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Teal N. Trujillo

DO WE NEED TO SECURE A PLACE AT THE TABLE FOR WOMEN? AN ANALYSIS OF THE LEGALITY OF CALIFORNIA LAW SB-826

Teal N. Trujillo[†]

INTRODUCTION

On November 1, 2018, close to 20,000 Google employees marched out of offices in fifty different cities as part of a global protest against gender inequality in the workplace.[1] This event was ignited by the recent disclosure that Google had paid a $90 million exit package to Andy Rubin, creator of the Android operating system, following a merited sexual harassment claim.[2] But tensions have been rising in Silicon Valley for years.[3] From San Francisco to Google's headquarters in Mountain View, California, protestors bellowed, "This doesn't end today" and "Time is up in Tech. Time is up at Google."[4] Protestors invoked the "Time's Up" language of the #MeToo Movement, which unearthed numerous prolonged scandals of sexual misconduct in nearly every industry over the past year. The movement sent shockwaves throughout the country.[5] Protestors in California were making a statement to the entire tech community, where women face exclusion on the outskirts of boy's club dynamics[6] and are notably underrepresented.[7]

† J.D. Candidate, Notre Dame Law School, 2020; B.A., Saint Louis University, 2016. I would like to thank the members of the Notre Dame Journal of Legislation for their diligent editing and support in writing this Note. Most importantly, I would like to thank all the strong women in my life, especially my mother, my Nana Phyllis Kime, and my Grandma Nico Trujillo.

1 *See* Jillian D'Onfro, *Google Walkouts Showed What the New Tech Resistance Looks Like, with Lots of Cues from Union Organizing*, CNBC (Nov. 3, 2018, 1:31 PM), https://www.cnbc.com/2018/11/03/google-employee-protests-as-part-of-new-tech-resistance.html.

2 *See* Kate Conger & Inyoung Kang, *California Today: Google Employees Around the World Walk Out*, N.Y. TIMES (Nov. 4, 2018, 4:41 PM), https://www.nytimes.com/2018/11/01/us/california-today-google-protest.html.

3 *See generally Google Reveals 48 Employees Fired for Sexual Harassment*, AP NEWS (Oct. 26, 2018), https://www.apnews.com/06bbde4e7ba449089a62d8d351ecbe8c (attempting to combat rumors of large exit severance packages given to male executives accused of sexual harassment, Google reveals forty-eight men were fired over the past two years with nothing, no compensation packages).

4 D'Onfro, *supra* note 1.

5 *See generally* Stephanie Zacharek et al., *Time Person of the Year 2017: The Silence Breakers*, TIME (Nov. 4, 2018, 5:23 PM), http://time.com/time-person-of-the-year-2017-silence-breakers/.

6 Kim Parker, *Women in Majority-Male Workplaces Report Higher Rates of Gender Discrimination*, PEW RESEARCH CTR. (Nov. 6, 2018 4:30 PM), http://www.pewresearch.org/fact-tank/2018/03/07/women-in-majority-male-workplaces-report-higher-rates-of-gender-discrimination/ (explaining 49% of women in male-dominated industries said sexual harassment was a problem in their workplaces, compared to 32% of women whose workplaces had more women than men).

7 Brooke E. Dresden et al., *Male-Dominated No Girls Allowed: Women in Male-Dominated Majors Experience Increased Gender Harassment and Bias*, 121 PSYCHOLOGICAL REPORTS 459, 460 (2018) ("14% of women who graduate with an engineering degree never enter the workforce, and a significant portion cite the

Google, a company that is only 31% female, was confronted with a call for "transparency, accountability and structural change" as written by the protest organizers on an internal Google site.[8] The demands went beyond better handling of sexual harassment claims and were a petition for basic fairness among sexes in the workplace.[9] The demands alluded to the unequal treatment of women at Google, a side effect of the male-dominated environment. In 2017, Pew Research Center found that 37% of women working in a majority-male workplace felt they had been treated as if they were not competent because of their gender at some point.[10] They were also much more likely to have experienced small slights in the workplace as opposed to majority-female or mixed group workplaces.

The lack of female representation in executive positions compounds the problem. Equal treatment in the workplace starts from the top down. Looking at the big picture, it may seem that women are succeeding on this front, as the number of women holding chief executive positions nearly doubled from 2007 to 2017.[11] However, that was an increase from just 2.8% to 5.4%.[12] By 2017, only twenty-seven companies in the benchmark S&P 500 stock index had female CEOs.[13] Currently, women hold a very small number of top executive positions in U.S. corporations.

One solution suggested to this problem is to mandate the presence of women on corporate boards. California has become the first state to enact a quota for the number of women that must serve on qualifying corporation's board of directors.[14] On September 30, 2018, Governor Jerry Brown signed Senate Bill 826 ("SB-826") into law, requiring all publicly traded companies with principal executive offices in California to have at least one woman on their board of directors by 2019.[15] In the three years following, depending on the size of the board, companies would also need to hire another one to two females directors.[16] The goal being that boards would end up with a makeup that is at least 40% female. Corporate boards that do not comply face financial penalty.[17]

Though the bill passed with high percentages in both the Assembly and Senate,

'engineering culture' as their main reason for leaving" and "[o]ne factor that may influence the perceived negative 'engineering culture' is sexual harassment").

8 Conger & Kang, *supra* note 2.

9 *Id*. The protestors had five specific demands allegedly including, "an end to forced arbitration of sexual harassment and assault, increased transparency about compensation and the appointment of an employee representative to the company's board." *Id*.

10 Parker, *supra* note 6.

11 Drew Desilver, *Few Women Lead Large U.S. Companies, Despite Modest Gains Over Past Decade*, PEW RESEARCH CTR. (Sept. 26, 2018), http://www.pewresearch.org/fact-tank/2018/09/26/few-women-lead-large-u-s-companies-despite-modest-gains-over-past-decade/ ("In 2017, 27 companies in the S&P 500 (or 5.4%) had women CEOs, up from 14 (2.8%) in 2007.").

12 *Id*.

13 *Id*.

14 *See* Vanessa Furhmans, *California Becomes First State to Mandate Female Board Directors*, WALL ST. J. (Sept. 30, 2018 6:13 PM ET), https://www.wsj.com/articles/california-moves-to-mandate-female-board-directors-1535571904?mod=article_inline.

15 S.C.R. 62, 2013-2014 Reg. Sess. (CA 2013).

16 Furhmans, *supra* note 14.

17 *Id*.

it has fostered strong opposition. Multiple business groups including the California Chamber of Commerce opposed the mandate as violating the United States and California constitutions, as it could result in adverse treatment based on merely one element of diversity: gender.[18] Additionally, there are constitutional challenges regarding enforcement as few companies have both their principal offices and are doing a majority of their business in California.[19] Regardless of the complexities surrounding the enforcement of SB-826, the disparity of women in executive positions is a significant issue.

This Note will delve into the particulars of California SB-826 to determine its legality and to examine available alternatives to accomplish its goal: to encourage equitable gender representation on corporate boards. Part I of this Note will discuss the requirements of SB-826 and the purpose behind the law including the legislature's intent. Part II will provide an examination of possible legal challenges that could be brought against the law. This Part will argue that SB-826 could not survive a constitutional challenge but should be salvaged due to the necessity of the bill. Finally, Part III will address alternative ways California could accomplish similar objectives proposed in SB-826 while still complying with both the state and national constitution.

I. UNDERSTANDING SENATE BILL 826

SB-826 is not California's first attempt at creating gender quotas, but the product of a continued commitment to the problem of underrepresentation of women in executive positions. On September 12, 2013, the California State Senate passed Concurrent Resolution Number 62 ("SCR-62"), a measure to "encourage equitable and diverse gender representation on corporate boards."[20] The Resolution was authored by Senator Hannah-Beth Jackson and sponsored by the National Association of Women Business Owners—California (NAWBO—CA).[21] This measure was the brain-child of what would become SB-826, imposing extremely similar quotas.[22] It relied upon multiple studies citing increased financial success and improved corporate culture among boards that include women.[23] The difference was

18 *Id*. The California Chamber of Commerce argues the mandate violated the U.S. and California constitutions because it could put companies in the position of displacing men seeking to serve on boards. *Id*.

19 *Id*.

20 S.C.R. 62, 2013-2014 Reg. Sess. (CA 2013).

21 *See Jackson Bill to Make California the First State to Require Women on Corporate Boards Heads to the Governor*, CAL. SENATE MAJORITY CAUCUS (Aug. 30, 2018), https://sd19.senate.ca.gov/news/2018-08-30-jackson-bill-make-california-first-state-require-women-corporate-boards-heads.

22 S.C.R. 62, 2013-2014 Reg. Sess. (CA 2013). The relevant portion of SCR-62 text:

("[W]ithin a 3-year period from January 2014 to December 2016, inclusive, every publicly held corporation in California with 9 or more director seats have a minimum of 3 women on its board, every publicly held corporation in California with 5 to 8 director seats have a minimum of 2 women on its board, and every publicly held corporation in California with 5 to 8 director seats have a minimum of one woman on its board.").

23 S.C.R. 62, 2013-2014 Reg. Sess. (CA 2013) ("A McKinsey and Company study entitled 'Women Matter' showed that companies where women are strongly represented at board or top management levels are also the companies that perform best." "An Oklahoma State University study found that board diversity, including gender and ethnicity, is associated with improved financial value.").

that the Resolution was non-binding and had no legally enforceable consequences for violations of its terms. California became the first state in the country to make an effort to define board diversity by taking such a stance.[24] The passing of SCR-62 set a precedent for other states who then passed initiatives with the same goals.[25] The following subparts will now discuss how the California State Senate built upon the framework created by SCR-62 to pass the current legislation.

A.Requirements of California Senate Bill 826

Five years after the SCR-62 initiative, California passed a binding piece of legislation regarding gender representation on corporate boards. Senate Bill 826, also authored by Senator Jackson, is an Act adding §§ 301.3 and 2115.5 to the California Corporation Code. Section 301.3(a) states that by the close of the year 2019 any publicly held domestic or foreign corporation with principal executive offices in California shall have a female director on its board.[26] The section goes on to make cumulative mandates through the year 2021:

> (b) No later than the close of the 2021 calendar year, a publicly held domestic or foreign corporation whose principal executive offices, according to the corporation's SEC 10-K form, are located in California shall comply with the following:
>
> > (1) If its number of directors is six or more, the corporation shall have a minimum of three female directors.
> >
> > (2) If its number of directors is five, the corporation shall have a minimum of two female directors.
> >
> > (3) If its number of directors is four or fewer, the corporation shall have a minimum of one female director.[27]

For purposes of this mandate, a publicly held corporation is defined as "a corporation with outstanding shares listed on a major United States stock exchange."[28] Among the Russell 3000 Index, a listing of such companies, 485 corporations—or 17% of the total companies—had all-male boards in the second quarter of 2017.[29] Eighty-six of these companies are headquartered in California, including brand names like

24 *See* Melissa Breuer, Note, *Next Stop for Diversity Initiatives: Corporate Boardrooms*, 42 IOWA J. CORP. L. 223, 226 (2016).

25 *Id*. ("On May 31, 2015, the Illinois House of Representatives passed HR 439, and on July 29, 2015, the Massachusetts Senate passed S1007. Each of these resolutions seeks to accomplish the same set of goals that CA SCR-62 was established to achieve.").

26 2018 Cal. Legis. Serv. Ch. 954 (SB-826) (current version at CAL. CORP. CODE § 301.3).

27 *Id*.

28 CAL. CORP. CODE § 301.3(f)(2) (West 2018).

29 *See* Vanessa Fuhrmans & Alejandro Lazo, *California Moves to Mandate Female Board Directors*, WALL ST. J. (Aug. 29, 2018 10:06 PM ET), https://www.wsj.com/articles/california-moves-to-mandate-female-board-directors-1535571904?mod=article_inline.

Sketches USA Inc. and TiVo Corp.[30] Further, the plain language of the law reads that it shall be binding upon any corporation "whose principal executive offices, according to the corporation's SEC 10-K form, are located in California."[31] Therefore, the law applies where: (1) the corporation's outstanding shares are listed on a major United States stock exchange and (2) the principal executive offices in accordance with the UnitedStates Securities Exchange Commission Form 10-K are located in California.

Turning back to the core requirements of the measure, additional consideration should be given to how the bill has chosen to define female and the restrictions—or lack thereof—placed on corporate board seats. As to the former, female is defined as "an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth."[32] The bill does not require a quota of the female sex. It is a mandate based on gender. Consequently, the bill is inclusive of transsexuals or all other persons self-identifying as female. This definition could be an intentional effort to circumvent the argument that the law is beneficial toward only one protected class of persons, people of the female sex. And so, the bill is technically not a bar to persons of the male sex. It is also a testament to the progressive ideals held by modern culture. The second interesting facet of the law is that it does not cap the number of seats a corporate board could have. For current boards that are predominately male, the law is not requiring that male board members be removed from their seats in order to be in compliance.[33] There is no prohibition on the addition of extra board seats to comport with the mandate. These two aspects of the law bolster the argument that the law is constitutional.

The final requirement, and most striking distinction between the bill and the previous resolution, SCR-62, is the inclusion of sanctions. There are now financial penalties enforceable upon public corporations who do not comply with the mandate. According to Section 301.3(e)(1), a first violation is punished by a $100,000 fine, and a second violation by a $300,000 fine.[34] There is another $100,000 fine for "failure to timely file board member information with the Secretary of State."[35] Part of complying with SB-826 requires disclosure to the State. Section 301.3(d) reads by the year 2020 "and annually thereafter," the bill necessitates a report be published online by the Secretary of State recording the number of corporations' subject to this section that were in compliance, the number of new corporations that will need to be in compliance, and the number of corporations that will no longer have to comply.[36]

30 *Id*.

31 CAL. CORP. CODE § 301.3(a) (West 2018).

32 CAL. CORP. CODE § 301.3(f)(1) (West 2018).

33 *See* Teresa L. Johnson, *Hurdles Ahead for California's Female Director Mandate*, ARNOLD & PORTER (Oct. 5, 2018), https://www.arnoldporter.com/en/perspectives/publications/2018/10/hurdles-ahead-for-cas-female-director-mandate.

34 CAL. CORP. CODE § 301.3(e)(1) (West 2018).

35 CAL. CORP. CODE § 301.3(e)(1)(A) (West 2018).

36 CAL. CORP. CODE § 301.3 (West 2018). The relevant portion of text of California Senate Bill No. 826:

(c) No later than July 1, 2019, the Secretary of State shall have published a report on its Internet Web site

Thus, in order to formulate this report, corporations must inform the Secretary of State of their submission to the bill or else face an additional $100,000 fine.

The law makes no mention of a corporation's place of incorporation, only the location of "principal executive offices."[37] There is a question, though, as to whether the mandate is applicable to companies incorporated elsewhere. Corporate case law has established a rule that "in disputes involving a corporation and its relationships with shareholders, officers or agents, the law to be applied is the law of the state of incorporation," commonly known as the internal-affairs doctrine.[38] Critics of the law suggest the conflict with this doctrine will be the Achilles heel of the legislation. Moreover, if the legislation were enforced only against corporations incorporated within California, that would significantly reduce the number of corporations affected. Notably, 80% of the Russell 3000 Index companies housed in California are incorporated in Delaware.[39]

Supporters of the law point to § 2115.5 and argue by analogy that the mandate applies to publicly held corporations incorporated outside California. Section 2115.5 is an addition to the state Corporations Code that attempts to make all components of § 301.3 also applicable to foreign corporations.[40] Section 2115.5(a) states that the bill "shall apply … to the exclusion of law of the jurisdiction in which the foreign corporation is incorporated."[41] Thus, the provision seeks to preempt the law of the place of incorporation also for any "foreign corporation with outstanding shares listed on a major United States stock exchange."[42] The parallel to treatment of foreign corporations is not especially strong.[43] This interpretation may be an overreach of

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documenting the number of domestic and foreign corporations whose principal executive offices, according to the corporation's SEC 10-K form, are located in California and who have at least one female director.

(d) No later than March 1, 2020, and annually thereafter, the Secretary of State shall publish a report on its Internet Web site regarding, at a minimum, all of the following:

(1) The number of corporations subject to this section that were incompliance with the requirements of this section during at least one point during the preceding calendar year.

(2) The number of publicly held corporations that moved their United States headquarters to California from another state or out of California into another state during the preceding calendar year.

(3) The number of publicly held corporations that were subject to this section during the preceding year, but are no longer publicly traded.

S. 826, Reg. Sess. (Ca. 2018).

37 CAL. CORP. CODE § 301.3(a) (West 2018).

38 *Internal-Affairs Doctrine*, BLACK'S LAW DICTIONARY (10th ed. 2014).

39 *See* Patrick McGreevy, *Gov. Jerry Brown Signs Bill Requiring California Corporate Boards to Include Women*, L. A. TIMES (Sept. 30, 2018 4:00 PM) http://www.latimes.com/politics/la-pol-ca-governor-women-corporate-boards-20180930-story.html.

40 CAL. CORP. CODE § 2115.5(a) (West 2018).

41 CAL. CORP. CODE § 2115.5(a) (West 2018).

42 CAL. CORP. CODE § 2115.5(b) (West 2018).

43 *See* Keith Paul Bishop, *Why California's Gender Quota Bill is More Likely to be Unconstitutional Than California's Pseudo- Foreign Corporations Act*, NAT'L. L. REV. (Sept. 4, 2018), https://www.natlawreview.com/article/why-california-s-gender-quota-bill-more-likely-to-be-unconstitutional-california-s (discussing the California Corporations Code § 2115.5 and how the Delaware Supreme Court has refused to give it effect).

the California state government, which will be discussed more thoroughly later in this Note.

However, even if the mandate were to be stringently enforced, making SB-826 applicable only to corporations both headquartered and incorporated in California, the impact would still be significant. Nearly 100 companies would still be affected if SB-826 goes into enforcement under that interpretation. The resulting impact would be that 684 women will have to be hired by the year 2021 to corporate boards in order to comply with the new law.[44] This would still create enormous opportunity for women and be a step towards ending the gender disparity in greater haste than would come about naturally.

SB-826 requires all publicly traded corporations whose principal executive offices are in California and have outstanding shares on a major United States stock exchange to have at least one female on their board of directors by the year 2019. Then, depending on the size of the board, they must add an additional one to two female directors by the year 2021. Accompanying these appointments, the corporation must timely file annual board information updates with the Secretary of State. If the disclosures are not complied with or the quotas of female directors not met, the corporation could face fines totaling $300,000 or more.

B. The Purpose and Legislative Intent behind California Senate Bill 826

Effective legislation is not only about the requirements, but how effectively those means effectuate the ends or the purpose of the law. This involves looking at the motivation and legislative intent behind SB-826. Here, we can look to the commentary of its author and the wording of the bill itself to decipher the mandate's purpose. Senator Hannah Beth-Jackson was the author of SRC-62 in 2013, urging an increase in the number of women on corporate boards of directors toward the same quotas currently required by SB-826.[45] Senator Beth-Jackson found that by December 31, 2016, less than 20% of the Russell 3000 Index companies covered had appointed the minimum number of female directors proposed by the resolution within the three-year cut-off period.[46] Thus, in 2017, Senator Jackson authored the current bill in the interest of creating a binding quota. Her motivation stems from the fact that "[o]ne-fourth of California's publicly traded companies still do not have a single woman on their board."[47] Though liberal-leaning, California lags behind the national average of 16.2%, for the Russell 3000 Index of women serving as female directors in public corporations, with only 15.5% of corporate board seats held by women.[48]

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44 McGreevy, *supra* note 39 ("If the law survives legal challenge, 684 women will need to fill board seats for Russell 3000 companies by 2021.").

45 CAL. CORP. CODE § 301.3(a) (West 2018); S.C.R. 62, 2013-2014 Reg. Sess. (CA 2013) ("[W]ithin a three year-period from January 2014 to December 2016, inclusive, every publicly held corporation in California with nine or more directors seats have a minimum of three women on its board, … with five to eight director seats have a minimum of two women on its board, and … with fewer than five director seats have a minimum of one woman on its board.").

46 CAL. SENATE MAJORITY CAUCUS, *supra* note 21.

47 *Id.*

48 *See* Johnson, *supra* note 33.

Senator Beth-Jackson has also been quoted saying, "With women comprising over half the population and making over 70% of purchasing decisions, their insight is critical to discussions and decisions that affect corporate culture, actions and profitability."[49] Senator Beth-Jackson advocates that the addition of more female directors is not only equitable, but also enhances the "performance, governance, innovation, and opportunity" of the corporation.[50]

Turning to the wording of the bill itself, SB-826 cites multiple statistics that have found corporate boards with three or more female directors more profitable.[51] Such corporations are more likely to have higher reported earnings,[52] higher average return on equity,[53] and better stock performance.[54] Other benefits among boards with women directors are that they tend to be more sustainable and future-oriented.[55] There are two issues with this research. The first is that the majority of the statistics about corporate performance used in the bill have been taken from two primary studies: one done by MSCI Inc., a global provider of equity, stock market index, and portfolio analysis tools; the other a long-term study by Credit Suisse Group AG, a joint-stock company that owns Credit Suisse Bank. The MSCI study purports that corporations, which reach a "critical mass" of women, also referred to as the "tipping point," had a median change in their earning per share of 37% and a ten percentage point change on their return on equity.[56] The study is limited, though, by the fact they cannot prove a causal link between the addition of women and rise in economic prosperity, only a correlation.[57] The study in effect minimizes their research by stating "[a]cademic studies have tied diversity in various groups to higher levels of

49 CAL. SENATE MAJORITY CAUCUS, *supra* note 21.

50 *Id.*

51 CAL. CORP. CODE § 301.3 Section 1(g)(1)(A) editor's and reviser's notes for § 301.3 ("According to the study entitled 'Women Directors on Corporate Boards From Tokenism to Critical Mass,' by M. Torchia, A. Calabro, and M. Huse, published in the Journal of Business Ethics in 2011, and report entitled 'Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance,' attaining critical mass … creates an environment where women are no longer seen as outsiders and are able to influence the content and process of board discussions.").

52 CAL. CORP. CODE § 301.3. *See also* editor and reviser's notes for § 301.3, which state: "[a] 2017 study by MSCI found that United States companies that began the five-year period from 2011 to 2016 with three or more female directors reported earnings per share that were 45 percent higher than those companies with no female directors at the beginning of the period."

53 CAL. CORP. CODE § 301.3 Section 1(c)(2) editor's and reviser's notes for § 301.3 ("In 2014, Credit Suisse found that companies with at least one woman on their board had an average return on equity (ROE) of 12.2 percent, compares to 10.1 percent in companies with no female directors.").

54 CAL. CORP. CODE § 301.3 Section 1(c)(4) editor's and reviser's notes for § 301.3 ("Credit Suisse conducted a six-year global research study from 2006 to 2012, with more than 2,000 companies worldwide, showing that women on boards improve business performance for key metrics, including stock performance.").

55 CAL. CORP. CODE § 301.3 Section 1(c)(3) editor's and reviser's notes for § 301.3 ("A 2012 University of California, Berkley study called 'Women Create a Sustainable Future' found that companies with more women on their boards are more likely to 'create a sustainable future' by … instituting strong governance structures with high level of transparency.").

56 Meggin Thwing Eastman et al., *The Tipping Point: Women on Boards and Financial Performance*, p. 15, MSCI ESG RESEARCH (Dec. 2016), https://www.msci.com/documents/10199/fd1f8228-cc07-4789-acee-3f9ed97ee8bb.

57 *Id.*

creativity and better decision making."[58] Thus, a corporate board with more diversity, not necessarily isolated to gender diversity, will have greater overall success. Second, the Credit Suisse six-year study is a global study monitoring countries like France, Spain, Belgium, and Germany where quotas have already been introduced.[59] The resulting research affirms that *diversity* delivers greater innovation and corporate performance.[60] However, in the countries that have already mandated quotas such as Spain, for example, they are not anticipated to be in full compliance with the quota by the required year.[61] There the quota is having minimal success. Further, one of the greatest obstacles the study cites for overcoming gender diversity is cultural bias—a difficult variable to measure across countries.[62] Though the results of the study are limited, it is the longest existing study examining gender diversity and corporate performance. Finally, regardless of the study's defects, nearly all of the statistical evidence for the bill supports the addition of women on behalf of corporate performance, a purely economic standpoint.

This further begs the question: is the profitability of corporations a proper purpose of state legislation? Was SB-826 driven by a lack of corporate performance? Rather, it is important to look at the historical context from which SB-826 sprung from. In October of 2017, Ashley Judd became the first celebrity to go on record exposing the "open secret" that was the repeated years of sexual abuse committed by Harvey Weinstein, filmmaker and cofounder of Miramax records, toward Hollywood actresses.[63] No one knew this single interview would result in a deluge of accusations, exposing sexual misconduct among beloved comedians, famous chefs and even Supreme Court appointees.[64] Sexual misconduct scandals were uncovered in all industries. Two of the primary industries affected were the entertainment industry and the tech industry,[65] both of which have strong roots in California and would be regulated by SB-826. The resulting conclusion is that there is a relationship between the gender gap and sexual harassment."[66] A male-dominated workforce may

58 *Id.*

59 *See generally* Barbara Lejczavk, *Diversity on Board!*, CREDIT SUISSE GRP. AG (Oct. 6, 2015), https://www.credit-suisse.com/corporate/en/articles/news-and-expertise/diveristy-on-board-201506.html.

60 *Id.* "As the report concludes: 'It is not case of a greater ability of one gender versus the other but that a more diverse group makes for better decision making and corporate performance.'" *Id.*

61 *Id.*

62 *Id.*

63 *See* Zacharek, et al., *supra* note 5.

64 *See* Charles Jones, *#MeToo One Year Later: Cosby, Moonves fall, Sex Harassment Fight at Work Far from Over*, USA TODAY (Oct. 4, 2018 5:21 PM ET), https://www.usatoday.com/story/money/2018/10/04/me-too-workplace-sexual-harassment-laws-policies-progress/1378191002/. The article discusses the conviction of comedian Bill Cosby on sex offense charges, the resignation of Chef Mario Batali who stepped down from his company after accusations of him groping multiple women, and the accusations of sexual harassment made against, now Supreme Court Justice Brett Kavanaugh.

65 *See generally* Jena McGregor, *Uber, Google and the Long, Lingering Tail of #MeToo*, WASH. POST (Oct. 26, 2018), https://www.washingtonpost.com/business/2018/10/26/uber-google-long-lingering-tail-me-too/?noredirect=on&utm_term=.1bdf92e0f9a2.

66 *See* Vanessa Fuhrmans, *What #MeToo Has to Do with the Workplace Gender Gap*, WALL ST. J. (Oct. 23, 2018 4:16 AM ET), https://www.wsj.com/articles/what-metoo-has-to-do-with-the-workplace-gender-gap-1540267680. ("[M]anagement experts and executives say, harassment can be a direct side effect of a workplace that slights women on everything from pay to promotions, especially when the perception is that men run the

give the perception that women's voices are unwelcome and that men are in charge.[67] A by-product of this type of culture can also be an increase in sexual harassment and workplace slights such as unequal pay and opportunities for women. Therefore, putting more women on corporate boards provides a protective barrier against workplace oppression and promotes a more inclusive, safer environment.

In light of public history, it is unlikely that SB-826 was driven by corporate profitability. Thus, the goals of the bill are to create an equal gender balance for top corporate executives, improve diversity, and decrease workplace harassment. It has been driven out of a concern for equal rights and protections. Besides corporate performance, there are two clear reasons behind SB-826. First, without an initiative like this to expedite the process, the United States Government Accountability Office and similar studies estimate it will take forty years for the number of women on corporate boards to match the number of men.[68] In effect, SB-826 will cut the projected natural timeline to a fraction of the period, requiring all boards to be in compliance within the next two years.[69] Second, the Act uses the language of attaining a "critical mass" of women on boards.[70] The purpose of this law is to transform the culture of boardrooms so that women no longer feel tokenized.[71] Developing a critical mass is also essential to women having enough presence and influence that they have the ability to effectuate real change.[72] SB-826 was proposed for the purpose of making corporate boards a representative reflection of women in the general population in a reasonable time period. This notion is also supported by statistical evidence that boards with women on them are more successful in their overall productivity and governance.[73] The inclusive nature of such boards would likely have an effect on decreasing the amount of workplace harassment and increasing accountability among executives. The side effect is that this will also increase profitability of corporations, but is that really such a terrible side effect? Senator Jackson said it best, "[i]t's not only the right thing to do, it's good for a company's bottom line."[74]

show and women can't speak up.").

67 *Id*.

68 CAL. CORP. CODE § 301.3 Section 1(f) editor's and reviser's notes for § 301.3.

69 CAL. CORP. CODE § 301.3(a) (West 2018).

70 CAL. CORP. CODE § 301.3 Section 1(g)(1)(A) editor's and reviser's notes for § 301.3.

71 CAL. CORP. CODE § 301.3 Section 1(g)(1)(A) editor's and reviser's notes for § 301.3 ("According to the study entitled 'Women Directors on Corporate Boards From Tokenism to Critical Mass,' by M. Torchia, A. Calabro, and M. Huse, published in the Journal of Business Ethics in 2011, and report entitled 'Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance,' attaining critical mass … creates an environment where women are no longer seen as outsiders and are able to influence the content and process of board discussions.").

72 CAL. CORP. CODE § 301.3 Section 1(g)(1)(B) editor's and reviser's notes for § 301.3 ("Boards of directors need to have at least three women to enable them to interact and exercise an influence on the working style, processes, and tasks of the board, in turn positively affecting the level of organizational innovation within the firm they govern.").

73 CAL. CORP. CODE § 301.3 Section 1(c)(5)(A-D) editor's and reviser's notes for § 301.3.

74 Antoinette Siu, *California May Mandate a Woman in the Boardroom—But Businesses are Fighting It*, CALMATTERS (Aug. 8, 2018), https://calmatters.org/articles/california-women-in-boardrooms-mandate/.

II. THE POTENTIAL LEGISLATIVE CHALLENGES AGAINST SB-826

There is no doubt that the purpose behind SB-826 is well-intentioned. However, from its inception the bill has been opposed by over thirty business groups challenging its legality.[75] Then-Governor Jerry Brown admitted to the weakness of the bill in his letter to the Senate.[76] He was quoted as saying, "I don't minimize the potential flaws that indeed may prove fatal to its ultimate implementation. Nevertheless, recent events in Washington, D.C.—and beyond—make it crystal clear that many are not getting the message."[77] Regardless of the need for the law, the question is whether the requirements as written could survive legal challenge. This Part will discuss the likely grounds on which a lawsuit would be brought against SB-826. The three most obvious attacks to be made on this bill are: (1) SB-826 is unconstitutional under the Equal Protection Clause of the United States Constitution and the Constitution of the State of California as it allows employment decisions to be based solely on one classification of diversity; (2) SB-826 violates of Title VII of the Civil Rights Act of 1964; and (3) SB-826 is unconstitutional under the Commerce Clause of the United States Constitution as applied to corporations and is a case of government overreach.

A. SB-826 IS UNCONSTITUTIONAL UNDER THE FOURTEENTH AMENDMENT AND THE EQUAL PROTECTION CLAUSE OF U.S. AND CALIFORNIA CONSTITUTIONS

The first potential lawsuit SB-826 could face is violation of the Equal Protection Clause of the Fourteenth Amendment. The Fourteenth Amendment guarantees: "No State shall … deny to any person within its jurisdiction the equal protection of the laws."[78] The Amendment is a personal right certain to each individual. Inversely, equal protection cannot mean one thing when applied to one person and something else when applied to another person of the same or different classification.[79] As Justice Powell wrote, "[i]f both are not accorded the same protection, then it is not equal."[80] The jurisprudence of the Fourteenth Amendment has afforded that unequal treatment of a person based on their membership in a protected group falls within the scope of this amendment.[81] Therefore, quotas based on a select classification have been found unconstitutional under the Fourteenth Amendment as they result in adverse treatment of the excluded group.[82] However, one exception to this has been the proposition of affirmative action—the allowance of the consideration of race in

75 McGreevy, *supra* note 39.

76 CAL. CORP. CODE § 301.3 Governor's signing message editor's and reviser's notes for § 301.3.

77 CAL. CORP. CODE § 301.3 Section 1(g)(1)(A) editor's and reviser's notes for § 301.3.

78 U.S. CONST. amend. XIV §1.

79 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1978) (Powell, J.) (plurality opinion).

80 *Id.*

81 *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 327 (2003); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

82 *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1978); Gratz v. Bollinger, 539 U.S. 224 (2003); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 551 U.S. 701 (2007).

decision making because diversity is a compelling interest of the United States.[83] Affirmative action is often associated with university admissions. The wealth of precedent written is regarding cases about the category of race and whether that can be considered during the application process.[84] SB-826 does not fall directly within this case law. Nonetheless, the use of a quota easily triggers the discussion of affirmative action and could be used as the tangential rationale for why SB-826 should be struck down.

Determining what is a constitutional affirmative action plan and what is a quota under the guise of an affirmative action has not been easy. In the landmark case on this issue, *Regents University of California v. Bakke*, the Supreme Court found the special admissions program of the Medical School at the University of California at Davis illegal but upheld that race may be a factor considered in selection of applicants for admission.[85] Petitioner was a white male who was rejected from the state's medical school.[86] He then challenged the legality of the school's special admissions program, which reserved sixteen of the 100 positions in the program for "disadvantaged" minority students.[87] In Justice Powell's plurality opinion, he applied the levels of scrutiny test that originated in *United States v. Carolene Products.*[88] Justice Powell asserted for the first time that race and ethnic distinctions are inherently suspect. Thus, should be subject to the most exacting judicial examination—strict scrutiny.[89] Practices evaluated under strict scrutiny are only justified where they further the compelling interest of the government and are necessary to safeguarding that interest, meaning there is no less restrictive alternative available.[90] In *Bakke,* the use of a quota system failed strict scrutiny because the type of diversity considered a "state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[91] Genuine diversity would not benefit from a quota system since it is not a sustainable solution. Further, the type of fixed percentage quota system implemented at U.C. Davis was not a necessary means toward the end of achieving educational diversity.[92]

In 2003, the Supreme Court upheld a race-conscious admissions program for the University of Michigan Law School in *Grutter v. Bollinger*, finding that it was

83 *See generally* Grutter v. Bollinger, 539 U.S. 306 (2003).

84 *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1978); Gratz v. Bollinger, 539 U.S. 224 (2003); Fisher v. Univ. of Texas at Austin, 570 U.S. 297 (2013), *aff'd,* 136 S.Ct. 2198 (2016); Students for Fair Admissions, Inc. v. Pres. & Fellows of Harvard Coll., 308 F.R.D. 39 (D. Mass. 2015), *aff'd,* 807 F.3d 472 (1st Cir. 2015).

85 *Bakke*, 438 U.S. at 265

86 *Id*.

87 *Id*.

88 Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143, 1153 (1992) (*citing* United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938)).

89 *Bakke*, 438 U.S. at 290.

90 *Id*. at 305.

91 *Id*. at 315.

92 *Id*. at 316.

narrowly tailored.[93] Writing for the majority, Justice O'Connor acknowledged that the Fourteenth Amendment was intended to do away with any discrimination based on race.[94] Though diversity is a compelling interest, the use of racial classifications is dangerous and should be "employed no more broadly than the interest demands."[95] The Court's holding reflects that admissions processes like *Grutter* using a wide variety of considerations will continue to pass the strict scrutiny standard.[96] To be considered narrowly tailored, the race-conscious admissions program cannot unduly burden persons not in the categorization; race must be limited to a "plus" factor.[97] A narrowly tailored affirmative action program does not violate the Fourteenth Amendment. Moreover, the program in *Grutter* was not based on a fixed quota but on enrolling a "critical mass" of minority students.[98] The concept speaks to the "substantial, important and laudable educational benefits that diversity is designed to produce, including cross-racial understanding and the breaking down of racial stereotypes."[99] Conversely, Justice O'Connor also wrote that "to assure some specified percentage of a particular group merely because of its race or ethnic origin would be patently unconstitutional."[100] Thus, a quota would cross the line.

The aforementioned cases discussed race-conscious affirmative action programs, not gender based programs. In *Bakke*, the Court did shed some light on how a gender-based cases would be treated. It determined gender would be handled with a lower level of scrutiny—intermediate scrutiny.[101] The rationale of the Court was that "[g]ender-based distinctions are less likely to create the analytical and practical problems present in preferential programs premised on racial and ethnic criteria."[102] The Court reasoned there are only two possible classifications for gender making class wide questions as to whether a group is being unduly burdened much more manageable to a reviewing court.[103] "Precedent shows, however, that facial quotas would still not survive even in intermediate scrutiny, the lesser scrutiny applied to sex-based affirmative action programs."[104]

Applying these principals to SB-826, similar to *Bakke*, where the admission

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

94 *Id*. at 341–42.

95 *Id*. at 342.

96 *Id*. at 306 (finding University of Michigan Law School based their admissions decisions off "students' academic ability coupled with a flexible assessment of their talents, experiences, and potential . . . including a personal statement, letters of recommendation, an essay describing how the applicant will contribute to the Law School life and diversity" as well as GPA and LSAT scores. The university also looks at 'soft variables,' such as recommenders' enthusiasm, the quality of undergraduate institution and … difficulty of undergraduate course selection").

97 *Id*. at 341.

98 *Id*. at 308.

99 *Id*.

100 *Id*.

101 *Bakke*, 438 U.S. at 302.

102 *Id*. at 302–03.

103 *Id*. at 303.

104 *See* Julia Glen, Note, *Affirmative Action: The Constitutional Approach to Ending Sex Disparities on Corporate Boards*, 101 MINN. L. REV. 2089, 2110 (2017). Glen cites Miss. Univ. for Women v. Hogan, 485 U.S. 718 (1982) for the proposition that a state supposed school could categorically prohibit men from being in attendance. *Id*.

program set aside sixteen seats strictly for minority applicants, SB-826 sets a rigid allocation of board seats that must be occupied by women by the year 2021. The law does use the term *minimum*, giving some flexibility as to the number of women who would be sitting on the board or the possibility of expanding the number of board seats to allow for the addition of more women. It could be argued that because of these two omissions it is not a facial quota. However, the motivation behind the legislation is for corporate boards to reflect women's actual representation in the community—40%. In light of this notion, it appears SB-826 is fated for an unavoidable demise as an unconstitutional quota. The representation mandated by SB-826 would not survive even intermediate scrutiny. This type of rigid percentage is exactly what Justice O'Connor warned against.

But the nature of corporate boards is inherently different from that of universities. Board directors are elected at the annual meeting of shareholders.[105] One of the few voting rights given to shareholders is their ability to elect directors. Under Delaware General Corporation Law, shareholders must comply with particular voting rules such as acting as a group by holding a meeting with adequate notice and quorum in order to elect directors.[106] A large corporation could have hundreds of shareholders and a true majority is required, meaning a majority of all possible shares, in order to elect a director. This process varies drastically from a "personal ratings" based approach that considers a select few traits used by selection committees of Universities.[107] That type of system results in relatively arbitrary scoring for candidates.[108] Therefore, comparing the election of corporate directors to the selection of students by universities is factually like comparing apples to oranges. The only slim hope that SB-826 would survive is that the case law is too far-fetched to be applicable.

A final consideration is that even affirmative action may no longer be considered constitutional in a matter of years. Though the reasoning of *Bakke* was affirmed in the *Fisher I* and *II* cases in 2013 and just recently in 2016,[109] the forthcoming case brought against Harvard College could upset a decades long precedent.[110] Since *Fisher*, the composition of the Supreme Court has changed dramatically with the addition of Justices Gorsuch and Kavanaugh.[111] The absence of swing-vote Justice

105 HAROLD MARSH, R. ROY FINKLE & KEITH PAUL BISHOP, MARSH'S CALIFORNIA CORPORATE LAW §10.05 (2019).

106 8 DEL. CODE § 141(b) (2016), https://delcode.delaware.gov/title8/c001/sc04.

107 *See* Anemona Hartocollis, *Does Harvard Admissions Discriminate? The Lawsuit on Affirmative Action, Explained*, N.Y. TIMES (Oct. 15, 2018), https://www.nytimes.com/2018/10/15/us/harvard-affirmative-action-asian-americans.html.

108 *Id*.

109 Fisher v. Univ. of Texas at Austin, 570 U.S. 297 (2013), *aff'd,* 136 S. Ct. 2198 (2016).

110 Students for Fair Admissions, Inc. v. Pres. & Fellows of Harvard Coll., 308 F.R.D. 39 (D. Mass. 2015), *aff'd,* 807 F.3d 472 (1st Cir. 2015) (refusing to intervene in Harvard's admissions procedures and finding that there is not a statistically significant block placed against Asian applicants to the university).

111 *See* Adam Liptak, *How Brett Kavanaugh Would Transform the Supreme Court*, N.Y. TIMES (Sept. 2, 2018), https://www.nytimes.com/2018/09/02/us/politics/judge-kavanaugh-supreme-court-justices.html ("His [Kavanaugh] confirmation would result in a rare replacement of the court's swing vote justice, moving Chief Justice John G. Roberts Jr.—a much more reliably conservative vote than Justice Kennedy—to the court's ideological center.")

Kennedy as well could mean the end of favorable affirmative action decisions.[112] Some would argue this is long overdue stating, "[a]ffirmative action has become the gateway drug to identity politics, or the breakup of America into antagonistic 'oppressor' and 'subordinate' groups constantly engaging in power relations."[113] Thus, even if the current legislation could surpass the test of scrutiny and evade designation as a quota that may not be enough.

In conclusion, SB-826 does not fit within the usual fact patterns of affirmative action cases. The precedent cases would have to be greatly stretched to accommodate the unique modes of election of corporate boards that differ substantially from the application processes used in university admissions. Inversely, the abundance of affirmative action case law sets a bright-line rule that quotas are unconstitutional under the Equal Protections Clause. The final factor that tips the scales in favor of SB-826 being overruled on constitutional grounds is that if it were to be brought to the Supreme Court, the Court's growing sentiments against any type of affirmative action measure would likely dominate.

B. SB-826 VIOLATES TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

The second potential lawsuit on which SB-826 could face a legal challenge is a violation of Title VII of the Civil Rights Act of 1964. Title VII of the United States Code prohibits discrimination in employment practices on the basis of race, color, sex, religion, or national origin.[114] It mandates that unlawful employment practices shall include: "to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, privileges of employment" because of an individual membership in a protected category.[115] Title VII was "aimed primarily at eradicating employment discrimination based on race," but by the time it was passed by Congress it had been expanded to include other underrepresented groups, including sex.[116] Sex is construed more broadly than just male or female assignment at birth.[117] Title VII provides "affirmative action" as a remedy[118] that could take the form of reinstatement, back pay, or any such relief the court deems just and proper.[119] Though "affirmative action" has no special meaning, there are limitations to the

112 *See generally* Ariana de Vogue, *Justice Anthony Kennedy's Evolution on Affirmative Action*, CNN (June 23, 2016, 2:21 PM) https://www.cnn.com/2016/06/23/politics/supreme-court-anthony-kennedy-affirmative-action/index.html; *see also* Yuvraj Joshi, *Bakke to the Future: Affirmative Action After Fisher*, 69 STAN. L. REV. ONLINE 17 (2016).

113 *See* Mike Gonzalez, *Yes, it's Time for Affirmative Action to End—Finally*, FOX NEWS (Aug. 20, 2018), https://www.foxnews.com/opinion/yes-its-time-for-affirmative-action-to-end-finally.

114 42 U.S.C.A. § 2000e-2(a)(2) (Westlaw through Pub. L. No. 115-391 (with a gap of Pub. L. No. 115-334)).

115 42 U.S.C.A. § 2000e-2(a)(1) (Westlaw through Pub. L. No. 115-391 (with a gap of Pub. L. No. 115-334)).

116 Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. 607, 611 (1998).

117 Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that Title VII barred discrimination based on sex, for failing to act in a way that conforms to social ideals; Sex stereotyping is part of sex discrimination).

118 42 U.S.C.A. § 2000e-2(g)(1) (Westlaw through Pub. L. No. 116-5).

119 West, *supra* note 116.

methods that can be used to promote minority employment in the workplace.[120] Among these constraints, Title VII indicates that an employer cannot "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" based on the protected categories.[121] In essence, Title VII advises against preferential treatment or any rigid percentages used to favor minority workers.[122] Therefore, Title VII effectively prohibits the use of quotas.

Just one year after *Bakke* was decided, the Supreme Court was again faced with a quota question but this time under the Civil Rights Act. In *United Steelworkers of America v. Weber*, the Supreme Court upheld a one-for-one quota for minority workers admitted to a training program.[123] Justice Brennan, writing for the majority, held that Congress intended Title VII to be a "catalyst to cause employers and unions to self-examine and to self-evaluate their employment practices and … cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts…"[124] *United Steelworkers* can be distinguished from *Bakke* as it was an affirmative action plan proposed as part of a collective-bargaining agreement.[125] By its terms, the training program selected trainees based on seniority with "the proviso that at least 50% of the trainees were to be black until the percentage of the black skilled craftworkers approximated the percentage of blacks in the local labor force."[126] The conclusion was that the proposed plan fell on the permissible side of affirmative action as it aligned with the purpose and intent of Title VII.[127] As Justice Brennan keenly pointed out, "the plan is a temporary measure, not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance."[128] *United Steel Workers* is just one in a string of cases that have muddied the stance on the legality of quotas. It was not until 2009 that a definitive answer was given.

In *Ricci v. Destefano*, the Supreme Court clearly stated that employment law rarely permits quotas.[129] This case, like the previous cases, was also in the context

120 *Id*.

121 42 U.S.C.A. § 2000e-2(a)(2) (Westlaw through Pub. L. No. 115-391 (with a gap of Pub. L. No. 115-334)).

122 42 U.SC.A. § 2000e-2(j) (Westlaw through Pub. L. No. 114-426). The relevant portion of Title VII states:

> Nothing contained in this [subchapter] shall be interpreted to require any employer, employment agency, labor organization, or joint labor management committee . . . to grant preferential treatment to any individual or to any group because of race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons. . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section or other area . . .

Id.

123 United Steel Workers v. Weber, 443 U.S. 193, 194 (1979).

124 *Id*. at 204 (*citing* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)) (quotations omitted).

125 *Id*. at 193.

126 *Id*. at 199.

127 *Id*. at 195.

128 *Id*. at 208.

129 Ricci v. DeStefano, 557 U.S. 557 (2009).

of racial discrimination. In *Ricci*, a group of white firefighters and one Hispanic firefighter sued the City of New Haven because, though they passed examination, they were denied the chance at promotion as the City refused to certify the results of the exam.[130] The results showed that white candidates had outperformed minority candidates. After inciting protest, the City decided to throw out the examinations to avoid a lawsuit based on the statistical disparity.[131] Nevertheless, this discrimination lawsuit still ensued by the converse parties. The City explained that it was caught in a catch-22: if it certified the test results they would face liability under Title VII for adopting a practice that had a disparate impact on minority firefighters. Writing for a 5–4 majority, Justice Kennedy reasoned that "[w]ithout some other justification, this express, race-based decision-making violates Title VII's command that employers cannot take adverse employment actions because of an individual's race."[132] He acknowledged that no matter how well intentioned the actions were, the employment decision was based on the member's status in a protected category—bluntly, that too many whites and not enough minorities passed the test.[133] Justice Kennedy reasoned that allowing this disparate treatment based on a good faith fear of committing disparate treatment could turn into an unwarranted focus on statistics[134] and, worst of all, a quota system.[135] Justice Kennedy feared a quota system based subjectively on employer ideals, but the opinion clearly expressed its distaste for quotas.

To further complicate the issue, the plaintiffs in *Ricci v. Destefano* also brought a claim under the Fourteenth Amendment's Equal Protection Clause.[136] It was determined that the discarding of the tests was a violation of Title VII, so the Court never reached the issue of equal protection.[137] The Court did briefly recognize the tension between "elimination segregation" that allows affirmative action as a "remedial program" under the Equal Protection Clause and disparate treatment under Title VII.[138] Justice Scalia was the only one to directly address the issue in his concurrence. He wisely wrote, "the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them."[139] Even if SB-826 were able to survive a claim brought on grounds of equal protection that is not to say it would be found legal under Title VII. The bill is demanding that corporate board decisions be made based on membership in a protected category. There are numerous scenarios that could be conceived where a man would face disparate treatment in

130 *Id*.

131 *Id*.

132 *Id*. at 579.

133 *Id*.

134 *Id*. at 581.

135 *Id*. at 582 ("[e]ven worse, an employer could discard test results (or other employment practices) with the intent of obtaining the employers preferred racial balance").

136 *Id*. at 576.

137 *Id*. at 563.

138 *Id*. at 582–83.

139 *Id*. at 595–96; *see also* Abigail Thernstrom, *The Supreme Court Says No to Quotas*, WALL ST. J. (July 1, 2009 12:01 AM ET), https://www.wsj.com/articles/SB124640586803076705.

attempting to meet the mandated number of female board directors. Additionally, gender is only one categorization in creating true diversity.

Moreover, there is no description of how applicants will be evaluated under SB-826 or what other qualifications would be in consideration. It could be argued that this law falls within the parameters of *United Steel Workers*.[140] Currently, only 15.5% of corporate board seats are held by women and one-fourth of California's public companies in the Russell 3000 index have no women serving as directors, yet women represent half of the population.[141] Under *United Steel Workers*, it could be considered a "manifest […] imbalance" if the number of qualified women on corporate boards is so strikingly unjust in comparison to the actual population.[142] However, this law is not a self-imposed affirmative action plan of a private company; SB-826 is a government-imposed requirement. Being a woman is the dispositive factor in this gender-conscious law. There is also no mention that this law is temporary like the one at issue in *United Steel Workers*. Instead, SB-826 is more closely aligned with *Ricci*, where the actions were well intentioned but still resulted in an act of disparate treatment. There are possible scenarios where the consequences of this law would prevent men from being hired, causing preferential treatment to persons not in the classified category solely based on their membership. This type of preferential treatment was held to be facially unconstitutional.[143]

Critically, the most important question not yet discussed is whether there is coverage. Can corporate board directors even be held liable under Title VII? SB-826 defines "employee" broadly as any individual employed by an employer, not including those elected to public office.[144] The Equal Employment Opportunity Commission gave greater insight through its compliance manual, which particularly focused on how members of a board of directors and major shareholders should be treated.[145] Generally, partners, officers, members of boards of directors, or major shareholders will not qualify as employees.[146] But the determination should not be made solely based on title. It is a consideration of whether the "individual acts independently and participates in managing the organization, or whether the individual is subject to another's control."[147] Under Delaware law, the primary influence of corporate law, directors are given complete control of the business and

140 United Steel Workers v. Weber, 443 U.S. 193 (1979).

141 CAL. CORP. CODE § 301.3 Section 1(e) editor's and reviser's notes for § 301.3.

142 United Steel Workers v. Weber, 443 U.S. 193, 194 (1979).

143 Ricci v. DeStefano, 557 U.S. 557, 577 (2009).

144 42 U.S.C.A. § 2000e (Westlaw through Pub. L. No. 115-426).

145 U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUEL SECTION 2: THRESHOLD ISSUES (2009), https://www.eeoc.gov/policy/docs/threshold.html#2-III-A-1-d.

146 *Id*.

147 *Id*. The relevant portion of the manual states: "Factors to be considered with regard to coverage of partners, officers, members of boards of directors, and major shareholders:

> Whether the organization can hire or fire the individual or set the rules and regulations of the individuals work;
>
> Whether and, if so, to what extent the organization supervises the individual's work;
>
> Whether the individual reports to someone higher in the organization;
>
> Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts;
>
> Whether the individual shares in the profits, losses and liabilities of the organization."

Id.

affairs of the corporation.[148] This includes hiring officers and determining their roles. This type of sweeping control—that is only answerable to shareholders who can choose to not re-elect a director—is unlikely to fall under the definition of an employee. Ultimately, even if SB-826 factually fits within a Title VII claim, which has been previously discussed, it would not be able to be struck down on these grounds because there is not proper coverage under the statute.

C. SB-826 IS UNCONSTITUTIONAL AS APPLIED TO CORPORATIONS CHARTERED OUTSIDE OF CALIFORNIA

D.

The third potential challenge SB-826 could face is that it is unconstitutional under the Commerce Clause of the United States when it is applied to corporations not headquartered within California. SB-826 is potentially a violation because it purports to apply to corporations with their principal executive offices in California that are chartered outside of California. Article I of the Constitution gives Congress the power "[t]o regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes."[149] The Clause has been held to limit the ability of states to tax or regulate activities that will affect interstate commerce.[150] SB-826 is being applied equally to corporations chartered in California and those out-of-state, as its enforcement hinges on the location of a corporation's "principal executive offices."[151] The Court has also struck down state laws that are not discriminatory but unduly burden interstate commerce.[152] In *Pike v. Bruce*, the Court affirmed that laws that create conflicting regulatory requirements, and even those that do not, will be struck down if they put a burden on interstate commerce and there is not a compelling interest.[153] SB-826 creates a conflicting regulation between what is required of corporate boards by laws of the state of incorporation compared to what is being mandated by California law. Therefore, SB-826 is putting a burden on interstate commerce where its benefits do not outweigh the burdens its placing. For California, it is unclear what the motivation would be for controlling the makeup of corporate boards outside of the state.[154] The compelling-state-interest test is the same test used to determine whether a law can survive strict scrutiny in an Equal Protection analysis.[155]

SB-826 advocates that the mandate is in the interest of increased corporate performance that comes with gender balanced corporate boards. However, corporate

148 8 DEL. C. § 141(a) (2016) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors").

149 U.S. CONST. art. I, § 8, cl. 32.

150 *See* Harold W. Horowitz, *The Commerce Clause as a Limitation on State Choice-of-Law Doctrine*, 84 HARV. L. REV. 806, 808 n.9. (1971).

151 CAL. CORP. CODE § 301.3(a) (West 2018).

152 Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

153 *Id*.

154 Vikram David Amar & Jason Mazzone, *Part Three on California's Mandate that Women be Placed on Corporate Boards: Dormant Commerce Clause and Improper Government Purpose Questions*, VERDICT (Nov. 1, 2018), https://verdict.justia.com/2018/11/01/part-three-on-californias-mandate-that-women-be-placed-on-corporate-boards.

155 *Compelling-State-Interest Test*, BLACK'S LAW DICTIONARY (10th ed. 2014).

performance or profitability is a matter of the "business and affairs of every corporation."[156] Delaware law sets out by statute the requirements necessary for the size and composition of corporate boards.[157] Any further constraints are to be included in the certificate of incorporation or the bylaws. Shareholders have the power to amend the by-laws.[158] Directors who are responsible for managing the business and affairs of the corporation can make discretionary decisions as to what requirements are going to be held for the board.[159] Further, as previously mentioned, the internal affairs doctrine states that the requirement of corporate boards is governed by the corporation's state of incorporation and not by the state in which its principal executive offices are located.[160] A board's gender diversity is a matter of internal corporate governance, as is shareholder voting, and SB 826 interferes with both. The law attempts to draw a parallel to the exception that has been made for foreign corporations under § 2115.5(a). This argument is not compelling as § 2115.5 includes, rather than specifically excludes, nationally traded corporations.[161] California also will have an extremely difficult case as to why it is a compelling interest of the State to be controlling the composition of other states' corporate boards of directors. In conclusion, a strong argument could be made under the Commerce Clause alongside a Fourteenth Amendment argument for why SB-826 is unconstitutional.

III. LEGAL ALTERNATIVES TO SB-826

The third Part of this Note will briefly discuss legal alternatives that could be used to achieve the same goal of greater representation of women on corporate boards. If this bill is struck down, which it likely will be, California will have to determine different means to achieve this same end. Alternative approaches to narrowing the gender gap on corporate boards include: (1) a tax incentive plan to induce corporations to voluntarily end the sex disparity in exchange for a tax break, (2) reforming SB-826 into a sunset provision encapsulated in another law so that it would expire in a short time period without re-approval, or (3) to allow the market to solve the issue.

The first alternative is the most plausible and has already been implemented in the United Kingdom with success and argued for in other scholarship.[162] A voluntary program would help to "avoid any confrontation with government regulation of the composition of executive boards."[163] A voluntary program would be more

156 8 DEL. CODE § 141(a) (2016), https://delcode.delaware.gov/title8/c001/sc04 ("The business and affairs of every corporation organized under this chapter shall be managed by and under the direction of a board of directors").

157 8 DEL. CODE § 141(b) (2016), https://delcode.delaware.gov/title8/c001/sc04.

158 HAROLD MARSH JR., R. ROY FINKLE & KEITH PAUL BISHOP, MARSH'S CALIFORNIA CORPORATE LAW §5.17 (2019).

159 8 DEL. CODE § 141(a) (2016), https://delcode.delaware.gov/title8/c001/.

160 *Internal-Affairs Doctrine*, *supra* note 38.

161 *See generally* Bishop, *supra* note 43.

162 *See* Glen, *supra* note 104, at 2133.

163 *Id*. at 2134.

comprehensive and also fall within the constitutional parameters set by affirmative action. Such a program would have to be done on a company-by-company basis to decide the goal number of women directors for that corporation.[164] Companies opting into this program would be required to do additional programming to facilitate the continued success.[165] The hope is that this would create a pipeline to kick-start getting more women into executive positions going forward. Since the program would not be permanent, it would be just a start to ending the gender gap. If the corporations met the predetermined expectations of the program, they would also receive a tax benefit.[166] For California, this could be a great compromise. There are currently concerns about corporations evading taxes, but here would be an opportunity for a corporation to rightfully earn a tax break while still benefiting society at large.[167] The problem with this program is that compliance would be voluntary. There would be no mandated participation which would take an exceptional amount of time and resources to monitor if the program was on a personalized, company-by-company basis. This alternative seems like it would have a high probability of success, since it aligns with corporate incentives.

The second suggested alternative is to use a sunset provision. Sunset provisions are "clauses embedded in legislation that allow a piece of legislation or a regulatory board to expire on a certain date."[168] The use of a sunset provision would reform SB-826 to be more in line with prior approved, constitutional precedent of temporary measures of affirmative action. The provision would be in place for a short time period, such as five years, until corporate boards are more representative of the general population. It is not certain this would be an adequate amount of time to be impactful, or that this sort of provision would be as thorough as having an entire bill dedicated to the issue of underrepresentation. But, it would be a start to resolving the disparity. Sunset provisions have the added benefit of creating a burden-shifting paradigm. Once the provision is set to expire, the burden lies on the proponents to gain political support to reenact the law.[169] This helps to reduce status quo bias for fading political movements.[170] The fact that the provision's default is that it will expire helps to mitigate error and reduce costs associated with reenactment or an amendment.[171] Governor Brown, in his introduction of the bill, admitted that he

164 *Id*.

165 *Id*.

166 *Id*. at 2134–35.

167 *See e.g.*, Edmund DeMarche, *California Democrats Want Businesses to Fork Over Half Tax-Cut Savings to State*, FOX NEWS (Jan. 22, 2018), https://www.foxnews.com/politics/california-democrats-want-some-businesses-to-fork-over-half-tax-cut-savings-to-state (claiming two California lawmakers introduced a bill to make corporations return their tax benefits gained from loopholes and unconscionable tax breaks).

168 BRIAN BAUGUS & FELER BOSE, MERCATUS CTR., SUNSET LEGISLATION IN THE STATE: BALANCING THE LEGISLATURE AND THE EXECUTIVE (2005), https://www.mercatus.org/system/files/Baugus-Sunset-Legislation.pdf.

169 *See* Ozan O. Varol, *Temporary Constitutions*, 102 CAL. L. REV. 409, 417 (2014).

170 *See id*. at 438.

171 *Id*. at 420 ("A temporary constitution or constitutional provision may mitigate both error and decision costs by increasing the quantity and quality of information available to the constitutional designers, reducing cognitive biases, promoting consensus building, and allowing the framers to employ temporary solution to temporary social problems.") (citations omitted).

worried for the constitutionality of the bill, and said it was meant to send a message.[172] There are many other platforms to send a message than to enact a law that potentially tramples constitutional rights.[173] Corporations are not the ones who should have to pay the litigation costs to attempt to overturn this bill. Additionally, there is the added stigma of being the organization behind attacking a bill attempting to mandate gender equality in the workplace. The social stigma of this, plus the added time, costs, and social criticism, could prevent organizations bringing suit, though they would have legitimate grounds.

A final option would be to strike the law down entirely and allow time to take its course. The bill does cite statistics that support the notion that as a society we are moving toward more equal representation of women.[174] The increase in the "conscious consumer" means that corporations are succumbing to social concerns in order to increase their profits.[175] Corporations are being held accountable by the general public to heighten their diversity efforts even without the added pressure of legislation. We are moving toward equal representation of genders on corporate boards. But without intervention, it would take forty to fifty years to accomplish the same goals that SB-826 could accomplish in two years. Generally, corporations try to steer clear of greater state or federal government control and are willing to make voluntary improvements or amendments in order to avoid interference.[176] Yet, skeptics of human nature suggest that "history teaches that such voluntary reforms are likely to be short-lived responses to passing pressures."[177] The issue is that SB-826 is a well-intended piece of legislation, but it will not survive judicial challenge.

CONCLUSION

The gender imbalance in corporate boardrooms across the country is an issue. As previously discussed, it is statistically shocking how few women actually serve in those roles.[178] SB-826 seeks to remedy a critical issue in this country in an expedited

172 CAL. CORP. CODE § 301.3 Governor's signing message editor's and reviser's notes for § 301.3 ("I don't minimize the potential flaws that indeed may prove fatal to its ultimate implementation. Nevertheless, recent events in Washington, D.C.—and beyond—make it crystal clear that many are not getting the message.").

173 Amar & Mazzone, *supra* note 154.

174 CAL. CORP. CODE § 301.3 Section 1(f)(2) editor's and reviser's notes for § 301.3. ("The 2017 Equilar Gender Diversity Index (GDI) revealed that it will take nearly 40 years for the Russell 3000 companies nationwide to reach gender parity—the year 2055.").

175 *See* Jessi Baker, *The Rise of the Conscious Consumer: Why Businesses Need to Open Up*, GUARDIAN (Apr. 2, 2015), https://www.theguardian.com/women-in-leadership/2015/apr/02/the-rise-of-the-conscious-consumer-why-businesses-need-to-open-up, (arguing corporations answer to the American people and a trend of "conscious consumption" is on the rise); *see generally* Susan McPherson, *8 Corporate Social Responsibility (CSR) Trends to Look for in 2018*, FORBES (Jan. 12 , 2018), https://www.forbes.com/sites/susanmcpherson/2018/01/12/8-corporate-social-responsibility-csr-trends-to-look-for-in-2018/#cff37fa40ce5.

176 Howard M. Metzenbaum, *Legal Approaches to Corporate Governance*, 65 NOTRE DAME L. REV. 926, 930 (1981).

177 *Id*.

178 CAL. CORP. CODE § 301.3 Section 1(e)(1) editor's and reviser's notes for § 301.3 ("As of June 2017, among the 446 publicly traded companies included in the Russell 3000 index and headquartered in California, representing nearly $5 trillion in market capitalization, women directors held 566 seats, or 15.5 percent of seats, while men held 3,089 seats, or 84.5 percent of seats.").

fashion. The bill's purpose and background are well-intentioned and rely upon insightful studies that show greater diversity increases financial gain, creativity, and a corporation's overall sustainability. This bill would help to make workplace environments safer and more successful. However, there is no statistical evidence that greater gender balance is responsible for the increased prosperity of corporations. Nor can we ignore the means through which gender equality is being achieved.

In sum, SB-826 is likely to face a host of constitutional challenges. Its blatant use of a quota could not pass even a test of intermediate scrutiny. The interests at stake here that benefit only one classification of persons do not rise to the level of a compelling state interest. Further, the implementation of this law will create a conflict with laws of other states and countries. California has little to no interest in dictating the qualification that out-of-state corporations should abide by in their composition of corporate boards. This bill could be considered an overreach of California's state government. Additionally, it is not the corporation who should have to pay for this law to be struck down.

What is the solution then? California is likely going to have to go back to the drawing board and find a legal solution for this issue. This Note only briefly touched on possible resolutions. One that has growing potential is the use of voluntary tax benefit programs that encourage greater compliance. Though this program may be costly, the alternative to doing nothing is to let this issue continue to resolve itself at a sluggish pace. SB-826 is a hopeful piece of legislation, but it is not legal. The next step is to create a more legitimate framework to carry out its well-intended purposes. In the end, this bill can be considered beneficial from the perspective of Governor Brown as it achieved his goal of getting politicians and other legislatures thinking about the problem of underrepresentation and, hopefully, inventing new solutions to tackle it.