A GLIMMER OF HOPE FOR CALIFORNIA'S "WELL-INTENTIONED" ATTEMPT TO PUT MORE WOMEN IN THE BOARDROOM

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INTRODUCTION

America's corporate boardrooms are not representative of its diverse population. Of the companies that comprised the Russell 3000 Index, which is made up of "most public companies on major U.S. stock exchanges, 485, or 17%," were run by all-male boards in 2018.[1] While women are scantly represented on corporate boards across the country[2] and around the world,[3] the problem is distinctly apparent in California. In 2018, a quarter of public companies headquartered in California did not have a single woman on their corporate board.[4] In fact, companies headquartered in California were also less likely to have two or more female directors than the companies that comprise the Russell 3000 Index.[5] As of June 2017, 445 companies in the Russell 3000 Index were headquartered in California, but only 565 of their 3,645 board seats were held by women.[6]

In 2013, California attempted to tackle this persistent imbalance through a state senate resolution. Senate Resolution 62, introduced by State Senator Hannah-Beth Jackson, urged public companies in California to increase the number of women on their boards to at least one, two, or three, depending on the size of their board, by 2017.[7] California was the first state in the country to adopt this type of resolution, but as of August 2018 five states had passed similar measures.[8] However, with no enforcement

1. Vanessa Fuhrmans, *California Becomes First State to Mandate Female Board Directors*, WALL ST. J. (Sept. 30, 2018, 6:13 PM), https://www.wsj.com/articles/california-becomes-first-state-to-mandate-female-board-directors-1538341932#comments_sector [https://perma.cc/3JMF-EEK6].

2. *Women in the Workforce – United States: Quick Take*, CATALYST (June 5, 2019), https://www.catalyst.org/knowledge/women-workforce-united-states [https://perma.cc/3GKL-G97W].

3. *Women in the Boardroom: A Global Perspective*, DELOITTE, https://www2.deloitte.com/za/en/pages/risk/articles/women-in-the-boardroom.html [https://perma.cc/7ZV9-HSDP] ("Overall, women now hold 12 percent of seats worldwide with only 4 percent chairing boards.").

4. Vanessa Fuhrmans & Alejandro Lazo, *California Moves to Mandate Female Board Directors*, WALL ST. J. (Aug. 29, 2018, 10:06 PM), https://www.wsj.com/articles/california-moves-to-mandate-female-board-directors-1535571904?mod=article_inline&ns=prod/accounts-wsj [https://perma.cc/5BXP-7D8B].

5. Julia Prodis Sulek, *Insult or Opportunity? California Bill Requiring Women on Corporate Boards Spurs Debate*, MERCURY NEWS (Sept. 5, 2018, 4:28 AM), https://www.mercurynews.com/2018/09/04/insult-or-opportunity-california-bill-requiring-women-on-corporate-boards-spurs-debate [https://perma.cc/LDJ8-2FC4].

6. *Corporations: Boards of Directors: Hearing on SB 826 (As Amended May 25, 2018) Before the State Assemb. Comm. on Judiciary* 4 (Cal. 2018) [hereinafter Judiciary Committee Hearing on SB 826] (citing the National Association of Women Business Owners ("NAWBO") writing in support of SB 826).

7. Press Release, State Senator Hannah-Beth Jackson, Jackson Bill to Make California the First State to Require Women on Corporate Boards Heads to the Governor 19 (Aug. 30, 2018), https://sd19.senate.ca.gov/news/2018-08-30-jackson-bill-make-california-first-state-require-women-corporate-boards-heads [https://perma.cc/479P-8E84].

8. *Id*.

measures, this aspirational resolution had little impact—as of its December 31, 2016 cut-off date, fewer than 20 percent of the targeted companies had the minimum number of women directors the resolution called for.[9]

As the aspirational resolution's failure proved, California needed to take more aggressive action to achieve greater female representation on its corporate boards. Thus, in 2018, Senator Jackson teamed up with Senate President Pro Tempore Toni Atkins to introduce Senate Bill 826 ("SB 826" or the "Act").[10] This time the state decided to require gender diversity in the boardroom, and to enforce those requirements through substantial financial penalties for nonadherence. SB 826 requires each public company headquartered in California to have a female director by the close of 2019.[11] Any board with five members must have two female directors by the close of 2021.[12] Every board of six or more members must have three female directors by that date.[13] The requirement will be enforced by a fine of one hundred thousand dollars for the first year of noncompliance and three hundred thousand dollars for each additional year.[14] If effectively applied to all 117 Russell 3000 corporations that are headquartered in California and have no women directors, SB 826 would result in the addition of 208 female directors over three years.[15]

Although similar efforts have been successful abroad,[16] the U.S. Supreme Court's current application of the equal protection doctrine has led many to believe that SB 826 is unconstitutional. According to a California state legislative analysis, the statute "would be subjected to heightened scrutiny under the equal protection clause of the [Fourteenth] Amendment of the U.S. Constitution and Article I, Section 7 of the California Constitution."[17] The focus of this Note is how SB 826 would fare under the Fourteenth Amendment. Specifically, SB 826's gender classification

9. *Id*.

10. *Id.*

11. *See generally* S. 826, 2017–2018 Reg. Sess. (Cal. 2018) (enacted) (adding CAL. CORP. CODE §§ 301.3, 2115.5).

12. *Id*. pmbl.

13. *Id*.

14. *Id*. § 2(e)(1)(A)–(C) (adding CAL. CORP. CODE § 301.3).

15. Joseph A. Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826* 1–2, (Stanford Law Sch. & Rock Ctr. for Corp. Governance, Working Paper No. 232, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3248791 [https://perma.cc/3DAF-4EB8].

16. *How to Deal with Board Gender Quotas*, THE ECONOMIST (Dec. 12, 2019), https://www.economist.com/business/2019/12/12/how-to-deal-with-board-gender-quotas [https://perma.cc/5RTY-9E2H].

17. Judiciary Committee Hearing on SB 826, *supra* note 6, at 6.

benefiting women would be subject to intermediate scrutiny under federal law. Pointing to cases involving racial affirmative action programs, the California legislative report explains that "using race as a 'factor' to reap the benefits of diversity is permissible, but using a 'quota,' or anything like it, is not a narrowly tailored means."[18]

This Note necessarily hones in on the intersection between the principles underlying discrimination on the basis of gender and those animating the racial affirmative action cases. Part I of this Note explores the development of the Court's equal protection doctrine, especially as it pertains to gender classifications. It then turns to the development of intermediate scrutiny as the standard of review for gender distinctions. Next, it examines how the Court has applied the equal protection doctrine in cases involving quotas and affirmative action programs designed to increase diversity, and how an anomaly has arisen between its treatment of race and gender. Finally, it introduces SB 826, California's attempt at mandating gender diversity in the corporate boardroom. Part II of this Note then argues that the race/gender anomaly has left a narrow path for SB 826 to prevail against an equal protection claim, even within the Court's current equal protection doctrine. Specifically, a colorable case exists that SB 826 will survive intermediate scrutiny because remedying past discrimination and dismantling gender stereotypes are important government interests to which the Act is substantially related. Finally, Part III concludes that although its success is unlikely given the makeup of the Supreme Court in 2020, SB 826 advances the goals of the Equal Protection Clause and that the Court would not have to alter its existing framework to uphold it.

I. BACKGROUND

The first time the U.S. Supreme Court invalidated a gender classification was in 1971.[19] Until then, the Court uniformly approved of sex-based discrimination—justifying such policies based on perceived biological differences between the sexes and a societal understanding that a woman's role was primarily as mother and homemaker.[20]

But, in the early 1970s, the Court began to balk at that reasoning. In

18. *Id*. at 7 (citing Grutter v. Bollinger, 539 U.S. 306 (2003), Gratz v. Bollinger, 539 U.S. 244 (2003), and Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)).

19. *See generally* Reed v. Reed, 404 U.S. 71 (1971) (invalidating an Idaho law giving preferential treatment to males over females in administering estates based on the Equal Protection Clause of the Fourteenth Amendment).

20. *See generally* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) (upholding an Illinois statute prohibiting women from practicing law).

1971, in *Reed v. Reed*, the Court finally overturned a gender classification—declaring unconstitutional an Idaho law that granted men preference over women in determining estate administrators.[21] *Reed* marked the first time since the Fourteenth Amendment's ratification, over one hundred years earlier, that the Court interpreted the Constitution to prohibit discrimination of women.[22] The framers of the Fourteenth Amendment were thinking about race discrimination, not sex discrimination, when they proposed the amendment.[23]

Still purporting to apply rational basis review, the Court declared that "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "[24] Although the Court claimed to be applying the same level of review as it had before, the more stringent requirements laid the groundwork for a heightened level of review.

These changes solidified over the next few years as the Court developed a new interpretation of the Equal Protection Clause, giving it a constitutional basis for barring sex-based state action.[25] Two years after *Reed*, the Court's move toward a heightened standard of review was made clear in *Frontiero v. Richardson*, which held that the differential treatment of female service members' dependency benefits was a violation of the Due Process Clause of the Fifth Amendment.[26] Ruth Bader Ginsburg, who was a director at the American Civil Liberties Union ("ACLU") at the time, encouraged the Court as an amicus curiae to treat sex like race since both were immutable characteristics.[27] Justice Brennan, writing for a plurality, accepted that argument and applied "strict judicial scrutiny," holding that treating male and female servicemembers differently "for the sole purpose of achieving administrative convenience" was a violation of the Due Process Clause of the Fifth Amendment.[28] However, Justice Brennan failed to secure enough

21. *Reed,* 404 U.S. at 72–74.

22. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1336 n.39, 1377 (2006) [hereinafter Siegel, *Constitutional Culture*].

23. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 954 (2002) [hereinafter Siegel, *She the People*].

24. *Reed*, 404 U.S. at 76 (citation omitted).

25. Siegel, *She the People*, *supra* note 23, at 953–54.

26. Frontiero v. Richardson, 411 U.S. 677, 690–91 (1973).

27. Siegel, *Constitutional Culture*, *supra* note 22, at 1371; Erin Blakemore, *Ruth Bader Ginsburg's Landmark Opinions on Women's Rights*, HISTORY (Nov. 9, 2018), https://www.history.com/news/ruth-bader-ginsburgs-landmark-opinions-womens-rights-supreme-court [https://perma.cc/RH25-5VNX].

28. *Frontiero*, 411 U.S. at 690–91.

votes to make his opinion law; some justices thought the Court should wait to see if the Equal Rights Amendment ("ERA") was passed.[29]

However, by 1976, then-attorney Ruth Bader Ginsburg and Justice Brennan had convinced a majority of the Court to apply a heightened standard to sex-based state action. This time, in *Craig v. Boren*, the Court was faced with a seemingly insignificant Oklahoma law prohibiting men under the age of twenty-one and women under the age of eighteen from purchasing "3.2% beer."[30] Ginsburg told the Court that regardless of the nature of the discrimination, "using gender as a classification . . . is highly questionable and should be closely reviewed."[31] *Craig* developed a new "intermediate scrutiny" standard that was more stringent than rational basis review, but still less rigorous than the strict scrutiny standard the Court applies in race discrimination cases.[32] Under intermediate scrutiny, the government must show that the classification is "substantially related" to the achievement of an "important" interest for a classification to prevail.[33]

Because the Court has not decided any cases about affirmative action for women, its race-based affirmative action jurisprudence is an important tool in evaluating how it may approach such a case. In 1978, one year after it established the intermediate scrutiny standard for evaluating gender-based distinctions, the Court was faced with a question of whether a race-based university admissions program was constitutional.[34] Justice Powell's controlling opinion in *Regents of the University of California v. Bakke* expressly applied "strict" or "the most exacting scrutiny" for the first time in evaluating the constitutionality of a race-based affirmative action program used in university admissions.[35] In *Bakke*, a white male who was rejected from the Medical School of the University of California at Davis challenged the school's special admissions program reserving a predetermined number of places for members of "minority groups."[36] Upon concluding that "the interest of diversity is compelling in the context of a university's admissions program," the Court explored whether the policy was narrowly tailored to

29. Siegel, *She the People*, *supra* note 23, at 954.

30. Craig v. Boren, 429 U.S. 190, 191–92 (1976).

31. *More Perfect: Sex Appeal*, N.Y. PUB. RADIO (Nov. 23, 2017), https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/sex-appeal [https://perma.cc/6FET-UA52].

32. *See Craig*, 429 U.S. at 199.

33. *Id*. at 197.

34. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 269–70 (1978).

35. *Id*. at 290, 300; Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1277–78 (2007) (suggesting that the development of strict scrutiny had a complex history).

36. *Bakke*, 438 U.S. at 272–75.

that interest.[37] In doing so, it looked to other university admissions programs that considered race as one of many factors and found them "a subtle and more sophisticated—but no less effective—means of according racial preference than the Davis program."[38] Because there was a less restrictive means available to achieve the university's interest, the program was not narrowly tailored, thus failing the second prong of strict scrutiny.[39] The Court has since made clear that race classifications, whether invidious or benign, trigger strict scrutiny—requiring the government to show that its policy is narrowly tailored to serve a compelling interest.[40]

In developing this standard, Justice Powell rejected the argument that race-based classifications should be considered in parallel to gender-based classifications and thus that the intermediate standard the Court had developed the previous year should be applied.[41] He posited that "[g]ender-based distinctions are less likely to create the analytical and practical problems" presented by race-based classifications because "[w]ith respect to gender there are only two possible classifications" so "[t]here are no rival groups which can claim that they, too, are entitled to preferential treatment."[42] Finally, he argued that "the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share," thus justifying a heightened standard of review.[43]

Bakke illustrates the pervasive understanding of race discrimination that shaped the Court's equal protection doctrine in the 1970s—group-based segregation was the archetypal harm and race-blindness was its remedy.[44] This concept clearly fails to consider the reality of race discrimination—that it manifests in many more ways than segregation and is exacerbated by ever-present institutional inequities.[45] Moreover, it ignores the harm caused by facially neutral regulations such as vagrancy laws, poll taxes, and literacy tests.[46]

It was within the context of this limited understanding of race

37. *Id*. at 314–15.
38. *Id*. at 318.
39. *Id*. at 316–20.
40. Rosalie Berger Levinson, *Gender-Based Affirmative Action and Reverse Gender Bias: Beyond* Gratz*,* Parents Involved*, and* Ricci, 34 HARV. J.L. & GENDER 1, 1–3 (2011).
41. *Bakke*, 438 U.S. at 302–03; Levinson, *supra* note 40*,* at 9.
42. *Bakke*, 438 U.S. at 302–03.
43. *Id*. at 303.
44. Siegel, *She the People*, *supra* note 23, at 956–57.
45. *Id*. at 957.
46. *Id*.

discrimination that sex discrimination doctrine took shape, and one thing was clear: society was not ready to be blind to the differences between the sexes. Critics of the ERA warned that just as the Fourteenth Amendment had removed "white" and "colored" signs from water fountains, the ERA would remove "men" and "women" signs from restrooms.[47] This was a popular and convincing argument at the time—that sex was simply different from race. Because many people were unwilling to overlook "inherent" distinctions between the sexes, the ERA fell short of ratification by three states and the Court was left to evaluate sex discrimination with the tools it already had.[48]

Justice Powell's use of strict scrutiny in evaluating race-based affirmative action policies has been solidified by the Court. In *Parents Involved in Community Schools v. Seattle School District No. 1*, Chief Justice Roberts stated that race should no longer be a factor in admissions,[49] leading some legal scholars to conclude that the Court today has "no tolerance" for race-based affirmative action programs.[50]

A. CALIFORNIA SENATE BILL 826

In its analysis of SB 826, the California Senate found that "[m]ore women directors serving on boards of directors of publicly held corporations will boost the California economy, improve opportunities for women in the workplace, and protect California taxpayers, shareholders, and retirees . . . ."[51] SB 826 cites various studies concluding that companies with female board members report higher earnings, greater return on equity, more sustainable futures, and better stock performance than those with no women directors.[52] Further, it points to findings that "there has been a greater correlation between stock performance and the presence of women on a board since the financial crisis in 2008" and that companies with female directors "significantly outperformed others" during the recession.[53] Despite these benefits, SB 826 states that it will take forty to fifty years to achieve gender parity without proactive intervention.[54]

47. *Id*. at 957–58.

48. David Chang, *Conflict, Coherence, and Constitutional Intent*, 72 IOWA L. REV. 753, 865 (1987).

49. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747–48 (2007).

50. Levinson, *supra* note 40, at 10.

51. S. 826, 2017–2018 Reg. Sess., § 1(a) (Cal. 2018) (enacted). "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." *Id*. § 1(c)(1).

52. *Id*. § 1.

53. *Id*. § 1(c)(5)(A)–(B) (citing Credit Suisse findings).

54. *Id*. § 1(a).

Thus, SB 826 requires all companies headquartered in California whose shares are listed on a major United States stock exchange to have at least one female director on their boards by December 31, 2019.[55] By December 31, 2021, the law requires corporations with six or more directors to have at least three female directors.[56] If a company does not comply, SB 826 imposes a one-hundred-thousand-dollar fine the first year and an additional three hundred thousand dollars each year until the company has the requisite number of female board members, along with one hundred thousand dollars for failure to provide information to the state.[57] SB 826 cites statistics illustrating the rarity of female directors on the corporate boards of the 446 public companies headquartered in California, including that women hold only 15.5 percent of their board seats.[58]

SB 826 was introduced in January 2018 by two Democratic state senators, Hannah-Beth Jackson of Santa Barbara and Toni Atkins of San Diego.[59] The bill received widespread support from the Democrat-controlled California State Legislature and passed the State Senate and Assembly with little resistance.[60] Governor Jerry Brown signed SB 826 on September 30, 2018 and issued a letter acknowledging the "serious legal concerns" and "potential flaws that indeed may prove fatal" to the law.[61] Citing "recent events in Washington, D.C." and "the special privileges that corporations have enjoyed for so long," the governor declared it "high time corporate boards include the people who constitute more than half the 'persons' in America."[62]

II. EVOLUTION OF SENATE BILL 826

Because SB 826 sets aside board seats for women, it is a facial gender classification that must survive intermediate scrutiny to withstand an equal protection claim under the Fourteenth Amendment. Under this test, there is

55. *Id*. pmbl.

56. *Id*.

57. *Id*. § 2(e)(1)(A)–(C).

58. *Id*. § 1(e)(1).

59. 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 [https://perma.cc/J2CS-5HDK].

60. *SB-826 Corporations: Boards of Directors*, *Votes*, CAL. LEGIS. INFO., http://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=201720180SB826 [https://perma.cc/U9WT-4K93] (showing that SB 826 passed the California Assembly on August 29, 2018 with forty-one ayes, twenty-six noes, and thirteen unrecorded votes. It subsequently passed the California Senate on August 30, 2018 with twenty-three ayes, nine noes, and eight unrecorded votes.).

61. McGreevy, *supra* note 59.

62. *Id*.

"a strong presumption that gender classifications are invalid,"[63] absent an "exceedingly persuasive"[64] showing that the law is justified by an "important" government interest to which it is "substantially related."[65]

A. EXACTLY HOW "INTERMEDIATE" IS INTERMEDIATE SCRUTINY?

Articulating intermediate scrutiny is straightforward enough, but anticipating how it will be applied to different government actions and what the resulting outcome will be has proven to be challenging. In fact, there has been disagreement within the Supreme Court as to what exactly the standard entails[66] and even what it should be labeled.[67] One thing is clear: intermediate scrutiny is somewhat more rigorous than rational basis review, yet less rigorous than strict scrutiny. The question persists of exactly where it stands in between those two standards. Two cases from the past few decades—*United States v. Virginia* and *Nguyen v. Immigration & Naturalization Service*—help narrow down the answer to that question.

First, in *United States v. Virginia*, the Court appeared to apply a more stringent level of scrutiny to sex-based classifications by requiring an "exceedingly persuasive justification" for the classification.[68] In *United States v. Virginia*, the Court struck down the exclusion of women from the Virginia Military Institute ("VMI"), a military-style academy run by the state of Virginia.[69] Under "conventional intermediate scrutiny," the policy of excluding women would likely have been justified by the accommodations that the state would have had to make to respect privacy between the sexes.[70] Along this line of reasoning, the state created an alternative academy, the Virginia Women's Institute for Leadership ("VWIL"), for women interested in developing military-style leadership skills.[71] However, writing for the

63. *See* J.E.B. v. Alabama *ex rel*. T.B., 511 U.S. 127, 152 (1994) (Kennedy, J., concurring).

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

65. Craig v. Boren, 429 U.S. 190, 197 (1976).

66. *Compare* United States v. Virginia, 518 U.S. at 575 (Scalia, J., dissenting) (criticizing the liberal majority for "elevating the standard [from intermediate scrutiny] to strict scrutiny"), *with* Nguyen v. Immigration & Naturalization Serv., 533 U.S. 53, 74 (2001) (O'Connor, J., dissenting) (criticizing the conservative majority for invoking intermediate scrutiny while actually applying rational basis).

67. Caroline Marschilok et al., *Equal Protection*, 18 GEO. J. GENDER & L. 537, 545 (2017) (emphasizing that intermediate scrutiny is "sometimes referred to as quasi-suspect or heightened scrutiny").

68. United States v. Virginia, 518 U.S. at 556.

69. *Id*. at 556–58.

70. Maxwell L. Stearns, Obergefell*,* Fisher*, and the Inversion of Tiers*, 19 U. PA. J. CONST. L. 1043, 1063 (2017). Stearns argues that instead of three tiers of scrutiny there are actually five tiers of scrutiny which have become inverted and resulted in doctrinal confusion, a lack of predictability, and pleas for abandonment or fundamental reform. *Id*. at 1046, 1066–67.

71. United States v. Virginia, 518 U.S. at 526.

majority, Justice Ginsburg rejected that justification as insufficient, citing profound differences between the programs' standards, curriculums, funding, and level of prestige.[72]

Justice Ginsburg had to hone the intermediate scrutiny standard in order to strike down VMI's exclusion of women.[73] She stated that the government had the burden to show an "exceedingly persuasive justification" for its discriminatory policy—a phrase that is repeated nine times throughout the majority opinion.[74] At the time, many believed that *United States v. Virginia* had heightened the standard of review to be applied to gender-based state action.[75] Justice Scalia dissented for this reason and accused the majority of having ratcheted up the standard of review.[76] The fact that the majority opinion never uses the term "intermediate scrutiny" and instead refers to the standard of review as "heightened scrutiny" throughout lends further support to this argument.[77]

However, in 2001, any concerns that the standard had been raised were likely placated by the Court's opinion in *Nguyen v. Immigration & Naturalization Service*, which appears to have lowered the standard below its pre-*United States v. Virginia* level.[78] *Nguyen* claimed to apply the traditional intermediate scrutiny test and explained that *United States v. Virginia*'s "exceedingly persuasive" requirement was merely a descriptor of the same test.[79] In *Nguyen*, the Court upheld a classification that mandated that U.S.-citizen fathers, but not U.S.-citizen mothers, of children born abroad to unwed parents satisfy certain requirements, including securing court-established paternity before conferring citizenship to their child.[80] The Court based this decision on its determination that the classification was grounded in real differences between men and women; specifically, that women are always present at a birth whereas men are not, making maternity easier to discern than paternity.[81]

Although the majority purported to subject the classification to intermediate scrutiny, many commentators—including the dissent—have pointed out that "the manner in which it explain[ed] and applie[d] this

72. *Id.* at 517.
73. Stearns, *supra* note 70, at 1064.
74. United States v. Virginia, 518 U.S. at 524, 529–30, 531–33, 534–46, 556.
75. *See* Stearns, *supra* note 70, at 1064.
76. *See* United States v. Virginia, 518 U.S. at 573 (Scalia, J., dissenting).
77. *See id*. at 533, 555, 560, 575.
78. *See* Nguyen v. Immigration & Naturalization Serv., 533 U.S. 53, 60, 70 (2001).
79. *Id*. at 70; *see* Marschilok, *supra* note 67, at 552.
80. *Nguyen*, 533 U.S. at 59.
81. *Id*. at 73.

standard is a stranger to [the Court's] precedents."[82] The dissent accused the majority of departing from established intermediate scrutiny analysis by "hypothesiz[ing] about the interests served by the statute" instead of "inquir[ing] into the actual purposes" of the classification.[83] Further, the dissent took issue with the majority ignoring ways in which modern DNA testing could be used to support a sex-neutral approach to verifying parentage before conferring citizenship.[84]

In 2017, in *Sessions v. Morales-Santana*, the Court overturned a different sex-based citizenship law imposing disparate physical presence requirements on U.S.-citizen mothers than U.S.-citizen fathers in order to confer citizenship.[85] Although the case reached a different outcome, *Morales-Santana* did not overturn *Nguyen*, leaving the standard it set in place.[86]

B. ANIMATING PRINCIPLES BEHIND SEX-BASED EQUAL PROTECTION DOCTRINE

Whether the Court's intolerance toward race-based classifications extends to sex-based preferences remains uncertain. The Court has not considered an equal protection challenge to gender-based affirmative action since the 1980s and has never done so in the employment context.[87]

Given that the Court has never considered the validity of a gender-based affirmative action program, whether a policy can survive an equal protection claim can best be determined by turning to the Court's race-based affirmative action decisions. The Court understands sex to be different from race for various reasons discussed below. Thus, this analysis can be done by identifying the principles that have animated race-based equal protection doctrine, comparing them to the Court's primary concerns in regard to sex discrimination, and then driving the analysis through the resulting framework.

Six key principles have animated the Court's treatment of racial

82. *Id*. at 74 (O'Connor, J., dissenting).

83. *Id*. at 78.

84. *Id.* at 80 ("It is difficult to see what [the discriminatory policy] accomplishes in furtherance of 'assuring that a biological parent-child relationship exists' . . . . The virtual certainty of a biological link that modern DNA testing affords reinforces the sufficiency of [the statute without the discriminatory provision].").

85. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686 (2017).

86. *Id*. at 1694.

87. Levinson, *supra* note 40, at 3.

classifications.[88] The Court purports that narrow tailoring reduces three negative consequences of racial classifications: (1) racial politics; (2) essentialism (the idea that all members of a racial group are the same); and (3) racial deprecation (the idea that one race is inferior to another).[89] The Court has also suggested that narrow tailoring promotes (4) individual dignity, (5) autonomy, and (6) meritocracy.[90] In combination, these factors have motivated the Court's general skepticism of race-based distinctions, and thus its stringent standard of review.

However, these principles are not the same as those that inspire the Court's sex-based equal protection doctrine. Thus, when driven through the appropriate underlying concerns, this doctrine should look different in the sex context than it does in the context of race.

Commentators cite various ostensible differences between sex and race discrimination as justifications of the more forgiving standard of review for sex discrimination.[91] Because the Fourteenth Amendment was designed to address race discrimination, not sex discrimination, it is appropriate for courts to apply a lower standard of review to questions of women's equality.[92] Sex discrimination is the product of "archaic and overbroad generalizations" about differences between the sexes rather than slavery and thus is not as harmful or significant in the nation's history as race discrimination.[93] Sex discrimination is inherently different from race discrimination; it is not always harmful or based on hatred.[94] Sex is not a "proscribed classification" because the "inherent differences" between the sexes serve as legitimate bases for some sex-based classifications.[95]

1. Anti-Balkanization

First, according to the Court, governmental actions based on race pose a threat to the nation's goal of social cohesion by "balkaniz[ing] us into competing racial factions."[96] Race-based efforts to integrate, the Court has

88. Sam Erman & Gregory M. Walton, *Stereotype Threat and Antidiscrimination Law: Affirmative Steps to Promote Meritocracy and Racial Equality in Education*, 88 S. CAL. L. REV. 307, 318 (2015).

89. *Id*. at 318–19.

90. *Id*. at 319.

91. Siegel, *She the People*, *supra* note 23, at 954–55.

92. *Id*.

93. *Id*. at 955 (citation omitted).

94. *Id*. at 956.

95. Marschilok, *supra* note 67, at 549; *see also* United States v. Virginia, 518 U.S. 515, 533 (1996).

96. Shaw v. Reno, 509 U.S. 630, 657 (1993); *see also* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1295 (2011) [hereinafter Siegel, *From Colorblindness to Antibalkanization*].

warned, "can cause a new divisiveness" by breeding hostility among people who may perceive themselves as having been incorrectly denied a benefit.[97] The pursuit of racial justice itself, the concern goes, could endanger community, and so it should yield to the preservation of social cohesion when those outcomes are at odds.[98]

However, the Court has not identified an analogous threat based on sex. This may be because society is not divided by gender in the same way it is by race. For instance, most families are composed of both men and women, whereas different racial groups are often geographically segregated.[99] Sexual desire between the sexes and the biological process of reproduction ensure that men and women will remain interdependent and that the Court's concerns of balkanization in the race context are not applicable in the gender context. In fact, the vast majority of the country is heterosexual.[100] Thus, most households are made up of both men and women—whether married or not.[101] Further, the Court may be less concerned that men and women, who have been codependent throughout history, may divide into competing factions, than it is concerned that more recently integrated racial groups may do the same. Regardless of its reasoning, balkanization has not been a driving force in shaping the Court's sex-based equal protection doctrine.

2. Anti-Essentialism

The Justices have remained consistently adamant that race has no bearing on an individual's worth or ability and should thus be viewed with great skepticism when used as a factor of consideration for admissions or advancement.[102] Being irrelevant to ability or worth, race-based policies, the

97. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment); Erman & Walton, *supra* note 88, at 367 & n.261.

98. Siegel, *From Colorblindness to Antibalkanization*, *supra* note 96, at 1301.

99. *See* THE WILLIAMS INST., DATA IN REVIEW 2018 1 (2018), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Williams-Institute-Data-in-Review-2018.pdf [https://perma.cc/4CNZ-P2TH]; *2010 Census Block Data*, UNIV. VA., https://demographics.virginia.edu/DotMap [https://perma.cc/PU9K-7BJE].

100. Although the numbers vary from study to study, it is safe to say that as of 2018 at least 90 percent of Americans identify as heterosexual. According to The Williams Institute, an LGBT think tank at the UCLA School of Law, in 2018 4.5 percent of the population was LGBT. THE WILLIAMS INST., *supra* note 99, at 1. However, even LGBT people do not isolate themselves based on sex. *See id*. Twenty-nine percent of LGBT people in the United States are raising children and many have friends and family of the opposite sex. *Id*.

101. *See id*.

102. Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 309–10 (2013) ("[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, the Equal Protection Clause demands that racial classifications . . . be subjected to the most rigid scrutiny." (alterations in original) (citations and internal quotation marks omitted)); *see also, e.g.*, *Parents Involved*, 551 U.S. at 730

Court has asserted, send the message that all members of a racial group think alike.[103]

Like the Court's fear of racial essentialism, it maintains an analogous concern that men and women may be treated as their sex. However, the Court has generally determined that "inherent differences" exist between the sexes that serve as legitimate bases for some sex-based classifications.[104]

Dismantling sex-based stereotypes has been a primary force behind the Court's equal protection doctrine since its inception in the 1970s. The Court has repeatedly held that any government objective predicated on stereotypical conceptions of gender roles does not amount to an important government objective under intermediate scrutiny.[105] However, unlike in the race context, in which the Court sees no inherent differences between racial groups, the Justices agree that there are some "real" differences between men and women.[106] Unfortunately, the agreement ends there, because where to draw the line between permissible sex-based classifications based on "real" differences between the sexes and impermissible ones that rest on stereotypical notions of gender roles is an area of much debate within the Court.[107] Overall, the Court has tended to strike down classifications based on notions of women being economically dependent on men,[108] traditionally sex-appropriate occupations,[109] and the idea that women are primary

("Allowing racial balancing . . . would effectively assur[e] that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race will never be achieved." (alteration in original) (citations and internal quotation marks omitted)).

103. *Fisher*, 570 U.S. at 309–10.

104. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 78–79 (1981) (finding that requiring men and not women to register for the draft "is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated" (citation omitted)); *see also* Marschilok, *supra* note 67, at 549.

105. *See* Marschilok, *supra* note 67, at 555 n.117 (discussing, parenthetically, the rejection of a women-only admission policy at a nursing school based on " 'archaic and stereotypic notions' tending to 'perpetuate the stereotyped view of nursing as an exclusively woman's job' " (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725, 729 (1982))); Orr v. Orr, 440 U.S. 268, 270–71, 279–80 (1979) (striking down a state law only allowing women to receive alimony because it was based on stereotypical views of gender roles that the wife is dependent and the husband is the breadwinner).

106. Marschilok, *supra* note 67, at 557.

107. *Id*.

108. *See*, *e.g.*, Wengler v. Druggists Mut. Ins., 446 U.S. 142, 147–49 (1980) (striking down a state law requiring that male widowers show economic dependence before receiving benefits but automatically extending them to female widows because it was based on the stereotype that men are breadwinners).

109. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729–30 (1982) (striking down a policy of only allowing women to attend nursing school based on the stereotype that nursing was a female job).

caregivers of children.[110] On the other hand, the Court has repeatedly accepted classifications predicated on physical differences between the sexes, having upheld statutes that require men to take additional steps to establish parentage[111] and legislation that penalizes men for having sexual intercourse with minor females but not women who do the same with minor males.[112]

While essentialism will likely remain at the forefront of the Court's sex-based equal protection analysis, it will likely not be as easily discerned as it is in the context of race.

3. Anti-Deprecation

Another consequence of race-based governmental policies, the Court has claimed, is that they "promote notions of racial inferiority."[113] Relatedly, Justice O'Connor wrote in *City of Richmond v. J.A. Croson, Co.* that "[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."[114] The Court has claimed that any racial preference "inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect . . . ."[115]

Parallel arguments have been made in opposition to gender-based affirmative action. For instance, second-wave feminists, including Ruth Bader Ginsburg before she joined the Court, initially disapproved of remedial gender-based classifications, arguing that such laws "reinforced the stereotype that women are needier, weaker, and less competent."[116]

Ultimately, as discussed above, the Court has permitted some classifications based on "inherent differences" between the sexes. However, it has emphasized that these differences may not be used "for denigration of the members of either sex or for artificial constraints on an individual's opportunity."[117] This suggests that while anti-deprecation motives will

110. *See generally, e.g.*, Bradwell v. Illinois, 83 U.S. 130 (1872) (upholding an Illinois statute prohibiting women from practicing law).

111. Nguyen v. Immigration & Naturalization Serv., 533 U.S. 53, 56–57, 58–59 (2001).

112. Michael M. v. Super. Ct. of Sonoma Cty., 450 U.S. 464, 470–72, 472 n.7 (1981).

113. Grutter v. Bollinger, 539 U.S. 306, 328 (2003) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion)).

114. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

115. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 229 (1995) (citation omitted).

116. Levinson, *supra* note 40, at 32.

117. United States v. Virginia, 518 U.S. 515, 533 (1996); *see also* Marschilok, *supra* note 67, at 558.

continue to drive the Court's sex-based equal protection doctrine, there is some room created by the "inherent differences" between the sexes—that does not exist in the race context—for the government to treat women differently from men. The key will be for the state to ensure that any such policy is based on a "real" difference—not one of the suspect stereotypes—and that such a difference is not being used for the denigration of either sex. This variance suggests that there is some opportunity for a sex-based classification to prevail where a race-based classification would not.

4. Promoting Dignity and Autonomy

The Court has likewise contended that when the government creates racial classifications, it potentially intrudes upon individuals' constitutional interests in dignity and autonomy.[118] For instance, Justice Kennedy, writing for the majority in *Parents Involved*, explained that "[u]nder our Constitution the individual, child or adult, can find his own identity, can define her own persona," and this interest is threatened by "state intervention that classifies on the basis of his race or the color of her skin."[119]

5. Promoting Meritocracy

Like it has in its analysis of race-based affirmative action programs, the Court will likely continue to value and protect meritocracy. Meritocracy is not a concern that the Court has voiced uniquely in the context of race.[120] In fact, it is a concern constitutive of the "American Dream": success should be earned through ability and effort is a defining national value.[121] This is illustrated by nationwide scandals that have erupted when the semblance of meritocracy has been destroyed.[122] There is no reason to believe that the Court would abandon or sacrifice such a defining national value when considering gender-based classifications. The American Dream itself relies

118. Erman & Walton, *supra* note 88, at 368.

119. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

120. Erman & Walton, *supra* note 88, at 352 ("[T]he Court has noted that even legal preferences—like those for veterans—'represent an awkward—and, many argue, unfair—exception to the widely shared view that merit and merit alone should prevail in the employment policies of government.' " (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 280 (1979))).

121. Erman & Walton, *supra* note 88, at 351–52.

122. *See*, *e.g.*, Ben Zimmer, *A 'Meritocracy' is Not What People Think it is*, THE ATLANTIC (Mar. 14, 2019), https://www.theatlantic.com/entertainment/archive/2019/03/college-admissions-scandal-what-meritocracy-really/584875 [https://perma.cc/96GK-TPRY] (describing the collective outrage when the 2019 college admissions bribery scandal helped "reveal the degree to which 'meritocracy' is a mirage when it comes to elite institutions of higher learning").

on a national belief that those who are meritorious will be successful.[123]

C. IS THERE AN IMPORTANT GOVERNMENT INTEREST?

Once the Court has established that purposeful, sex-based discrimination exists, it can only be valid if it is in furtherance of an "important governmental objective."[124] Unlike under rational basis review, in which the Court must accept the government's objective, under intermediate scrutiny the Court evaluates the actual purposes for a classification.[125] This ability to determine the motive behind a policy places a greater burden on the government to justify its sex-based classification.[126]

California's boardroom gender quota law serves two government interests: (1) rectifying past discrimination and (2) dismantling gender stereotypes, both of which should be found "important" under the Court's existing doctrine.

The requirement that a sex-based distinction be justified by an "important governmental objective" is "considerably less rigorous" than the "compelling state interest" required under strict scrutiny.[127] But, as evidenced by the broad array of objectives that have been found to satisfy the requirement by lower courts, it is also more difficult to define and predict whether a government interest fulfills this standard.[128]

The Court has held that some objectives, like administrative convenience or upholding stereotypical conceptions of gender roles, do not meet the standard of an important governmental interest.[129] For instance, in *Wengler v. Druggists Mutual Insurance*, the Court explained that the claimed justification of administrative convenience was not an important justification for a Missouri law to deny a widower benefits on his wife's work-related death without proof of his dependency when widows could get the same

123. Erman & Walton, *supra* note 88, at 351–52 (explaining that meritocracy holds a place of privilege in U.S. life and was even described by President Clinton as one of "our highest ideals" (citation omitted)).

124. Marschilok, *supra* note 67, at 553–54.

125. *Id*. at 554.

126. *Id*.

127. *Id*. (first quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); and then citing Goldfarb v. Town of W. Hartford, 474 F. Supp. 2d 356, 366 (D. Conn. 2007)).

128. Marschilok, *supra* note 67, at 554–55 ("[T]hese objectives include an interest in remedying past sex discrimination, avoiding the commitment of federal resources to support discriminatory practices, ensuring public safety and deterring crime, maintaining equity in estate taxation, protecting moral sensibilities, and supporting the security needs of jails." (footnotes omitted)).

129. *Id*. at 555.

benefits without such proof.[130] Likewise, in *Mississippi University for Women v. Hogan*, the Court held that the state's policy of refusing admission to males at its university's nursing school violated the Equal Protection Clause.[131] In doing so, it clarified that the test for determining the validity of a gender-based classification "must be applied free of fixed notions concerning the roles and abilities of males and females" and that "[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions."[132] However, the Court has provided little guidance as to what *does* constitute an important governmental interest.

1. Remedying Past Discrimination

In the race context, the Court has accepted that remedying past discrimination may serve as a compelling justification for affirmative action, but only in limited circumstances in which past "identified discrimination" is present.[133] Thus, if the specific entity adopting the affirmative action program has not directly or indirectly discriminated on the basis of race, the program will not be upheld.[134] This standard is not met by evidence of stark statistical underrepresentation of a minority group.[135]

Conversely, the Court has held that remedying past sex-based discrimination is an acceptable objective for sex-based classifications[136] as long as the policy is focused on redressing specific rather than general discrimination.[137] For example, in *Hogan*, the Court rejected the state's justification for an all-female nursing school—that it compensated for discrimination against women in education generally—because the state "made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field . . . ."[138]

In 1977, in *Califano v. Webster*, the Court noted that "[r]eduction of the

130. Wengler v. Druggists Mut. Ins., 446 U.S. 142, 151 (1980); *see also* Frontiero v. Richardson, 411 U.S. 677, 689–91 (1973).

131. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982).

132. *Id*. at 724–25.

133. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989).

134. Levinson, *supra* note 40, at 20.

135. *Croson*, 488 U.S. at 500–01. The fact that 50 percent of Richmond's population was made up of racial minorities, whereas only 0.67 percent of the city's prime construction contracts were awarded to minority-owned businesses, was insufficient to show identified discrimination. *Id.* at 499–500.

136. Califano v. Webster, 430 U.S. 313, 317 (1977); *see also* Johnson v. Transp. Agency, 480 U.S. 616, 631, 641–42 (1987) (holding that promoting a female dispatcher over a man based on the "manifest imbalance" in proportion of men to women in the job category was acceptable under Title VII of the Civil Rights Act of 1964).

137. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 728 (1982).

138. *Id*. at 729.

disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as . . . an important governmental objective."[139] But, it clarified that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."[140] The Court quoted its opinion in *Kahn v. Shevin*, and recognized that "[w]hether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs."[141] Thus the Court found that a provision of the Social Security Act stating that a woman could exclude "from the calculation of [her] retirement benefits" three more lower-earning years than a man "works directly to remedy some part of the effect of past discrimination."[142]

Webster looked to the Social Security provision's legislative history to determine that the legislation aimed to address that justification and that it purposefully enacted the preference to compensate for past employment discrimination. The Court found through the legislative history that "the differing treatment of men and women in [the provision] was not 'the accidental byproduct of a traditional way of thinking about females,' but rather was deliberately enacted to compensate for particular economic disabilities suffered by women."[143]

There are two main takeaways from *Webster*. First, it told courts to distinguish between "invidious gender discrimination and genuinely remedial action."[144] Second, it held—with unanimous support—that remedying "generalized societal discrimination" constituted a sufficient justification for gender-based classifications benefiting women.[145] Although never repeated, *Webster*'s reasoning has never been overturned or repudiated.[146]

139. *Webster*, 430 U.S. at 317. "If anything, the history of invidious discrimination against blacks renders the remedial rationale considerably stronger for race-based affirmative action than for gender-based affirmative action, and, yet, the Court permits only gender-based, not race-based, affirmative action as a remedy for societal discrimination." Levinson, *supra* note 40, at 20.

140. *Webster*, 430 U.S. at 317 (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975)).

141. *Id*. at 318 (quoting Kahn v. Shevin, 416 U.S. 351, 353 (1974)).

142. *Id*.

143. *Id*. at 320 (citation omitted).

144. Levinson, *supra* note 40, at 9.

145. *Id.*

146. *Id.*; *cf.* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989). Although the Court has accepted remedying past discrimination as a compelling justification for race-based affirmative action, it clarified that only past discrimination must be "identified." Specifically, the entity adopting the affirmative action program must have participated in past discrimination for the system to be invalid.

In evaluating SB 826, the Court should adhere to its reasoning in *Webster* and determine that remedying past societal discrimination is sufficient justification for the law. For many years, women were unable to ascend the corporate ladder to leadership positions, and certainly were not able to get a seat in the board room. Like in *Webster*, the California State Legislature has clearly detailed the motivation behind its policy. It has cited various studies showing the lack of gender diversity on corporate boards as well as the benefits achieved by female inclusion. Although women have been able to enter previously male-dominated industries, they have often been limited by the "glass ceiling"—a problem the California State Legislature illustrated through the many statistics it cited in SB 826.[147] Like the economic inequality that the contested provision in *Webster* was designed to target, these inequities amount to discrimination that warrants remedial gender-based state action.

2. Dismantling Sex Stereotypes

The Court has never evaluated a sex classification like SB 826 that aims to dismantle sex stereotypes, so it has not had the chance to establish that dismantling sex stereotypes is an important government interest. However, it has repeatedly held that any objectives predicated on stereotypical conceptions of gender roles fail to qualify as important governmental interests.[148] Likewise, since its 1971 decision in *Reed v. Reed*, the Court has consistently overturned laws it found to be based on "fixed notions concerning the roles and abilities of males and females."[149] Thus, it is highly likely that dismantling gender-based stereotypes, a theme that has guided the Court's sex-discrimination doctrine, is an important government interest.

3. Increasing Gender Diversity

A third potential interest that California could state as justification for SB 826 is increasing gender diversity. The Court has recognized diversity as a justification for race-based classifications,[150] but the Court has "never recognized the diversity rationale for gender-based affirmative action."[151] In *Grutter v. Bollinger*, the Court recognized that diversity of students at

Further, stark statistical underrepresentation of a minority group does not provide the "strong basis in evidence" necessary to warrant remedial action. *Croson*, 488 U.S. at 499–500.

147. *See generally* S. 826, 2017–2018 Reg. Sess. (Cal. 2018) (enacted) (adding CAL. CORP. CODE §§ 301.3, 2115.5).

148. *See supra* note 105 and accompanying text.

149. *See, e.g.,* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).

150. *See* Grutter v. Bollinger, 539 U.S. 306, 330, 334 (2003).

151. Levinson, *supra* note 40, at 24.

universities is a compelling government interest that justifies race-based affirmative action.[152] The majority cited amicus briefs from Fortune 500 companies expressing the importance of diversity in students developing skills needed in professional settings.[153]

However, various factors may impact the Court's response to the diversity rationale in the sex context that are different from those affecting race. For instance, the idea that exposing minority and nonminority students to each other will promote better understanding does not translate to gender because males and females interact within families and communities throughout their lives.[154] Thus, the Court is generally less concerned with forcing the sexes to integrate. In fact, sex-segregated education is a widely accepted and even a growing trend in the public education system.[155] At the same time, the argument that racial diversity reduces implicit racial bias by breaking down stereotypes rings equally as true in the context of gender.[156]

D. IS SB 826 SUBSTANTIALLY RELATED TO THOSE INTERESTS?

Intermediate scrutiny requires that the means employed by SB 826 be substantially related to the government's objective.[157] Unlike the narrowly tailored requirement under strict scrutiny which has been more precisely defined by the Court, it is less clear what relationship is necessary to satisfy intermediate scrutiny.[158] However, it is clear that the requirement is less stringent than the relationship that has been demanded of race-based actions. So, while racial classifications may only be used absent reasonably effective non-classificatory alternatives,[159] the same must not be true of gender classifications.

To reach the more stringent "narrow tailoring" requirement under strict scrutiny, "race-conscious admissions policies must be limited in time."[160]

152. *Grutter*, 539 U.S. at 330, 334.

153. *Id*. at 330–31 ("These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.").

154. *See* Levinson, *supra* note 40, at 24–25.

155. *See id*. at 25 n.170 ("The number of single-sex public high schools has grown from two in 1995 to ninety-five in 2009, and the number of single-sex classrooms has increased from about a dozen in 2002 to over 360 in 2008.").

156. *See id*. at 26 ("Once more women are seen in male-dominated occupations and assume leadership positions, notions of lack of ability and incompetence tend to evaporate. The influx of large numbers of women arguably leads to acceptance, tolerance, and mutual respect.").

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

158. Marschilok, *supra* note 67, at 556.

159. Erman & Walton, *supra* note 88, at 362.

160. *Id*. at 363 (quoting Grutter v. Bollinger, 539 U.S. 306, 309 (2003)).

While it is unclear whether this is required under intermediate scrutiny, it is not necessary to make that determination since SB 826 meets the demands of the more rigid test. Although the law does not explicitly have a twilight date, the California State Legislature cited studies claiming that "it will take 40 or 50 years to achieve gender parity, if something is not done proactively."[161] If gender parity is met in the next fifty years, SB 826's female board member requirements will no longer be necessary. However, by acting as a catalyst to that naturally occurring phenomenon, the law is further shortening the time it would be necessary, or even impactful, to less than forty to fifty years. Once gender parity is met, SB 826 will be rendered moot, having no practical significance. The law thus meets the Court's time-limitation requirement of strict scrutiny.

To further determine whether SB 826 would meet the somewhat elusive "substantial relationship" requirement, the law may be driven through the framework defined by the animating principles behind the Court's sex-based equal protection doctrine: mitigating essentialism and deprecation of the sexes, ensuring individual dignity and autonomy, and protecting meritocracy.

Some commentators have argued that a policy mandating the appointment of female board members perpetuates a stereotype that women are not qualified to be board members by promoting the idea that they would not have a spot in the boardroom without the requirement.[162] Republican venture capitalist Jillian Manus agreed that the Act gives women an advantage in an area where they are at a disadvantage.[163] But, she also called it an "insult" because "women will be put on boards because of their gender and not because of merit. Merit is key."[164]

If it were true that SB 826 was predicated on the idea that women could not independently accomplish what was necessary to be placed on a corporate board because of their lesser abilities or more natural role as homemakers, the Act would seemingly be in contention with the Court's equal protection motivations. On the contrary, SB 826 is aimed at remedying widespread historical discrimination based on the unacceptable stereotype that women belong either in the home or in more "feminine" careers.[165] For this reason, it furthers the Court's efforts to counter essentialism and

161. S. 826, 2017–2018 Reg. Sess., § 1(a) (Cal. 2018) (enacted).

162. Sulek, *supra* note 5.

163. *Id*.

164. *Id*.

165. The Court has repeatedly rejected these stereotypes as well as any classification predicated upon them. *See supra* Section II.B.2.

denigration of the sexes by breaking down barriers created by outdated stereotypes.

Further, widespread understanding that corporations do not choose their board members based on merit, but rather on personal connections or other non-meritorious factors, undermines this argument.[166] Actually, placing more women in high-visibility director positions will greatly challenge enduring stereotypes of what women can and should be able to accomplish. Unlike a policy mandating that corporations hire more women at all levels or requiring that universities accept more women into programs in which they are underrepresented, SB 826 narrowly addresses high-visibility positions that are most likely to affect pervasive gender stereotypes.

Unlike university admissions processes that the Court has perceived to threaten meritocracy, requiring corporations to include women on their boards would encourage meritocracy in a system marked by inequity. Board member selection is fundamentally different from the admission and selection programs that the Court has reviewed. In college admissions, admissions officers' dependence on objective standards such as standardized test scores and grades fosters a perception of meritocracy of which the Court has been protective.[167] Viewing standardized tests and grades as "open, competitive, and relatively accurate predictors" of future academic performance, the Court has feared that classifications may undermine those qualities.[168]

Conversely, corporate directors are most often chosen based on subjective qualities including interpersonal and communication skills, leadership skills, culture fit, and passion.[169] For instance, a job advertisement for a director seat at San Francisco-based company Genentech calls for someone with an "[e]nterprise mindset with ability to build networks, collaborate, and influence internally"—qualities that no test could measure or detect.[170] Lack of quantifiable hiring criteria, the tendency of boards to

166. *See infra* text accompanying notes 169–70.

167. Erman & Walton, *supra* note 88, at 360 ("Justices have displayed similar faith in tests and grades in the educational context . . . . [Justice Powell] presumed that traditional bases for admission would generally provide a 'fair appraisal of each individual's academic promise.' " (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 306 n.43 (1978))).

168. *Id*. at 359.

169. *See, e.g.*, *Corporate Security Director – Site Services: Genentech*, INDEED, https://www.indeed.com/viewjob?jk=5b41cc16f02e46c2&tk=1ct67jp3obi98803&from=serp&vjs=3 [https://perma.cc/JW63-Z2AZ]; *Director, Corporate Development: Google*, INDEED, https://www.indeed.com/viewjob?jk=50c923781b51fe0a&q=Corporate+Board+Member&tk=1ct67jp3obi98803&from=web&vjs=3 [https://perma.cc/SVG2-9Y9N].

170. *See Corporate Security Director – Site Services*, *supra* note 169.

source new members through personal networks, and vast underrepresentation of women and minorities have contributed to a widespread suspicion that board member selection is not merit-based.[171] In fact, Barbara Black has pointed to the poor performance of boards of many large financial institutions during the 2008 financial crisis as evidence that current nomination practices have fallen short of selecting the most qualified board members.[172]

The underrepresentation of women has itself been cited as proof that the selection of corporate board members is not a meritorious process.[173] Black argues that, given the number of professional women in corporate America and the efforts of advocacy groups and institutional investors to develop female talent banks, women's absence from the boardroom cannot be for lack of qualified women.[174] Commentators have posited that "the desire to maintain social comfort levels and board cohesion, narrow search criteria and procedures for selecting new directors, skepticism about the so called 'business case' in favor of appointing women to corporate boards, and plain old-fashioned sex discrimination" have stalled progress toward greater female representation on boards.[175] Thus, by adding women to corporate boards, California would be advancing the appearance of—and perhaps even actual—meritocracy in corporate board selection by requiring corporations to seek board members outside of their regular talent pools.

Critics of SB 826 have also raised concerns that its singular focus on gender diversity ignores other aspects of diversity.[176] This critique echoes Justice Powell's assertion in *Bakke* that the "special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity."[177] However, in the context of corporate boards, reality has shown that an increase in gender diversity has led to diversity in other areas as well. A recent influx of female directors on S&P 500 boards has contributed to a greater diversity of skills, qualifications, and

171. *See, e.g.*, Barbara Black, *Stalled: Gender Diversity on Corporate Boards*, 37 U. DAYTON L. REV. 7, 20 (2011) ("The lack of progress [toward gender diversity on corporate boards] is profoundly discouraging for those who believe in meritocracy.").

172. *Id*.

173. *See, e.g.*, *id*.

174. *Id*.

175. Jayne W. Barnard, *More Women on Corporate Boards? Not So Fast*, 13 WM. & MARY J. WOMEN & L. 703, 704 (2007).

176. Emily Stewart, *California Just Passed a Law Requiring More Women on Boards. It Matters, Even If It Fails*, VOX (Oct. 3, 2018, 1:10 PM), https://www.vox.com/2018/10/3/17924014/california-women-corporate-boards-jerry-brown [https://perma.cc/3N7C-9Y5W].

177. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978).

perspectives.[178] While it is true that minority representation on corporate boards remains shamefully low,[179] it cannot be the case that the pursuit of gender diversity must be abandoned for inability to address all forms of diversity at once.

E. WHY QUOTAS ARE PERMISSIBLE FOR SEX WHEN THEY ARE CLEARLY IMPERMISSIBLE FOR RACE

A significant challenge that SB 826 faces is that it is essentially a quota system—designating a certain number of seats for women.[180] In this way, the classification is similar to the program in *Bakke* which the Court found to have impermissibly "operated as a racial quota, because minority applicants . . . were rated only against one another . . . and 16 places in the class of 100 were reserved for them."[181]

The Court has clearly rejected such race-based quota systems, instead favoring "affirmative action" programs that consider race as "simply one element—to be weighed fairly against other elements."[182] These "more indirect means" make race's importance less visible, allowing each applicant to be considered as an individual and in turn lessening the consequential "divisiveness" and "corrosive discourse."[183]

The five previously discussed factors suggest that the Court's clear rejection of race-based quota systems does not extend to SB 826.

First, as discussed in Section II.A, *Nguyen* signals that the intermediate scrutiny standard is substantially less stringent than strict scrutiny, the level of review applied to race-based classifications.[184] Here, the difference between the two standards likely means that SB 826, a program that would clearly be unacceptable in the race context, is permissible as a gender-based classification.

178. SPENCERSTUART, 2018 UNITED STATES SPENCER STUART BOARD INDEX 3 (2018), https://www.spencerstuart.com/-/media/2018/october/ssbi_2018.pdf [https://perma.cc/9MYL-V2NQ] ("[N]ew women directors have markedly different backgrounds from their male peers. Women are more frequently line and functional leaders and financial executives and less frequently at the CEO level. Their industry experiences differ as well, with women more likely to have backgrounds in the tech/telecommunications and consumer sectors and less likely to have private equity/investment backgrounds.").

179. *Id.* Only 19 percent of new S&P 500 board members in 2018 were male or female minorities, up only 6 percent in the previous five years. *Id*. at 8.

180. S. 826, 2017–2018 Reg. Sess., pmbl. (Cal. 2018) (enacted).

181. *Bakke*, 438 U.S. at 279.

182. *Id*. at 318.

183. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

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

Second, SB 826, as a program intended to benefit women, is fundamentally different from earlier statutes the Court struck down. While those statutes ostensibly treated women favorably, they did so in the paternalistic sense. For example, even though *Craig v. Boren* is nominally similar to *Bakke* in that a man challenged the statute in *Craig* and a white applicant challenged the admissions program in *Bakke*, *Craig* should not be considered as the same because its analysis was based on the concern that even *benign* legislation designed to *help* women in the 1970s was still based on, and perpetuating of, stereotypes that harm women.[185] Thus, it is the *stereotype* that plays the role of invidious intent, causing the harm to a minority group, and making actual malicious intent irrelevant in the gender context.[186] Such laws were not passed in an effort to help women or address inequality.[187] Thus, even though the plaintiff in *Craig* was a man who was supposedly harmed by the differential standard, the application of scrutiny was for the benefit of women.[188]

For race, however, in *Bakke* and *Adarand*, the statutes were passed for a remedial purpose—not paternalistic assumptions about differences, but rather an effort to help the disadvantaged race gain access.[189] The Court viewed this as problematic not because it perpetuated stereotypes about the benefited minority, but rather because it harmed innocent white applicants.[190] Thus, the focus of the Court's concern was for the minority group in *Craig* and for the majority in *Adarand* and *Bakke*. This is a major difference between the Court's treatment of race and its treatment of gender. While the evil to be flushed out in strict scrutiny is either invidious intent to oppress or the harm of being classified on the basis of race, the evil to be

185. *See Bakke*, 438 U.S. at 266; Craig v. Boren, 429 U.S. 190, 192, 201–03 (1976); *see also* Orr v. Orr, 440 U.S. 268, 279, 283 (1979) (striking down a state law only allowing women to receive alimony because it was based on stereotypical views of gender roles that the wife is dependent and the husband is the breadwinner).

186. *See Bakke*, 438 U.S. at 298–99; *Craig*, 429 U.S. at 204.

187. *See Craig*, 429 U.S. at 201. Oklahoma enacted the statute at issue to regulate driving while under the influence of alcohol based on an assumption that young men were more likely than young women to do so. *Id.*

188. *See id*.

189. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 206 (1995) (applying strict scrutiny to a practice of providing incentives for hiring businesses owned by "socially disadvantaged individuals" which the government defined as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities" (citations omitted)); *Bakke*, 438 U.S. at 272 ("[T]he faculty devised a special admissions program to increase the representation of 'disadvantaged' students in each Medical School class.").

190. *Adarand*, 515 U.S. at 270; *Bakke*, 438 U.S. at 298 ("[T]here is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.").

flushed out by intermediate scrutiny is the use of assumptions about differences between men and women that are not based in biology. Thus, for gender, the fit need not be so tight with regard to the prior discrimination that is the basis of the remedial action. Because SB 826's mandated inclusion clearly does not contribute to the central harm—reinforcement of stereotypes—it should pass intermediate scrutiny.

Third, unlike in the race context in which the Court insists that quotas threaten an applicant's dignity and autonomy by considering the applicant as a member of a group rather than an individual, the Court does not appear to hold an analogous concern that people lose their individuality when considered as a member of their sex. This is propelled by the Court's insistence that some real differences between the sexes exist that may justify disparate treatment of men and women.[191]

Fourth, the fact that SB 826 targets the corporate board selection process—which is not perceived to be merit-based—rather than university or general hiring bolsters the state's position because it does not pose a threat to merit, a value the Court has consistently protected.[192]

Fifth and finally, the fact that balkanization, a key concern in the race context, is not a factor in the Court's sex-based equal protection consideration further supports the conclusion that quotas may be acceptable in the sex context.

CONCLUSION

While SB 826 does not face an easy path when it is inevitably challenged under the Equal Protection Clause, it should not be written off as a failed attempt just yet. SB 826 is an attempt by the California State Legislature to increase female representation on corporate boards. Although the law may be severely restricted by jurisdictional limits, it sends an important message to corporations that they must do more to include women on their boards. SB 826 also may serve as a model for other states, such as Delaware,[193] to implement effective mandates that corporations include women in their leadership.

Because it is a distinction between men and women, it is a facially discriminatory sex-based classification and thus must survive intermediate

191. *See supra* note 95 and accompanying text.

192. *See supra* Section II.B.5.

193. *See* Suzanne Barlyn, *How Delaware Became a Hub of Corporate Secrecy*, BUS. INSIDER (Aug. 24, 2016, 10:51 AM), https://www.businessinsider.com/heres-why-corporations-are-flocking-to-delaware-to-conduct-business-2016-8 [https://perma.cc/VN5V-R5C4].

scrutiny to withstand an equal protection claim under the Fourteenth Amendment. Under this test, there is a "strong presumption"[194] that it is invalid that can only be overcome by an "exceedingly persuasive" showing that SB 826 is justified by an "important" government interest to which it is "substantially related."[195]

Applying the Court's existing equal protection doctrine, there is a plausible way that SB 826 could survive intermediate scrutiny because remedying past discrimination and dismantling gender stereotypes are important government interests to which the law is substantially related. Women remain vastly underrepresented on corporate boards due to generations of policies at universities and corporations that intentionally discriminated against women and kept them from advancing up the corporate ladder.

Although women have been joining traditionally male professions such as law, medicine, police work, and corporate leadership, the glass ceiling has remained impermeable.[196] By placing women in director positions, SB 826 will contribute to the shattering of that barrier by remedying past discrimination while also dismantling existing deeply-entrenched stereotypes and subconscious gender bias that continue to keep women out of the boardroom. Thus, although its success may be unlikely given the makeup of the current Court, SB 826 advances the goals of the Equal Protection Clause and in upholding it the Court would not alter its existing framework.

194. *See* J.E.B. v. Alabama *ex rel*. T.B., 511 U.S. 127, 152 (1994) (Kennedy, J., concurring).

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

196. *See Women in Male-Dominated Industries and Occupations: Quick Take*, CATALYST (Feb. 5, 2020), https://www.catalyst.org/research/women-in-male-dominated-industries-and-occupations [https://perma.cc/6ENW-6AVV].