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# MANDATING WOMEN: DEFENDING SB 826 AND FEMALE QUOTAS IN THE CORPORATE WORKPLACE

Lauren Kim\*

## I. INTRODUCTION

Gender discrimination is not a new, or unknown, issue. “Glass ceiling,” “glass elevator,” “78 cents gap,” and “persist” are all common colloquialisms expressing the discrimination and barriers women have faced, especially in corporate settings.<sup>1</sup> Recently, however, some of these colloquialisms, like “glass ceiling,” have been considered “outdated” as major concerns about gender discrimination have been reduced as the wage gap gradually closes.<sup>2</sup> Yet, gender discrimination is still extremely prevalent in professional environments, and eliminating gender discrimination today requires more directed action and initiatives than those already set forth.

California attempted to tackle this issue by instituting a law in an area that women have continually been blocked from—the corporate workplace.<sup>3</sup> In 2018, California passed California Senate Bill 826 (“SB 826”), which requires publicly held domestic and foreign corporations whose principal executive offices are in California to have at least one female director on their boards by the close of the

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1. Jessica Bennett, *Who Still Calls It a ‘Glass Ceiling?’ Not the 6 Women Running for President*, N.Y. TIMES (July 23, 2019), <https://www.nytimes.com/2019/07/23/us/politics/glass-ceiling-female-candidates-2020.html?module=inline> (these terms “describe the inability of white-collar women to rise beyond the mid-manager level in their jobs, and the often invisible barriers preventing that rise”).

2. *Id.* (“The women running for president [in the 2020 election] are promising many things as they make their pitches to voters. They are being asked repeatedly how being women may affect their chances. But so far, none of them are emphasizing the ‘glass ceiling.’”).

3. S.B. 826, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

2019 calendar year.<sup>4</sup> Additionally, by the close of the 2021 calendar year, the corporations must have at least two female directors if there are five or more board directors and at least three female directors if there are six or more board directors.<sup>5</sup> If a corporation fails to comply with these terms, it will be fined \$100,000 for the first violation and \$300,000 for each subsequent yearly violation.<sup>6</sup> Although similar rules have been adopted in other countries like France and Norway, California is the first state in the United States to pass a bill instituting a mandatory corporate quota.<sup>7</sup>

SB 826 is justified because the effects of gender discrimination are most pronounced in corporate boards and management positions. Latest statistics show women are more likely than men to hold four-year degrees, but women mainly work in middle-skill occupations that only require some training or education beyond high school.<sup>8</sup> These middle-skill occupations typically have lower average earnings than occupations with a predominantly male workforce such as IT, transportation, and manufacturing.<sup>9</sup> Women make up only 5% of the Fortune 500 CEOs, 7% of the top executives in the Fortune 500, 10% of the top management positions in the S&P 1500, and 19% of the S&P 1500 board seats.<sup>10</sup>

Unfortunately, the California legislature has already faced incredible backlash and opposition for SB 826, as California-based companies claim the requirement is unconstitutional and violates the

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4. *Id.* (adding sections 301.3 and 2115.5 to the California Corporations Code).

5. *Id.* (defining female as an individual who self-identifies her gender as a woman).

6. *Id.*

7. See William Sprouse, *California to Require Women on Boards*, CFO (Oct. 1, 2018), <https://www.cfo.com/governance/2018/10/california-to-require-women-on-boards/> (“In 2017, Pennsylvania passed a resolution urging public and private companies to have a minimum of 30% women on their boards by 2020, but that law does not impose penalties.”); see also Jill E. Fisch & Steven Davidoff Solomon, *California’s “Women on Boards” Statute and the Scope of Regulatory Competition*, EUR. BUS. ORG. L. REV. (forthcoming) (on file with the Faculty Scholarship at Penn Law) (describing “the proliferation of jurisdictions that have adopted legislation imposing gender quotas on corporate boards”).

8. NAT’L COAL. FOR WOMEN & GIRLS IN EDUC., TITLE IX AT 45: CAREER & TECHNICAL EDUCATION: A PATH TO ECONOMIC GROWTH 4 (2017), <https://www.ncwge.org/TitleIX45/Career%20and%20Technical%20Education.pdf>.

9. *Id.* (“Women are concentrated in fields such as child care, preschool education, home care, and hairdressing—all occupations with median earnings for full-time work that would leave a family of three in near-poverty.”).

10. JUDITH WARNER ET AL., CTR. FOR AM. PROGRESS, THE WOMEN’S LEADERSHIP GAP: WOMEN’S LEADERSHIP BY THE NUMBERS 5 (2018), <https://cdn.americanprogress.org/content/uploads/2018/11/19121654/WomensLeadershipFactSheet.pdf>.

Equal Protection Clause.<sup>11</sup> The Equal Protection Clause states that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”<sup>12</sup> A corporate quota mandating women raises the issue of whether, in the efforts to foster equality for women, inequality is created elsewhere. Two parties have already filed suits against the state of California claiming that SB 826 deprives men of equal protection and relies on a variety of stereotypes about women.<sup>13</sup> Both parties claim that California’s quota and initiative classify on the basis of gender, which triggers a heightened scrutiny.<sup>14</sup> Intermediate scrutiny is applied to gender classifications, as such classifications must be substantially related to an important government interest.<sup>15</sup>

How the courts apply intermediate scrutiny has not always been straightforward.<sup>16</sup> In *United States v. Virginia*,<sup>17</sup> a case regarding a male-only military college in Virginia, the Supreme Court utilized an intermediate standard of review in analyzing whether this admission policy violated the Equal Protection Clause.<sup>18</sup> *Virginia*, however, led to confusion because the Court applied intermediate scrutiny in a rigorous way, closer to strict scrutiny.<sup>19</sup> Lower courts were left to apply this unclear test of intermediate scrutiny in various gender discrimination claims.<sup>20</sup> Most recently in *Nguyen v. Immigration &*

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11. See Complaint at 5–6, Meland v. Padilla, No. 2:19-cv-02288-JAM-AC (E.D. Cal. Nov. 13, 2019), 2019 WL 6037825; Amended Complaint at 4–5, Crest v. Padilla, No. 19STCV27561 (Super. Ct. Cal. Sep. 20, 2019).

12. U.S. CONST. amend. XIV, § 1.

13. See Complaint, Meland v. Padilla, *supra* note 11, at 6–7; Amended Complaint, Crest v. Padilla, *supra* note 11, at 4–5.

14. Complaint, Meland v. Padilla, *supra* note 11, at 6–7; Amended Complaint, Crest v. Padilla, *supra* note 11, at 4–5.

15. *United States v. Virginia*, 518 U.S. 515, 532–33 (1996); *Craig v. Boren*, 429 U.S. 190, 218 (1976) (holding that an intermediate-level of scrutiny is applied to gender classifications).

16. Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 138 (2011) (“Since the outcome of an equal protection case is largely determined by whether the group is designated as a suspect, quasi-suspect, or non-suspect class, one may assume that the test for distinguishing between the three types of classes has been carefully crafted and precisely defined. But despite decades of case law on this specific issue, nothing could be further from the truth.”).

17. 518 U.S. 515 (1996).

18. *Id.* at 515–16.

19. See R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 238 (2002) (“[T]he opinion ultimately seemed to require that the State of Virginia show an ‘exceedingly persuasive justification’ for its gender discrimination at the Virginia Military Institute (VMI), not merely a substantial relationship to important government interests.”).

20. *Id.*

*Naturalization Service*,<sup>21</sup> the Court returned to the “substantially” related version of intermediate scrutiny.<sup>22</sup> These two cases left the lower courts with two different understandings of the government engaging in stereotyping.

Applying intermediate scrutiny to corporate quotas like SB 826, however, is relatively straightforward. In *Califano v. Webster*,<sup>23</sup> the Court addressed whether a provision in the Social Security Act that calculates benefits for women in a more advantageous way is unconstitutional because it directly compensates women for past economic and employment discrimination.<sup>24</sup> The Court found that the favorable treatment of women was justified because the provision’s purpose was to redress society’s longstanding disparate treatment of women.<sup>25</sup> Allowing women to benefit favorably through their wage is constitutional.<sup>26</sup> This is directly relevant and applicable to SB 826, which claims that adding women on corporate boards responds to years of gender discrimination in these California companies.<sup>27</sup> Yet, neither of the plaintiffs acknowledges *Califano* in their complaints opposing SB 826.<sup>28</sup> This seems odd when *Califano* addresses a situation where differing treatment of men and women is justified and, even more specifically, a situation like SB 826, which tries to remedy discrimination against women in the job market.

Improving access to corporate opportunities for women is not only necessary but also constitutional. This Note argues for the constitutionality of female corporate quotas, such as California’s SB 826. Part II briefly summarizes the history of the Equal Protection Clause in regard to gender-based classifications and intermediate scrutiny, and the development of California’s SB 826 and corporate quotas. Part III applies the modern Equal Protection Clause framework of intermediate scrutiny to SB 826. Part IV addresses the current lawsuits and opposition against SB 826 and California’s mandated quotas in the context of the *Califano* decision. Part V considers the

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21. 533 U.S. 53 (2001).

22. *Id.* at 53.

23. 430 U.S. 313 (1977).

24. *Id.* at 313–14.

25. *Id.* at 317.

26. *Id.* at 318.

27. See S.B. 826, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

28. See Complaint, Meland v. Padilla, *supra* note 11, at 6–7; Amended Complaint, Crest v. Padilla, *supra* note 11, at 4–5.

future potential consequences of corporate quotas for the courts and society. Part VI concludes.

## II. LEGAL BACKGROUND

### A. *Development of the Equal Protection Clause in Regard to Gender Discrimination*

When the United States Constitution was written, it contained no laws affording its citizens equal protection of the laws.<sup>29</sup> The Fourteenth Amendment, along with the Equal Protection Clause, was added after the Civil War in response to the widespread discrimination against former slaves.<sup>30</sup> The Fourteenth Amendment, however, did not apply to women, and women could not vote until the passage of the Nineteenth Amendment.<sup>31</sup> Married women also could not contract, hold property, litigate for themselves, or control their own earnings.<sup>32</sup> With such few rights clearly laid out for women, few women felt the need to litigate gender equality suits after the ratification of the Fourteenth Amendment, and the few women who tried were unsuccessful.<sup>33</sup>

During the 1970s, the Supreme Court adhered to a two-tier standard of review for equal protection claims: strict scrutiny and rational basis review.<sup>34</sup> The standard of review was determined by the classification.<sup>35</sup> A classification is the denial of rights to a group made of similarly situated individuals while granting these same rights to other groups.<sup>36</sup> Strict scrutiny is applied to suspect classifications, which include race and national origin.<sup>37</sup> To survive strict scrutiny, the classification used by the government must be narrowly tailored to

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29. See U.S. CONST. amend. XIV (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”); George B. Daniels & Rachel Pereira, *Equal Protection as a Vehicle for Equal Access and Opportunity: Constance Baker Motley and the Fourteenth Amendment in Education Cases*, 117 COLUM. L. REV. 1779, 1785 (2017).

30. ERWIN CHEREMINSKY, CONSTITUTIONAL LAW 725 (Wolters Kluwer 5th ed. 2017).

31. U.S. CONST. amend. XIX; CHEREMINSKY, *supra* note 30, at 725.

32. See Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth Amendment and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 162–63 (1979); CHEREMINSKY, *supra* note 30, at 883.

33. Ginsburg, *supra* note 32, at 163.

34. *Id.* at 164.

35. See *id.*

36. See CHEREMINSKY, *supra* note 30, at 726–27.

37. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 217 (1944), *abrogated on other grounds by Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

serve a compelling government interest.<sup>38</sup> A rational basis standard of review is applied to non-suspect classifications, which include age, disability, wealth, and sexual orientation.<sup>39</sup> To survive a rational basis review, the classification merely needs to be rationally related to a legitimate government purpose.<sup>40</sup> At the time, it was unclear which standard of review would apply to gender or sex classifications. Sex was similar to race and national origin because it was an immutable and immediately visible characteristic, and additionally, there were biological differences between females and males.<sup>41</sup> Intermediate scrutiny, which is how gender classifications are currently reviewed, did not appear until later when courts tried to fit gender classifications into one of these two existing standards of review.<sup>42</sup>

In 1971, the Supreme Court first invalidated a gender classification in *Reed v. Reed*,<sup>43</sup> where the Court held that an Idaho law was unconstitutional because the government's claimed purpose of administrative convenience—that it was cheaper to choose men—was unreasonable and merely arbitrary.<sup>44</sup> At the time, the Court stated that it applied a rational basis standard of review, but if the Court had truly applied rational basis review, the law would have been upheld because the classification would have been rationally related to the purpose that it was administratively cheaper to choose men.

Only two years later, in *Frontiero v. Richardson*,<sup>45</sup> the Supreme Court applied strict scrutiny because sex, like race and national origin, could have been considered an inherently suspect classification.<sup>46</sup> The Court claimed that sex was a suspect classification because there was a history of gender-based classifications used for purposeful discrimination, gender was an immutable characteristic, gender impacted women's ability to influence the political process, and

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38. *Id.* at 219 (holding that the executive order ordering Japanese-Americans to move to relocation camps classifying on race and national origin did not violate the Equal Protection Clause because there was a compelling government interest of national security).

39. *See, e.g.,* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312–13 (1976).

40. *Id.* at 314 (holding that the Massachusetts statute requiring police officers to retire at age fifty, classifying on basis of age, was constitutional because it furthered a legitimate state goal of ensuring physical health and vitality of police officers).

41. CHEMERINSKY, *supra* note 30, at 883.

42. *See generally id.* at 883–97 (describing the history of intermediate scrutiny).

43. 404 U.S. 71 (1971).

44. *Id.* at 74.

45. 411 U.S. 677 (1973).

46. *Id.* at 683–88 (explaining how and why sex and gender are not non-suspect classifications and are closer to the suspect classifications of race and national origin).

gender-based discrimination was typically based on stereotypes and stigmas that had no relationship to an individual's actual capabilities.<sup>47</sup>

In 1976, the Court adopted and agreed on an intermediate scrutiny standard of review as the appropriate level of review for gender classifications in *Craig v. Boren*.<sup>48</sup> The Court set forth a new standard of review stating that in order “[t]o withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”<sup>49</sup> Since *Craig*, the Court has reaffirmed an intermediate level of scrutiny for gender classifications.<sup>50</sup> In the Supreme Court's evaluation of gender classifications in *Virginia*, the Court used intermediate scrutiny.<sup>51</sup> Virginia Military Institute (VMI), a male-only school that excluded women, relied entirely on outdated and overbroad gender stereotypes of the legal, social, and economic inferiority of women, which were not substantially related to an important government purpose.<sup>52</sup> Most recently in 2001, the Supreme Court decided another gender classification case with *Nguyen*.<sup>53</sup> At issue was the citizenship statute that made it more difficult for a child born abroad and out of wedlock to a United States father to claim citizenship than if the child were born to a United States mother under the same circumstances.<sup>54</sup> The Court held that a citizenship statute was constitutional.<sup>55</sup>

Since the Court's examination of gender-based classifications in the 1970s, it has applied all three levels of scrutiny. Therefore, it is currently unclear how the Court will apply intermediate scrutiny to regulations classifying on the basis of gender in the future.<sup>56</sup> Will the Court continue using the traditional intermediate level of scrutiny,

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47. *Id.*

48. 429 U.S. 190 (1976).

49. *Id.* at 197.

50. See CHEMERINSKY, *supra* note 30, at 892 (citing *United States v. Virginia*, 518 U.S. 515 (1996); *Califano v. Westcott*, 443 U.S. 76, 89 (1979); *Caban v. Mohammed*, 441 U.S. 380, 388 (1979); *Orr v. Orr*, 440 U.S. 268, 279 (1979); *Califano v. Webster*, 430 U.S. 313, 316–17 (1977)).

51. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

52. *Id.* at 534.

53. *Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53 (2001).

54. *Id.* at 59–60.

55. *Id.* at 60–61.

56. Desiree Palomares, Comment, *The Fallacy of the Intermediate Scrutiny Analysis*, 97 DENV. L.F. 95, 98 (2019) (“Although the Supreme Court has designated the intermediate scrutiny standard for gender-based classifications, there is little guidance for the proper application of the standard.”).



which was created to exist in between strict scrutiny and a rational basis review? Or depending on the understanding of the rule, will the Court possibly revert to using a stricter understanding of intermediate scrutiny as articulated by Justice Ginsburg in *Virginia*? Many scholars and lower court judges believe that the majority's interpretation of intermediate scrutiny in *Virginia*, which required "an exceedingly persuasive justification" for gender classification applied a more rigorous standard of review closer to strict scrutiny.<sup>57</sup> It created some confusion about how intermediate scrutiny should be applied, and whether it was even applicable to gender-based classifications.<sup>58</sup> Scholars have argued that in direct defiance of *Virginia*'s new stricter and heightened intermediate scrutiny, courts swung back to the previously known intermediate level of scrutiny that a gender-based classification must be substantially related to an important government purpose.<sup>59</sup>

Yet, when looking at corporate quotas, or any other gender-based affirmative action set forth by governments attempting to reverse prior discrimination, the Court, and even the lower courts, have been relatively straightforward in how they apply intermediate scrutiny.<sup>60</sup> In *Califano*, the Court upheld a Social Security provision allowing women to eliminate low-earning years from the calculation of their benefits because it remedied past discrimination.<sup>61</sup> Laws that are "self-consciously and deliberately" set forth to compensate for years of

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57. *Virginia*, 518 U.S. at 571–74 (Scalia, J., dissenting) (stating that the majority raised the level of scrutiny to strict scrutiny, which was unprecedented); Heather L. Stoboough, Comment, *The Aftermath of United States v. Virginia: Why Five Justices Are Pulling in the Reins on the "Exceedingly Persuasive Justification"*, 55 SMU L. REV. 1755, 1755 (2002) (stating that Ginsburg's use of "exceedingly persuasive justification" in the majority opinion led to a stricter test for gender-based classifications).

58. See generally Palomares, *supra* note 56, at 96–97 (courts applying the "substantially related" framework).

59. *Id.*; see also Amy Hinkley, Note, *Scrutinize This!: The Questionable Constitutionality of Gender-Conscious Admissions Policies Utilized by Public Universities*, 37 PEPP. L. REV. 339, 350 (2010) ("Regardless of the standard applied, the Court's method of determining whether a challenged classification has violated the Equal Protection Clause involves a review of the asserted purpose for the classification and a review of the relationship between the purpose and the challenged classification.").

60. See Angelo Guisado, *Reversal of Fortune: The Inapposite Standards Applied to Remedial Race-, Gender-, and Orientation-Based Classifications*, 92 NEB. L. REV. 1, 34 (2013) ("The majority of circuit courts have adhered to a consistent application of intermediate scrutiny in assessing gender-based classifications regardless of invidious or remedial purpose.").

61. *Califano v. Webster*, 430 U.S. 313, 314–16 (1977).

gender discrimination are constitutional.<sup>62</sup> The favorable treatment of the “female wage earner enacted here was not a result of ‘archaic and overbroad generalizations’ about women” or any kind of stereotypes about women.<sup>63</sup> Ultimately, while there are areas that the lower courts and the Supreme Court still have to address with regard to rules on gender-based classifications, the favorable treatment of women in the job market has been addressed, and the Court has ruled it constitutional.<sup>64</sup>

### *B. Development of California SB 826 and Corporate Quotas*

Historically, most corporate boards are comprised of men, and even as gender gaps are closing, 99 percent of corporate boards of directors are still predominantly male.<sup>65</sup> These corporate boards are essential to a company’s life because they make decisions in directing and overseeing the actions of both the company and the chief executive officer.<sup>66</sup> In a direct effort to bring females into these boardrooms, SB 826 was passed by the California state legislature. SB 826 requires foreign and domestic publicly-held companies in California to have at least one woman on their board of directors by the end of 2019, and more women by the end of 2021 (depending on the size of the board).<sup>67</sup> If corporations do not follow these guidelines, they will be subject to a fine.<sup>68</sup> In the findings supporting SB 826, the California legislature noted the importance of a corporate quota as “studies predict[ed] that it [would] take over 40 or 50 years to achieve gender parity, if something [was] not done proactively” and also

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62. *Id.* at 320 (emphasizing that the statute in question was “deliberately enacted to compensate for particular economic disabilities suffered by women”); see also John E. Morrison, *Viva La Diferencia: A Non-Solution to the Difference Dilemma*, 36 ARIZ. L. REV. 973, 974–76 (1994) (discussing the debate of whether equality means “having the same rules apply to everyone, or having the rules apply the same to everyone”); Kathleen M. Sullivan, *Constitutionalizing Women’s Equality*, 90 CAL. L. REV. 735, 746 (2002) (“[L]aws self-consciously and deliberately enacted to compensate for past discrimination against women . . . might be upheld.”).

63. *Califano*, 430 U.S. at 317 (citing *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)) (discussing stereotypes about women “such as casual assumptions that women are ‘the weaker sex’ or are more likely to be child-rearers or dependents”); see also Morrison, *supra* note 62, at 975 (discussing implicit assumptions about women).

64. See *Califano*, 430 U.S. at 320.

65. Jeff Green et al., *Wanted: 3,732 Women to Govern Corporate America*, BLOOMBERG BUSINESSWEEK (Mar. 21, 2019), <https://www.bloomberg.com/graphics/2019-women-on-boards/>.

66. *Id.*

67. S.B. 826, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

68. *Id.*

highlighted that companies would perform better because boards tend to work more effectively with female members.<sup>69</sup>

California's new law has been controversial because it is perceived as being discriminatory to both men and women.<sup>70</sup> In opposition to SB 826, the California Chamber of Commerce and twenty-nine California businesses sent a letter to the California Senate arguing that if the companies were presented with a situation in which two equally qualified candidates, one male and one female, were applying for a director position, the company would be forced to choose the female candidate and deny the male solely because of their genders.<sup>71</sup> From a different perspective, other opponents of these corporate quotas believe these kinds of female-focused initiatives only serve to discredit the progress women have already made without government mandates or quotas and "undermine the achievements of future female hires."<sup>72</sup>

Currently, the two lawsuits objecting to SB 826 claim that the law violates the Constitution's Equal Protection Clause.<sup>73</sup> While one of the complaints claims that SB 826 expends taxpayer funds and resources, both are centered around the idea that SB 826 discriminates against men.<sup>74</sup> The courts have yet to rule on the constitutionality of SB 826, but they will have to answer whether these mandates are constitutional and will set precedent for the other states that want to implement

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69. *See id.* § 1 (listing the California legislature's findings about why this bill is necessary for the progression of gender parity). *Contra* Laurel Wamsley, *California Becomes 1st State to Require Women on Corporate Boards*, NPR (Oct. 1, 2018, 4:47 PM), <https://www.npr.org/2018/10/01/653318005/california-becomes-1st-state-to-require-women-on-corporate-boards> ("The *Economist* also found that some of the benefits touted for increasing the number of women on boards—such as closing the wage gap between men and women, or having an effect on company decision-making—haven't necessarily come to pass.")

70. *See, e.g.*, Letter from Cal. Chamber of Commerce et al. to Members of Cal. State Senate (Aug. 30, 2018), <http://blob.capitoltrack.com/17blobs/713497c1-4d2f-4865-acb1-6492b4a2ad1c> (opposing SB 826 on the grounds that it would discriminate against males).

71. *See id.*

72. *See, e.g.*, Anastasia Boden, *Op-Ed: Setting Quotas on Women in the Boardroom Is Probably Unconstitutional. It Also Doesn't Work*, L.A. TIMES (July 8, 2019, 3:05 AM), <https://www.latimes.com/opinion/op-ed/la-oe-boden-quotas-women-corporate-boards-unconstitutional-20190708-story.html> (written by the attorney representing the Pacific Legal Foundation, the party bringing suit against the California state for SB 826).

73. *See* Jane Edison Stevenson & Tierney Remick, *California Law Mandating Women Directors Is Challenged*, CFO (Nov. 25, 2019), <https://www.cfo.com/governance/2019/11/california-law-mandating-women-directors-is-challenged/>.

74. *See* Complaint, *Meland v. Padilla*, *supra* note 11, at 6–7; Amended Complaint, *Crest v. Padilla*, *supra* note 11, at 4–5.

similar laws. Although California is the first state to pass a mandatory corporate quota, more states hope to pass similar legislation.<sup>75</sup>

The issue has also come up in the implementation of gender party quotas to raise women's political representation. These quotas would require a certain percentage of female candidates on a party list.<sup>76</sup> The United States Democratic Party instituted a party level quota with an Equal Division Rule, which required National Convention delegates to be equally divided between men and women.<sup>77</sup> Similar to corporate quotas, the Equal Division Rule was also created to encourage women's active participation in the political process, rectifying years of past discrimination towards women in the political process.<sup>78</sup> This rule has also been opposed by men and women as they claim it restricted men's voting rights and ultimately created more inequality.<sup>79</sup> Although corporate quotas are a great starting point in remedying centuries of discrimination against women, the question of their constitutionality will have to be addressed, especially as many besides those bringing lawsuits against the state of California have already begun to weigh in on the issue.<sup>80</sup>

### III. MODERN EQUAL PROTECTION CLAUSE ANALYSIS OF SB 826

As mentioned above, the Supreme Court and lower courts will soon have to address whether these female quotas created to combat gender inequality violate the Equal Protection Clause. In analyzing the Equal Protection Clause and the female-focused initiatives and quotas, the first issue the Court must address is how the law classifies.<sup>81</sup> All laws classify because they either try to distinguish or create disparity in some way, but laws that discriminate are either facially or non-

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75. Stevenson & Remick, *supra* note 73 (stating that several states are considering similar laws, but similar statutes are already in place in other nations like France and Norway).

76. Lisa Schnall, Note, *Party Parity: A Defense of the Democratic Party Equal Division Rule*, 13 AM. U. J. GENDER SOC. POL'Y & L. 381, 382 (2005).

77. *Id.*

78. *Id.* at 405.

79. *See, e.g., id.* at 392 (citing *Bachur v. Democratic Nat'l Party*, 836 F.2d 837 (4th Cir. 1987)).

80. *See* Julie C. Suk, *Gender Quotas After the End of Men*, 93 B.U. L. REV. 1123, 1139 (2013) ("In the domains where women remain disadvantaged or underrepresented, this tension remains masked, as the two rationales converge to support positive measures to eradicate women's disadvantage. But in the domains where women are beginning to outperform men, should gender balance be manufactured? This question has direct relevance to the United States.").

81. *See* CHEMERINSKY, *supra* note 30, at 726.

facially discriminatory.<sup>82</sup> A facial classification exists on the face of the law when the law draws a distinction based on a particular characteristic, like race or gender.<sup>83</sup> In contrast, a non-facial classification is facially neutral but has a discriminatory impact and is passed to achieve a discriminatory purpose.<sup>84</sup> Here, corporate quotas facially classify based on gender because SB 826 requires a minimum number of *women* to be on corporate boards.<sup>85</sup>

Second, the courts will address what level of scrutiny or standard of review applies. Courts will apply one of three different levels of review: (1) strict scrutiny; (2) intermediate scrutiny; or (3) rational basis review.<sup>86</sup> As stated above, gender-based classifications are subject to an intermediate scrutiny, and *Califano* provides an analogous precedent to follow and abide by.<sup>87</sup>

Moreover, in examining the constitutionality of a law, courts evaluate the law's ends and means. For intermediate scrutiny, the government has the burden of proof to show the law's end is important.<sup>88</sup> Additionally, the means to achieve the end should not be excessively overinclusive or underinclusive.<sup>89</sup> A law is underinclusive if it fails to include all of the individuals who should be included to accomplish the law's purpose or end.<sup>90</sup> A law is overinclusive if the law includes individuals whose inclusion does not help accomplish the law's purpose.<sup>91</sup> Intermediate scrutiny requires a somewhat close fit, but it is possible for a law to both be underinclusive and overinclusive.<sup>92</sup> Putting all this together, intermediate scrutiny examines whether a gender-based classification (means) is substantially related to an important government interest (end). This Note will apply intermediate scrutiny as applied by *Califano* to

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82. *Id.* at 726–27.

83. *Id.*

84. *Id.* at 727.

85. S.B. 826, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

86. Kelso, *supra* note 19, at 227–28.

87. See *Califano v. Webster*, 430 U.S. 313, 314–19 (1977); Norman T. Deutsch, Nguyen v. INS and the Application of Intermediate Scrutiny to Gender Classifications: Theory, Practice, and Reality, 30 PEPP. L. REV. 185, 187–88 (2003) (providing framework for analyzing laws that facially classify based on gender).

88. See *Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53, 60 (2001); CHEMERINSKY, *supra* note 30, at 729.

89. CHEMERINSKY, *supra* note 30, at 729–30.

90. *Id.*

91. *Id.* at 730.

92. *Id.*

determine whether these affirmative action programs and laws mandating women meet the required level of scrutiny.

For an intermediate level of review, the government gender classification, or means, must be substantially related to an important government interest, or end. The California legislature set forth specific reasons and purposes for imposing a corporate quota. They wanted to “boost the California economy, improve opportunities for women in the workplace, . . . protect California taxpayers, shareholders, and retirees,” and “achieve gender parity.”<sup>93</sup> Similar to *Craig*, where the Court referred to statistics showing that 0.18 percent of females versus 2 percent of males between the ages of eighteen and twenty were arrested for drunk driving in support of Oklahoma law banning men under twenty-one from drinking,<sup>94</sup> statistics also were given great weight in support of passing SB 826.<sup>95</sup> For example, SB 826 cited to numerous studies which concluded that companies tend to perform more effectively with women on corporate boards.<sup>96</sup> Other studies have concluded even the number of women correlates with the board’s overall effectiveness, as having three women on a board, rather than one or none, increases the board’s overall effectiveness.<sup>97</sup> Unlike in *Craig*, where the Court held that statistics did not form the proper basis for gender classification, the statistical evidence here supports gender classification because the law attempts to create gender parity and gender is a legitimate proxy for corporate quotas.<sup>98</sup>

The ends for female-specific corporate quotas are premised on promoting women’s interest in corporate positions, raising confidence of women to participate in these positions, expanding opportunities for women in areas traditionally dominated by men, and even reducing barriers for men seeking entry into “female fields.”<sup>99</sup> Under *Califano* and a traditional intermediate scrutiny analysis, the end here would be important. In gender-based affirmative action cases, the Court has

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93. S.B. 826, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

94. *Craig v. Boren*, 429 U.S. 190, 201–02 (1976).

95. S.B. 826, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

96. *See id.* § 1(c)–(g).

97. *Id.*

98. *See Craig*, 429 U.S. at 201–02.

99. *See* NAT’L COAL. FOR WOMEN & GIRLS IN EDUC., *supra* note 8, at 1; *STEM for Girls*, UNIV. OF CAL. DAVIS, <https://wrrc.ucdavis.edu/programs/academic/stem-4-girls> (last visited Feb. 23, 2020) (advertising a public university’s STEM program for young girls to build confidence and foster interest in joining STEM fields).

accepted remedying societal gender discrimination and differences in opportunities as an “important governmental objective.”<sup>100</sup>

Applying intermediate scrutiny, California is likely to show an exceedingly persuasive justification for including women in the boardroom. Unlike *Virginia*, in which a male-only school in Virginia tried to defend its single-sex school system by using overbroad generalizations about women and their abilities, the purpose and justification of California’s corporate quota in improving opportunities for women in the boardroom does not rely on stereotypes about the legal or economic inferiority of women.<sup>101</sup> Justice Ginsburg, in the majority opinion of *Virginia*, and the per curiam opinion of *Califano*, clearly stated that gender-based classifications may be used to compensate women for economic disabilities and to promote equal employment opportunities and that these are exceedingly persuasive justifications.<sup>102</sup> The Court does not tolerate laws grounded in “archaic and overbroad generalizations” about women, like that a woman’s role is only in the home, not the corporate workplace.<sup>103</sup> Nor does the court tolerate any laws based on a traditional notion that women depend on men financially.<sup>104</sup>

On the other hand, opponents of these quotas may argue that such justification is not exceedingly persuasive because a rights-based framework is designed to guard against exclusion or any explicit discrimination.<sup>105</sup> Although there is a history of women who were unable to join corporate board positions, SB 826 only expands the diversity of women and denies opportunities to men. In *Virginia*, the Court stated that a policy denying women an equal opportunity to participate and contribute to society their individual talents simply because they were women was unconstitutional and violated the Equal Protection Clause.<sup>106</sup> The majority in *Virginia* was only seeking to put forth a public policy argument that a male-only school violated the Equal Protection Clause by denying women and did not consider that

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100. See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 722–25, 728–29 (1982) (intermediate scrutiny must be applied free of fixed stereotypes about men’s and women’s abilities).

101. See *United States v. Virginia*, 518 U.S. 515, 515–16, 532–33 (1996).

102. *Id.* at 533; *Califano v. Webster*, 430 U.S. 313, 317 (1977).

103. Lauren Sudeall Lucas, *A Dilemma of Doctrinal Design: Rights, Identity, and the Work-Family Conflict*, 8 FLA. INT’L U. L. REV. 379, 384 (2013) (citing *Craig*, 429 U.S. at 198).

104. *Id.*

105. *Id.* at 385.

106. *Virginia*, 518 U.S. at 532.

a female-only policy could have a similar discriminatory effect and, therefore, could also be unconstitutional.<sup>107</sup> Economic disparity favoring females is exceedingly persuasive when evaluating the history of women in the workplace, but economic disparity favoring males is not.<sup>108</sup>

Pacific Legal Foundation, one of the parties bringing suit against California in relation to SB 826, contends that women have been making progress in corporate environments without quotas or laws and do not need the unsolicited help.<sup>109</sup> While it is true that statistically women have been making progress, corporate boardrooms have other barriers to entry that women have been unable to overcome.<sup>110</sup> Vacancies on a board of directors are rare, and when there is an opening, a personal connection or recommendation of a current director, who is almost always a man, wins out.<sup>111</sup> Another argument against quotas is that in the pursuit of including women, men are excluded as a result. A common example involves one male and one female candidate applying for the same position, requiring a company to be forced to choose the female candidate to meet its quota. This is a valid concern, but according to *Califano*, it would be reasonable to give the position to the female candidate, who has lived in and is a product of years of discrimination in labor and economics, if both candidates are equally qualified.<sup>112</sup> Ultimately, a court will be likely to conclude that California can show an exceedingly persuasive justification for corporate board quotas.

The relationship between the means and end of creating gender parity in the boardroom is a very tight fit. Although women are slowly beginning to hold executive and senior positions, there is still a very small percentage of women in board seats.<sup>113</sup> The job market has been,

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107. *See id.* at 532–33.

108. *See* Deborah Brake et al., *Centennial Panel: Two Decades of Intermediate Scrutiny: Evaluating Equal Protection for Women*, 6 AM. U. J. GENDER & L. 1, 6 n.32 (1997).

109. *See* Boden, *supra* note 72.

110. *See* Green et al., *supra* note 65.

111. *Id.*

112. *Califano v. Webster*, 430 U.S. 313, 313–14 (1977).

113. *See* S.B. 826, 2017–2018 Leg., Reg. Sess. § 1 (Cal. 2018) (“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. More than one-quarter, numbering 117, or 26 percent, of the Russell 3000 companies based in California have NO women directors serving on their boards.”); WARNER ET AL., *supra* note 10, at 1, 5 (women only hold 19 percent of the S&P 1500 board seats).



and is still, inhospitable to women unless they are seeking lower-paid jobs.<sup>114</sup> Accordingly, this California law only seeks to include women on a corporate board of directors and does not allow room for individuals whose inclusion would not help create gender parity. Although SB 826 has a lot of problems and leaves loopholes for corporations to find an out, it does signify a step towards gender equity in the boardroom, which affects large corporate business decisions.

#### IV. THE CONSEQUENCES OF SETTING FORTH A DRASTIC CHANGE LIKE SB 826

In 2018, SB 826 passed, and according to some projections, California can expect to have 692 new women on boards of directors by 2021.<sup>115</sup> Although this law sounds ambitious, many have pointed out that a number of California companies are incorporated in Delaware.<sup>116</sup> Those incorporated in Delaware may not have principal executive offices in California and would likely not have to follow this rule.<sup>117</sup> In spite of this, two suits have been filed against the state of California (and many more are likely to follow), which claim that the law mandating women is unconstitutional and violates the Equal Protection Clause.<sup>118</sup>

Although these female-focused measures and mandated laws were set forth in hopes of creating gender parity, they have received a lot of public backlash. California's corporate quota is the first of its kind in the United States, and there are already lawsuits claiming it is unconstitutional.<sup>119</sup> This kind of response is not completely surprising. A law mandating women on a corporate board is an extremely direct, straightforward way of injecting change into the corporate world. The California Chamber of Commerce and the various other businesses who wrote the letter to the California Senate opposing SB 826 reacted

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114. *Califano*, 430 U.S. at 318.

115. See S.B. 826, 2017–2018 Leg., Reg. Sess. (Cal. 2018); Green et al., *supra* note 65.

116. Green et al., *supra* note 65.

117. See 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, 329 (2019) (while SB 826 does not mention the company's place of incorporation, raising a question of whether the law applies to companies incorporated outside of California, supporters of the law rely on section 2115.5 of the California Corporations Code to argue for the law's applicability to foreign corporations).

118. Stevenson & Remick, *supra* note 73.

119. *Id.*

in a predictable manner.<sup>120</sup> They emphasized that they were not opposed to creating more gender diversity on boards but that they did not like the manner in which SB 826 sought to accomplish this goal.<sup>121</sup> They made a valid point that gender is not the only measure of diversity and expressed their concerns of having to potentially displace current male board members.<sup>122</sup> Yet, SB 826 and other measures like it are necessary to institute actual change.

SB 826 symbolizes a movement. If California's corporate quota is deemed constitutional, other states will likely follow suit by drafting similar bills or passing similar pending legislation.<sup>123</sup> If all states in the United States were to instill the same kind of change and all companies in the Russell 3000 had to put women on their board of directors, 3,732 board seats would need to open for women, and the number of women on these boards would increase by around 75 percent.<sup>124</sup> On its face, SB 826 and any female quotas to bring forth economic equality like that of *Califano* seek a positive change to reduce and remedy gender discrimination.

#### V. WHY IS "QUOTA" SUCH A ROUSING, STIRRING WORD? DIFFERING VIEWPOINTS OF SB 826 AND THE LOWER COURTS

Given the historical and political context of a female quota and the changing role of women in the workplace (and especially a corporate workplace), it is understandable why there is such a variety of opinions weighing in on SB 826. A quota is perceived and understood as a "hard" remedy because it is a more aggressive and a more straightforward method of imposing equality than a "soft" remedy like affirmative action, which merely gives guidelines for organizations to follow and implement as they see fit.<sup>125</sup> Opponents of SB 826 and female quotas assert that the laws intrude on the public-private sector spheres.<sup>126</sup> Indeed, one of the complaints filed opposing SB 826 alleges that the plaintiff companies and shareholders have paid

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120. See Letter from Cal. Chamber of Commerce, *supra* note 70.

121. *Id.*

122. *Id.*

123. Stevenson & Remick, *supra* note 73.

124. Green et al., *supra* note 65.

125. See Darren Rosenblum, *Loving Gender Balance: Reframing Identity-Based Inequality Remedies*, 76 *FORDHAM L. REV.* 2873, 2874 (2008); Tracy A. Thomas, *Reconsidering the Remedy of Gender Quotas*, *HARV. J. L. & GENDER ONLINE* 1, 3 (2016), <https://harvardjlg.com/2016/11/reconsidering-the-remedy-of-gender-quotas/>.

126. Rosenblum, *supra* note 125, at 2880.

income taxes and various other taxes to the state of California and that this money and other taxpayer's funds would be illegally expended in carrying out and implementing SB 826.<sup>127</sup> Opponents of female quotas argue that a quota is a public regulation interfering with the operations of a private organization or corporation.<sup>128</sup> In the selection process of an equally qualified female and male candidate, forcing the private company to choose the female candidate would allow the government to take part in the organization's decision-making.<sup>129</sup>

This type of government interference is especially significant because a corporate board of directors typically makes the decisions dictating the future of the company. It is true that this government interference is a shortcoming in incorporating quotas, but it is a risk necessary in creating gender balance and an attitude that needs to be changed when it comes to remedying discrimination. Countries like Norway, which already have corporate female quotas and measures that emphasize equal opportunities in education, employment, and professional advancement, understand that the extremely close interaction of the public and private sectors is experimental.<sup>130</sup> This experimentation, however, may explain why places like Norway have high economic competition rankings and maintain a form of democracy with health, education, and unemployment benefits.<sup>131</sup> In times like today, where private organizations cannot remedy discrimination, it may be necessary to shift the burden.

Another argument is that SB 826 discredits the progress women have made in climbing the corporate ladder without any kind of government regulation or public interference.<sup>132</sup> Although women have made significant progress in the corporate boardroom, government interference has been directly impactful in schools through Title IX.<sup>133</sup> Title IX bans discrimination based on gender in

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127. See Amended Complaint, *Crest v. Padilla*, *supra* note 11, at 4–5.

128. Rosenblum, *supra* note 125, at 2880.

129. See *id.*

130. See *id.* at 2879.

131. *Id.* at 2879 n.37.

132. See Complaint, *Meland v. Padilla*, *supra* note 11, at 1; *California's "Woman Quota" Targeted in New Lawsuit*, PAC. LEGAL FOUND. (Nov. 13, 2019), <https://pacificlegal.org/press-release/californias-woman-quota-targeted-in-new-lawsuit/>; *Creighton Meland v. Alex Padilla, Secretary of State of California: Fighting California's Discriminatory Woman Quota Law*, PAC. LEGAL FOUND., <https://pacificlegal.org/case/creighton-meland-v-alex-padilla-secretary-of-state-of-california/> (last visited Feb. 23, 2020).

133. See U.S. DEP'T OF JUSTICE, EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX 2 (2012), <https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf>.

any federally funded educational programs.<sup>134</sup> Some private and public schools receive federal funds and, as a result, must comply with Title IX.<sup>135</sup> Since Title IX's enactment, there have been significant improvements in educational access for women with increased high school and college graduation rates—the number of women with college degrees has more than tripled since 1968—and women now have more advanced degrees than their male counterparts.<sup>136</sup> While Title IX created and advanced educational opportunities for women, there are still barriers that may take time to overcome. Women still earn less than half of bachelor degrees earned in STEM-based (Science, Technology, Engineering, and Mathematics) fields.<sup>137</sup> In 2017, women received only 19.1% of the bachelor degrees in computer science, 21.5% in engineering, and 41.7% in mathematics.<sup>138</sup> STEM-based education opportunities are particularly important for women as people become increasingly more reliant on technology.

As a result of this high demand for workers, the national average salary for those with STEM-based education (\$87,000) is significantly higher than that of a middle-skill occupation.<sup>139</sup> Schools and private organizations also created scholarships specifically for female students.<sup>140</sup> Many of these scholarships were funded directly by public and private schools to encourage female participation in STEM and “84% of about 220 universities offer single-gender scholarships, many

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134. *Id.* at 1.

135. *Id.*

136. *Id.* at 2–3.

137. Josh Trapani & Katherine Hale, *Higher Education in Science and Engineering*, NAT'L SCI. FOUND. (Sept. 4, 2019), <https://nces.nsf.gov/pubs/nsb20197/demographic-attributes-of-s-e-degree-recipients#s-e-degrees-by-sex>.

138. *Id.*

139. *See Why Are There So Few Women in STEM?*, W. GOVERNORS UNIV. (July 1, 2019), <https://www.wgu.edu/blog/why-are-there-so-few-women-in-stem1907.html>; *see also* NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., *supra* note 8, at 4 (“Middle-skill occupations where women dominate (making up 75% or more of the workforce) pay median wages of just 66 cents for every dollar in middle-skill occupations where men similarly dominate.”).

140. *See, e.g., Female Scholarships*, SCHOLARSHIPS.COM, <https://www.scholarships.com/financial-aid/college-scholarships/scholarship-directory/gender/female> (last visited Feb. 23, 2020) (listing different scholarships offered exclusively to females and women); Kenny Sandorffy, *Scholarships for Women in STEM*, SCHOLARSHIP OWL (Dec. 4, 2019), <https://scholarshipowl.com/blog/find-scholarships/scholarships-for-women-in-stem/> (“There are many organizations and programs that want to encourage young female students to enter the fields of STEM. They do this by awarding college scholarships.”).

of them in STEM fields.”<sup>141</sup> 57 percent of universities are engaged in sex-specific scholarship practices that are facially discriminatory, which means that they offer five or more scholarships that are gender-specific.<sup>142</sup> Universities also have tried more concrete measures to foster female participation such as altering their curriculum and courses. Harvey Mudd College, a college widely known for its STEM-centered education, “revis[ed] the introductory computing course and split[] it into two levels divided by experience,” “provid[ed] research opportunities for undergraduates after their first year in college,” and sent its female students to a national conference gathering together prominent women in technology.<sup>143</sup> Other universities and colleges have also been offering female-only awards, professional development workshops, and summer camps for middle school and high school students.<sup>144</sup> Ultimately, the government’s attempt to create equitable opportunities for women in education has been revolutionary for women’s progress in schools and in their careers after education, and sets an example of what is possible with the implementation of SB 826.

Another issue that arose in the discussion of the constitutionality of SB 826 is which standard of scrutiny applies. Some scholars argue that *Virginia* and *Nguyen* set forth two different understandings of the standards of review, and it is currently unclear how the courts will proceed and scrutinize gender-based classifications.<sup>145</sup> Currently, intermediate scrutiny seems rather arbitrary and is subject to many different interpretations.<sup>146</sup> On the road to and from intermediate

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141. Teresa Watanabe, *Women-Only STEM College Programs Under Attack for Male Discrimination*, L.A. TIMES (Aug. 20, 2019, 7:00 AM), <https://www.latimes.com/california/story/2019-08-20/women-only-science-programs-discrimination-complaints> (citing *Sex-Specific Scholarships*, STOP ABUSIVE & VIOLENT ENV’TS, <http://www.saveservices.org/equity/scholarships/> (last visited Feb. 23, 2020)).

142. *Sex-Specific Scholarships*, STOP ABUSIVE & VIOLENT ENV’TS, <http://www.saveservices.org/equity/scholarships/> (last visited Feb. 23, 2020).

143. CHRISTIANNE CORBBET & CATHERINE HILL, SOLVING THE EQUATION: THE VARIABLES FOR WOMEN’S SUCCESS IN ENGINEERING AND COMPUTING 4 (2015), <https://www.aauw.org/app/uploads/2020/03/Solving-the-Equation-report-nsa.pdf>.

144. Watanabe, *supra* note 141.

145. See Ajmel Quereshi, *The Forgotten Remedy: A Legal and Theoretical Defense of Intermediate Scrutiny for Gender-Based Affirmative Action Programs*, 21 AM. U. J. GENDER SOC. POL’Y & L. 797, 799 (2013); Kelso, *supra* note 19, at 238 (“[T]he opinion ultimately seemed to require that the State of Virginia show an ‘exceedingly persuasive justification’ for its gender discrimination at the Virginia Military Institute (VMI), not merely a substantial relationship to important government interests.”).

146. Quereshi, *supra* note 145, at 799.

scrutiny, the Court has gone from applying rational basis, to creating an intermediate standard of review, to a more rigorous intermediate scrutiny closer to strict scrutiny, and then back to the original intermediate standard of review.<sup>147</sup> This is incredibly problematic as the Supreme Court continues to apply intermediate scrutiny to gender classifications to fit certain Justices' ideologies, instead of applying the standards of review based on theory.<sup>148</sup>

The lower courts and California courts have tried to address this. The Sixth Circuit and Federal Circuit Courts of Appeals have applied strict scrutiny when reviewing cases involving gender-based classifications.<sup>149</sup> In California, a lower court has concluded that gender is a suspect classification and, therefore, is subject to strict scrutiny review.<sup>150</sup> The specific regulation at issue in the California case was distinct from SB 826 and the Social Security provision in *Califano* because the law in *Califano* gave preferential treatment without emphasizing stereotypes and was created to remedy discrimination. In addition, the California court went on to state that race-based classifications are not subject to strict scrutiny merely because they are “race conscious.”<sup>151</sup> Nevertheless, applying strict scrutiny at a state level in California may lead to a different result because, according to the court, the ultimate goal of the Equal Protection Clause is the elimination of factors like race from public decisions.<sup>152</sup>

There is a tension in legal thought as some believe *Virginia* ended up creating a more rigorous, stricter version of intermediate scrutiny, which required a showing of “exceedingly persuasive justification” for any classification.<sup>153</sup> Justice Ginsburg, who authored the majority opinion in *Virginia*, emphasized the importance of having a genuine, actual purpose for a gender classification.<sup>154</sup> The purpose must not be hypothesized simply to defend equal protection litigation, and it

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147. *See id.* at 800–22.

148. *See, e.g.,* *Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53 (2001); *United States v. Virginia*, 518 U.S. 515 (1996).

149. *Quereshi, supra* note 145, at 813–14.

150. *Connerly v. State Personnel Bd.*, 112 Cal. Rptr. 2d 5, 19–20 (Ct. App. 2001) (*Crest v. Padilla's Amended Complaint* cites to this case and it is also important to note that Pacific Legal Foundation was one of the defendants in this case).

151. *Id.* at 29.

152. *Id.*

153. *Virginia*, 518 U.S. at 524.

154. *Id.* at 533.

should not rely on overbroad generalizations or stereotypes.<sup>155</sup> Justice Ginsburg has consistently been a leading advocate for gender equality and equal rights for women, and ultimately, VMI and their mission were in direct defiance of equal protection and the fundamental values Justice Ginsburg stands for.<sup>156</sup> Justice Ginsburg is famously known for saying, “[W]hen do you think it will be enough? When will there be enough women on the court? And my answer is when there are nine.”<sup>157</sup>

Justice Ginsburg, however, has been highly criticized for moving gender from a “quasi-suspect” type of a classification to a suspect classification similar to race and national origin in pursuit of her own principles.<sup>158</sup> Some claim that *Nguyen* was the retaliation and reversal of Ginsburg’s decision by the other Justices on the Supreme Court.<sup>159</sup> It seems as though the Justices fail to agree on how to apply these levels of scrutiny.<sup>160</sup>

Even if Justice Ginsburg pushed gender from an intermediate standard of review to something closer to strict scrutiny, the theory of suspect classification that triggers a heightened level of scrutiny should be applied in evaluating gender. In *Frontiero*, the Court set forth five factors that can change a non-suspect classification to a suspect classification.<sup>161</sup> The first factor requires a showing of a history of purposeful discrimination and how similar the classification is to a suspect classification.<sup>162</sup> As mentioned above, similar to those of minority race and national origin, women have a history of being discriminated against and excluded. Even the post-Civil War amendments, like the Fourteenth Amendment, originally did not apply to women. The second factor considers whether there is an immutable characteristic.<sup>163</sup> Gender is usually highly visible, but unlike race and

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155. *Id.*

156. See Ginsburg, *supra* note 32, at 177–78.

157. *When Will There Be Enough Women on the Supreme Court? Justice Ginsburg Answers That Question*, PBS NEWSHOUR (Feb. 5, 2015, 7:48 PM), <https://www.pbs.org/newshour/show/justice-ginsburg-enough-women-supreme-court>.

158. Stoboagh, *supra* note 57, at 1755–56.

159. *Id.* at 1756–57.

160. *Id.* at 1779; see also Ozan O. Varol, *Strict in Theory, but Accommodating in Fact?*, 75 MO. L. REV. 1243, 1280 (2010) (highlighting that the *Virginia* Court engaged in a more exacting analysis under intermediate scrutiny than the *Grutter v. Bollinger*, 539 U.S. 306 (2003), Court did under strict scrutiny).

161. *Frontiero v. Richardson*, 411 U.S. 677, 682–88 (1973).

162. *Id.* at 684.

163. *Id.* at 686.

national origin, it is something that you may change after birth. The third factor examines to what extent the classification impacts political power.<sup>164</sup> Women have a history of powerlessness in the political system, despite being in a numerical majority. Women have been and continue to be underrepresented in the legislature: only 24 percent of seats in Congress and 28 percent of seats in the state legislatures are filled by women.<sup>165</sup> The fourth factor considers whether the discrimination against the class, simply based on the classification, is grossly unfair.<sup>166</sup> As stated in *Virginia*, it seems unfair to discriminate against similarly situated people when there is no real relation between gender and the ability to perform or contribute to society.<sup>167</sup> Finally, the fifth factor inquires whether the classification is based on stereotypes and stigmas, which was heavily emphasized in *Virginia*.<sup>168</sup> The *Frontiero* factors here are mostly met, and thus, gender should trigger heightened scrutiny. Ultimately, however, the *Frontiero* factors are not determinative, and although gender is similar to race and origin, they are not the same and should not be deemed to be a part of the same suspect classification.

On the other hand, strict scrutiny is warranted because governments should not be allowed to create laws that discriminate or distinguish between genders, especially on their face and based on stereotypes about men and women. Justice Ginsburg adequately described her concern for the laws that reinforced outdated ideas about the physical, economical, and legal inferiority of women.<sup>169</sup> The main concern, however, with applying strict scrutiny to gender-based classifications is that it allows for the courts to strike down affirmative action.<sup>170</sup> There are various programs currently in place, including scholarships and female-only educational programs that explicitly exclude men or give an advantage to women. In 1972, Title IX was federally enacted by Congress to try and shift the statistical gender gap

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164. *Id.* at 685–86.

165. WARNER ET AL., *supra* note 10, at 2.

166. *See Frontiero*, 411 U.S. at 685.

167. *See United States v. Virginia*, 518 U.S. 515, 532 (1996).

168. *Id.* at 533–34; *see also Frontiero*, 411 U.S. at 685 (“[O]ur statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes.”).

169. *Virginia*, 518 U.S. at 533–34.

170. CHEMERINSKY, *supra* note 30, at 884.



in schools.<sup>171</sup> Title IX bans discrimination “on the basis of sex” in schools or in “any education program[s] or activit[ies] receiving Federal financial assistance.”<sup>172</sup> If strict scrutiny were applied, affirmative action for women in education would be struck down as not being narrowly tailored enough to serve a compelling government interest.<sup>173</sup> Even if there is a compelling government interest, the classification under strict scrutiny is allowed only if no less restrictive alternative is available.<sup>174</sup> Opponents of affirmative action could and would be able to list various alternatives to female quotas.

“Intermediate scrutiny truly is a middle ground which allows challenges to laws that facially classify on the basis of gender and upholds such laws if they pursue gender equality. Additionally, intermediate scrutiny allows for a semi-loose or semi-tight fit compared to the “tight” fit of strict scrutiny and “loose” fit required by rational basis review. Strict scrutiny would be harmful to our current social, political, and legal progress, and to the same values that Justice Ginsburg advocates for. In order for intermediate scrutiny to work, however, it needs to be standardized and carefully laid out. Attack of California’s corporate quota mandating women or any similar statute would be a great opportunity for the Supreme Court to address a gender classification because it has such drastic means to reach an equitable end.

*Nguyen* seemed to try to move scrutiny applied to gender classifications back to the intermediate standard of review created by *Craig*. The Court in *Nguyen* acknowledged that with intermediate scrutiny, the fit between the means and end must be “exceedingly persuasive.”<sup>175</sup> In applying this standard from *Virginia*, the Court clarified that “exceedingly persuasive justification” is established by showing the classification served an important government purpose and the means employed were substantially related to the achievement

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171. U.S. DEP’T OF JUSTICE, EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX, *supra* note 133, at 2; *see* 20 U.S.C. § 1681(a) (2015).

172. 20 U.S.C. § 1681(a) (2015).

173. *See* CHEMERINSKY, *supra* note 30, at 727 (“Under strict scrutiny, a law is upheld if it is proven necessary to achieve a compelling government purpose. The government must have a truly significant reason for discriminating, and it must show that it cannot achieve its objective through any less discriminatory alternative.”).

174. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, J., concurring in part).

175. *Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53, 70 (2001).

of that objective.<sup>176</sup> Although *Nguyen* did not clearly state how the Court planned to address gender classifications and it only addressed a citizenship statute, which could have been addressed via plenary power, it still tried to solve the problem created by *Virginia* and stuck to the intermediate level of scrutiny created for a “quasi-suspect” classification.<sup>177</sup>

Some claim that the Court has been applying rational basis review to gender classifications simply disguised as strict scrutiny and intermediate scrutiny.<sup>178</sup> As the courts move towards using a rational basis plus model, it becomes more difficult to distinguish between the three levels of scrutiny.<sup>179</sup> Stating gender is a non-suspect classification subject to a rational basis review may be beneficial in creating more female-focused initiatives to combat years of past gender discrimination. It also creates an equal effect for the opposing field of thought. Although more laws would classify on the basis of gender for proper ends, it could allow for laws that discriminate against women simply because a rational basis review permits a very loose fit between a law’s means and its proposed end. This is not to say that rational basis is completely deferential to a government’s means and ends. While rational basis is still a legitimate level of scrutiny, the Court has afforded it flexibility.<sup>180</sup>

Some legal scholars and professionals also believe that the Court has actually been using seven different standards of review in its analyses and suggest explicitly setting forth multiple levels of scrutiny.<sup>181</sup> These models add “plus” for each of the three levels of scrutiny to create more gradients for separate, distinct sets of facts.<sup>182</sup> It seems unlikely, however, that a model with even more levels of scrutiny would create predictability and guidance for the lower courts.<sup>183</sup> Such a system would likely lead to more confusion and leave more room for the lower courts to implement their own ideologies and beliefs. The lower courts are not immune to the political process and parties. To maintain transparency in evaluating laws that distinguish

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176. *Id.*

177. Deutsch, *supra* note 87, at 270.

178. *See, e.g., id.*

179. *Id.* at 186–88.

180. *Id.* at 213.

181. *See, e.g.,* Kelso, *supra* note 19, at 256.

182. *Id.*

183. *Contra id.* at 256–57.

or discriminate in some way, a simple theoretical model would be most beneficial for the lower courts.

Admittedly, intermediate scrutiny needs to be rethought, but it does not require a complete overhaul of the current equal protection analysis. Moving forward, the Court should follow the intermediate standard of *Craig* and *Nguyen*. In both cases, the Court laid out why there was a middle level of scrutiny and why it was necessary to create a new level of scrutiny for gender. Gender discrimination is not as deeply rooted in history and as biological as race and national origin. It also is distinguishable from age and wealth. Gender classifications are distinctive and should be treated as such. Intermediate scrutiny should be maintained, as it allows for governments to institute gender laws that may distinguish or exclude in some way but classify in the direct pursuit of gender parity.

Truly, gender does not fit into a strict scrutiny standard of review like race or national origin and gender certainly does not require the kind of exacting judicial examination required by a heightened level of scrutiny. It also should not fall within the most deferential rational basis review, which currently is more of a rational basis plus standard of review. Laws have been rarely declared unconstitutional under a rational basis review. Although it is unknown how the California courts will rule on the law mandating women on corporate boards, the Court does need to address which standard of review it will apply to gender for the lower courts to follow and apply in the upcoming years.

This perception and differing views of intermediate scrutiny, however, do not need to be addressed in a lawsuit regarding the constitutionality of California's SB 826. SB 826 and corporate gender quotas are simply constitutional under *Califano*. *Califano* is directly applicable to female quotas, as SB 826 creates economic disparity to remedy years of gender discrimination and inequality.<sup>184</sup> *Califano* may have been decided in 1977, but it is still good law today and directly applicable to a quota that impacts economical and financial differences in the corporate environment.

## VI. CONCLUSION

SB 826 is a bold but necessary step California took to fight back against years of systematic gender discrimination. Yet, the reality is

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184. See *Califano v. Webster*, 430 U.S. 313, 314 (1977).

that female quotas, in any realm, but especially in a corporate workplace, are not accepted. There is a very vocal opposition. Some claim that it destroys the ideas of merit, effort, and hard work. Lawsuits claim these female-focused programs and legislative actions are discriminatory towards men and reinforce stereotypes about women. Contrary to what these lawsuits say, however, these female-only programs are not anti-male and aim to defy overbroad generalizations instead of adhering to them. These programs and laws mandating women on corporate boards attempt to bring change and, even with such drastic measures, it will take forty to fifty years for gender equality to be a reality.

SB 826 is an experimental measure in California and in the United States. There is no precedent, but the courts are likely to address the issue of female quotas soon. Indeed, this Note discussed why corporate quotas mandating women in corporate board positions are constitutional and do not violate the Equal Protection Clause. Although it is unknown how the California courts will rule on the lawsuits opposing SB 826, *Califano* provides a straightforward answer. Statutes, like SB 826, deliberately made to directly compensate women for past economic discrimination may be discriminatory, but they are constitutional. There is a long and continuous history of discrimination against women, and a quota is a remedy.

SB 826, and any female quotas that other states may implement, may seem abrupt, but change sometimes needs to be forced. Here, remedying years and years of discrimination towards women requires a mandated advantage. Ultimately, the hope is that these new gender-based classifications setting forth female-focused initiatives will be useful in breaking down the “glass ceilings” and “78 cents wage gaps.” As these phrases become “outdated,” so should actual discrimination and the concepts these phrases describe.

