Chief Operating Officer.¹¹¹ This data further suggests that the recruiting pool for board members was expanded to women in experienced positions, allowing them to make career advances.

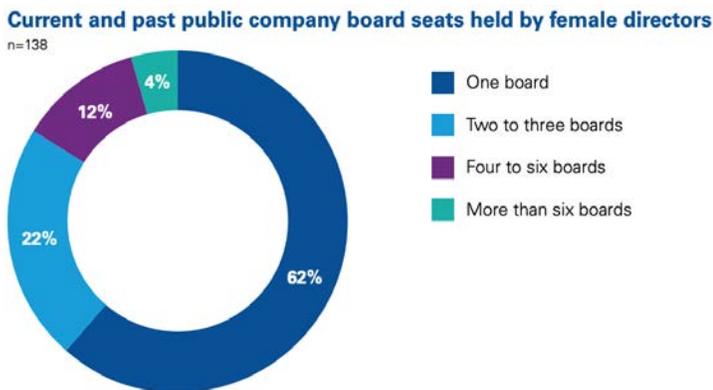


Figure 1¹¹²

C. States with Legislation Similar to California’s Bill 826 in Progress

Although California is the only state to currently have signed legislation requiring a certain number of women per corporate board, other states are also considering promoting gender diversity at the corporate board level through their own implementation of gender-related requirements. Some of these states also are considering board gender quotas for businesses incorporated or headquartered in-state. States following this pattern of legislation are New Jersey, Michigan, and Washington. Moreover, other states have chosen to pursue board director parity by requiring companies to report demographic information about their board members, in addition to recruiting practices and diversity policies. Maryland, Illinois, and New York are leaders in this legislative approach. Finally, some states including Pennsylvania and Massachusetts have passed initiatives that recommend a number of women on boards but do not require any specific company action.

1. States Seeking to Pass Gender Quotas

¹⁰⁹ Courtenay Brown, *California’s ‘Woman Quota’ Law Seems to be Working*, ECON. & BUS.: AXIOS (February 21, 2020), <https://www.axios.com/californias-woman-quota-law-seems-to-be-working-f18e9450-40de-483d-99f6-d8b850439824.html> (last visited Apr. 24, 2020).

¹¹⁰ *The Women Changing California Boardrooms*, KPMG, (2020), <https://boardleadership.kpmg.us/relevant-topics/articles/2020/the-women-changing-california-boardrooms.html> (last visited Apr. 24, 2020).

¹¹¹ *Id.*

¹¹² *Id.* at 5.

New Jersey's proposed bill closely mirrors California's SB-826. New Jersey's bill is titled Senate Bill 3469 and was introduced on February 14, 2019. If it had been passed, Senate Bill 3469 would have required publicly-held domestic and foreign corporations whose principal executive office is located in the State to have a minimum of one female director on its board by December 31, 2019. Moreover, by December 31, 2021, a publicly-held domestic or foreign corporation located in New Jersey would be required to have a minimum of one female director if the corporation has four or fewer directors; two female directors if the corporation has five directors; and at least three female directors if the corporation has six or more directors. Despite the Bill's intent to help develop women's careers in the workplace, Senate Bill 3469 ultimately failed to win passage in January 2020.¹¹³

Perhaps the similar bill introduced in Michigan will fare better. Michigan's Senate Bill 115 was introduced on February 14, 2019, as well, and would require domestic and foreign publicly-held corporations with principal executive offices in Michigan to have at least one female director by January 1, 2021. In two years, by 2023, gender quota requirements would increase depending on the board size: if there are six board members, three must be women; if there are five board members, two must be women; and boards with four or fewer board members may have a minimum of one woman.¹¹⁴ Michigan would impose the same fine amounts that California has imposed through SB-826. Ultimately, Senate Bill 115 was referred to the Committee on Economic and Small Business Development in February 2019, where it remains.

The State of Washington is also considering similar legislation imposing gender quotas. Introduced in January of 2019, Senate Bill 5142 specified that by December 2020, corporations in the state must have at least one woman on their boards. Two years later, in December 2022, boards with 20 or more members must have 30% of its members be female, boards with 10-20 members must have at least 3 women, and boards smaller than 9 members must continue to have at least one woman. The first time that companies fail to meet this quota they will be fined \$100,000 and if they fail to follow the quota a second time, they will be fined \$300,000. This legislation did not originally make it through the legislative process. However, it was re-introduced in January of 2020 for the latest legislative session, where its fate has yet to be determined.

2. States with Reporting Requirements

As mentioned previously, some states are taking a more lenient approach compared to gender quotas when seeking to improve boardroom gender diversity. For example, states including Maryland, Illinois, and New York are passing diversity reporting requirements.

Maryland was the first of three states to pass legislation requiring corporations to disclose board gender data via Bill 1116. Bill 1116 passed the Senate and House on May 13, 2019. This law requires tax-exempt, domestic, non-stock corporations with operating budgets exceeding \$5 million and domestic stock corporations with total sales exceeding \$5 million to include the number of women on boards in their annual reports submitted to the State Department of Assessments and Taxation. The Comptroller is responsible for publicly releasing this information

¹¹³ S.B. 3469, 2018-2019 Regular Session of the Legislature (N.J. 2019). To access on the internet go to: <https://www.billtrack50.com/BillDetail/107064> (last visited Apr. 24, 2020).

¹¹⁴ S.B. 0115, 2019 Regular Session of the Legislature (Mich. 2019). To access on the internet go to: [http://www.legislature.mi.gov/\(S\(4nhhv3si0buhww4ud1p3hyen\)\)/mileg.aspx?page=GetObject&objectname=2019-SB-0115](http://www.legislature.mi.gov/(S(4nhhv3si0buhww4ud1p3hyen))/mileg.aspx?page=GetObject&objectname=2019-SB-0115) (last visited Apr. 24, 2020).

on its website at the start of every calendar year. This reporting requirement will remain in effect until September 20, 2029.¹¹⁵

Furthermore, Illinois is also promoting gender diversity via reporting requirements. House Bill 3394 was signed by Governor J.B. Pritzker on August 27, 2019.¹¹⁶ The original version of this law would have required publicly-traded corporations in the state to have at least one woman, one African-American, and one Latino person on each board. However, the Senate turned down these requirements, instead passing the version of the bill that requires corporations to report all demographic information about board members and to also report diversity policies and recruiting practices used within the firm. This information is publicly available through the Department of State in a report composed by the University of Chicago.¹¹⁷ The first release of the diversity report will be available January 1, 2021.¹¹⁸

The final state that has already passed reporting requirements for board gender diversity is New York. New York State's Bill 4278 was signed by Governor Andrew Cuomo on December 30, 2019.¹¹⁹ The bill requires all domestic and foreign corporations that do business in New York to report to the Department of Taxation and Finance how many women are on their board of directors. By February 1, 2022, the Department of State in New York will report these findings to highlight how many women are on each board and raise awareness to the issue of gender diversity in upper-level management.¹²⁰

3. States Passing Resolutions and Reporting Recommendations

In 2017, the Colorado legislature adopted a Joint Resolution that encouraged “equitable and diverse gender representation on corporate boards.”¹²¹ The resolution also called for corporations to have a minimum number of female directors depending on the size of the board, with the hope that corporations would implement the recommendations by December of 2020.¹²²

Looking to Pennsylvania, the legislature of that state referred House Resolution 1114 to the Committee on Commerce on March 6, 2019. Unlike the legislation in California, New Jersey, Michigan, and Washington, this resolution, which was enacted into law on April 26th of 2019, provides only a suggestion regarding the number of women that should be on boards of directors; it does not impose any fines on corporations that do not meet these guidelines. This resolution advises that a minimum of three women serve on boards with nine or more director seats. Additionally, it recommends a minimum of two women to serve on boards with five to eight board

¹¹⁵ H.B. 1116, 2019 Regular Session of the Legislature, (Md. 2019).

¹¹⁶ Patrick J. Rocks & Kathryn Montgomery Moran, *New Illinois Law Requires Corporations to Report Diversity on Corporate Boards*, JACKSON LEWIS (Aug. 29, 2019), <https://www.jacksonlewis.com/publication/new-illinois-law-requires-corporations-report-diversity-corporate-boards> (last visited Apr. 26, 2020).

¹¹⁷ *Id.*

¹¹⁸ *Id.* To view the bill online go to: <http://www.ilga.gov/legislation/101/HB/PDF/10100HB3394enr.pdf>

¹¹⁹ Eli Freedberg, *New Year, New Trend? New York to Require Corporate Reporting on Number of Women on the Board*, (Jan. 6, 2020),

<https://www.littler.com/publication-press/publication/new-year-new-trend-new-york-require-corporate-reporting-number-women> (last visited Apr. 26, 2020).

¹²⁰ *Id.*

¹²¹ Michael Hatcher & Weldon Latham (of Jackson Lewis, P.C.), *States are Leading the Charge to Corporate Boards: Diversify!*, HARV. LAW SCH. F. ON CORP. GOVERNANCE (MAY 12, 2020), <https://corpgov.law.harvard.edu/2020/05/12/states-are-leading-the-charge-to-corporate-boards-diversify/> (last visited on Aug. 10, 2020).

¹²² *Id.*

of directors and at least one woman to serve on boards of five or fewer directors. The Resolution text cites 2021 as the year by which corporate leadership opportunities for women should be improved via these guidelines.¹²³

This alternate approach to promote gender parity involves legislative resolutions that underscore the problem and encourage companies to add women to their boards. The Commonwealth of Massachusetts, as another example, has also encouraged greater gender parity on corporate boards through reporting recommendations. In 2015, Massachusetts passed Resolution 1007.¹²⁴ This resolution references the Boston Club's 2014 Census of Women Directors and Executive Officers of Massachusetts Public Companies. The Boston Club's 2014 Census reported that, as of June 2014, women held 14.9% of the board seats and 11.8% of executive officer positions in the 100 largest public companies in Massachusetts.¹²⁵ This report also found that 24 of the top 100 companies did not have a single woman on their board of directors. As a result of these statistics, this resolution was passed to encourage all companies in Massachusetts, both privately-held and publicly-traded, to disclose the total number of directors and total number of women directors on their boards. Resolution 1007 also urges firms with nine or more members to have at least three women on their boards and firms with fewer than nine board members to have a minimum of two women on the board by December 31, 2018.¹²⁶

Since passage of this recommendation, the Commonwealth of Massachusetts has not yet released any insights regarding how the resolution has impacted gender parity on boards of directors. Considered by some to be the most liberal state in 2020, it is no surprise that Massachusetts is an early mover in this trend toward getting more women on boards.¹²⁷ We can only wonder if the Commonwealth will act on pending legislation and follow California's lead and adopt gender quota legislation, because this is arguably the most progressive approach that shows a commitment to the advancement of women's corporate careers¹²⁸. However, this progressive approach is countervailing to other liberal values of equal protection, freedom of association, freedom of speech, and corporate governance concerns, which might act as impediments to this legislation.

V. Legal Challenges to California's Bill 826

Gender quotas exemplify the paradox of the Equal Protection Clause.¹²⁹ Gender quotas force us to acknowledge the dichotomies between using law to promote equality and ultimately treating people equally. At some point, if we want to treat people equally, the law has to stop granting certain groups of people extra protections. Theoretically, there should no longer be a need for those protections if everyone is treated equally. Therefore, even if affirmative action in the case of gender

¹²³ H.R. 114, 2019 Regular Session of the Gen. Assembly, (Pa. 2019), To access the bill online go to: <https://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2019&sessInd=0&billBody=H&billType=R&billNbr=0114&pn=0736>.

¹²⁴ Res. 1007, Reg. Session of the Legislature, (Mass. 2015), To access the bill online go to: <https://malegislature.gov/Bills/189/Senate/S1007>.

¹²⁵ *Id.* citing the Boston Club 2014 Census.

¹²⁶ *Id.*

¹²⁷ *Most Liberal States 2020*, WORLD POPULATION REVIEW, (Apr. 6, 2020), <https://worldpopulationreview.com/states/most-liberal-states/> (last visited Apr. 24, 2020).

¹²⁸ Esther Whieldon, *States Float Corporate Board Diversity Bills in Wake of California's New Law*, S&P GLOBAL MARKET INTELLIGENCE (Jan. 30, 2019), <https://www.spglobal.com/marketintelligence/en/news-insights/trending/DpxXrj-rt47oUzR3GShJGA2>.

¹²⁹ U.S. Const. amend. XIV.

quotas is helpful for some women, it creates issues of female tokenism, interferes with the right of freedom of association, infringes on the freedom of corporate governance, and, at some level, undermines the very values of equal protection.¹³⁰

Consequently, there is a tension in the law surrounding gender quotas. Gender quotas undermine notions of equal protection. They also often force us to balance constitutional equal protection values against due process concerns.¹³¹ Many commentators claim that gender quotas do not strike the correct balance between these values. Still others raise additional legal concerns, ranging from the Commerce Clause to the Internal Affairs Doctrine. Many of these criticisms are reflected in the two current lawsuits based on California's SB-826.

Many states throughout the country have an interest in broadening the gender diversity of corporate boards and have tried to do so through the passage of law. These laws, like California's gender quota mandate, SB-826, are likely to generate litigation, given the conflict resolution norms prevalent in the United States. Lawsuits are a more common mechanism for resolving conflict here in the United States compared to other countries. For instance, in 2013, for every 100,000 people, a total of 5,806 suits were filed in the United States compared to 3,681 and 2,416 suits filed in England and France, respectively.¹³² The United States consistently dominates in litigious behavior globally.

Given the apparent legal controversies that California's gender quota law stirs up, it is obvious that litigation was soon to follow its passage. Even Governor Brown acknowledged the potential corporate governance and equal protection legal issues Bill 826 raises. In fact, when Brown signed the bill into law, he stated that these "potential flaws [of the bill] . . . may prove fatal to its ultimate implementation."¹³³ Less than a year after Governor Brown voiced these words, the first complaint against the State of California was filed in August 2019 and, three months later, the second suit was filed in November.¹³⁴ These two legal actions are *Crest v. Padilla* and *Meland v. Padilla*, both of which will be discussed in greater detail in the following sections.

A. Litigation Based on California Law: *Crest v. Padilla*

The first of these lawsuits, *Crest v. Padilla*, is based on California law and is, therefore, being pursued through the state court system starting in the Superior Court of the State of California.¹³⁵

¹³⁰ See Beate Elstad & Gro Ladegard, *Women on corporate boards: Key influencers or tokens?*, 17 *Journal of Management & Governance*, 1 (2011). Also see Mariateresa Torchia, *Women Directors on Corporate Boards: From Tokenism to Critical Mass*, 102 *J. BUS. ETHICS* 299, note 2 (2011).

¹³¹ Equal Protection and Due Process are two sides of the constitutional "fairness coin": The Equal Protection Clause focuses on fairness in the context of equality or equal treatment under the law and the Due Process Clause focuses on fairness in the context of justice, particularly justice in the individual case. That is, Equal Protection protects us from being treated differently from others improperly, whereas Due Process ensures that the process by which the law is enforced is fair. Due Process also makes sure that the laws, themselves, are fair and in conformance with our constitutional rights, particularly our Bill of Rights protections pursuant to the first ten amendments to the United States Constitution.

¹³² J. Mark Ramseyer & Eric B. Rasmusen, *Are Americans More Litigious?: Some Quantitative Evidence*, in *THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW* 69, 72 (Yale University Press, 2013).

¹³³ *California Becomes First State to Require Women on Corporate Boards*, NBC NEWS (September 30, 2018), <https://www.nbcnews.com/news/us-news/california-becomes-first-state-require-women-corporate-boards-n915201> (last visited Apr. 24, 2020).

¹³⁴ Evan Symon, *California 'Woman Board Quota' Law Faces Legal Challenge In Court*, CALIFORNIA GLOBE (Dec. 19, 2019), <https://californiaglobe.com/section-2/california-woman-board-quota-law-faces-legal-challenge-in-court/> (last visited Apr. 26, 2020).

¹³⁵ *Crest v. Padilla* will hereinafter be referred to as the *Crest* case (or *Crest*).

The lawsuit was filed by Judicial Watch, Inc., a conservative group founded in 1994 and dedicated to promoting the transparency and accountability of the government of the United States. The mission statement of Judicial Watch includes the phrase, “because no one is above the law.”¹³⁶ Although Judicial Watch had initial interest in holding the state of California accountable for what it believes to be an illegal law, in order to meet the standing requirements imposed by law¹³⁷ Judicial Watch had to select plaintiffs who paid taxes in California. Thus, the named plaintiffs in this case are Judy De Vries, Earl De Vries, and Robin Crest.¹³⁸ The defendant, Alex Padilla is the Secretary of the State of California; therefore the plaintiffs are suing the government via the Secretary of the State. Note that, in October of 2019, Secretary Padilla filed a demurrer to the suit, arguing that the plaintiffs lack standing and that the action is not ripe.¹³⁹ However, on June 3rd, 2020, Superior Court Judge Maureen Duffy-Lewis overruled the demurrer, finding both that the plaintiffs had standing and that the action was sufficiently “ripe” to proceed.¹⁴⁰ Because of this ruling upholding the standing of the plaintiffs, the primary legal arguments laid out in *Crest* can be addressed in this litigation, allowing for a potential resolution of the law’s constitutionality under California law.¹⁴¹

The specific claims made in *Crest* focus on both the California State Constitution and California common law. First, the complaint asserts that, according to California’s Constitution, and applicable court rules, taxpayer funds may not be used to fund illegal activity, thus conferring standing on taxpayers to bring a claim for relief, as noted in the discussion, above.¹⁴² The complaint goes on to outline the plaintiffs’ arguments for why gender quotas are illegal. As stated in Section 7 of the California Constitution: “A person may not be...denied equal protection of the laws.”¹⁴³ California Constitution Article I Section 31 says that “the State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”¹⁴⁴ Seeing that SB-826 sets quotas based on gender, it also “employs express gender classifications”¹⁴⁵ triggering a review of whether or not the quotas comply with Article I Section 31 of the California Constitution. Accordingly, this argument allows us to consider the paradox of equal treatment. We must question whether or not helping women—which was a group previously discriminated against—advances equal protection or undermines equal protection by continuing to treat women differently via the gender quotas.

¹³⁶ *About Judicial Watch*, JUDICIAL WATCH, <https://www.judicialwatch.org/about/#mission> (last visited Apr. 24, 2020).

¹³⁷ *Standing*, CORNELL LAW SCHOOL, <https://www.law.cornell.edu/wex/standing> (last visited May 6, 2020).

¹³⁸ Complaint for Injunctive and Declaratory Relief at 4, *Crest v. Padilla*, No.19STCV27561, (Sup. Ct. of Cal., County of Lost Angeles, Civ. Div. Aug. 6, 2019). To view this complaint online go to: <https://www.judicialwatch.org/wp-content/uploads/2019/08/Crest-et-al-v-Padilla-Women-on-Boards-complaint-27561.pdf> (last visited Apr. 28, 2020).

¹³⁹ Keith Paul Bishop, *Secretary of State Must Answer Legal Challenge to Female Director Quota Law*, ALLEN MATKINS’ CALIFORNIA CORPORATE AND SECURITIES LAW BLOG (June 11, 2020), <https://www.calcorporatelaw.com/secretary-of-state-must-answer-challenge-to-female-director-quota-suit> (last visited on Aug. 10, 2020).

¹⁴⁰ *Crest v. Padilla*, No. 19STCV27561 (Sup. Ct. of Cal., County of Lost Angeles, Civ. Div. June 3, 2020)(ruling on submitted matter). To view this decision online go to: <https://www.judicialwatch.org/wp-content/uploads/2020/06/Crest-v-Padilla-motion-denied-27561.pdf> (last visited Aug. 10, 2020).

¹⁴¹ *Supra* note 139.

¹⁴² *Supra* note 138.

¹⁴³ CAL. CONST., art. 1, §7, subd. (a).

¹⁴⁴ CAL. CONST., art I, § 31.

¹⁴⁵ *Supra* note 138.

The next part of the legal argument in *Crest* requires the court to determine the level of judicial review that ought to be applied to gender quotas. At the national level, gender issues are often reviewed at the intermediate scrutiny level. However, the claims in *Crest* are made pursuant to California standards. In the complaint, the plaintiffs cite *Connerly v. State Personnel Board*¹⁴⁶ as precedent that established a strict scrutiny standard for gender classifications in California. In *Connerly*, the governor of California, Pete Wilson, challenged five state government programs that involved affirmative action. The Superior Court found that the State “[could not] establish different levels of equal protection for men and women out of gender prejudice and/or gender paternalism.”¹⁴⁷ This decision cited a previous case, *Korei v. Metro Car Wash*, in which the California Superior Court ruled that “public policy in California mandates the equal treatment of men and women.”¹⁴⁸ Therefore, although the Constitution of the United States does not require strict scrutiny for gender classifications, the California Constitution does. Because California’s Senate Bill 826 calls for obvious gender classifications, the first part of the *Connerly* precedent reveals that the gender quotas will be held to a level of strict scrutiny under the California constitution.

However, the standard of review for the gender quotas in California does not end at the imposition of strict scrutiny by the California Constitution under traditional modes of Equal Protection analysis. The ruling in *Connerly v. State* goes on to cite California Proposition 209. Proposition 209 was a voters’ initiative on the general election ballot on November 5, 1996, to amend the state constitution. It passed with 54% of the vote.¹⁴⁹ The proposition “prohibits discrimination against or preferential treatment to individuals or groups regardless of whether the government action could be justified under strict scrutiny.”¹⁵⁰ Indeed, the court in *Connerly* noted that the California Supreme Court “construed Proposition 209 in accordance with the ordinary meaning of its words”, citing to the court’s decision in *Hi-Voltage Wire Works v. San Jose*.¹⁵¹ In *Hi-Voltage*, the Supreme Court in California held that, within the context of Proposition 209, *discrimination* means “to make distinctions in treatment; show partiality (in favor of) or prejudice (against)” and *preferential* means “a giving of priority or advantage to one person ... over others.”¹⁵² As the court in *Connerly* made clear, in adopting Proposition 209, the voters intended to prohibit the state from classifying individuals by race or gender.¹⁵³ Applying this amendment to the gender quotas required by SB-826, this means that, even if gender quotas pass a strict scrutiny review, if the California courts believe they promote preferential treatment to a group or discriminate against a group of individuals, then gender quotas would be ruled unconstitutional in California. However, we must note that California Proposition 16 is a proposal to repeal Proposition 209, thus allowing for the

¹⁴⁶ *Connerly v. State Personnel Bd.*, 92 Cal. App. 4th 26 (2001).

¹⁴⁷ *Id.* at 44.

¹⁴⁸ *Id.* at p. 37 citing *Koire v. Metro Car Wash*, 40 Cal.3d 24 , 219 Cal.Rptr (1985).

¹⁴⁹ Proposition 209, which was on the ballot in California on Nov. 5th, 1996, added [Section 31](#) to the [California Constitution's Declaration of Rights](#), which said that the state cannot discriminate against or grant preferential treatment on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, and public contracting.^[1] Therefore, Proposition 209 banned the use of [affirmative action](#) involving race-based or sex-based preferences in California. California Proposition 209, Affirmative Action Initiative, BALLOTEDIA, [https://ballotpedia.org/California_Affirmative_Action_Proposition_209_\(1996\)](https://ballotpedia.org/California_Affirmative_Action_Proposition_209_(1996)).

¹⁵⁰ *Id.*

¹⁵¹ *Connerly*, 92 Cal. App. 4th at 41, citing *Hi-Voltage Wire Works v. San Jose*, 24 Cal. 4th 537, 559, 101 Cal. Rptr. 2d 653, 12 P.3d 1068 (2000).

¹⁵² *Id.* See also *supra* note 149.

¹⁵³ *Id.*

implementation of affirmative action policies in California.¹⁵⁴ Voters in California will get to decide on this constitutional amendment when they submit their ballots in the November 3rd, 2020 election. We will have to wait until the November results are available to see how this issue will be decided by Californians.

As seen through the precedent cited in *Crest*, express gender classifications are subject to strict scrutiny in California. Even if Proposition 16 passes in California, the potential application of a strict scrutiny form of review makes a ruling against gender quotas quite likely. Moreover, even if gender classifications do pass the strict scrutiny standard, the California Constitution still does not allow for them pursuant to Proposition 209 (although this limitation might be lifted if Proposition 16 passes). Given these limitations, it is likely that gender quotas will be deemed illegal by California courts because the gender quotas clearly give preferential treatment to women, in contradiction of the California Constitution. If the state ruling follows precedent then the plaintiffs, including Judicial Watch, will succeed in making sure “no one is above the law.” However, if Proposition 16 passes, then we may have to wait and see how precedent evolves regarding the issue of gender quotas in California.

B. Litigation Based on Federal Law: *Meland v. Padilla*:

The second complaint filed against California Senate Bill 826 is *Meland v. Padilla*.¹⁵⁵ The primary claim against gender quotas in this case is centered on the Equal Protection Clause of the Fourteenth Amendment, relying on federal laws rather than California law, in contrast to *Crest*. This complaint was filed in the federal U.S. District Court for the Eastern District of California.¹⁵⁶

The Plaintiff in this case, Creighton Meland, Jr., is from Chicago, Illinois, and is a shareholder of the company OSI Systems Inc. This company is headquartered in Hawthorne, California, making it subject to SB-826. OSI Systems Inc. is an electronics company that was founded in 1987. The company produces electronic systems and parts for homeland security, healthcare, defense, and aerospace.¹⁵⁷ OSI Systems Inc. was rated #55 on the Forbes *Best Small Companies* list in 2012 and had revenue of \$958 million in 2015.¹⁵⁸

In order to properly assess the *Meland* case, it is important to recognize the corporate governance and shareholder assertions surrounding Meland’s claims as the plaintiff. Corporate governance can be defined as the relationship between a corporation and its shareholders.¹⁵⁹ The shareholders of a company often do not participate in the corporate control of day-to-day operations and instead provide their say in how the company is run by electing corporate board members. The board members are then responsible for coordinating corporate control, or the company’s officers and upper-management.¹⁶⁰ This means that shareholders influence how the

¹⁵⁴California Proposition 16, Repeal Proposition 209 Affirmative Action Amendment (2020), BALLOTPEdia, [https://ballotpedia.org/California_Proposition_16_Repeal_Proposition_209_Affirmative_Action_Amendment_\(2020\)](https://ballotpedia.org/California_Proposition_16_Repeal_Proposition_209_Affirmative_Action_Amendment_(2020)).

¹⁵⁵ Referred to as *Meland*.

¹⁵⁶ Complaint For Declaratory and Injunctive Relief, *Meland v. Padilla*, No. 2:19-cv-02288-JAM-AC (US D Court E.D. Ca. Nov. 13, 2019). To view online go to: <https://pacificlegal.org/wp-content/uploads/2019/11/Creighton-Meland-v.-Alex-Padilla-Secretary-of-State-of-California-Complaint.pdf>.

¹⁵⁷ *About OSI*, OSI Systems Inc., <https://www.osi-systems.com/about-osi/> (last visited Apr. 24, 2020).

¹⁵⁸ Forbes, *OSI Systems*, Forbes, <https://www.forbes.com/companies/osi-systems/#7e6129c03c8f> (last visited Aug. 10, 2020).

¹⁵⁹ Chapter 30, *Investor Protection, Insider Trading, and Corporate Governance*, in Roger LeRoy Miller, BUSINESS LAW TODAY: TEXT AND SUMMARIZED CASES (11th Edition, Standard Edition, Cengage Learning 2017).

¹⁶⁰ *Id.*

company performs through their selection of corporate board members. The *Meland* complaint notes that the gender quotas “must impact the behavior of shareholders like Mr. Meland, who are responsible for voting for the members of the board of directors at annual meetings.”¹⁶¹ Therefore, Mr. Meland’s right to choose who he believes is the best candidate for a board of director role is infringed when he has to choose a certain number of women for the board. This potential to affect shareholder voting rights contradicts previous corporate governance practices and is especially concerning when the choice that the shareholder has to make may be illegal according to other law, which is what the complaint asserts.

At the time that shareholder Meland filed the lawsuit, the company’s board of directors was composed of five men and zero women. In December 2019, just in time to meet SB-826’s timeline requiring at least one woman on every company’s board of directors, Kelli Bernard was appointed to OSI System’s board of directors. Prior to this position, she served as Vice-President and National Cities Leader of AECOM, but was brought onto OSI System’s board of directors.¹⁶²

Despite the Plaintiff’s legal objections centering on shareholder rights as evidenced in the complaint, OSI Systems Inc. is adhering to SB-826 by adding a woman to its board. As a result, it is important to note this difference between Meland representing himself as a shareholder, rather than bringing the claim derivatively on behalf of OSI Systems Inc. or having the company initiate a lawsuit against the law on its own behalf. This differentiation calls into question Meland’s standing. Standing is the ability for an individual or group of individuals to bring a lawsuit to court. The plaintiffs must be able to show that they have experienced “actual or imminent” injuries as a result of the claim they are pursuing.¹⁶³ The injury that Meland purports to have received is an unconstitutional infringement on his voting rights as a shareholder because he must now vote for a certain number of women to serve on the OSI Systems Inc. board of directors or risk the imposition of fines on the corporation. Typically, when an action interferes with shareholder voting rights, the following lawsuit would be a direct claim, rather than a derivative one.¹⁶⁴ In a direct claim, the shareholder alleges a direct harm, often asserting that the company has failed to do its duty to the shareholder. In contrast, for derivative claims, a shareholder files a suit on behalf of the company.¹⁶⁵ It seems that Meland’s intent was to file a direct claim, rather than a derivative claim, an argument with which we agree. However, there are a number of arguments that suggest that this claim is actually derivative, rather than direct. The arguments that Meland makes against SB-826 focus on the unconstitutionality of imposing gender quotas on corporate boards. The corporation will be fined if they do not adhere to the allegedly unconstitutional gender quotas imposed on the board of directors by the statute, possibly suggestive of harm to the corporation rather than to the shareholders. Shareholders are not directly held responsible for non-compliance and are free to vote for whom they want, albeit with the proviso that fines will be imposed on the corporation if the election does not result in the requisite number of board seats for women. Arguably, it is the corporation, rather than the shareholders, that faces potentially unconstitutional

¹⁶¹ Complaint For Declaratory and Injunctive Relief, *Meland v. Padilla*, No. 2:19-cv-02288-JAM-AC (US D Court E.D. Ca. Nov. 13, 2019). To view online go to: <https://pacificlegal.org/wp-content/uploads/2019/11/Creighton-Meland-v.-Alex-Padilla-Secretary-of-State-of-California-Complaint.pdf>.

¹⁶² *Kelli Bernard*, OSI Systems Inc., <https://investors.osi-systems.com/board-directors/kelli-bernard> (last visited Apr. 27, 2020).

¹⁶³ See *Lujan v. Defenders of Wildlife* (90-1424), 504 U.S. 555 (1992).

¹⁶⁴ For precedent regarding derivative claims see *Cohen v. Beneficial Industrial Loan Corp.*, 336 U.S.541 (1949). Also see *Grimes v. Donald*, 673 A.2d 1207 (Del.Sup.Ct.1996).

¹⁶⁵ *What is the Difference Between a Shareholder Derivative Suit vs. a Direct Claim?*, Trembly Law, (Oct. 10, 2017), <https://tremblylaw.com/difference-shareholder-derivative-suit-vs-direct-claim/> (last visited May 7, 2020).

constraints and the corporation has taken steps to comply with the law. Therefore, the plaintiff in *Meland* may face some difficulty in appropriately demonstrating that he has standing.

In fact, on April 20 of 2020, the federal district court ruled that Meland does not have standing, specifying that, if OSI Systems Inc. as a corporation does not agree with gender quotas, then the company should be the one to sue.¹⁶⁶ This means that the federal court did not make any ruling on the constitutional arguments in the *Meland* case but merely has ruled that Meland does not have standing to bring the claim. Meland has appealed this decision to the United States Court of Appeals for the Ninth Circuit.¹⁶⁷ An Amicus brief has been filed in the case¹⁶⁸ and it is expected that the court will consider the case in early 2021.¹⁶⁹

1. The Standing Arguments in *Meland v. Padilla*

While this dismissal does not go to the merits of the underlying claims in the complaint, the grant of the motion to dismiss based on a lack of standing may, nevertheless, signify the death knell for this case. While citizen advocacy groups and individual shareholders may be interested in pursuing litigation against the California gender quotas, corporations, themselves, may be less likely to do so. When investors, as well as employees, customers, and the general public, are calling for advances in diversity, often relying on academic research promoting diversity as potentially performance-enhancing,¹⁷⁰ corporations may be reluctant to spend corporate resources on litigation opposing the addition of women to corporate boards. Indeed, the backlash against such litigation may present significant risks that corporations may very well wish to avoid. Unless corporations, themselves, are willing to bring these actions, then shareholders may find it difficult to get these cases heard on the merits if the courts deny them direct access and force them to resort to derivative claims.

In his Order Granting Defendant's Motion to Dismiss, United States District Judge John A. Mendez specified that Meland, the Plaintiff, was not affected by SB-826 "in a personal and individual way."¹⁷¹ The court found that the provision of SB-826 requiring "women to be included on these boards applies only to corporations."¹⁷² The decision goes on to state that SB-826 only places requirements on corporations and only corporations face possible regulations and fines.¹⁷³ According to this decision, while the law may influence the way a shareholder chooses to vote at future shareholder meetings, it does not require a shareholder to vote in any particular way and,

¹⁶⁶ Order Granting Defendant's Motion to Dismiss, *Meland v. Padilla*, No. 2:19-cv-02288-JAM-AC (US D Court E.D. Ca. Apr. 20, 2020). Also see *Eisenberg v. Flying Tiger Lion, Inc.*, 451F.2d 267 (2nd Cir. 1971).

¹⁶⁷ William Savitt et al., *Federal District Court Dismissal of Challenge to Board Diversity Statute*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Apr. 24, 2020), <https://corpgov.law.harvard.edu/2020/04/24/federal-district-court-dismissal-of-challenge-to-board-diversity-statute/> (last visited May 14, 2020).

¹⁶⁸ Brief of Amicus Curiae Hamilton Lincoln Law Institute in Support of Appellants and Reversal Filed With Consent of All Parties, *Meland v. Padilla*, No. 20-15762 (9th Cir. July 29, 2020).

¹⁶⁹ *Meland v. Padilla*, HAMILTON LINCOLN LAW INSTITUTE (JULY 29, 2020), <https://hlli.org/meland-v-padilla/>.

¹⁷⁰ See, for example, Mikayla Kuhns, Rudy Kwack and Kosmas Papadopoulos, *California Dreamin': The Impact of the New Board Gender Diversity Law*, THE CLS BLUE SKY BLOG: COLUMBIA LAW SCHOOL'S BLOG ON CORPORATIONS AND THE CAPITAL BLUE SKY MARKETS (January 4, 2019), <https://clsbluesky.law.columbia.edu/2019/01/04/california-dreamin-the-impact-of-the-new-board-gender-diversity-law/> (last accessed on June 1, 2020), which discusses the impact of Bill 826 and underscores the market support for gender diversity gains.

¹⁷¹ Order Granting Defendant's Motion to Dismiss, *Meland v. Padilla*, No. 2:19-cv-02288-JAM-AC (US D Court E.D. Ca. Apr. 20, 2020).

¹⁷² *Id.*

¹⁷³ *Id.*

thus, that influence is “merely incidental to the injury caused to the corporation” by SB-826.¹⁷⁴ Additionally, the court asserts that SB 826 does not strip Plaintiff of his voting rights, nor does it force Plaintiff to vote in any particular manner. Therefore, the court finds that the Plaintiff’s claim is derivative of OSI’s. Moreover, the court observes that OSI has added a female director in accordance with SB 826, thus undermining the Plaintiff’s ability to establish his injury as “actual or imminent, nor conjectural or hypothetical.”¹⁷⁵

A different result may be reached if there is a finding that SB-826 undermines or interferes with shareholder voting rights. Indeed, the distinction between a direct and a derivative claim is often difficult to draw.¹⁷⁶ The United States Court of Appeals for the Ninth Circuit may adopt a more liberal approach to the standing question than that advocated for by the District Court in its dismissal. Moreover, the Supreme Court of the United States may take a different view of the standing issue, if the case goes forward on appeal. Additionally, other cases may emerge with different standing arguments that might allow a shareholder to initiate a direct action. It might also be possible for a case to be pursued derivatively, although that path is often a challenging one for shareholder-plaintiffs. Furthermore, derivative claims are limited by the equitable restriction “that generally prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation’s management has refused to pursue the same action for reasons other than good-faith business judgment.”¹⁷⁷ There is a strong argument to be made that SB-826 does interfere with the voting rights of shareholders, which could, thus, allow for a direct claim to be pursued if that argument was accepted on appeal. Additionally, there are ample reasons for affected corporations to pursue a claim. However, there may be practical constraints at play, as mentioned above, that may hinder corporations from challenging SB-826. It will be interesting to see how this case is handled on appeal. The result on the standing issue may ultimately determine the fate of the case, notwithstanding the strength of the underlying legal claims.

2. Additional Arguments Raised in *Meland v. Padilla*

Because the courts still have not made a decision on the merits of the case, it is necessary to spend some time assessing the rest of the claims asserted in *Meland*. Looking more specifically at the Fourteenth Amendment Equal Protection claims, the plaintiff argues that SB-826 facially discriminates on the basis of sex and that the women board quotas serve no important government interest that could sustain a sex-based classification under the Equal Protection Clause.¹⁷⁸ The Plaintiff further argues that, even if balancing the gender make-up on corporate boards did serve an important government interest, the rigid quota that SB-826 imposes does not do enough to advance that government interest. What’s more, the complaint also highlights that the women quotas “[rely] on a variety of improper gender stereotypes, such as the belief that women board

¹⁷⁴ *Id.*, quoting *U.S. v. Stonehill*, 83 F.3d 1156, 1160 (9th Cir. 1996).

¹⁷⁵ *Id.* Quoting *Lujan v. Def’s. Of Wildlife*, 504 U.S. 555, 560-61 (1992).

¹⁷⁶ *See, for example*, Seth Aronson Sharon L. Tomkins Ted Hassi Andrew R. Escobar, *Shareholder Derivative Actions: From Cradle to Grave*, O’Melveny & Myers, LLP, Los Angeles, California (June 2009), <https://www.mondaq.com/pdf/clients/87654.pdf> (last accessed on June 1, 2020). *See also*, Stephen Bainbridge, *Can a Breach of Fiduciary Duty Suit Be Brought Directly?*, PROFESSORBAINBRIDGE.COM (May 4, 2020), <https://www.professorbainbridge.com/professorbainbridge.com/2020/05/can-a-breach-of-fiduciary-duty-suit-be-brought-directly.html> (last access on June 1, 2020).

¹⁷⁷ Order Granting Defendant’s Motion to Dismiss, *Meland v. Padilla*, No. 2:19-cv-02288-JAM-AC (US D Court E.D. Ca. Apr. 20, 2020) quoting *Franchise Tax Board of Calif. V. Alcan Aluminum LTD.*, 493 U.S. 331, 336 (1990).

¹⁷⁸ Complaint For Declaratory and Injunctive Relief, *Meland v. Padilla*, No. 2:19-cv-02288-JAM-AC (US D Court E.D. Ca. Nov. 13, 2019).

members bring a particular ‘working style’ which will impact corporate governance.”¹⁷⁹ We also see the idea of tokenism addressed when the complaint states that the women quotas are “deeply patronizing.” Ultimately, the *Meland* arguments stem from equal protection rights set forth by the Fourteenth Amendment, outlined below.

C. Equal Protection Clause Concerns

1. Standards of Scrutiny for Equal Protection Arguments

Because the argument in the *Meland Case* is made under the Fourteenth Amendment’s Equal Protection Clause, we must look at the federal standard for review of gender classifications. In 1976, *Craig v. Boren* established that intermediate scrutiny is the level of review typically required for gender discrimination.¹⁸⁰ The state of Oklahoma had a law that prohibited the sale of “non-intoxicating” 3.2% beer to males under the age of 21 and to females under the age of 18. Oklahoma lawmakers claimed that this difference between the genders was necessary because of traffic accident data that showed men were more likely to get into a motor vehicle accident due to alcohol consumption than women. The question brought to the Supreme Court of the United States was whether or not this different application of law to men versus to women violated the Fourteenth Amendment’s Equal Protection Clause. The Court ruled against this difference in treatment because the law did not show a substantial relationship between the law and traffic safety accidents according to gender.¹⁸¹ Therefore, this ruling called for stricter review than rational basis review, but less strict than strict scrutiny review, which is usually reserved for racial classifications.

A law can be upheld under intermediate scrutiny if it serves an important or significant government interest and is substantially related to achieving that interest.¹⁸² Unlike strict scrutiny, which requires a law to be in place to further a compelling state interest and be narrowly tailored to achieve this result, intermediate scrutiny is a slightly less demanding standard of review.¹⁸³ However, the Court has not yet set a precedent on which level of scrutiny it will apply when assessing gender quotas. It has made rulings on race quotas and affirmative action, so we can look to these rulings when attempting to predict how *Meland* might be decided.

2. Precedent Regarding Affirmative Action and Quotas in the United States

A key case that set precedent regarding the Fourteenth Amendment is *University of California v. Bakke*.¹⁸⁴ In this case, a white man named Allan Bakke applied for admission into the University of California Medical School in two different years. At both times, he was rejected for admission to the medical school. After his rejection, Bakke learned that the University had reserved sixteen out of one hundred spots in the medical school for qualified minority applicants. However, the minority students who were accepted had lower GPAs and exam scores than Bakke did for each of the years in which he was not admitted. As a result, the Supreme Court had to decide if the

¹⁷⁹ *Id.* at 6.

¹⁸⁰ *Craig v. Boren*, 429 U.S. 190 (1976).

¹⁸¹ *Craig v. Boren*, OYEZ, <https://www.oyez.org/cases/1976/75-628> (last visited Apr. 27, 2020).

¹⁸² Brett Snider, *Challenging Laws: 3 Levels of Scrutiny Explained*, FINDLAW (Jan. 27, 2014), https://blogs.findlaw.com/law_and_life/2014/01/challenging-laws-3-levels-of-scrutiny-explained.html (last visited Apr. 25, 2020).

¹⁸³ *Id.*

¹⁸⁴ *University of California v. Bakke*, 438 U.S. 265 (1978).

affirmative action policy the University of California used to reject Bakke twice, instead favoring minority student admittance, was legal under the Fourteenth Amendment's Equal Protection Clause.¹⁸⁵

In a 5-4 decision, the justices ordered that Bakke be admitted to the medical school. Four of the justices in support of this decision asserted that racial quota systems like the one the University of California used could never be supported under the Fourteenth Amendment. Justice Lewis Powell argued that it was the rigid use of racial quotas that made the university's practice unconstitutional. The justices concluded that race is an acceptable admission criterion when taken in consideration with several other criteria. Ultimately, this decision set the precedent that when race is the characteristic employed in a quota system it is unconstitutional when rigidly applied.¹⁸⁶ Applying this precedent to SB-826 suggests that the quota system may be impermissible. While the quota imposed by SB-826 related to gender, rather than race, it is a rigid quota system similar to that in *Bakke*.

To further our understanding of the precedent surrounding the Fourteenth Amendment and affirmative action approaches such as quotas in the U.S., we can look to a set of two cases from Michigan. The interpretation of the Equal Protection Clause in these Michigan cases can also help us gauge how the case in *Meland* may be decided.

The first of these cases is *Gratz v. Bollinger*.¹⁸⁷ In 1995 white students Jennifer Gratz and Patrick Hammacher applied to the University of Michigan's College of Literature, Science, and the Arts (LSA). Both candidates were denied admission.¹⁸⁸ The Office of Undergraduate Admissions (OUA) revealed that its evaluative process took account of multiple factors of the applicants including test scores, high school, geography, and alumni. Students were awarded points in a point system for their ratings on each of these factors. The OUA also awarded 20 additional points to students who were included in underrepresented minority groups. Therefore, the committee admitted almost any qualified student in a certain group that it determined to be underrepresented. The Supreme Court had to decide whether or not this use of racial preferences in admissions violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. The court found that use of this point system that admitted nearly every applicant of "underrepresented minority" status was not narrowly tailored and violated the Constitution.¹⁸⁹

The next case from Michigan University, *Grutter v. Bollinger*, further shows a pattern of strict scrutiny being applied when race is used as a factor in admission.¹⁹⁰ In this 1997 case, which was heard along with the *Gratz v. Bollinger* case, a white student named Barbara Grutter applied to the University of Michigan Law School.¹⁹¹ She was denied admission despite having a 3.8 GPA and a LSAT score of 161. She, subsequently, filed a lawsuit under the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act. The law school had a policy where it used race as a factor in admissions decisions because it serves a "compelling interest in achieving diversity in the student body."¹⁹²

¹⁸⁵ *Regents of the University of California v. Bakke*, OYEZ, <https://www.oyez.org/cases/1979/76-811> (last visited Apr. 25, 2020).

¹⁸⁶ *Id.*

¹⁸⁷ *Gratz v. Bollinger*, 539 U.S. 244 (2003).

¹⁸⁸ *Gratz v. Bollinger*, OYEZ, <https://www.oyez.org/cases/2002/02-516> (last visited Apr 27, 2020).

¹⁸⁹ *Id.*

¹⁹⁰ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹⁹¹ *Grutter v. Bollinger*, OYEZ, <https://www.oyez.org/cases/2002/02-241> (last visited Apr. 25, 2020).

¹⁹² *Id.*

The Supreme Court found in this case that the use of race as a factor in admissions was not illegal under the Fourteenth Amendment's Equal Protection Clause. The Court believed that the narrowly tailored use of race in admissions decisions that furthered a compelling interest for the students by having diversity benefit their educational experiences was appropriate. The law school admissions committee conducted highly individualized reviews of all candidates and no acceptance or rejection occurred just on the basis of race, therefore the committee's use of race as a factor did not unduly harm white applicants.¹⁹³ From these two cases out of Michigan we can see a pattern of the Supreme Court allowing a strictly tailored use of race in selection criteria, but consistently rejecting rigid point systems or quotas.

The final significant case that involves the Equal Protection Clause of the Fourteenth Amendment that is of consequence to the constitutionality of SB-826 is *Fisher v. University of Texas*.¹⁹⁴ Similar to the previous cases, the Court also ruled on race being used as an admission criterion, this time at the University of Texas. The State of Texas passed a law requiring the University to admit all students who graduated in the top ten percent of their classes. The University noted a large difference in racial representation at the university and the actual racial makeup of the state.¹⁹⁵ As such, they decided to admit all students in the top ten percent of their high school class and used race as a factor in admitting students who fell outside of the top ten percent. Initially, the Supreme Court of the United States found that strict scrutiny was not properly applied by the lower courts in assessing this admissions process. The consideration of race was not a narrowly tailored use connected to a compelling state interest, rendering the admission process potentially illegal under the Fourteenth Amendment.¹⁹⁶ However, when the case came back to the Supreme Court of the United States after remand, the court upheld the Texas admissions policy. Justice Kennedy began his decision by stating the central question at issue in the case: "The Court is asked once again to consider whether the race-conscious admissions program at the University of Texas is lawful under the Equal Protection Clause."¹⁹⁷ Ultimately, the Court answered that question in the affirmative.

Many legal specialists thought that the *Fisher* ruling would signal the end of affirmative action.¹⁹⁸ However, we see that the court did not take that drastic step. The court has been moving towards a strict scrutiny approach for affirmative action, and may continue its trend to move further away from upholding affirmative action initiatives altogether.¹⁹⁹ After all, the goal of affirmative action is to eventually move away from such measures in order to finally treat all individuals equally. However, the Supreme Court of the United States has continued to find that we still need to advance the compelling state interest of remedying past legally sanctioned discrimination. Until we achieve that goal and arrive at a level playing field, then we may need to continue to consider affirmative action policies. It is interesting to note that the *Fisher* decision was decided by a 4-3 margin because of Justice Kagan's recusal and Justice Scalia's recent death. This small margin indicates that the Supreme Court continues to be equally divided on the affirmative action issue. With newer Justices weighing in on the decision, and the trend towards a more conservative Court

¹⁹³ *Id.*

¹⁹⁴ *Fisher v. University of Tex. at Austin*, 570 U.S. ___, 133 S.Ct. 2411, 186 L.Ed.2d 474 (Fisher I).

¹⁹⁵ *Fisher v. University of Texas*, OYEZ, <https://www.oyez.org/cases/2012/11-345> (last visited Apr. 25, 2020).

¹⁹⁶ *Id.*

¹⁹⁷ *Fisher v. University of Texas*, 579 U.S. ___, 136 S.Ct. 2198 (2016).

¹⁹⁸ Put in footnote here!

¹⁹⁹ For more information on this pattern away from affirmative action see Garrett Epps, *Is Affirmative Action Finished?*, THE ATLANTIC (Dec. 10, 2015), <https://www.theatlantic.com/politics/archive/2015/12/when-can-race-be-a-college-admissions-factor/419808/> (last visited May 7, 2020).

during the Trump administration, it would not be surprising to see a decision limiting affirmative action in the future.²⁰⁰

From our review of Fourteenth Amendment precedent, we can see that the United States Supreme Court has ruled that race may be used in affirmative action measures only when it is justified by the standard of strict scrutiny. If strict scrutiny standards are not met in a particular case, then racial preferences would be ruled unconstitutional. Moreover, if the issue at hand was whether or not a racial quota may be used, the Court has told us this is impermissible.

3. Application of Equal Protection and Affirmative Action Precedents to SB-826

From this analysis we can conclude that the Supreme Court of the United States may look at the gender quotas imposed by SB-826 in one of two ways; that is, the Supreme Court must decide which level of scrutiny to apply to gender quotas. On the one hand, the Court may follow the precedent of *Craig v. Boren*, which establishes that the gender quotas must only pass intermediate scrutiny. California may be able to show that the gender quotas are substantially related to improving workplace opportunities for women given the current success of the Bill according to the reports on board of director compositions published March 2020.

However, based on the review of the management literature from Norway, we saw that gender quotas had mixed results. Many of the same women called the golden skirts were simply put into more board positions and some firms did not have improved financial performance. Additionally, many of the new board women were regarded as tokens and overall gender representation across different levels of management was not improved as a result of gender quotas at the board level. Therefore, from this evidence, the State of California may have a difficult time showing that gender quotas are substantially related to improving workplace opportunities for women and firm performance.²⁰¹

On the other hand, the Court may follow the pattern of considering any type of quota as requiring strict scrutiny review. Strict scrutiny is a high burden to meet, meaning that the gender quotas not only must substantially advance women's careers and firm performance, but do so in the least restrictive manner. The mixed evidence on the effectiveness of gender quotas makes it even less likely that gender quotas would be able to stand up in court when subjected to strict scrutiny review. Finally, the Court may rule that quotas, even in the context of gender rather than race, are altogether unconstitutional. In *Bakke*, the Supreme Court clearly ruled that race-based

²⁰⁰ See William C. Kidder, *How Workable are Class-Based and Race-Neutral Alternatives at Leading American Universities?*, 64 UCLA L. REV. DISCOURSE 100 (2016). Also see Carl Cohen, *A Conflict of Principles: The Battle Over Affirmative Action at the University of Michigan*, 16 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 79 (2015).

²⁰¹ See, for example: Lissa Lamkin Broome, John M. Conley, & Kimberly D. Krawiec, *Does Critical Mass Matter? Views From the Boardroom*, 34 SEATTLE U. L. REV. 1049 (2011), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3085&context=faculty_scholarship (last accessed on June 1, 2020); Kimberly D. Krawiec, John M. Conley, & Lissa L. Broome, *The Danger of Difference: Tensions in Directors' Views of Corporate Board Diversity*, U. Ill. L. Rev. Vol. 2013, No. 3 (April 23, 2013). Available at SSRN: <https://ssrn.com/abstract=2272871> (last accessed on June 1, 2020); Lissa L. Broome, John M. Conley & Kimberly D. Krawiec, *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. Rev. 759, <https://scholarship.law.unc.edu/nclr/vol89/iss3/4> (2011) (last accessed August 10, 2020). See also, Kimberly D. Krawiec, *Board Diversity in the News Again*, THE FACULTY LOUNGE: CONVERSATIONS ABOUT LAW, CULTURE, AND ACADEMIA (September 1, 2018), <https://www.thefacultylounge.org/2018/09/board-diversity-in-the-news-again.html> (last accessed on June 1, 2020) and Kimberly D. Krawiec, *Board Diversity In The News Again*, KIMBERLY D. KRAWIEC BLOG, <http://kimberlydkrawiec.org/board-diversity-in-the-news-again/> (last accessed on June 1, 2020).

quotas are illegal and similarly, in the Michigan cases when extra points for admission were given to minority applicants, the Court ruled that the rigid point system was illegal. Seeing that the Court does not usually allow quotas under the strict scrutiny test and it has applied this standard to all diversity quotas in the past it is likely that the court may decide that quotas are also not permissible, even if they are used in the context of gender rather than race. Indeed, why would the court uphold quotas for affirmative action policies based on gender, which is only a quasi-suspect classification, when it has refused to uphold quotas to provide affirmative action based on the suspect classification of race?

The outcome of the *Meland* case depends on how the federal courts decide to consider the gender quotas. We cannot accurately predict how Meland's arguments will play out until we know if the Courts will interpret the gender quotas as a gender or quota issue. That decision will dictate the resulting level of scrutiny required.

D. Additional Arguments Against California's Bill 826

Although the *Crest* case relies on the California Constitution and state precedent to make its claims and the argument in *Meland* is grounded in corporate governance and Fourteenth Amendment Equal Protection claims, there are other legal arguments that could be used against SB-826's gender quotas. For instance, future lawsuits against California's SB-826 could involve claims regarding the Commerce Clause.

The Commerce Clause is a constitutional provision in the first Article of the document.²⁰² It grants the United States Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes."²⁰³ Thus, this provision authorizes the federal government to have regulatory power over the states. Further interpretation of the Commerce Clause has also established what is known as the Dormant Commerce Clause.²⁰⁴ As a result of Congress having power over interstate commerce, the Dormant Commerce Clause assumes that the states cannot discriminate against interstate commerce nor unduly burden it. Two influential Supreme Court cases that illustrate how the dormant Commerce Clause has been applied to interstate commerce are *Pike v. Bruce Church* and *Maine v. Taylor*. *Pike v. Bruce Church* arose when Arizona passed a law requiring cantaloupes grown in-state to also be packaged and shipped in Arizona. If cantaloupe farmers did not meet this protocol they were fined \$200,000. Despite packaging being cheaper in California, farmer Church could not take advantage of this out of state opportunity and sued Arizona. The Court found that Arizona's restriction on interstate packing and sale limited interstate commerce, violating the Commerce Clause.²⁰⁵

Almost 20 years later, *Maine v. Taylor* was brought to the Supreme Court of the United States.²⁰⁶ In this case, the state of Maine had banned the importation of live baitfish into the state to protect its waters and avoid irregularities in its coastal fish populations. A fisherman sued the state on the grounds that the ban violated the Commerce Clause. However, because the issue in

²⁰² U.S. Const. art. I, § 8.

²⁰³ *Id.*

²⁰⁴ *The Dormant Commerce Clause*, LAW SHELF EDUCATIONAL MEDIA, <https://lawshelf.com/coursewarecontentview/the-dormant-commerce-clause/> (Apr. 27, 2020).

²⁰⁵ *Pike v. Bruce Church, Inc.*, OYEZ, <https://www.oyez.org/cases/1969/301> (last visited Apr. 27, 2020).

²⁰⁶ *Maine v. Taylor*, 477 US 131 (1986).

this case regulated a legitimate local matter and did not arbitrarily discriminate against interstate commerce, the court upheld Maine’s law.²⁰⁷

From these precedents, we can see that state laws which place an undue burden on interstate commerce will not be upheld by federal courts. California’s SB-826 requires all companies incorporated or headquartered in California to adhere to the gender quotas. Interfering with governance provisions for businesses headquartered or incorporated in a different state can be seen as an undue burden on interstate commerce. Moreover, California’s law interferes with how shareholders who do business outside of California can vote for their board of directors, an issue that was tangentially raised in the *Meland* case. Future cases could include arguments alleging that SB-826 unduly burdened commerce in other states because of its impact on shareholders outside of California.

Another compelling argument against SB 826 derives from the “Internal Affairs Doctrine”—a conflicts of law rule holding that corporate governance matters are controlled by the law of the state of incorporation.”²⁰⁸ Stephen Bainbridge has argued in his blog that SB-826 would likely violate the Internal Affairs Doctrine.²⁰⁹ As Bainbridge has pointed out, “[v]irtually all U.S. jurisdictions follow the internal affairs doctrine, even if the corporation in question has virtually no ties to the state of incorporation other than the mere fact of incorporation”[,], whereas a few states make an exception to the internal affairs doctrine “for so-called pseudo-foreign corporations. A foreign corporation is one incorporated either by a state or nation other than the state in question.” In contrast, a pseudo-foreign corporation “has most of its ties to the state in question rather than to the state of incorporation.”²¹⁰ Bainbridge goes on to state that

“[i]n most states, there is no significant legal difference between a foreign and a pseudo-foreign corporation, and the internal affairs doctrine will be applied to invoke the law of the state of the incorporation with respect to both. California and New York are the principal exceptions to this rule. Both states purport to apply parts of their corporate laws to pseudo-foreign corporations formed in other states but having substantial contacts with California or New York.”²¹¹

Indeed, Bainbridge points out that California’s general provision, §2115, has been ruled unconstitutional by the Delaware Supreme Court in *VantagePoint Venture Partners 1996 v. Examen, Inc.*, under both the Due Process and the Commerce Clauses of the United States Constitution.²¹² As the court noted in its decision, section 2115 “mandates application of certain enumerated provisions of California’s corporation law to the internal affairs of ‘foreign’ corporations if certain narrow factual prerequisites [set forth in section 2115] are met.”²¹³ The

²⁰⁷ *Id.*

²⁰⁸ Stephen Bainbridge, *Can California Require Delaware Corporations to Comply with California’s New Board of Director Gender Diversity Mandate? No.*, PROFESSORBAINBRIDGE.COM (September 1, 2018), <https://www.professorbainbridge.com/professorbainbridge.com/2018/09/can-california-require-delaware-corporations-to-comply-with-californias-new-board-of-director-gender.html#more> (last accessed on June 1, 2020).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* (referencing Cal. Corp. Code § 2115; N.Y. Bus. Corp. L. §§ 1317–20).

²¹² *Id.* (quoting from *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108 (Del. 2005)).

²¹³ *VantagePoint v. Examen Inc.*, 871 A 2d 1108, 1114 (Del. May 05, 2005).

court found that, under the California statute, “if more than one half of a foreign corporation's outstanding voting securities are held of record by persons having addresses in California (as disclosed on the books of the corporation) on the record date, *and* the property, payroll and sales factor tests are satisfied, then on the first day of the income year, one hundred and thirty five days after the above tests are satisfied, *the foreign corporation's articles of incorporation are deemed amended to the exclusion of the law of the state of incorporation.*”²¹⁴ Furthermore, the Delaware Supreme Court stated that “[i]f the factual conditions precedent for triggering section 2115 are established, many aspects of a corporation's internal affairs are purportedly governed by California corporate law to the exclusion of the law of the state of incorporation.”²¹⁵ In *VantagePoint Venture Partners*, the Delaware court emphasized that the “internal affairs doctrine is a major tenet of Delaware corporation law having important federal constitutional underpinnings.”²¹⁶ Delaware's well-established choice-of-law rule — the internal affairs doctrine — requires that “Delaware courts must apply the law of the state of incorporation to issues involving corporate internal affairs, and that disputes concerning a shareholder's right to vote fall squarely within the purview of the internal affairs doctrine.”²¹⁷ Thus, California’s §2115 cannot be applied to foreign corporations, specifically those whose primary state of incorporation is Delaware. Bainbridge contends that SB-826 would not fare any better either in the Delaware courts or at the Supreme Court of the United States, although we do not yet have any clear directive from the country’s highest court regarding the application of the Internal Affairs Doctrine to gender quota legislation.

In addition to the arguments, above, there are a number of ambiguities in SB-826 that could result in legal challenges. First, SB-826, as codified in section 301.3 of the California Corporation Code, expressly imposes a quota on “a publicly[-]held domestic or foreign corporation whose principal executive offices, according to the corporation’s SEC 10-K form, are located in California”. The first statutory interpretation challenge involves whether the statute applies to domestic corporations whose principal executive offices are not in California.²¹⁸ The second area of ambiguity arises with respect to publicly-held foreign corporations. “While Section 301.3 includes a requirement that the foreign corporation's principal executive offices be in California, SB 826 also added a new Section 2115.5 that provides:

"Section 301.3 shall apply to a foreign corporation that is a publicly-held corporation to the exclusion of the law of the jurisdiction in which the foreign corporation is incorporated."

Noticeably absent from this section is any requirement that the foreign corporation's principal executive offices be in California.”²¹⁹ It seems unlikely that California can impose the

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 1114-1117.

²¹⁷ *Id.* at 1115.

²¹⁸ Stephen Bainbridge, *The ambiguous application of California's Corporate Board Gender Quota Law (SB 826)*, PROFESSORBAINBRIDGE.COM (January 4, 2019), <https://www.professorbainbridge.com/professorbainbridgecom/2019/01/the-ambiguous-application-of-californias-corporate-board-gender-quota-law-sb-826.html> (last accessed on June 1, 2020), quoting Keith Paul Bishop, *Does California's Gender Quota Law Apply To All Foreign Corporations?*, CALIFORNIA CORPORATE AND SECURITIES LAW (January 3, 2019), <https://www.calcorporatelaw.com/does-californias-gender-quota-apply-to-all-foreign-corporations> (last accessed on June 1, 2020).

²¹⁹ *Id.*

requirements of SB-826 on foreign corporations that do not have significant ties to California, but the statute seems to specify otherwise.²²⁰

Lastly, SB-826 may interfere with the rights of shareholders to exert control over the corporation through the process of voting for board members. Interference with the choices that shareholders have regarding board members seems to undermine general principles of corporate governance in ways that implicate both First Amendment and Due Process rights.²²¹ Other approaches might be more likely to withstand constitutional scrutiny and should, perhaps, be the preferred alternative.²²²

E. Legal Analysis Conclusion

The gender quota law in California is likely illegal. Although gender quotas are motivated by good intentions both to help women climb the corporate ladder and provide better gender representation on boards, these quotas do not seem to hold up under either federal or state law. As we saw in the claim made in *Crest*, California precedent clearly bans the use of all quotas even when they are meant to help a disadvantaged group subject to discrimination because quotas themselves give preferential treatment to a group of people, which only proliferates unequal treatment. Next, the *Meland* case allowed us to explore the Equal Protection Clause ramifications of gender quotas. Although there is more room for activism when deciding gender-based issues compared to race-based quotas due to the intermediate scrutiny standard typically applied to gender, given the current political makeup of the Supreme Court, it is unlikely this activism would allow for gender quotas. Moreover, gender quotas unduly interfere with interstate commerce and are not likely to be permitted under the dormant Commerce Clause. However, these legal claims may not be successfully litigated because of the arguments raised by the district court in its dismissal based on standing, which may leave these constitutional issues unresolved.

Despite the legal challenges, we applaud California legislators for taking the lead in corporate board gender parity goals in the United States. Nevertheless, even when a law is well intended, it cannot be upheld if it clearly violates state laws and constitutional provisions. Arguably as a result of California's progressive Senate Bill 826, 186 women joined previously all-male boards. Women who had never previously served on boards before were afforded that opportunity and only time will tell what financial and social benefits/results were reaped from diversification of these corporate boards. Even if the California gender quota law falls, the number of women joining corporate boards should not. In an equal world devoid of the various forms of gender discrimination woven into the fabric of our society and corporate workplaces discussed earlier, women and men would hold an equal number of management positions and board of directors seats. In an ideal setting, a law would not be required to encourage the representation of women on boards, however it seems that it will take far longer than acceptable for equal representation of women on boards to occur without the help of regulations and a constant focus on increasing the number of women in management positions.

VI. Solutions to Gender Disparity on Corporate Boards and Future Research

²²⁰ *Id.*

²²¹ Vikram David Amar and Jason Mazzone, *Part Three on California's Mandate That Women Be Placed on Corporate Boards: Dormant Commerce Clause and Improper Government Purpose Questions*, VERDICT: LEGAL ANALYSIS AND COMMENTARY FROM JUSTIA (November 1, 2018), <https://verdict.justia.com/2018/11/01/part-three-on-californias-mandate-that-women-be-placed-on-corporate-boards> (last accessed on June 1, 2020).

²²² *Id.*

It can be foreseen that gender quotas will be ruled unconstitutional or otherwise unlawful in the United States. Consequently, policy-makers, activists, and diversity and inclusion specialists alike should be armed with other solutions to the problem of gender disparity on boards. It might be appropriate, then, to suggest some plausible solutions.

A. Governmental Policy Solutions

Focusing in on mandated solutions, reporting regimes as seen in Maryland, Illinois, New York, and California may turn out to be a beneficial tactic and could supplement the reporting requirements imposed by the federal securities law, although more research on the effectiveness of the reporting approach at the state and federal level is necessary. The only way to resolve an issue is to be aware of the fact that there is a problem. Reporting requirements draw attention to diversity numbers and allow firms and governments to identify if there is a representation problem in the first place.

These reporting mandates should require corporations to report the gender, race, and age of board members and managers in their firms. Additionally, it would also be useful for corporations to disclose diversity recruiting policies and strategies if any are being implemented. This information should be available to the public, so consumers know the makeup of the company they are purchasing from, employees have information about the company they are deciding to work for, and investors have an understanding about the governance structure of the company in which they are choosing to invest.

In addition to the benefit of public scrutiny, reporting regimes may also provide an internal benefit. If firms have to report about these numbers, then this reporting will allow upper management to identify any representational gaps in their structure. This will enable the corporation to make necessary improvements. Moreover, it will help protect the corporation from any public backlash associated with outdated recruiting patterns.

Continued evaluation of the effectiveness of these reporting policies should be engaged in to make sure that the objective of board gender diversity and movement of women into top leadership positions is being achieved.

B. Internal Organizational Solutions

Corporations, themselves, can adopt reporting regimes around gender diversity to move toward more equal representation on boards and in the workplace more generally. As part of an internal reporting regime, corporations can carry out reporting initiatives similar to those discussed, above. Indeed, there is an investor-driven push for corporations to engage in this kind of voluntary reporting around environmental, social, and governance (ESG) issues.²²³

Mentorship and recruiting practices are other internal initiatives that corporations can voluntarily adopt to help with the problem of underrepresentation of women on corporate boards and in top leadership positions. These efforts should focus on developing and enhancing women's careers by providing women with guidance and support. When launching a mentorship effort, it is

²²³ See Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution*, HARV. BUS. REV. (May-June 2019), <https://hbr.org/2019/05/the-investor-revolution>. See also Robert G. Eccles, Ioannis Ioannou & George Serafeim, *The Impact of Corporate Sustainability on Organizational Processes and Performance*, MGMT. SCI., Vol. 60, No. 11 (Nov. 6, 2014), <https://doi.org/10.1287/mnsc.2014.1984>.

important to ensure that men and women are being evenly mentored by male and female leadership and that members of both genders have similar opportunities. While mentorship by members of the same affinity group (or employee resource group) within the corporation is a significant source of support, research suggests that mentoring opportunities can be especially effective when women are partnered with a male mentor.²²⁴ Given the prevalence of gender stereotypes and the unconscious biases they foster, it appears that having the support of a male mentor, who may often be regarded as an effective manager, can help women advance in the workplace.²²⁵ Ultimately, it is important to pair women with successful managers of both genders so that they can develop the mindset of a capable leader. This, in turn, helps to stifle gender stereotypes surrounding management styles. Catalyst research has also found that sponsorship is a key to advancing the careers of women,²²⁶ so appropriate initiatives for sponsorship should also be implemented by corporations as part of employee development.

Additionally, recruitment practices should have a specified diversity mission that all talent recruiters abide by.²²⁷ Recruiters should seek an equal representation of each gender for candidate pools when possible and make an effort to choose women when equally as qualified as men. Having a set policy that describes these hiring decision processes will deter recruiters from going with candidates merely because they meet the gender stereotypes typically associated with the job or role. It will also encourage recruiters to search for candidates beyond those who are most similar to themselves. Giving women resources in the company via a support system and choosing to hire women in the first place will allow women to move through an organization more similarly to their male counterparts, in turn giving women the opportunity to gain the necessary experience to be a board member. As these corporate organizational changes are implemented, scholars must examine which of the strategies can most effectively move gender parity forward.

C. Societal Culture Shift

Finally, in order to achieve gender equalization on corporate boards, we have to address the dominant gender stereotypes in our society's culture that may hinder women's participation on corporate boards.²²⁸ In order to do so, we have to look carefully at the common conceptions that shape our definitions of men and women.²²⁹ We acknowledge that this paper discusses gender quotas on corporate boards predominantly through a binary lens, although, as noted earlier, the gender quota law at issue defines female as "an individual who self-identifies her gender as a

²²⁴ Lisa Rabasca Roepe, *Why Male Leaders Should Mentor Women*, SHRM, (Nov. 26, 2019), <https://www.shrm.org/hr-today/news/hr-magazine/winter2019/pages/why-male-leaders-should-mentor-women.aspx> (last visited Apr. 27, 2020).

²²⁵ *Id.* See also W. Brad Johnson & David Smith, *ATHENA RISING: HOW AND WHY MEN SHOULD MENTOR WOMEN* (Sept. 20, 2016); Fiona Macauley, *The Surprising Benefits When Men Mentor Women: When Men Mentor Women, Both Benefit Greatly*, INC. (April 10, 2019), <https://www.inc.com/fiona-macaulay/advice-for-men-who-are-uncertain-about-mentoring-women.html> (last visited Aug. 10, 2020).

²²⁶ *Report: Sponsoring Women to Success*, CATALYST (Aug. 17, 2011), <https://www.catalyst.org/research/sponsoring-women-to-success/> (last visited Apr. 27, 2020).

²²⁷ Pamela Babcock, *5 Steps to Improve Diversity Recruiting*, SHRM (Feb. 24, 2017), <https://www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/Pages/Five-Steps-Improve-Diversity-Recruiting.aspx> (last visited Aug. 10, 2020).

²²⁸ Naomi Ellemers, *Gender Stereotypes*, 69 ANN. REV. PSYCHOL. 275 (JAN. 2018),

²²⁹ CECILIA L. RIDGEWAY, *FRAMED BY GENDER: HOW GENDER INEQUALITY PERSISTS IN THE MODERN WORLD* (Oxford University Press, 2011).

woman, without regard to the individual's designated sex at birth."²³⁰ While this definition in the bill is inclusive of transsexuals or all other persons self-identifying as female²³¹, gender quotas, including California's SB-826, do not adequately address issues of intersectionality that are important to the problem of lack of diversity on corporate boards.²³² In order to overcome gender bias on corporate boards, we must examine the roles that we assign men and women in society. Nevertheless, it also will be necessary to think critically about all of the culturally dominant gender stereotypes that permeate our thinking, including the dominance of the binary approach to gender. Moreover, other important diversity considerations, such as race, ethnicity, and religion, among others, must also be carefully considered if we are to achieve true diversity on corporate boards.²³³ Thus, further research and advocacy should take place around these concerns. However, despite the limitations of a binary approach to gender, examining the lack of female representation on corporate boards and thinking about how to create a better gender balance on those boards is an important first step in challenging gender stereotypes. To that end, we think it is important to recognize the role that binary gender stereotypes play in the continuation of gender disparities on corporate boards.

In our culture, work does not hold the same meaning for women as it does for men.²³⁴ Conventional social norms suggest that work and providing for the family is at the very core of what it means to be a man while the role of a woman is to be a caretaker and create a home environment for the rest of the family.²³⁵ These social norms and the conscious and unconscious biases that they perpetuate are an impediment to the advancement of women in the workplace, generally, and on corporate boards, in particular.²³⁶ In order to allow for equal participation at all levels of the workplace, we must value the contributions of women in the workplace and the contributions of men to caretaking efforts. The decision regarding which parent should be the primary caretaker should not be predetermined based on gender. Both men and women should be able to freely choose this role without the burden of society's approbation and both men and women should be valued for the contributions that they make to all caretaking obligations.²³⁷ Women who work should not be made to feel guilty about leaving children with another caretaker and should be free to make the choice to work, similar to that afforded men. We need to think

²³⁰ Trujillo, *supra* note 45, quoting CAL. CORP. CODE §301.3(F)(1)(West 2018).

²³¹ *Id.*

²³² *Id.* See also Tewari, *supra* note 45.

²³³ See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989), <http://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8>. See also Jane Coaston, *The Intersectionality Wars*, THE HIGHLIGHT BY VOX (MAY 28, 2019), <https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination> (last visited Aug. 10, 2020).

²³⁴ BARRIERS AND BIAS: THE STATUS OF WOMEN IN LEADERSHIP, AAUW (MARCH 2016), <https://www.aauw.org/app/uploads/2020/03/Barriers-and-Bias-nsa.pdf> (last visited Aug. 20, 2020).

²³⁵ Susan Chira, *Men Don't Want to Be Nurses. Their Wives Agree.*, THE NEW YORK TIMES (June 24, 2017), <https://www.nytimes.com/2017/06/24/opinion/sunday/men-dont-want-to-be-nurses-their-wives-agree.html> (last visited Apr. 27, 2020).

²³⁶ Mary Brinton, *Gender Inequality and Women in the Workplace*, HARV. SUMMER SCHOOL BLOG (July 31, 2014), <https://blog.dce.harvard.edu/summer/gender-inequality-women-workplace> (last visited Aug. 10, 2020).

²³⁷ For a discussion of "second shift" issues with an emphasis on childcare, refer to Suzanne M. Bianchi, Liana C. Sayer, Melissa A. Milkie, & John P. Robinson, 91 SOC. FORCES 55 (Sept. 1, 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4242525/> (last visited on Aug. 10, 2020).

about who bears the burden of the “second-shift”.²³⁸ We also have to think about the burden of emotional work and the gendered ways in which we “assign” that burden.²³⁹

To support both women and men with work-life trade-offs, corporations should have flexible work hours and work from home options that allow people to blend their work and home lives to maximize their performances in both domains of life. Perhaps we might also think a bit differently about what success looks like, both at work and at home. Rather than retaining the many barriers that limit women’s ability to both have children and to climb the corporate ladder, corporations should provide women and men with opportunities to excel. Maternity and paternity leave should be offered equally to both men and women, so men do not have less time when a child is born, reversing the normalization of the idea that women have to spend more time with kids. Granting both men and women the same amount of leave allows for men and women to equalize both the benefits and the costs of the experience associated with having a child.

Along with changing the way corporations and family dynamics continue to stereotype and limit women’s careers, our society needs to continue to overcome other pervasive gender stereotypes. While educational opportunities for men and women have become more equal over time, disparities remain in how women are expected to use their education. Despite receiving over half of the education in the world, women still do not hold even a third of leadership positions in corporations. Therefore, women are not expected to use their education in the same way as men. These varied expectations must be altered before true transformation can take place. Similarly, women must be encouraged to take a seat at the table and to engage in salary and promotion negotiations,²⁴⁰ but the gender stereotypes that hinder women who act assertively must also be uncovered and altered.²⁴¹ Continued examination of these societal factors must be undertaken in order to continue to generate insight into valid options for change. Moreover, as with the solutions outlined in previous sections, we must engage in continued research efforts to determine which of the many strategies we implement are the most effective in addressing the issue of board gender disparity, specifically, and wider diversity issues, more generally.

VII. Conclusion

This discussion of gender disparity at the corporate board level and the analysis of recent legislative efforts to combat this disparity should contribute to the vast array of literature on the subject that highlights the social nature of this issue. Moreover, discussion of the California gender quotas and the recent litigation challenging those quotas can contribute to the growing field of literature on the legality of these gender quotas in the United State. While gender quota legislation ultimately may be rejected as unlawful, with careful thought and consciousness we should be able

²³⁸ ARLIE HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT* (Penguin Books, 2003; 1st Published in 1989).

²³⁹ See ARLIE HOCHSCHILD, *THE MANAGED HEART* (1983); Rebecca Erickson, *Why Emotion Work Matters: Sex, Gender, and the Division of Household Labor*, 67 J. OF MARRIAGE & FAMILY 337 (May 2005), <https://www.jstor.org/stable/3600273?seq=1> (last visited on Aug. 10, 2020); and Rose Hackman, “Women Are Just Better at This Stuff: Is Emotional Labor Feminism’s Next Frontier?”, *THE GUARDIAN* (Nov. 8, 2015), <https://www.theguardian.com/world/2015/nov/08/women-gender-roles-sexism-emotional-labor-feminism> (last visited on Aug. 10, 2020).

²⁴⁰ SHERYL SANDBERG, *LEAN IN* (2013).

²⁴¹ *Should Women “Lean In” to Create More Value in Negotiations?: How Can a Woman Create More Value at the Bargaining Table?*, PROGRAM ON NEGOTIATION AT HARVARD LAW SCHOOL (July 23, 2020), <https://www.pon.harvard.edu/daily/dealmaking-daily/should-women-lean-in-to-create-more-value-in-negotiations/> (last visited on Aug. 10, 2020).

to find a solution to these gender inequities that advances the careers of women and upholds American legal values, while also advancing the goal of diversity, more generally.