

2017

Affirmative Action: The Constitutional Approach to Ending Sex Disparities on Corporate Boards

Julia Glen

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Glen, Julia, "Affirmative Action: The Constitutional Approach to Ending Sex Disparities on Corporate Boards" (2017). *Minnesota Law Review*. 173.

<https://scholarship.law.umn.edu/mlr/173>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Note

Affirmative Action: The Constitutional Approach to Ending Sex Disparities on Corporate Boards

*Julia Glen**

Observers may compare obtaining a seat on an executive board as the payoff for successfully climbing the corporate ladder. Reaching the top is the ultimate achievement; starting on the bottom rung as a new hire and rising up to leadership roles requires working hard for many years and overcoming numerous employment obstacles, all to earn a seat at the uppermost table. This metaphor fails to consider the additional challenges plaguing women who try to climb this corporate ladder. Women in the United States compose nearly one-half of the workforce; yet, they hold less than one-sixth of executive board positions.¹ A woman working to obtain corporate leadership positions faces far more rungs on her corporate ladder than her male colleagues, in the form of fighting sex-based stereotypes, unequal pay for the same work, and the fear of (or from) sexual harassment.² Perhaps some rungs are missing or broken, demonstrable by the lack of mentorship opportunities for women within companies. And although the ladder keeps going up-

* J.D. Candidate, University of Minnesota Law School, 2017. Thank you to the strong women who raised me and encouraged me throughout this process. A special thank you to my mother, Lucinda C. Glen, my aunt, Connie Sheehy, my grandmother, Linda Cordes, and my law school friends and co-editors, especially Alysha Bohanon and Mary Heath. I would also like to thank the editorial board of the *Minnesota Law Review*, William Elliott, Vanessa Colletti, Taylor Gess, and Stephen Maier for their work on this Note. Copyright © 2017 by Julia Glen.

1. WOMEN IN THE LABOR FORCE IN 2010, U.S. DEP'T LABOR, <http://www.dol.gov/wb/factsheets/qf-laborforce-10.htm> [hereinafter WOMEN IN THE LABOR FORCE]. JUDITH WARNER, CENTER FOR AMERICAN PROGRESS, THE WOMEN'S LEADERSHIP GAP: WOMEN'S LEADERSHIP BY THE NUMBERS 1 (2015).

2. See LAURA BATES, EVERYDAY SEXISM 223–36 (2014) (describing a study that showed sexist jokes, repeated questions about women's ability to do work because of their sex, lower pay, and other forms of subtle sexism are harmful to a woman's success in the workplace over time and providing examples from women who experienced sexual harassment in the workplace).

ward, the glass ceiling often halts a woman's progress before she can make it to the top rung, allowing her to see the top but prohibiting her from reaching it.³

Although reasons for this disparity may vary, statistics show that women obtain fewer executive board positions than men, even though there are just about as many women in the labor force as there are men.⁴ Historically, Congress has taken legislative steps to counteract this reality. Congress passed the Equal Pay Act of 1963,⁵ the Civil Rights Act of 1964,⁶ and the Pregnancy Discrimination Act in 1978⁷—to name a few—in an effort to eliminate discrimination and limit the obstacles for underrepresented groups, like women, in the workplace.

But even with anti-discrimination legislation in place, the number of women in leadership is not representative of the labor force.⁸ According to the Department of Labor, women compose forty-seven percent of the workforce in the United States.⁹ The largest percentage of employed women fall into management and professional occupations.¹⁰ Yet, in 2015, women held only 16.5% of the top five executive board positions in businesses on the S&P 500, and fourteen percent of all executive board positions.¹¹

3. See generally Julie C. Suk, *Work-Family Conflict and the Pipeline to Power: Lessons from European Gender Quotas*, 2012 MICH. ST. L. REV. 1797, 1797–98 (2012) (describing the lack of women in leadership positions as a “leaky pipeline” because somewhere along the way, women are slipping through the cracks of the pipeline to power).

4. See WOMEN IN THE LABOR FORCE, *supra* note 1.

5. 29 U.S.C. § 206(d) (2000) (requiring equal pay for equal work done by men and women).

6. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 (2000).

7. 42 U.S.C. § 2000e(k) (2000).

8. See WOMEN IN THE LABOR FORCE, *supra* note 1. Chimamanda Ngozi Adichie offers one potential explanation for this phenomenon: “If we see the same thing over and over again, it becomes normal. If only boys are made class monitor, then at some point we will all think, even if unconsciously, that the class monitor has to be a boy. If we keep seeing only men as heads of corporations, it starts to seem ‘natural’ that only men should be heads of corporations.” CHIMAMANDA NGOZI ADICHIE, WE SHOULD ALL BE FEMINISTS 13 (2015).

9. See WOMEN IN THE LABOR FORCE, *supra* note 1.

10. *Id.* (reporting that women represent “51.5 percent of all workers in the high-paying management, professional, and related occupations,” including 66.1% of tax examiners, collectors, and revenue agents; 53.2% of financial managers; and 72.5% of medical and health services managers, to name a few).

11. Matt Egan, *Still Missing: Female Business Leaders*, CNN MONEY (Mar. 24, 2015), <https://money.cnn.com/2015/03/24/investing/female-ceo>

Many nations are taking additional legislative measures to reduce facially unexplainable gender disparities in their domestic corporations' executive boards. Norway, France, and Germany, for example, have established quotas for equalizing gender representation on corporate boards.¹² The United Kingdom, also recognizing the problem, enlisted the help of a private organization and created a voluntary program incentivizing companies to diversify the gender representations on their boards.¹³

The United States has taken no comparable steps in reducing the gender gap, although the problem has not gone unnoticed. On International Women's Day, March 8, 2017, a bronze statue of a young woman with her hands placed firmly on her hips appeared on Wall Street, standing directly in front of the famous Charging Bull statue.¹⁴ The statue, named Fearless Girl, was created to put pressure on corporations to promote and retain more women in leadership, specifically in their boardrooms.¹⁵ The plaque at her feet reads, "Know the power of women in leadership. SHE makes the difference."¹⁶ This statue recognizing the lack of female representation on corporate boards was originally intended to stay on Wall Street only temporarily; however, after much public support, Fearless Girl and the message she was intended to send to corporations remains on display.¹⁷

Although the Fearless Girl statute drew attention to the issue, the problem remains. Catalyst, a nonprofit research firm on women in business, releases an annual list of companies in the United States with zero women on their corporate boards ("The Zero List"), showcasing the underrepresentation of wom-

-pipeline-leadership. Some report that, in 2015, the ratio of women in corporate boards rose to seventeen percent in the United States. *See, e.g.*, Alison Smale & Claire Cain Miller, *Germany Sets Gender Quota in Boardrooms*, N.Y. TIMES (Mar. 6, 2015), http://www.nytimes.com/2015/03/07/world/europe/german-law-requires-more-women-on-corporate-boards.html?_r=1.

12. *See* Smale & Miller, *supra* note 11 (listing countries with established gender quotas).

13. *See* 30 PERCENT CLUB, <http://30percentclub.org> (last visited Mar. 31, 2017).

14. Verena Dobnik, *'Fearless Girl' Statue Stares Down Wall Street's Iconic Bull*, BLOOMBERG (Mar. 8, 2017), <https://www.bloomberg.com/news/articles/2017-03-08/fearless-girl-statue-stares-down-wall-street-s-iconic-bull>.

15. *Id.*

16. *Id.*

17. Maya Rhoden, *The 'Fearless Girl' Statue Is Staying on Wall Street*, FORTUNE (Mar. 27, 2017), <http://fortune.com/2017/03/27/fearless-girl-statue-wall-street>.

en in corporate board positions in American companies.¹⁸ Some companies responded by adding qualified female members, while others did not.¹⁹ A female vice president of a non-profit company expressed her cautious relief that some companies have added female directors to their boards by saying, “I do think we can say it’s no longer acceptable to have zero women on a board of directors . . . I just hope we don’t get stuck at one, and that one becomes the new zero.”²⁰ While other nations are setting legal quotas requiring companies to have at least forty percent representation of both sexes, companies in the United States should be wary of becoming comfortable by simply eliminating the “inexorable zero.”²¹ The fear of one being the new zero is not without merit; it is statistically observable in the United States. If one woman already holds one of the top five positions in an executive boardroom, the chances of another woman being selected for the remaining four positions goes down fifty-one percent.²²

Some American companies have joined the 30 Percent Club, a branch of a program established in the United Kingdom promoting female representation on corporate boards, and have

18. Kimberly Weisul, *Globally, Women Gain Corporate Board Seats – but Not in the US*, FORTUNE (Jan. 13, 2015), <http://fortune.com/2015/01/13/catalyst-women-boards-countries-us>; see also *2015 Catalyst Census: Women and Men Board Directors*, CATALYST (2016), <http://www.catalyst.org/knowledge/2015-catalyst-census-women-and-men-board-directors> (providing the most recent annual report).

19. Weisul, *supra* note 18 (showing that the year the “zero list” was released fifty corporations had zero women on their board, and that the following year eighteen remained).

20. *Id.*

21. *United States v. City of N.Y.*, 713 F. Supp. 2d 300, 317 (2010) (“[T]he 100% sex-segregated workforce is highly suspicious and is sometimes alone sufficient to support judgment for the plaintiff.” (citing *Loyd v. Phillips Bros. Inc.*, 25 F.3d 518, 524 n.4 (7th Cir. 1994))); *Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 662 (5th Cir. 1983) (“To the noble theoretician predicting the collisions of weightless elephants on frictionless roller skates, zero may be just another integer, but to us it carries special significance in discerning . . . policies and attitudes.”); see also Weisul, *supra* note 18.

22. See Cristian Dezso, *The Hidden Quota for Women at the Top*, MD. ROBERT H. SMITH SCH. BUS. (May 11, 2015), <http://www.rhsmith.umd.edu/news/ras-spring-2015/dezso> (identifying a “quota effect” in businesses where one woman was in the top tier, the likelihood of another woman being on the board drops by about fifty percent); Rachel Feintzeig, *One Is Enough: Why There Aren’t More Women Executives*, WALL ST. J. (Apr. 7, 2015), <http://blogs.wsj.com/atwork/2015/04/07/one-is-enough-why-there-arent-more-women-executives> (citing a study conducted by the University of Maryland School of Business and the Columbia Business School).

set voluntary goals that will eventually lead to thirty percent representation of both sexes on their corporate boards.²³ Although it is encouraging to see progress, glacial movements resulting from legislation created in the 1960s, like Title VII and the Equal Pay Act, is not the change to which the United States should aspire.²⁴ In comparison to other nations' sex representation on corporate boards, the United States is severely behind and could see undesirable consequences unfold in the global business market because of it.²⁵

Other countries' approaches to solving gender disparities on corporate boards may be to institute a quota, but the United States would not have to create parallel quota legislation to achieve a similar end. In fact, it could not: quotas are unconstitutional in the United States.²⁶ Rather, the United States could implement an affirmative action program. Affirmative action, unlike a quota, is a constitutional approach used to right historical wrongs and end discriminatory practices, whether they are facially discriminatory or discriminatory in effect.²⁷ Instituting an affirmative action program narrowly tailored to eliminate the gender disparity in corporate leadership would be a constitutional approach the United States could take to catch up to the international movement of gender equality in business.

23. See Smale & Miller, *supra* note 11; 30 PERCENT CLUB, *supra* note 13.

24. This Note is not suggesting that Title VII, the Equal Pay Act, or other legislation promoting equality between the sexes in the 1960s was or is bad legislation. Rather, it is examining the progress made on representation of the sexes on corporate boards since their implementation and noting how corporate executive board composition does not show a representative make up.

25. In a global market, consumers have more choices on where to buy and why to buy from certain corporations and not others. Statistics show that people are willing to move their business and pay more for socially responsible products. See Mike Hower, *50% of Global Consumers Willing To Pay More for Socially Responsible Products*, SUSTAINABLE BRANDS (Aug. 12, 2013), http://www.sustainablebrands.com/news_and_views/behavior_change/50-global-consumers-willing-pay-more-socially-responsible-products (“[W]here skepticism toward corporate social responsibility runs high, cause-marketers face an uphill battle . . . [S]ocial impact programs must be incontestably authentic to a company’s business objectives, vision and values.”).

26. See *infra* note 82.

27. See Yena Lee, *Reaction to: Reforming Diversity: Finding Our Way to a More Inclusive Affirmative Action Jurisprudence: Should Historical Mistreatment Be the Basis for the Affirmative Action?*, 5 GEO. J.L. & MOD. CRITICAL RACE PERSP. 79, 79 (2013) (“[T]he original purpose of affirmative action was to provide redress to [historically-disadvantaged groups].”).

Focusing an affirmative action program at the highest echelons of corporate governance, the board of directors, is the best place to start. Among other duties, a company's board of directors appoints the company's highest executives. In a study examining the female/male make up in S&P 1500 companies over twelve years, David Matsa and Amalia Miller discovered that once both sexes are represented on a company's board of directors, the number of women in the top executive positions and higher managerial roles increase exponentially in comparison to companies with no female representation.²⁸ The research showed a ten percent increase in female representation on corporate boards over twelve years lead to a twenty-one percent increase in female representation in executive positions throughout S&P 1500 companies.²⁹

This Note aims to recognize the lack of female representation on United States corporate executive boards, and, using international quotas as an influence, promotes the establishment of an affirmative action program to help combat this inequality. Part I examines the doctrinal and theoretical basis of gender quotas internationally, how and why these quotas would not be allowed in the United States, and describes the roles of affirmative action and Title VII in the United States. Part II looks into the benefits of a diverse corporate board and examines statistics surrounding gender representation in the United States. Part III offers a potential two-step solution to combat gender inequality in boardrooms. First, the United States should introduce a voluntary program similar to voluntary programs already established in the United Kingdom.³⁰ The voluntary affirmative action programs would be consistently and publically announced and celebrated to promote socially responsible business practices combating inequality. Second, Congress should announce a voluntary program with incentives if individually set affirmative action targets are met. Within this program, if companies reached their individually set targets they would be rewarded with tax breaks proportionate to their success and the amount typically owed, as determined reasonable by Congress.

28. David A. Matsa & Amalia R. Miller, *Chipping Away at the Glass Ceiling: Gender Spillovers in Corporate Leadership* 2–6 (RAND Labor & Population Working Paper Series, WR-842, 2011), https://www.rand.org/content/dam/rand/pubs/working_papers/2011/RAND_WR842.pdf.

29. *Id.*

30. See generally 30 PERCENT CLUB, *supra* note 13.

I. THE INTERNATIONAL USE OF DOMESTICALLY UNCONSTITUTIONAL QUOTAS AND THE ROLE OF AFFIRMATIVE ACTION IN THE UNITED STATES

Internationally, countries have utilized quotas to combat the disparities in gender representation on corporate executive boards. While facial quotas are unconstitutional under United States jurisprudence,³¹ there are other alternatives available to address misrepresentation and discrimination. This Part first describes international programs instituting gender quotas, the successes these international programs have seen, and the measures other countries have taken to make quotas legal. It then details the history of unconstitutional quotas in the United States. Next, it describes how affirmative action, a constitutional alternative to quotas, has battled inequality and the standards that must be met to ensure the constitutionality of affirmative action programs. Finally, this Part provides the alarming statistics of female representation in the United States.

A. INTERNATIONAL FOCUS ON SEX EQUALITY THROUGH QUOTAS

Statistically, the United States falls well behind many European nations regarding female representation on corporate boards.³² Many nations, excluding the United States, have taken legislative measures to combat the gender disparity in corporate board rooms by instituting quotas and amending governing documents to ensure the legality of the initiatives promoting equality.³³ Norway is one of the European frontrun-

31. See *infra* note 82 and accompanying text.

32. Weisul, *supra* note 18 (showing the United States is ranked tenth out of the twenty countries surveyed and how other nations with similar percentages have shown faster growth than the United States).

33. See Julie C. Suk, *Quotas and Consequences: A Transnational Re-evaluation*, in *PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW* 228, 237–48 (Debra Hellman & Sophia Moreau eds., 2013) (providing and examining examples of French and Brazilian programs and constitutional amendments for corporate gender quotas); Anne Sweigart, *Women on Board for Change: The Norway Model of Boardroom Quotas as a Tool for Progress in the United States and Canada*, 32 *NW. J. INT'L L. BUS. AMBASSADOR* 81A (2012) (showcasing the debates and creation of gender quotas in Norway); Christopher D. Totten, *Constitutional Precommitments to Gender Affirmative Action in the European Union, Germany, Canada and the United States: A Comparative Approach*, 21 *BERKELEY J. INT'L L.* 27 (2003) (discussing the constitutional amendments made to allow for gender quotas in government representation and on corporate boards in Germany and efforts by the European Union).

ners in bringing sex parity to executive boards.³⁴ Norway is not alone; France, Germany, and the United Kingdom have taken measures to promote fair representation of the sexes on corporate boards.³⁵ This Section examines the programs and legislation established in Norway, France, Germany, and the United Kingdom, observing how each nation created their quotas and noting the differences in the requirements of the quotas.

Many nations, when making the first steps toward equality among the sexes, passed legislation requiring equal representation in public governing bodies.³⁶ After amending constitutions and public official representation began to become slightly more sex equal, these nations took legal steps to promote the same change in the private, business sector.

This Section describes the abundantly successful quota system established in Norway. Then, it explains the quota creation process in France. Next, it describes the recently enacted quota in Germany. Lastly, this Section describes the voluntary goal program developed by an organization in the United Kingdom.

34. See, e.g., Jens Dammann, *Place Aux Dames: The Ideological Divide Between U.S. and European Gender Discrimination Laws*, 45 CORNELL INT'L L.J. 25, 72 n.287 (2012) (stating Scandinavian countries are "held up as a model for actively seeking to end all forms of gender discrimination" (citing Jamie Alan Aycok, *Contracting out of the Culture Wars: How the Law Should Enforce and Communities of Faith Should Encourage More Enduring Marital Commitments*, 30 HARV. J.L. & PUB. POL'Y 231, 235 (2006))).

35. See generally Totten, *supra* note 33 (examining arguments against gender quotas in Europe and how European courts handled them before and after the establishment of quotas).

36. Parity legislation is possibly the most logical first step towards equality, but one that is highly unlikely in the United States and is beyond the purview of this Note. The democratic election process is one deeply rooted in United States history; and, while other nations have seen great success in eliminating the gender gap in elected officials by instituting parity legislation, legislation will likely receive harsher backlash than steps towards gender equality in corporate boardrooms. Corporate boardrooms are privately run and their composition is not publically voted on. See generally Fredrik Engelstad & Mari Teigen, *Firms, Boards, and Gender Quotas: Comparative Perspectives*, 29 COMP. SOC. RES. 126, 126–30 (2012) (describing the evolution of legislation globally promoting gender equality); Darren Rosenblum & Daria Roithmayr, *More Than a Woman: Insights into Corporate Governance After the French Sex Quota*, 48 IND. L. REV. 889 (2015) (explaining gender parity legislation in France, the outcomes on decisionmaking post-parity legislation, and interviewing French political leaders about gender parity legislation); Ruth Rubio-Marín, *A New European Parity-Democracy Sex Equality Model and Why It Won't Fly in the United States*, 60 AM. J. COMP. L. 99, 108–10 (2012) (providing constitutional considerations made in Spain, Italy, and France when creating gender quotas for political office).

1. Norway

Originally, in 2002, the gender³⁷ quota on corporate boards in Norway was limited to companies on the Oslo stock exchange, or public limited companies.³⁸ Since its implementation, in 2006 it expanded to include additional companies.³⁹ The implementation of legal gender quotas on corporate boards was consequential to the Gender Equality Act passed years before.⁴⁰

If Norwegian companies failed to comply with legislative gender quotas by 2008, the Norwegian government had sanctions in place to use as punishment.⁴¹ First, companies received a warning, followed by a fine, and if companies still failed to comply, they would suffer forced dissolution.⁴² If need be, Norway has a system in place to allow state intervention in the private sector to help combat the gender disparities globally recognized on corporate boards.⁴³ By 2005, women held twenty-four percent of board seats.⁴⁴ The forty percent goal was met in

37. Norway, along with the other nations used as international examples in this Note, created gender quotas. This Note proposes an affirmative action program on the basis of sex. Sex is the biological difference between male and female genitalia, while gender refers to the characteristics societally prescribed to a sex. To preserve accuracy, this Note will refer to international gender quotas as such, but does not intend to equate sex with gender. This Note chooses to focus on a sex-based affirmative action program because of the language used in Title VII jurisprudence, not because the author thinks that affirmative action programs in the future should be limited to sex-based classifications.

38. LORD DAVIES OF ABERSOCH, CBE, *WOMEN ON BOARDS* 24 (UK, Feb. 2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31480/11-745-women-on-boards.pdf (providing information composed by the United Kingdom when discussing their options in promoting equal representation in corporate board rooms); Mari Teigen, *Gender Quotas on Corporate Boards: On the Diffusion of a Distinct National Policy Reform*, 29 *COMP. SOC. RES.* 115, 122 (2012); *Norway Gender Representation on Corporate Boards*, WOMEN IN MANAGEMENT (Nov. 2008), http://www.eu-norway.org/news/gender_rep_boardrooms/#.VtSB2JMrL6Y (“There are approximately 500 public limited companies in Norway . . . [p]ublic limited companies normally have a broader spread of shares and less personal involvement in the management.”).

39. Teigen, *supra* note 38.

40. *Id.*; see also Sweigart, *supra* note 33 (showcasing the debates and creation of gender quotas in Norway).

41. All Norwegian companies required to comply with quotas by 2008 did so and no sanctions were enforced. Teigen, *supra* note 38, at 125 (explaining how nothing beyond a warning has been used to enforce compliance).

42. *Id.* at 124–25 (describing the sanctions available in Norway if companies do not comply with quotas by the established deadlines).

43. *Id.* at 126.

44. *WOMEN ON BOARDS*, *supra* note 38, at 22.

its entirety by 2009 without issuing a single sanction.⁴⁵ The Norwegian Director General of the Ministry of Children, Equality, and Social Inclusion stated the gender quota “[is] certainly positive and serve[s] both economic goals as well as democracy and fairness. Research has shown that diversity is good for business’[s] bottom line.”⁴⁶

The successes of gender quotas on corporate boards in Norway depend greatly on the cultural and societal views of business and government regulation of business within the nation. Such views in Norway differ significantly from the general, societal view of business in the United States. Dating back to the *Lochner* era in the United States, the business sphere is separate from that of the governmental sphere.⁴⁷ Norway is known as a corporatist nation,⁴⁸ meaning the state is more powerful than businesses, and the owners of businesses are considered to be the communities they serve rather than the business leaders who run them.⁴⁹ In contrast, the United States is a pluralist nation, where the state does not participate in institutionalized negotiations with large businesses, but rather business can influence political change by lobbying and through other avenues of political speech.⁵⁰ Additionally, contrary to the

45. *Id.* (“[F]ull compliance was achieved by 2009.”). *But see* Dammann, *supra* note 34, at 73–74 (highlighting that the Norwegian quota only affected the composition of supervisory boards, which by definition do not have any managerial power: while women hold more leadership positions, the increase in managerial power may not receive the same success).

46. Arni Hole, *Government Action To Bring About Gender Balance*, WOMEN ON BOARDS, <http://womenonboards.gocirql.com/pubs/articles/norway.html> (last visited Mar. 31, 2017); see also Julie C. Suk, *Gender Parity and State Legitimacy: From Public Office to Corporate Boards*, 10 INT’L J. CONST. L. 449, 452 (2012).

47. See Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. Rev. 1, 3 (1991) (defining the *Lochner* era as a time when “judges concerned about protecting big business from the nascent regulatory state departed from the norm of restraint and substituted their values . . . underconstru[ing] the scope of congressional power and overprotect[ing] private property”).

48. Suk, *supra* note 46, at 459 (describing corporatist regimes as nations where “public policy is made not only through legislation adopted by representatives elected through universal suffrage, but also through negotiations between the state and interest groups, such as industry associations and trade unions”).

49. Vibeke Heidenreich, *Why Gender Quotas in Company Boards in Norway—and Not in Sweden?*, 29 COMP. SOC. RES. 147, 161 (2012).

50. See *id.* at 176 (describing how Sweden, like the United States, has a different ideological view of the role of business and the government compared

United States, Norway has a state-feminist tradition, strongly emphasizing gender equality.⁵¹

2. France

Following Norway, France recognized and addressed the gender disparity on corporate boards.⁵² France, like many European nations, first instituted political parity legislation, making sure there was adequate representation of the sexes in public office.⁵³

France did not approach their quota exactly like Norway did, but after successfully instituting parity legislation in government, opted for constitutional amendments to ensure the legality of gender quotas.⁵⁴ In 2006, France tried to pass legislation similar to Norway's quota legislation, but it was struck down as unconstitutional.⁵⁵ Consequentially, France amended the constitution, eliminating this barrier the second time around. The constitutional amendment "requir[ed] the law to promote equal access by men and women to professional and social responsibility."⁵⁶ This amendment allowed for the constitutionality of corporate gender quotas.⁵⁷ Before implementing legislation for gender quotas on corporate boards, the French instituted gender quotas for elected government bodies.⁵⁸ The

to Norway); Suk, *supra* note 46, at 462 (describing the United States as a pluralist nation and explaining what that entails).

51. Teigen, *supra* note 38, at 125 (describing Norway's gender equality measures encouraging female employment by providing paid maternity and paternity leave, on-site kindergartens, etc.).

52. *Id.* at 128.

53. *Id.* (describing the parity legislation in France, and providing statistics showing that in 2010 only nineteen percent of parliament members were women).

54. See Dammann, *supra* note 34, at 46–52 (showcasing ideological differences of women in the workplace in France and the United States); Rosenblum & Roithmayr, *supra* note 36, at 895–97 (exploring how French officials and citizens felt about the gender quotas); Suk, *supra* note 33, at 237–44 (providing and examining examples of French and Brazilian programs and constitutional amendments for corporate gender quotas).

55. Suk, *supra* note 46, at 451 (detailing France's legislative process in creating gender quotas).

56. *Id.* (citing Loi constitutionnelle 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République, art. 1, J.O., July 24, 2008, at 11890 (Fr.)).

57. *Id.* at 451, 457–58 (describing the path the French took to first make a constitutional amendment to allow for gender quotas in elected, public office and then gender quotas in private corporate business).

58. *Id.* at 457.

French government used gender quotas in elected government bodies as a stepping-stone to create the gender quota on corporate executive boards.⁵⁹

France requires at least forty percent representation of each gender on public corporate boards.⁶⁰ By creating check-point dates, France recognized the improbability of reaching this percentage immediately passing the law.⁶¹ In 2013, France required a minimum of twenty percent representation by either gender, and set a forty percent representation goal to be reached in 2016.⁶² While the French forty percent quota was not yet met in 2015, tremendous progress was noted at the time.⁶³

3. Germany

Germany joined the sex equality on corporate boards movement by establishing a quota in 2015.⁶⁴ Prior to the passage of quotas, the top thirty companies in Germany already surpassed the United States' average female representation by having twenty-five percent female composition on corporate boards, prior to the passage of quotas, but fell short of the new thirty percent requirement.⁶⁵ Like Norway and France, Germany passed a constitutional amendment making the creation of gender quotas legal.⁶⁶

Originally, some companies were required to set "flexi quotas" establishing targets for the number of women on corporate boards.⁶⁷ If these flexi-quotas were not met, there would be fines to follow.⁶⁸ Under the new law, nearly 100 corporations were given a 2016 deadline to fill at least thirty percent of their corporate executive boards with women.⁶⁹ Companies falling within the thirty percent quota requirement include Germany's largest companies with shareholders and employees composing

59. *Id.* at 457–58.

60. Teigen, *supra* note 38, at 128.

61. *See id.* at 123–24.

62. *Id.* at 128.

63. *See* Weisul, *supra* note 18 (showing by January 2015, 29.7% of corporate board seats in France were held by women).

64. *See* Smale & Miller, *supra* note 11.

65. *Id.*

66. Totten, *supra* note 33, at 39–44 (discussing the constitutional amendments made to allow for gender quotas in government representation and on corporate boards in Germany and efforts by the European Union).

67. Teigen, *supra* note 38, at 131.

68. *Id.*

69. Smale & Miller, *supra* note 11.

their supervisory boards.⁷⁰ These companies, such as Volkswagen with only fifteen percent women on their executive board, will have to fill the gender representation gaps or face penalties.⁷¹ Adidas, a German company with the newly assigned quota, already met the thirty percent requirement.⁷² Thousands of additional, smaller companies were required to submit their official plans to integrate women into their corporate boards by the end of September 2015.⁷³ By 2018, the plan is to increase the quota to fifty percent gender representation.⁷⁴

Discussions surrounding a gender quota in Germany were not always positive.⁷⁵ For example, some German businesses were worried they would not be able to find enough qualified women to fill the roles in time to avoid penalties, that the cost to comply will be unduly burdensome, and it will only result in companies moving out of Germany to avoid making any changes.⁷⁶ Despite these concerns, similar programs in Norway have not resulted in companies relocating to avoid the gender quota.⁷⁷

4. United Kingdom

Unlike any of the aforementioned nations, the United Kingdom took a voluntary, less quota-like approach to fixing the gender disparity on corporate boards. The Thirty Percent Club is not a quota, but an initiative program promoting gen-

70. Alanna Petroff, *Germany's New 30% Rule for Women on Boards*, CNN MONEY (Mar. 8, 2015), <http://money.cnn.com/2015/03/06/news/women-boards-germany-30>.

71. *Id.*

72. *Id.*

73. Smale & Miller, *supra* note 11; *see also* Petroff, *supra* note 70.

74. Petroff, *supra* note 70.

75. Teigen, *supra* note 38, at 131; *see also* Heather Horn, *What the World Can Learn from Germany's Debate over Gender Quotas*, THE ATLANTIC (Feb. 29, 2012), <http://www.theatlantic.com/international/archive/2012/02/what-the-world-can-learn-from-germanys-debate-over-gender-quotas/253664> (discussing the need for gender equality in Germany); Nicole Sagener, *Germany Debates Bill To Set Gender Quota on Corporate Boards*, EURACTIV.COM (Mar. 3, 2015), <http://www.euractiv.com/section/all/news/germany-debates-bill-set-gender-quota-on-corporate-boards> (showing thoughts of those who voted for and against the implementation of gender quotas on corporate boards in Germany and pointing out arguments both for and against a gender quota in Germany).

76. Sagener, *supra* note 75.

77. *See supra* Part I.A.1.

der balance through voluntary means.⁷⁸ By publically publishing the composition of their corporate executive boards and promoting their continued efforts to include women in leadership positions, companies who signed up to be a part of this program are seen as socially and culturally conscious.⁷⁹ The Thirty Percent Club has seen tremendous results, increasing female representation on corporate boards from 12.5% to just over twenty-three percent since 2010.⁸⁰

Norway, France, and Germany amended their constitutions to affirm the legality of gender quotas on executive boards.⁸¹ The United Kingdom has not instituted a quota, but does have a prominent voluntary program promoting equal gender representation on corporate board. Currently, there is neither a prominent voluntary program, nor a government-mandated quota or goal in the United States to promote equal gender representation on corporate executive boards.

B. UNCONSTITUTIONALITY OF QUOTAS IN THE UNITED STATES

As the last Section described, other nations have had success with increasing female representation on corporate boards through quotas. Some have even amended their constitutions to allow for these quotas. This approach is unlikely to pass muster in the United States, however, as the United States Supreme Court has held that any type of quota is unconstitutional because it strips a person of their individuality provided by the

78. Teigen, *supra* note 38, at 132.

79. See 30 PERCENT CLUB, *supra* note 13.

80. *Id.*

81. Unlike the United States, Norway, France, and Germany amend their respective governing documents more frequently. Compare Patrick Bahners, *What Distinguishes Germany's Basic Law from the United States Constitution?*, NOTRE DAME NEWS (May 18, 2009), <http://news.nd.edu/news/human-dignity-and-freedom-rights> ("The American [C]onstitution has been changed only twenty-seven times during the 222 years of its existence . . .") (*translating* FRANKFURTER ALLGEMEINE ZEITUNG, <http://www.faz.net> (May 18, 2009)), with Grunnlovsjubileet, *The Bicentenary of the Norwegian Constitution 2014*, STORTINGET, <http://www.stortinget.no/en/Grunnlovsjubileet/In-English/The-Bicentenary-of-the-Norwegian-Constitution-2014> (last visited Mar. 31, 2017) ("The Norwegian Constitution has been amended more than 400 times since 1814 . . ."), and ELAINE MAK, JUDICIAL DECISION-MAKING IN A GLOBALISED WORLD: A COMPARATIVE ANALYSIS OF THE CHANGING PRACTICES OF WESTERN HIGHEST COURTS 22 (2013) ("The French Constitution of 1958 has been amended . . . 24 times since its adoption . . ."), and Bahners, *supra* (stating at that time the German governing documents had been changed fifty-five times in their sixty-one years of existence).

Constitution.⁸² The Fifth and Fourteenth Amendments of the United States Constitution provide such protections to the individual.⁸³ In attempts to correct a history of discrimination, carefully crafted affirmative action programs can be initiated.⁸⁴ These programs have the ability to promote a group of individuals over another, as long as the program fits within criteria tailored through precedent.⁸⁵

This Section examines the unconstitutionality of quotas in the United States by looking at the text and interpretation of the Fifth and Fourteenth Amendments. Additionally, it introduces and explains the role Title VII plays in combating inequality in the United States and what the text of Title VII says about quotas.

1. Quotas Violate Constitutional Requirements Established by the Fifth and Fourteenth Amendments

The Fourteenth Amendment guarantees to all persons “equal protection of the laws.”⁸⁶ Any instance in which a person is treated differently because of their membership in any protected group falls within the scope of the Fourteenth Amendment.⁸⁷ Even if statutes or private actions fall under the scope of the Fourteenth Amendment, however, this does not automatically mean those statutes or private actions violate the Fourteenth Amendment.⁸⁸

The Fifth Amendment requires the federal government to provide equal protection of the laws.⁸⁹ The textual composition

82. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289, 299 (1978) (Powell, J.) (plurality opinion) (describing the individuality protected by the Fifth and Fourteenth Amendments); *Grutter v. Bollinger*, 539 U.S. 306, 309, 334 (2003) (reaffirming *Bakke*'s holding that quotas are unconstitutional, violating the Fifth and Fourteenth Amendments); see also Title VII, 42 U.S.C. § 2000e-2(j) (1964) (stating preferential treatment will not be granted because of a percentage imbalance). See generally 136 CONG. REC. 31,827, 31,828 (1990) (detailing President George H.W. Bush's veto of the Civil Rights Act of 1990 because it may have resulted in the ability to establish quotas on employers).

83. *Bakke*, 438 U.S. at 361 (Brennan, J., concurring).

84. See, e.g., Title VII, 42 U.S.C. § 2000e (1964) (outlining the provisions of the Civil Rights Act of 1964 as they apply to the workplace).

85. See *infra* Part II.B.

86. U.S. CONST. amend. XIV, § 1.

87. *Grutter*, 539 U.S. at 327 (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229–30 (1995)).

88. *Id.*

89. U.S. CONST. amend. V.

of the Fifth Amendment lacks the same “equal protection” language provided for in the Fourteenth Amendment.⁹⁰ Jurisprudence surrounding the interpretation of the Fourteenth Amendment’s equal protection clause evolved prior to parallel interpretation of the Fifth Amendment.⁹¹ Before the Supreme Court interpreted the Fifth Amendment to provide equal protection like the Fourteenth Amendment, the Fifth Amendment was interpreted to allow for racially discriminatory legislation that would not survive modern legal standards.⁹² Now, the Fifth Amendment is read to require of the federal government what is required of the states under the Fourteenth Amendment’s Equal Protection Clause.

2. Title VII’s Role in Protecting Individuals from Discrimination and Reaffirming the Illegality of Quotas

Title VII of the United States Code prohibits discrimination based on sex, race, color, natural origin, or religion.⁹³ A product of the Civil Rights Act of 1964, Title VII makes it unlawful for employers to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment.”⁹⁴ One of the stated purposes for creating Title VII was to protect racial minorities⁹⁵ but Title VII’s protections are not limited to racial discrimination.⁹⁶ Title VII

90. Compare U.S. CONST. amend. V (“[N]or be deprived of life, liberty, or property, without due process of law”), with U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

91. *Adarand Constructors, Inc.*, 515 U.S. at 213–15; see, e.g., *Detroit Bank v. United States*, 317 U.S. 329, 337 (1943) (citing *LaBelle [sic] Iron Works v. United States*, 256 U.S. 377, 392 (1921); *Steward Machine Co. v. Davis*, 301 U.S. 548, 584–85 (1937); *Sunshine Coal Co. v. Adkins*, 310 U.S. 381, 400, 401 (1940); *Helvering v. Lerner Stores Co.*, 314 U.S. 463, 468 (1941)) (holding the Fifth Amendment does not protect individuals from discriminatory legislation created by Congress, even though the Fourteenth Amendment provides such protections from states).

92. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 225 (1944) (holding Congress has the ability to condone and enforce racially discriminatory legislation isolating Japanese Americans).

93. See Title VII, 42 U.S.C. § 2000e (1964).

94. § 2000e-2(a)(1).

95. See Louis Menand, *The Sex Amendment: How Women Got in on the Civil Rights Act*, NEW YORKER, July 21, 2014, at 80.

96. See *id.*

protections extend to a vast array of underrepresented and vulnerable groups.⁹⁷

Congress created Title VII “pursuant to the commerce power to regulate purely private decisionmaking [It] was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments.”⁹⁸ This shows that Congress did not intend for Title VII just to apply to the state and federal government, but rather to private actors, because the Fifth and Fourteenth Amendments already require anti-discriminatory practices of the State. Legislative history “emphasize[s] . . . that Title VII would open up the upper echelons of private enterprise”⁹⁹ by prohibiting discriminatory practices targeted toward a particular group of people in the private sphere, but was not intended to eliminate the individuality protected by the Fifth and Fourteenth Amendments.¹⁰⁰ The Supreme Court has stated that “[t]he prohibition against . . . discrimination . . . must . . . be read against the background of the legislative history of Title VII and the historical context from which the Act arose.”¹⁰¹ Title VII was intended as a “catalyst” for employers to analyze their “practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country’s history.”¹⁰²

Title VII eliminates the possibility of establishing a quota. The text states that no employer shall “limit, segregate, or classify his employees [or applicants for employment] in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee” based on the aforementioned list of characteristics.¹⁰³ Title VII dictates that nothing within Title VII itself

97. See Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 J.S. HIST. 37, 37–56 (1983) (describing the jurisprudential evolution of Title VII to protect against gender discrimination). See generally Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 431–58 (1966) (providing a detailed legislative history of Title VII, including the initial purpose of protecting racial minorities from discriminatory employment practices).

98. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 206 n.6 (1979).

99. See Dammann, *supra* note 34, at 49.

100. See *id.* at 49 n.146 (discussing ramifications on individual choice while still promoting equality).

101. *Weber*, 443 U.S. at 201.

102. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (quoting *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)).

103. Title VII, 42 U.S.C. § 2000e-2(a)(2) (1964).

should ever be interpreted to *require* employers or schools to create preferential treatment to fix any percentage imbalance of the aforementioned characteristics.¹⁰⁴ Title VII states:

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons . . . in comparison with the total number of [sic] percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area¹⁰⁵

While the existence of Title VII §§ 703(a) and 703(j) may close the door on the possibility of quotas, they do not prohibit all forms of affirmative action programs. Title VII allows the employment or classification of a person based on their sex, race, color, natural origin, or religion if one of these characteristics is “a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”¹⁰⁶ Title VII also protects employees from any sort of adverse treatment because of traditional gender stereotypes.¹⁰⁷ Congress legalized affirmative action programs through Title VII in hopes of spurring voluntary action and local resolution of forms of discrimination by recognizing and aiding historically disadvantaged groups.¹⁰⁸ Thus, Title VII does not eliminate the constitutionality of affirmative action: it is the legal basis for affirmative action programs. The next Section will explore further the distinction between quotas and affirmative action programs.

104. *See id.* § 2000e-2(j).

105. *Id.*

106. *Id.* § 2000e-2(e)(1).

107. Suk, *supra* note 3, at 1799 (describing Title VII's protections against gender discrimination in the workplace); *see also* Thomas v. Eastman Kodak Co., 183 F.3d 38, 61 (1st Cir. 1999) (“The concept of ‘stereotyping’ includes not only simple beliefs such as ‘women are not aggressive’ but also . . . more subtle cognitive phenomena which can skew perceptions and judgments.”); U.S. EQUAL EMP’T OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES EEOC NOTICE 915.002 (2007), <http://www.eeoc.gov/policy/docs/caregiving.html> (“Employment decisions based on . . . stereotypes violate the federal antidiscrimination statutes, even when an employer acts upon such stereotypes unconsciously or reflexively.” (footnotes omitted)).

108. H.R. REP. NO. 88-914, at 18 (1963).

C. AFFIRMATIVE ACTION: A CONSTITUTIONAL TOOL TO ADDRESS INEQUALITY

An affirmative action program is one way Title VII allows an employer to combat inequality in the workplace. This Section introduces affirmative action jurisprudence in the United States. Affirmative action allows preferential treatment to a group of persons based on a common characteristic as long as these programs survive the scrutiny standard assigned to that particular characteristic.¹⁰⁹ This Section examines what it means to be a member of a suspect class protected by affirmative action and why gender fits within the requirements of a protected class.¹¹⁰ First, this Section details the history of affirmative action in the United States, explaining jurisprudence surrounding racial affirmative action programs. Then, this Section compares racial affirmative action jurisprudence to sex-based affirmative action jurisprudence to show that sex-based affirmative action programs are easier to implement in a constitutional manner than race-based affirmative action programs because they are examined with a lower scrutiny level.

1. History of Affirmative Action in the United States

Quotas are unconstitutional in the United States, but non-quota affirmative action programs surviving the judicial scrutiny level assigned to the protected class are not. The Supreme Court created the scrutiny levels appropriate for race and sex-based programs through their decisions in *Regents of the University of California v. Bakke* and its progeny.

In *Regents of the University of California v. Bakke* the Supreme Court considered the constitutionality of a racial quota in an affirmative action program that used race as a determining factor for admission to medical school.¹¹¹ The petitioner, Bakke, argued that he was not admitted to medical school because he identified as white, while other students were admit-

109. See Title VII, 42 U.S.C. § 2000e; see also *infra* note 120.

110. The Supreme Court uses multiple factors in determining whether a class is considered a suspect class. Some of these factors are: “whether the class has suffered a history of purposeful discrimination; whether the class is defined by a trait that bears no relationship to an individual’s ability to perform or contribute to society; whether the trait defining the class is immutable; and finally, whether the class is a discrete group subject to prejudicial majoritarian political power.” *benShalom v. Marsh*, 690 F. Supp. 774, 777 (E.D. Wis. 1988).

111. 438 U.S. 265 (1978).

ted because they identified as a member of a minority ethnicity.¹¹² Under the admissions program in question, the medical school reserved sixteen out of one hundred seats for minority students.¹¹³ Holding the particular quota-based admissions program unconstitutional in *Bakke*, Justice Powell's plurality opinion stated, "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."¹¹⁴ Thus, while a quota is not constitutional, the *Bakke* Court held that non-quota affirmative action programs initiated to promote equality may be constitutional if properly devised, surviving strict scrutiny analysis.¹¹⁵

Under the strict scrutiny test established in *Bakke*, an affirmative action program must survive strict scrutiny review when it involves "a government practice or statute which restricts fundamental rights or which contains suspect classifications."¹¹⁶ An affirmative action practice or statute survives this scrutiny analysis when it "furthers a compelling government purpose and, even then, only if no less restrictive alternative is available."¹¹⁷ Courts must evaluate all suspect acts or statutes on individual facts and circumstances.¹¹⁸ Additionally, in order to justify the use of a suspect classification, "a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguard of its interest."¹¹⁹ This narrowly tailored requirement ensures

112. *Id.* at 277–78 (Powell, J.) (plurality opinion).

113. *Id.* at 279; *see also* Title IV, 42 U.S.C. § 2000c-2 (1964) (authorizing technical assistance to public schools attempting to desegregate).

114. *Bakke*, 438 U.S. at 320.

115. *See id.*; *see also* *Quota*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining quota as "[a] proportional share assigned to a person or group; an allotment" or "[a]n official limit on the number or amount of something that is allowed or required over a given period").

116. *Bakke*, 438 U.S. at 357 (Brennan, J., concurring).

117. *Id.*

118. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) ("[I]n dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts." (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 343–44 (1960))).

119. *Bakke*, 438 U.S. at 305 (Powell, J.) (plurality opinion) (quoting *In re Griffiths*, 413 U.S. 717, 721–22 (1973) (footnotes omitted) (alteration in original)); *see also* *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (describing the Fourteenth Amendment as an amendment created to counteract discrimination);

the protection of a class in hopes of promoting equality and avoiding the advancement of stereotypes.¹²⁰

Post-*Bakke*, the Court held race and other characteristics grouping individuals together can be factors used in determining things like admission and employment promotions, but continued its opinion that quotas are unconstitutional.¹²¹ The Court specified, “[C]lassifications are not *per se* invalid under the Fourteenth Amendment.”¹²² Even though the individuality provided for by the Fourteenth Amendment may be affected, it does not mean it is violated when affirmative action programs are instituted.¹²³ Critics of affirmative action jurisprudence argue that by allowing race classifications to be the focus of the discussion, emphasis is often placed upon the possible benefits received by “nonparty . . . minority beneficiaries of the program[]” rather than the harm experienced by the plaintiff who brought the case.¹²⁴ Consequently, this shifts the rights protected from individual rights to group rights, which is contrary to what the Fourteenth and Fifth Amendments provide.¹²⁵

Within the *Bakke* opinion the Court mentions that affirmative action programs created in an attempt to eliminate gender

McLaughlin v. Florida, 379 U.S. 184, 196 (1964) (illustrating the heavier burden required to justify classifying a group of people for legislation).

120. *Bakke*, 438 U.S. at 360 (Brennan, J., concurring in the judgment) (citing *Califano v. Webster*, 430 U.S. 313, 317 (1977)). For further explanation of avoiding the advancement of stereotypes, see the discussion of sex-based affirmative action programs in Part I.C.2.

121. See *Bakke*, 438 U.S. at 355–56. In *Bakke* the Court decided characteristics could be factors. Not all characteristics receive the same level of scrutiny review. For example, gender receives intermediate scrutiny, a less strict standard—and one that is easier to justify using classifications as factors—than the strict scrutiny required for race based classifications. See *Craig v. Boren*, 429 U.S. 190, 218 (1976) (applying intermediate scrutiny for using gender as a factor, rather than the strict scrutiny required for using race as a factor).

122. *Bakke*, 438 U.S. at 356.

123. See *id.*

124. John V. White, *What Is Affirmative Action?*, 78 TUL. L. REV. 2117, 2129 (2004); see also *id.* at 2127–31 (arguing affirmative action undercuts American antidiscrimination law in a variety of ways, including changing the standard of proof needed to show discriminatory practices exist and focusing on the benefits received by nonparties over the harm received by the plaintiff); *Bakke v. Regents of the Univ. of Cal.*, 553 P.2d 1152, 1161–62 (Cal. 1976) (en banc), *aff’d in part, rev’d in part*, 438 U.S. 265 (1978) (concluding based on the harm received by the plaintiff; unlike the reasoning issued by the Supreme Court, the California Supreme Court found *Bakke* was not admitted because of the admissions program, focusing on intent, injury, and causation).

125. See White, *supra* note 124, at 2131.

disparities would not receive the same strict scrutiny.¹²⁶ The Court distinguishes sex-based classifications from race-based classifications because, in the Court's opinion, sex-based classifications would create fewer "analytical and practical problems" than race or ethnic-based classifications.¹²⁷ The Court says this is because "racial . . . preferences present[] far more complex and intractable problems than gender-based classifications. More importantly, the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share."¹²⁸ Precedent shows, however, that facial quotas would still not survive even intermediate scrutiny, the lesser scrutiny standard applied to sex-based affirmative action programs.¹²⁹

After *Bakke* the Court frequently faced the question of constitutionality of many affirmative action programs.¹³⁰ Just a year later, in 1979, the Court held a private company's program reserving fifty percent of seats in the training program for African Americans was not a violation of constitutional rights, but fit squarely within permissible behavior of Title VII.¹³¹ While facially this may appear to be a quota, Justice Brennan distinguished this program because it "is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance."¹³²

The Court embraced Justice Brennan's statement attempting to cure the manifest imbalance, but not without limits. The Court did not allow the continuation of a non-quota affirmative

126. *Bakke*, 438 U.S. at 302 (Powell, J.) (plurality opinion) (citing *Califano v. Webster*, 430 U.S. 313, 316–17 (1977); *Craig v. Boren*, 429 U.S. 190, 211 (1976) (Powell, J., concurring)).

127. *Bakke*, 438 U.S. at 302–03. The Court said there are fewer practical problems with "gender" based classifications because "there are only two possible classifications." *Id.* Whether this is true or politically correct in today's society is outside the scope of this Note, but it is the Court's justification in *Bakke*.

128. *Id.* at 303.

129. *E.g.*, *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (holding the state-supported professional nursing school could not categorically exclude males from enrolling).

130. *See, e.g.*, *United States v. Paradise*, 480 U.S. 149, 185–86 (1987) (affirming a narrowly tailored affirmative action program promoting well-qualified African Americans, partially because of their race); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (applying strict scrutiny for a race affirmative action program); *Craig v. Boren*, 429 U.S. 190 (1976) (applying intermediate scrutiny for a gender affirmative action program).

131. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 195, 197 (1979).

132. *Id.*

action program that terminated white workers before their African American colleagues when downsizing, not considering any aspect of their employment record other than race.¹³³ Slight preferential treatment in hiring and granting promotions does not affect the individual on the same level as employment termination. The Court found termination of a person who identified as white over an African American did not help to eliminate the racial imbalance.¹³⁴ Thus, attempts to cure the manifest imbalance are encouraged and allowed, but in positive ways such as hiring and promoting, but not in terminating employees because of race.

While the quota at issue in *Bakke*, and any quota, is unconstitutional, not all programs implemented to increase diversity are quotas. Affirmative action programs have constitutionally been instituted in attempts to address and redress historical discrimination and mistreatment. In *Grutter v. Bollinger*, the Court held constitutional a university program promoting diversity by attempting to increase the number of African American students in its law school.¹³⁵ The law school at the University of Michigan used a race-conscious admission program that included an applicant's race as one of the factors when it considered whether the applicant was qualified.¹³⁶ The affirmative action program did not use race as a dispositive factor, but the factor did carry significant weight in admission decisions.¹³⁷ The Court found that because it was just a factor and not dispositive, the program was distinguishable from the quota deemed unconstitutional in *Bakke*.¹³⁸ The Court emphasized the university had a compelling interest in creating a diverse student body.¹³⁹ Although requiring a quota, a specific number of seats to be filled strictly based on race, is still considered unconstitutional, the *Grutter* opinion stresses that programs similar to the program in *Grutter* have the possibility of surviving the strict scrutiny analysis *if* they are narrowly tailored and

133. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 583 (1984).

134. *See id.* at 577, 579; *see also* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282 (1986) ("Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose.").

135. 539 U.S. 306, 328 (2003).

136. *See id.* at 309, 315–16.

137. *Id.* at 338.

138. *Id.* at 337 (emphasizing the importance of "this individualized consideration" as "paramount" to the distinction from *Bakke*).

139. *Id.* at 328.

promote a compelling government interest by the least restrictive means.¹⁴⁰

The Supreme Court interpreted Title VII to require strict scrutiny for race-based affirmative action programs. While this interpretation reaffirms the unconstitutionality of quotas, it does not deem all race-based affirmative action programs unconstitutional. Affirmative action programs are not quotas, because affirmative action programs can be constitutional and quotas cannot. Affirmative action programs consider an individual's protected class characteristic and ensure that characteristic is used to benefit the individual instead of detriment her, as it may have historically.

2. Sex Is a Classification Protected by Affirmative Action

Bakke and all aforementioned jurisprudence considered racial affirmative action programs and the strict-scrutiny requirements that these programs must survive to be deemed constitutional. This jurisprudence is not limited to race-based discrimination, however; the Civil Rights Act of 1964 protects and encourages the continued support for many other historically disadvantaged groups.¹⁴¹ Most importantly for the purposes of this Note, Title VII allows for the promotion of persons based on sex, if in a specified context a sex is historically disadvantaged.¹⁴² As the Court stated, "Sex-based statutes . . . must be viewed not in isolation, but in the context of our Nation's 'long and unfortunate history of sex discrimination.'"¹⁴³ Title VII allows for constitutional affirmative action programs promoting women, in an effort to reverse a long and ever-present history of sex discrimination.¹⁴⁴

This Section contrasts the scrutiny requirements for race and sex-based affirmative action programs, explains why sex is considered a qualifying characteristic under the Civil Rights Act of 1964, and reviews pertinent case law surrounding sex affirmative action programs.

140. *Id.* at 306, 326–28.

141. *See* Title VII, 42 U.S.C. § 2000e (1964) (including "color, religion, sex, or national origin").

142. *Id.*

143. *Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53, 74 (2001) (O'Connor, J., dissenting) (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994)).

144. *See id.*

a. Affirmative Action Programs for Sex Need Only Survive Intermediate Scrutiny Analysis

Affirmative action programs promoting the advancement of racial minorities receive a different level of scrutiny than affirmative action programs promoting the advancement of an underrepresented sex. *Bakke* establishes that affirmative action programs addressing race must survive strict scrutiny. These programs must be narrowly tailored, fulfilling a compelling government interest, and there cannot be a less-restrictive alternative available.¹⁴⁵ Unlike race, sex receives intermediate scrutiny, making it easier to find constitutional affirmative action programs created to bring equality among the sexes.¹⁴⁶ If a sex-based affirmative action program is narrowly tailored enough to survive intermediate scrutiny, it does not violate the Fourteenth Amendment.¹⁴⁷ To survive an intermediate scrutiny review for sex discrimination, the program supporters must demonstrate (1) some past discrimination, either by the government or not, against a sex;¹⁴⁸ and (2) the affirmative action is one that was fact-based and analyzed, and not based on stereotypes.¹⁴⁹ Additionally, “[F]or a gender-based classification to withstand equal protection scrutiny, it must be established ‘at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.’”¹⁵⁰

b. Women Are Considered a Suspect Class Because of a Long History of Sex-Based Discrimination

To qualify as a proper affirmative action program, the program must be created to protect a group of people who fit with-

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

146. *Compare* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (applying strict scrutiny for a race affirmative action program), *with* *Craig v. Boren*, 429 U.S. 190 (1976) (applying intermediate scrutiny for a gender affirmative action program).

147. *See* *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 274 (1995) (Ginsburg, J., dissenting).

148. *NAACP v. Seibels*, 31 F.3d 1548, 1580 (11th Cir. 1994).

149. *Contractors Ass’n of E. Pa., Inc. v. City of Phila.*, 6 F.3d 990, 1010 (3d Cir. 1993) (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 582–83 (1990)).

150. *Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53, 60–61 (2001) (alteration in original) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

in a protected classification.¹⁵¹ For example, when discussing a race-based affirmative action program, observable in *Bakke*, people who identify as white do not receive any sort of suspect classification protections.¹⁵² The Court explained the absence of suspect classification protections for people who identify as white by stating, “the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”¹⁵³

While previous discussion focused on racial affirmative action and righting racial historical wrongs, affirmative action programs to mitigate disparities between sexes have also been deemed constitutional.¹⁵⁴ Women, like racial minorities, have been and continue to be discriminated against. As Hillary Clinton said, “I am a woman and, like millions of women, I know there are still barriers and biases out there, often unconscious, and I want . . . an America that respects and embraces the potential of every last one of us.”¹⁵⁵ In *Frontiero v. Richardson*, the Court stated, “There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination . . . which, in practical effect, put women, not on a pedestal, but in a cage.”¹⁵⁶ Examples of discriminatory practices and beliefs based on sex are abundant: one of our founding fathers, Thomas Jefferson, expressed that women “should be neither seen nor heard in society’s decision[-]making councils.”¹⁵⁷

151. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290–91 (1978) (Powell, J.) (plurality opinion).

152. *Bakke*, 438 U.S. at 357 (Brennan, J., concurring in the judgment) (describing how whites are not a historically disadvantaged group and do not deserve any suspect, protected classification under Title VII).

153. *Id.* (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

154. See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (Brennan, J.) (plurality opinion) (“[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our [legal] system that legal burdens should bear some relationship to individual responsibility.” (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972))).

155. HILLARY CLINTON: IN HER OWN WORDS 57 (Lisa Rogak ed., 2014) (citing Hillary Clinton’s concession speech on June 7, 2008).

156. *Frontiero*, 411 U.S. at 684.

157. *Id.* at 684, n.13.

The “sexual contract” helps to explain how historically women were placed in the caregiver role, an inferior role to men.¹⁵⁸ The sexual contract argues women were prevented from holding any position that would allow them to make social or political change, because only women could procreate and “protecting” women from the world of work would safeguard the continuation of the human race.¹⁵⁹ This historical disenfranchisement has followed women throughout the decades, resulting in fewer female faces in positions of power.¹⁶⁰ The sexual contract theory is reflected in early jurisprudence. In 1873, the Court opined:

Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother.¹⁶¹

Historically, women in the United States have been restricted in career choices because of socially assigned sex requirements and laws that have been created to enhance sex normality stereotypes.¹⁶² For example, in the early 1900s a law existed restricting the number of hours women could work.¹⁶³ In 1908, the Supreme Court deemed this law constitutional.¹⁶⁴ Women were not to work as much as men, because they were

158. See Suk, *supra* note 3, at 1808 (describing men’s and women’s roles through the sexual contract theory as a reason for the existence of gender stereotypes).

159. See *id.* at 1807–08 (explaining the sexual contract as a theory to make certain the next generation would exist and be well cared for, the class of persons watching over them could not be focused on any other aspect of life).

160. See generally JESSICA BENNETT, *FEMINIST FIGHT CLUB: AN OFFICE SURVIVAL MANUAL FOR A SEXIST WORKPLACE* 113 (2016) (“[F]or hundreds of years, it’s been culturally ingrained in us that men lead and women nurture. So when a woman turns around and exhibits ‘male’ traits—ambition, assertion, and sometimes even aggression—we somehow see her as too masculine, not ladylike enough, and thus we like her less.”).

161. *Frontiero*, 411 U.S. at 684–85 (quoting *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring)).

162. See Suk, *supra* note 3, at 1808 (describing how women’s societal roles are historically based on gender stereotypes).

163. *Muller v. Oregon*, 208 U.S. 412, 416–17 (1908).

164. *Id.* at 423.

women and that characteristic alone was enough to allow specialty legislation, limiting their workplace involvement.¹⁶⁵ This law reflects just what the sexual contract details: women must not participate in social change or involvement, because they are to procreate.¹⁶⁶

The Supreme Court held that using sex stereotypes constitutes a violation of equal protection under Title VII because it prevents equal treatment in the workplace.¹⁶⁷ Studies have shown “women are *viewed* as having less leadership ability than men, as less assertive than men, less willing to take risks than men, less willing to take a stand than men, and less willing to defend their beliefs than men.”¹⁶⁸ Women are frequently characterized as too kind, too sweet, and too gentle to hold positions of power.¹⁶⁹ Any discriminatory practice based on stereotypes attributed to sex, be it termination of employment or lack of consideration for promotion to a seat on an executive board, violate protections provided for in Title VII.¹⁷⁰ However, precedent allows promoting a woman to a position, using sex as a factor, if the promotion is in a traditionally male-dominated field.¹⁷¹

165. *Id.* at 422–23.

166. *See* Suk, *supra* note 3, at 1807–08 (describing the sexual contract).

167. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (“In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978))), *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 1981a (2017) (superseded on other grounds, regarding damages).

168. David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 958 (1996) (emphasis added).

169. *But see generally* ADICHIE, *supra* note 8, at 18 (“Today . . . [t]he person more qualified to lead is *not* the physically stronger person. It is the more intelligent, the more knowledgeable, the more creative, more innovative. And there are no hormones for those attributes. A man is as likely as a woman to be intelligent, innovative, creative.”); REBECCA SOLNIT, *MEN EXPLAIN THINGS TO ME* 34 (2014) (“Kindness and gentleness never had a gender, and neither did empathy.”).

170. *See Hopkins*, 490 U.S. at 251; *see also* *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982) (holding one cannot use affirmative action to reinforce stereotypes).

171. *Johnson v. Transp. Agency of Santa Clara Cty.*, 480 U.S. 616, 636 (1987) (holding that you can promote a woman over an equally qualified man because of gender in positions typically male-dominated).

c. Constitutional Affirmative Action Programs Promoting Women

Determining whether a sex-based affirmative action program is constitutional is a burden-shifting process. Initially it is the adversely affected party's burden to show a prima facie case that sex has been taken into account in making an employment decision.¹⁷² Once this has been established, an employer must meet its burden by asserting proof of an affirmative action program.¹⁷³ If proof is shown, the burden shifts back to the employee to prove the employer's justification is pretextual and the program is invalid.¹⁷⁴

To be valid, the affirmative action program must survive intermediate scrutiny.¹⁷⁵ There must be some past discrimination against the advantaged sex, and the program must be fact-based, not promoting stereotypes.¹⁷⁶ The employer need not show their particular business has historically discriminated against a sex, but only needs to demonstrate imbalance in traditionally segregated jobs.¹⁷⁷ To claim an imbalance reflecting an underrepresentation of women an employer may compare "percentage[s] of minorities or women in the employer's work force with the percentage in the area labor market . . . who possess the relevant qualifications."¹⁷⁸

The Supreme Court has deemed an affirmative action program encouraging the promotion of women into a particular position of employment constitutional.¹⁷⁹ In *Johnson v. Transportation Agency*, the Transportation Agency set short-term goals for itself to revisit annually to provide accurate and achievable employment decisions.¹⁸⁰ The short-term goal in dispute was three women for the fifty-five expected openings in that particular position.¹⁸¹ The Court found this program "did not unnec-

172. *See id.* at 626 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973)).

173. *Id.*

174. *Id.*

175. *Contractors Ass'n of E. Pa., Inc. v. City of Phila.*, 6 F.3d 990, 1010 (3d Cir. 1993).

176. *See id.*

177. *See Johnson*, 480 U.S. at 630.

178. *Id.* at 632.

179. *Id.* at 641–42.

180. *Id.* at 636.

181. *Id.* (describing this goal as "modest . . . of about 6% for that category [or position]").

essarily trammel male employees' rights or create an absolute bar to their advancement."¹⁸² Additionally, even though there were numerical goals, the Court found this program did not reduce to blind hiring, because it considered only qualified candidates for the positions.¹⁸³ This affirmative action program explicitly stated it was temporary; the Court discussed possible hesitations it may have if a program was to "maintain" a work force rather than "attain a balanced work force."¹⁸⁴ Thus, the Court held that an affirmative action program promoting women over men because of sex was constitutional because it was a short-term goal that did not unnecessarily trammel the rights of or absolutely ban the advancement of men, and only considered qualified applicants.¹⁸⁵

One aspect consistently focused upon by the Court is that sex-based affirmative action programs cannot advance stereotypes.¹⁸⁶ A clear example of this reasoning can be found in *Mississippi University for Women v. Hogan*.¹⁸⁷ In this case, a male applicant who was denied admission to the nursing program at the Mississippi University for Women brought suit arguing a Title VII violation.¹⁸⁸ The Court deemed the women-only nursing program unconstitutional.¹⁸⁹ The Court articulated the need to look into the program's purpose:

Although the test for determining the validity of a gender-based classification is straight forward, it must be applied free of fixed notions concerning roles and abilities of males and females Thus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.¹⁹⁰

182. *Id.* at 617.

183. *Id.* at 637–38 (contrasting this program with others by stating that even though there are numerical goals, numerical goals do not always constitute quotas); *see, e.g.*, BENNETT, *supra* note 160, at 133 (providing an example of how some companies already do this: the production company required a blind application process for the newest *Star Wars* movie that required any list of possible writers, directors, actors, and producers to be representative of sex and race in the United States).

184. *Johnson*, 480 U.S. at 639 (emphasis omitted).

185. *Id.* at 637–42.

186. *See generally* HILLARY RODHAM CLINTON, *LIVING HISTORY* 140 (2003) ("Gender stereotypes . . . trap women by categorizing them in ways that don't reflect the true complexities of their lives.").

187. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

188. *Id.* at 720–21.

189. *Id.* at 733.

190. *Id.* at 724–25.

The relationship between the means and the program's objective purpose are necessary to "assure that the validity of classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."¹⁹¹ The determined purpose for only allowing women was not one promoting a disadvantaged group in the field, because women were the dominant sex within that field of work. Thus, the Court determined this program only perpetuated stereotypical roles for men and women and violated Title VII of the Civil Rights Act of 1964.¹⁹²

Affirmative action programs advancing the promotion of women can be constitutional under Title VII. Sex-based affirmative action programs can be constitutional because women are a protected class in certain circumstances.¹⁹³ A sex-based affirmative action program must survive intermediate scrutiny to be constitutional.¹⁹⁴ Intermediate scrutiny is easier for affirmative action plans to survive than the strict scrutiny required of race-based affirmative action programs, making it easier to create and implement constitutional sex-based affirmative action programs than race-based affirmative action programs.¹⁹⁵

D. STATISTICS OF GENDER REPRESENTATION IN THE UNITED STATES

As this Note has demonstrated, other countries have seen success in increasing female representation on corporate boards by enacting quota legislation or voluntary programs to require or incentivize companies to include more women in their highest level of leadership. The United States has neither legislation nor voluntary programs, and as this Section will explain, the statistics for female representation on corporate boards shows an increasing gap between the gender composition of the United States and foreign corporate boards. This Section first provides statistics for female representation on corporate boards in the United States. It then compares these statistics with the percentage of women on corporate boards in other na-

191. *Id.* at 725–26.

192. *Id.* at 733.

193. *See supra* Part I.C.2.

194. *See Craig v. Boren*, 429 U.S. 190 (1976) (holding that gender discrimination is evaluated under intermediate scrutiny rather than strict scrutiny).

195. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319–20 (1978).

tions, specifically nations that have enacted programs to correct corporate board sex disparities.

The population of the United States is just over fifty percent female.¹⁹⁶ Women earn nearly sixty percent of all undergraduate and masters degrees.¹⁹⁷ Women account for thirty-eight percent of masters in business and management degrees and thirty-six percent of masters in business administration degrees.¹⁹⁸ Women compose just over forty-seven percent of the workforce¹⁹⁹ and hold nearly fifty-two percent of all professional level jobs.²⁰⁰ At S&P 500 companies in 2014, women composed forty-five percent of employees.²⁰¹ Yet, women hardly hold fourteen percent of executive board positions.²⁰²

In 1995, white men composed forty-three percent of the workforce, yet held ninety-seven percent of the top executive positions at the 1500 largest corporations in the United States.²⁰³ This leaves only three percent for anyone who does not fall within the cross-section of identifying as male and white. In 2015, the numbers differ slightly. Of S&P 500 companies, just over fourteen percent of executive board members are female.²⁰⁴ Twenty-four women hold the highest executive board position, chief executive officer, out of the 500 positions available in S&P 500 companies.²⁰⁵ Twenty-four out of 500 means roughly women hold five percent of CEO positions.²⁰⁶ Women hold a larger percentage of seats on S&P 500 board of directors.

196. JUDITH WARNER, CTR. FOR AM. PROGRESS, THE WOMEN'S LEADERSHIP GAP: WOMEN'S LEADERSHIP BY THE NUMBERS 1 (2015).

197. *Id.*

198. *Id.*

199. *FFF: Women's History Month: March 2015*, U.S. CENSUS BUREAU, (Feb. 26, 2015), <http://www.census.gov/newsroom/facts-for-features/2015/cb15-ff05.html> (citing in 2013, women composed 47.4% of the labor force in the United States).

200. WARNER, *supra* note 196 (detailing women's involvement in leadership positions in many areas of business and politics).

201. *Id.*

202. Egan, *supra* note 11. Looking at the Fortune 500 companies instead of the S&P 500, statistics show women held 11.7% of board seats in 2000 and held 16.9% in 2013. *Id.*

203. Oppenheimer, *supra* note 168, at 967 (citing AFFIRMATIVE ACTION REVIEW: REPORT TO THE PRESIDENT 23 (1995)).

204. Egan, *supra* note 11.

205. *Id.*

206. Matt Egan & Sophia Ordonez, *How Many Women Are in the C-Suite?*, CNN MONEY, <http://money.cnn.com/infographic/investing/female-ceo-leadership/?iid=EL> (last visited March 31, 2017) (providing a list of companies with women as CEO).

Based on proxy statements submitted by S&P 500 companies in 2015, women held 19.9% of the board seats.²⁰⁷ If leadership that is representative of their workforce is what companies are striving for, the United States has a long way to go.

In a global comparison of the percentage number of women on corporate boards, the United States is tied with Australia for tenth place.²⁰⁸ Norway, France, and the United Kingdom, all countries with either a quota or a voluntary program, are ranked higher than the United States.²⁰⁹

II. AFFIRMATIVE ACTION, QUOTAS, AND THE DISRUPTIVE PRESENCE OF INEQUALITY IN BOARD ROOMS

For some, removing sex-based stereotypes in modern social thought and promoting leadership that is representative of the workforce may be the underlying goal of having more women on executive boards. For others, more business-focused, the primary goal may be to make business the most efficient, money-making machine it can be. Luckily for both groups, having women on corporate executive boards is a means to reach both ends. This Part displays the benefits companies have experienced after introducing women to their corporate boards. Then, this Part reiterates how programs established by individual employers to promote female representation on corporate boards are constitutional. Lastly, this Part addresses counter-arguments on the benefits of female involvement on corporate boards and affirmative action generally.

207. *2015 Catalyst Census: Women and Men Board Directors*, CATALYST (June 14, 2016), <http://www.catalyst.org/knowledge/2015-catalyst-census-women-and-men-board-directors>.

208. Ben Rooney, *Best and Worst Countries for Women on Corporate Boards*, CNN MONEY (Jan. 13, 2015), <http://money.cnn.com/2015/01/13/news/companies/women-corporate-board-global> (using a Catalyst study's data pool, the United States has 19.2% female representation on corporate boards of directors).

209. *Id.*; see also WARNER, *supra* note 196, at 4 (“In private-sector women’s leadership . . . the United States ranks number four in women’s economic participation and opportunity on the World Economic Forum’s 2014 Gender Gap Index of 142 countries . . . [b]ut in the public sector . . . the United States lags far behind many countries.”).

A. WHY WOMEN? BENEFITS OF A GENDER DIVERSE EXECUTIVE BOARD

While it may be easy to discredit an argument that stereotypes all women to have the same characteristics,²¹⁰ it is more difficult to discredit statistics. In 2015, women only accounted for approximately nineteen percent of corporate directors and fourteen percent of corporate officers in S&P 500 companies in the United States.²¹¹

Reducing the sex disparity is not only good from a social or cultural perspective. In the United States, “the ‘business case’ for diversity is the proposition that diversity in a firm . . . will enhance the company’s bottom line, measured primarily by shareholder value.”²¹² Many observable business benefits are consequential to having more women present on the executive board, such as corporate social responsibility, improved financial performance, and an increase of women in upper-level, non-board, positions.²¹³ Companies with both men and women on their executive boards have statistically contributed more to philanthropies and donated more money to charities.²¹⁴ Over a

210. See DOUGLAS M. BRANSON, *NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM* 65 (2007) (“[W]omen are criticized . . . for being timid or emotional . . . for harsh, overly assertive conduct; for excessive zeal and loyalty to the company; and for unremitting pursuit of perfectionism by their subordinates as well as themselves.”); Egan, *supra* note 11 (stating that women are “very good at multitasking, have a sixth sense with people, are nurturing and service-oriented” (quoting Maggie Wilderotter, past CEO of Frontier Communications)); Horn, *supra* note 75 (providing examples of advice often given to women to succeed in male-dominated professions, such as “push forward rather than shrinking back while approaching childbearing years [and] be more assertive”).

211. See *2015 Catalyst Census: Women and Men Board Directors*, *supra* note 18; Kimberly Gladman et al., *Women on Boards in the Americas*, CATALYST (May 31, 2013), <http://www.catalyst.org/knowledge/women-boards-americas> (showing in 2013, women held sixteen percent of corporate board positions); Rachel Soares et al., *Fortune 500 Executive Officer Positions Held by Women*, CATALYST (Dec. 10, 2013), <http://www.catalyst.org/knowledge/fortune-500-executive-officer-positions-held-women> (stating women held 14.6% of executive officer positions in Fortune 500 companies in 2013).

212. Suk, *supra* note 3, at 1805; see also David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1553 (2004) (“If American business is to continue to expand and prosper in a competitive global economy . . . then [American corporations] must have access to a substantial pool of talented minorities. . . . Diversity . . . is not only ‘good for business,’ it is essential.”).

213. Weisul, *supra* note 18.

214. Soares et al., *supra* note 211.

span of five years, companies with women on their corporate executive boards outperformed companies with two or fewer women on their board by eighty-four percent on returns on sales, sixty percent on return on invested capital, and forty-six percent on return on equity.²¹⁵ Studies show that companies that have corporate executive boards that include women in their composition tend to have a smaller pay disparity between men and women.²¹⁶ Additionally, it has been reported, “With more women on boards, a wider range of insight, perspectives, and experiences are brought to bear on the issues a board faces.”²¹⁷ Companies on the S&P 500 with female members on their board of directors are more likely to have equity-based compensation for directors, representing the interests of shareholders over those of individual directors.²¹⁸ A study by *Harvard Business Review* reported that if there was parity between the sexes in the workplace, the United States economy would earn approximately \$4.3 trillion more between 2016 and 2025, and \$2.1 trillion more by 2025 if all companies in the United States matched the company with the fastest progress to parity.²¹⁹

Not only does allowing women a seat at the executive board table take a step in the right direction for anti-discriminatory employment and a more representative leadership body, it has been proven to produce impressive business

215. Nancy M. Carter & Harvey M. Wagner, *The Bottom Line: Corporate Performance and Women's Representation on Boards (2004–2008)*, CATALYST (Mar. 1, 2011), <http://www.catalyst.org/knowledge/bottom-line-corporate-performance-and-womens-representation-boards-20042008>.

216. Dammann, *supra* note 34, at 75 (showing women employed by companies with a woman CEO make ten to twenty percent more than women who work in companies with a male CEO).

217. Weisul, *supra* note 18 (quoting Kris Byron, a professor at Syracuse University who examined 140 studies of board performance across thirty-five countries). Some may argue this statement is premised on stereotypes that women carry different personality traits because of their gender. As previously discussed, the Court has emphasized stereotyping is wrong; however, not because it is not ever correct, rather, because it is sometimes wrong. *See generally* Stanton v. Stanton, 421 U.S. 7, 14–15 (1975) (invalidating a divorce proceeding requiring support for a son until he was twenty-one to help pay for his education, but only for a daughter until she was eighteen because a woman's role is not to continue her education, but to raise a family because stereotypically that is what women do).

218. Renee B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, 94 J. FIN. ECON. 291, 301–03 (2009).

219. Kweilin Ellingrud et al., *How Reducing Gender Inequality Could Boost U.S. GDP by \$2.1 Trillion*, HARV. BUS. REV. (Apr. 12, 2016), <https://hbr.org/2016/04/how-reducing-gender-inequality-could-boost-u-s-gdp-by-2-1-trillion>.

benefits that possibly lead to fairer and more equal social policies.²²⁰ Thus, whether a corporation's goal is to fight injustice and underrepresentation or to be more productive and make more money, adding women to its executive board is beneficial.

B. SEX-BASED AFFIRMATIVE ACTION PROGRAMS ARE CONSTITUTIONAL AND SUCCESSFUL IN INCREASING THE NUMBER OF WOMEN IN LEADERSHIP POSITIONS

Despite the social and fiscal benefits to increasing female representation on corporate boards, United States companies have fallen behind foreign companies in achieving sex parity in executive boardrooms. Although the United States cannot adopt the gender quota requirements of other nations, sex-based affirmative action programs are an alternative, and constitutional, method to address this disparity. This Section reiterates the constitutionality of sex-based affirmative action programs. Then, it provides examples of domestic and international companies that instituted an affirmative action program and integrated more women into leadership positions.

As discussed in Part I, affirmative action programs instituted to combat sex discrimination are constitutional.²²¹ To survive intermediate scrutiny, the program proponents must show the program combats past discrimination and that it is fact-based, rather than promoting gender stereotypes.²²² Throughout American jurisprudence, many sex-based affirmative action programs have been upheld.²²³ Additionally, other effective sex-based affirmative action programs in the United States are not reviewable in case law, because they have not been challenged in a court of law.

At one point in time, sex-based affirmative action programs were accountable for helping roughly six million women retain and maintain employment.²²⁴ An example of a global business

220. See Suk, *supra* note 46, at 454–59 (discussing how gender quotas in France demonstrate that such quotas can lead to greater democratic policies).

221. See *supra* Part I.B.2.

222. See *Contractors Ass'n of E. Pa., Inc. v. City of Phila.*, 6 F.3d 990, 1010 (3d Cir. 1993).

223. For an example provided and described in this Note see, *Johnson v. Transp. Agency of Santa Clara Cty.*, 480 U.S. 616, 636 (1987) (upholding a gender based affirmative action program because it promoted women into a field where their gender is underrepresented). *But see* *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982) (holding the affirmative action program unconstitutional because it promoted gender stereotypes).

224. Sally Kohn, *Affirmative Action Has Helped White Women More than*

that has been recognized for its successful sex-based affirmative action program is IBM.²²⁵ Worldwide, women compose twenty-nine percent of IBM's workforce and twenty-five percent of their management.²²⁶ While this does not speak directly to IBM's executive board makeup, it does show that affirmative action programs can help promote women into leadership positions. Once women are in important leadership positions, they can help implement policies that render a work environment more amenable to foster future female leaders. For example, IBM hosts meetings with its female executives from across the globe to formulate strategies that allow employees to realistically balance their work and lifestyle needs.²²⁷ Two of the concerns addressed were the lack of female mentorship/networking and the difficulties surrounding childcare and the lack of flexible scheduling.²²⁸ These conversations lead IBM to implement its Child Care Resource Referral System and a similar program for elder care, among other tools "not provid[ing] an advantage, but . . . eliminat[ing] the disadvantage" executive women face.²²⁹

Thus, not only are sex-based affirmative action programs constitutional, they have been utilized to promote women leaders into positions of power. As can be observed in the successful IBM program, once women leaders are in the influential positions of executive power, policies can be instituted to maintain women leadership capabilities.

C. BENEFITS PROVIDED THROUGH GENDER-BASED AFFIRMATIVE ACTION PROGRAMS OUTWEIGH THE ARGUMENTS AGAINST THEIR IMPLEMENTATION

Sex-based affirmative action, like any form of affirmative action, does not come without its fair share of criticism and

Anyone: Their Successes Make the Case Not for Abandoning Affirmative Action, but for Continuing It, TIME (June 17, 2013), <http://ideas.time.com/2013/06/17/affirmative-action-has-helped-white-women-more-than-anyone>.

225. See generally *Diversity & Inclusion*, IBM, <http://www-03.ibm.com/employment/us/diverse> (briefly highlighting the diversity and affirmative action mission of IBM).

226. *Building an Equal Opportunity Workforce: Transforming the World*, IBM, <http://www-03.ibm.com/ibm/history/ibm100/us/en/icons/equalworkforce/transform>.

227. *The Advancement of Women in IBM*, WORLD BANK, <http://www.worldbank.org/html/extdr/pos00/pdfs/Women.pdf> (last visited Mar. 31, 2017).

228. *Id.*

229. *Id.*

concerns. This Section discusses a few of the criticisms surrounding affirmative action programs created to combat sex-based discrimination. While these criticisms do exist and may have some merit, this Note argues that the benefits such constitutionally permitted programs provide far outweigh any of the below-mentioned apprehensions.

An argument against the creation of affirmative action as a stepping-stone for equality is that affirmative action encourages separatism.²³⁰ The argument is that by focusing on the differentiating characteristic, such a program emphasizes that the specified group of people are unable to succeed on their own.²³¹ A similar argument was used against the implementation of race-based affirmative action programs under the Civil Rights Act of 1964, for example in Title VI and Title VII.²³² The purpose of these programs was to eliminate additional barriers facing groups of people who historically were discriminated against,²³³ however, the worry that affirmative action programs promote the separation of these groups still exists and is widely debated.²³⁴ The view this Note supports—the view that the majority of the Supreme Court holds—is that affirmative action is necessary and constitutional in combatting discrimination and promoting those who are disadvantaged because of the history of discriminatory practices.²³⁵

One counterargument to this Note's stance is that affirmative action programs for women in executive board positions

230. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319–20 (1978).

231. *Id.* at 298; see also *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 173–74 (1977).

232. See *Bakke*, 438 U.S. at 298 (“[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.”); Andrew F. Halaby & Stephen R. McCallister, *An Analysis of the Supreme Court's Reliance on Racial "Stigma" As A Constitutional Concept in Affirmative Action Cases*, 2 MICH. J. RACE & L. 235 (1996) (highlighting arguments that race-based affirmative action programs stigmatize the very groups they intend to protect).

233. See Lee, *supra* note 27 (“[T]he original purpose of Affirmative Action was to provide redress to [historically disadvantaged groups].”).

234. Tanner Colby, *Affirmative Action Doesn't Work. It Never Did. It's Time for a Solution*, SLATE (Feb. 10, 2014), http://www.slate.com/articles/life/history/features/2014/the_liberal_failure_on_race/affirmative_action_it_s_time_for_liberals_to_admit_it_isn_t_working.html (“[T]he effect of affirmative action overall was to funnel upwardly mobile blacks into a separate employment pipeline.”).

235. *Grutter v. Bollinger*, 549 U.S. 306, 328 (2003) (holding an affirmative action program at a university constitutional).

lead to unnecessary initial costs to business. When Norway instituted a gender quota for women on executive boards, the initial business impact was negative: stock price at the introduction of the law decreased and did not immediately increase when the quota was implemented.²³⁶ While implementation may have had initial monetary costs, Norwegian officials said the benefits of this legislation far surpass its monetary effects.²³⁷ The Norwegian Ministry of Children, Equality, and Social Inclusion supports the law because, “[i]f women make up more than half of university educated persons, but only seven percent of corporate directors, this would suggest that corporate boards are missing out on a significant pool of Norway’s talent.”²³⁸ Additionally, as discussed above, even though businesses may witness a brief drop in monetary gain, having an executive board where both sexes are represented provides long-term monetary benefits.²³⁹

Critics also argue that sex-based quotas or affirmative action programs producing similar effects lead to unqualified or under-qualified executive board members.²⁴⁰ This argument is without merit. In order for an affirmative action program to be constitutional, to determine underrepresentation, it can only compare the seats available on the board to the number of qualified women in the field.²⁴¹ Thus, in the program’s creation and application, it can only consider women who are qualified, alleviating this fear. Additionally, it would be a detriment to a business’s interest to institute a program that would lead to incompetent executive representation. It would be in the best interest of the business that instituted the program to seek out the best candidates for the job. Participating in an affirmative action program may require a business to look beyond its normal applicant pool, but not necessarily outside of its internal employees, and definitely not outside of the qualified applicants in the field.

236. Kenneth R. Ahern & Amy K. Dittmar, *The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation*, 127 Q.J. ECON. 137, 159–60 (2012).

237. Suk, *supra* note 46.

238. *Id.* at 452.

239. Carter & Wagner, *supra* note 215.

240. Ahern & Dittmar, *supra* note 236, at 145.

241. *See Johnson v. Transp. Agency of Santa Clara Cty.*, 480 U.S. 616, 631–32 (1987).

The last counterargument is what is known as the ‘opt-out’ argument. Some argue that women choose not to hold executive board positions because they are simply too demanding and do not align with the family-based focus women have; in other words, women do not want to be executive board members.²⁴² Setting aside the stereotyping surrounding this discussion, it would be inaccurate to argue that this argument is entirely untrue. Some women choose to stay at home with their children or to move to a less demanding job because they want to.²⁴³ Not all women on the management and executive track have this mindset, however. To deny the promotion of sex-based affirmative action plans because “women do not want to be executives” is promoting the sexual contract and the continuation of sex-based discriminatory employment practices.²⁴⁴ Companies, like IBM, have taken and should continue to enact the necessary policies that allow women to choose to “opt-out” but do not force them out.²⁴⁵ If the reason women are not represented on executive boards is truly because they are opting out, then the data will continue to reflect the numbers present today once affirmative action programs are implemented, nullifying this counterargument.

III. AFFIRMATIVE ACTION IS A CONSTITUTIONAL ALTERNATIVE TO QUOTAS, PRODUCING A SIMILAR OUTCOME IN COMBATING INEQUALITY

For any change in the composition of executive boards to occur, Americans must recognize women are underrepresented. Then, society must believe this underrepresentation is problematic. Once people of the United States recognize the problem, then our society will be open to a solution. While this may sound rudimentary, it is critical to note that discussion of gender quotas sprouted internationally after public discussions articulated disgust at the fact that women are underrepresented in leadership roles in the business world, especially on corpo-

242. See Judith Warner, *The Opt-Out Generation Wants Back in*, N.Y. TIMES (Aug. 7, 2013) <http://www.nytimes.com/2013/08/11/magazine/the-opt-out-generation-wants-back-in.html>.

243. *Id.*

244. See Suk, *supra* note 3, at 1807–08 (detailing the social contract and historical discriminatory practices to keep women in the caretaker role).

245. See *Building an Equal Opportunity Workforce: Transforming the World*, *supra* note 226.

rate boards.²⁴⁶ Recent topics of public concern in the United States include conversations surrounding equal pay for men and women, but there is not the same debate surrounding the lack of female representation in top leadership positions.²⁴⁷ If we look strictly to the international models, it is apparent that without an initial public discussion, change will not occur in the United States.

Anti-quota and anti-affirmative action discussion remains unaltered today from what it was in its initial application; whether the discussion revolves around race or sex, some people are wary that unqualified people will be promoted *simply* because of a physical characteristic.²⁴⁸ There is an uncomfortable dichotomy: “No one wants to be seen as the token female who only got a role because of a quota, but there’s also acknowledgement that the pace of change is too slow.”²⁴⁹ Something has to change to help establish equal representation, but

246. See generally Rosenblum & Roithmayr, *supra* note 36 (showing conservative and liberal perspectives in conversation surrounding the creation of gender quotas in France); Totten, *supra* note 33, at 29–44 (showcasing conversation surrounding the European directive for gender quotas and gender equality in Europe); Rachel A. Van Cleave, *Luogo E Spazio, Place and Space: Gender Quotas and Democracy in Italy*, 42 U. BALT. L. REV. 329 (2013) (highlighting the necessity of promoting women in Italy before the national creation of gender quotas).

247. Nolan Feeney, *Jennifer Lawrence on Pay-Gap Essay Backlash: ‘Thank You For Proving My Point,’* TIME (Nov. 25, 2015), <http://time.com/4126967/jennifer-lawrence-pay-gap-essay-backlash> (describing the backlash actress Jennifer Lawrence received after pointing out to the press how unfair it is that women do not get paid the same amount in the entertainment business and how they tend to not ask for more money when negotiating contracts).

248. *Compare Affirmative Action: Joint Oversight Hearings Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary and the Subcomm. on Emp’t Opportunities of the H. Comm. on Educ. & Labor*, 99th Cong. 337 (1985) (statement of Julius LeVonne Chambers, Director-Counsel, NAACP Legal Defense & Educational Fund) (“[A]ffirmative action does not mean admitting or hiring unqualified or less meritorious candidates.”), with Horn, *supra* note 75 (“The principle of equal protection under the law . . . has a lot going for it, and quotas, even when set internally, are one hell of a mess where equal protection is concerned. Though the aim is to correct an injustice, and the assumption is that the highly qualified women who have previously been passed over will now get the jobs they, by merit, deserve, that’s not necessarily the way it plays out.”).

249. Egan, *supra* note 11; see also CLARENCE THOMAS, MY GRANDFATHER’S SON 74–75 (2007) (“[A]ffirmative action (though it wasn’t yet called that) had become a fact of life at American colleges and universities, and before long I realized that those blacks who benefited from it were being judged by a double standard. As much as it stung to be told that I’d done well in the seminary despite my race, it was far worse to feel that I was now at Yale because of it.”).

anti-affirmative action fears remain ever-present in colloquial conversation around possible solutions. It is estimated that “at the current rate of change, it will take until 2085 for women to reach a parity with men in key leadership roles in the United States.”²⁵⁰ In 2085 it will be the Civil Rights Act of 1964’s 121st birthday, which is far too long to wait to see parity of the sexes in business leadership roles.

This Part introduces a two-step solution to combating the inequality of sex representation on corporate executive boards. Section A showcases the first step in the program, a voluntary program promoting transparency and social responsibility, similar to the program established in the United Kingdom. Section B describes the second part of the plan, building on the voluntary program by adding an incentive to set an inclusionary target and establishing necessary mentoring programs. If properly structured and enforced by private businesses, such a program allowing and encouraging promotion of qualified women to executive boards would not only be constitutional, but essential to combat inequality and promote accurate representation of the sexes.

A. ESTABLISHING A VOLUNTARY PROGRAM PROMOTING TRANSPARENCY AND SOCIAL RESPONSIBILITY

Encouraging corporations to be transparent about the composition of their executive boards and upper management positions could lead to corporations becoming socially responsible by way of more female representation on boards and in upper management. This effect is observable by the changes in corporate board make up after the release of the Zero List in 2014.²⁵¹ The number of corporations with zero women on their board of directors shifted from fifty corporations in 2014 to eighteen in 2015.²⁵²

If the United States makes corporate board composition transparency voluntarily, it is unlikely all companies will comply in a timely fashion, especially companies that currently have an entirely male executive board. It would be worthwhile

250. WARNER, *supra* note 196, at 5 (detailing women’s involvement in leadership positions in many areas of business and politics).

251. *See* Weisul, *supra* note 18.

252. *Id.* Nothing states that releasing the Zero List is the only reason or direct cause of the increase in female representation on corporate boards. However, nothing has been released to show the Zero List had no impact on the subsequent outcome.

to have the Equal Employment Opportunity Commission's (EEOC) periodic reports produced even more publically than they are now.²⁵³ The data encompassed in the EEOC's reports is critical to showing trends in female employment in public industry and would be a valuable tool in increasing transparency.²⁵⁴ Non-profit organizations, like Catalyst, could also assist in the mass distribution of this information.²⁵⁵

A voluntary program, similar to what is promoted by the 30 Percent Club in the United Kingdom, may have a chance for success in the United States.²⁵⁶ In fact, the 30 Percent Club has a chapter in the United States.²⁵⁷ Currently, there are sixty-six board members and CEOs in the United States that are members of the 30 Percent Club.²⁵⁸ The goal established by the 30 Percent Club is to have women constitute thirty percent of executive board directors on S&P 100 boards by the end of 2020.²⁵⁹ A few companies currently partnered with the United Kingdom voluntary program are: Berkshire Hathaway, Cisco, Citigroup, Deloitte LLP, Kate Spade, and Coca Cola.²⁶⁰ This branch of the 30 Percent Club has established a mentorship program and coordinates events to promote its mission.²⁶¹

To bolster the effects of the voluntary affirmative action program, the EEOC should release two consistent, widely pub-

253. See *Job Patterns for Minorities and Women in Private Industry (EEO-1)*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/index.cfm> (last visited Mar. 31, 2017) (providing reports for the minority and female trends in employment status in private industry).

254. If it is shown, especially in the first few years of pushing an equal representation initiative in private industry, that more research is necessary than what is currently being provided by the EEOC, Congress can always commission additional research to be conducted and presented by the Congressional Research Service. See *About CRS*, LIB. CONGRESS, <http://www.loc.gov/crsinfo/about> (last visited Mar. 31, 2017).

255. For an overview of the Catalyst organization, see *supra* note 14 and accompanying text.

256. *What We Do*, 30 PERCENT CLUB, <https://30percentclub.org/about/what-we-do> (last visited Mar. 31, 2017) (describing initiatives to increase women's involvement in business).

257. See *About*, 30 PERCENT CLUB, <https://us.30percentclub.org/about> (last visited Mar. 31, 2017) (detailing the programs available in the United States).

258. *Id.*

259. *Id.*

260. *Id.*

261. *Cross Company Mentoring Program*, 30 PERCENT CLUB, <https://us.30percentclub.org/initiative/cross-company-mentoring-program> (last visited Mar. 31, 2017).

licized lists of organizations: one list of companies participating in the program and their progress toward sex parity, and another list of companies who are not participating and have made no progress.²⁶² The concept of these reports is very similar to the Zero List: to promote social responsibility. In the modern era, social responsibility is becoming more and more important and driving business practices.²⁶³ It is argued that “[t]hese days corporate motivation seems almost beside the point because of the significant business risks to ignoring [corporate social responsibility]. Consumers and other companies are likely to shun firms that develop unethical reputations.”²⁶⁴ Taking affirmative steps in creating a program to help combat discrimination based on sex and correct the underrepresentation on executive boards must be observed as a socially responsible business practice. Socially responsible business practices are “business objectives [that] need to be to both maximize shareholder value in the long term and to address society’s biggest problems.”²⁶⁵

Even with the creation of and progress made by the zero list and the 30 Percent Club chapter in the United States, the movement’s success thus far has not been statistically observable. The 30 Percent Club’s United States chapter claims that the percentage of women on executive boards has increased from 20.2% to 23.2% since the chapter’s launch in 2014 in businesses on the S&P 100.²⁶⁶ Women in the United States still hold only five percent of chief executive officer positions.²⁶⁷ It is diffi-

262. This research would continue to be conducted and released by the EEOC but would be promoted and published more through the participating companies and the EEOC.

263. Social responsibility is “[t]he obligation of an organization’s management towards the welfare and interests of the society in which it operates.” *Social Responsibility*, BUS. DICTIONARY, <http://www.businessdictionary.com/definition/social-responsibility.html> (last visited Mar. 31, 2017).

264. *Why Companies Can No Longer Afford To Ignore Their Social Responsibilities*, TIME (May 28, 2012), <http://business.time.com/2012/05/28/why-companies-can-no-longer-afford-to-ignore-their-social-responsibilities>. Social responsibility is also proven to be one of the driving forces in engaging and retaining talented workforce: “70% of young Millennials . . . say a company’s commitment to the community has an influence on their decision to work there.” *Id.*

265. *Id.* (quoting Wharton professor Jerry Wind).

266. *About*, *supra* note 257 (noting that the executive board make-up of the companies that have members in the 30 Percent Club have seen greater success, with female representation up to 28% from 21.9% in 2014).

267. WARNER, *supra* note 196 (detailing women’s involvement in leadership positions in many areas of business and politics).

cult to definitively state that this sort of voluntary program would be as successful in the United States as it has been in the United Kingdom.²⁶⁸ We have, however, seen some progress. The Zero List has increased the number of women on executive boards in a short time frame.²⁶⁹ The increase in representation is small, but with increased publicity and consistent annual reporting, an entirely voluntary program fueled by social responsibility may be all the United States needs.

B. TAX INCENTIVE ADDITION TO BOLSTER THE EXPANSION OF THE VOLUNTARY PROGRAM

Although an entirely voluntary program could still have a large impact on the sex make up of United States corporate boards, a voluntary program combined with a government incentive for participation is the ideal solution to address the sex disparity on United States corporate boards. To avoid any confrontation with government regulation of the composition of executive boards, the United States should institute a voluntary, opt-in program where companies establish their own target goals and, if their goals are met, are rewarded with a tax incentive. A voluntary program established by private businesses will fit within a constitutional, affirmative action landscape.

While the Norwegian program of strict quotas and severe punishments may be an example of a system worth striving for, such implementation stretches what is remotely fathomable within the norms and laws of the United States. Similar to what Germany established in Germany's first step toward gender quotas for smaller, publicly traded companies, the target number of female board members would be set on an individual, company-by-company basis.²⁷⁰ By establishing the program specifics on their own, companies would ensure the affirmative action programs were made factually specific to that individual company, ensuring the programs constitutionality.²⁷¹ The goal's

268. See SUSAN VINNICOMBE ET AL., CANFIELD INT'L CTR. FOR WOMEN LEADERS, *THE FEMALE FTSE BOARD REPORT: 2015: PUTTING THE UK PROGRESS INTO A GLOBAL PERSPECTIVE* 19 (2015) (describing the European Union's new requirement of corporate transparency, a non-financial reporting directive, to promote diverse management and leadership in European countries).

269. See Weisul, *supra* note 18.

270. See Teigen, *supra* note 36, at 131 (describing the target program established in Germany).

271. See *Contractors Ass'n of E. Pa., Inc. v. City of Phila.*, 6 F.3d 990, 1010 (3d Cir. 1993) (providing the requirements of a gender-based affirmative ac-

timeframe would be pre-established to make certain that progress is made in a reasonable time; and, because the program would be temporally limited, it would allow for companies to set goal numbers of women on the individual company's executive board.²⁷² If a program is temporally limited, having a goal of a specific number of women on a company's executive board would likely be constitutional.²⁷³ While this reasonable standard may seem arbitrary, the percentage would be one established by the company itself, so it would be defined as whatever that company deemed reasonable at that time for its business.

In addition to setting a target goal for the number of women holding corporate board positions, companies who opt into this program will need to create additional programming to ensure continued success. Placing women at the top will not automatically ensure the number of women in leadership will increase at a faster rate than what is observable now, but establishing a pipeline of women in leadership roles would be a helpful step to speed up the process.²⁷⁴ Establishing a pipeline will lead to both mentorship and sponsorship critical to the advancement of women in leadership.²⁷⁵ Creating a mentorship program of women in high leadership roles with women currently working farther down the ladder and women in graduate or undergraduate school with business aspirations would be a condition companies would be encouraged to set in their individually tailored affirmative action plans.

If the companies chose to opt into this voluntary program and they achieved their goal within the required timeframe,

tion program to be constitutional and survive intermediate scrutiny when based on specific analysis).

272. See *Johnson v. Transp. Agency of Santa Clara Cty*, 480 U.S. 616, 638–40 (1987) (holding a program with short-term goal numbers is constitutional, as long as it is to attain and not maintain and is temporary).

273. See *id.*

274. See Egan, *supra* note 11 (“If you don’t have women in the pipeline, they are not going to get the top job . . . It doesn’t just mean being a mentor. Sponsorship means you are really fighting for that person.” (quoting Rita McGrath, professor at Columbia Business School)).

275. See *id.*; BATES, *supra* note 2, at 236 (describing a study that showed not only that men are more likely to be hired and paid more than an equally qualified woman, but that the companies were more likely to offer the male applicants career mentoring than they were the female applicants); Egan, *supra* note 11; see also *Building an Equal Opportunity Workforce: Transforming the World*, IBM, <http://www-03.ibm.com/ibm/history/ibm100/us/en/icons/equalworkforce/transform> (last visited Mar. 31, 2017) (describing IBM’s programming that was instituted to promote the continued success of women leaders and executives).

then they would be rewarded. First, the EEOC would release to the public which companies successfully reached their targets. Just as described in Section A, the socially responsible business practices would bring the company valuable benefits.²⁷⁶ This would create public conversation and encourage continued socially responsible growth.

Companies would also receive a tax benefit if they successfully met their goal of female representation on their executive boards. Congress would create a tax benefit initiative that would provide a tax break for the companies that reached their goal. The scope of Congress's ability to tax and spend is expansive²⁷⁷ and some tax initiatives approved by Congress, like this benefit would be, are explicitly for the purpose of promoting social welfare.²⁷⁸ Thus, a tax incentive would be provided to companies that successfully reach their short-term goal within the allotted timeframe. This tax benefit would be proportionate to the company's annual tax payment as determined reasonable by Congress.²⁷⁹ The tax incentives would be reevaluated annually and would increase as representation moved towards equilibrium within the corporate board. For example, a company that met their short-term goal of ten percent female representation would receive a tax benefit, but would receive a smaller tax benefit than a company of the same size that reached their goal of twenty-five percent female representation.

276. See *supra* Part III.A.

277. See U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (explaining Congress's spending power is not limited just to directly granted powers to spend provided for in the Constitution).

278. See Anne L. Alstott, *Gender Quotas for Corporate Boards: Options for Legal Design in the United States*, 26 PACE INT'L L. REV. 38, 47 (2014) (providing examples like alternative fuels, solar power, clean energy, and electric cars).

279. Another solution to explore that is beyond the purview of this Note is if states were to institute statewide gender affirmative action programs in public companies, then Congress could provide the state with additional funds. Congress has the power to attach conditions when granting federal funding to the States. To allow for conditions to be placed upon the states, spending must be (1) in pursuit of the "general Welfare"; (2) "unambiguous[] . . . enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation"; and (3) related to federal interest in "national projects or programs." See U.S. CONST. art. I § 8, cl. 1; *Dole*, 483 U.S. at 207 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

If any person challenged the legality of a company's affirmative action program, it would be reviewed individually by a court of law. This would be necessary to ensure an accurate, fact based review to maintain the program's constitutionality under the intermediate scrutiny test and to avoid the continuation of gender stereotyping. This Note does not encourage the creation of a regulatory, administrative agency review of these individualized affirmative action programs. However, under this Note's proposed solution, such agencies would emphasize the benefits a company would receive if it reached out to the EEOC or other administrative body for guidance when creating and implementing its affirmative action programs to ensure their constitutionality.

While the tax incentive may encourage companies' involvement in the voluntary program, the social discussion emerging in response to the executive board compensation reports would be enough to spark the necessary conversation of underrepresentation. The United States would finally be able to join the conversation that is taking place internationally, as observed in Norway, France, Germany, and the United Kingdom. As socially responsible business practices continue to have a positive effect on businesses, the United States will remain competitive, while counteracting a long and ever-present history of discriminatory practices based on sex.

CONCLUSION

In the United States, women are vastly underrepresented on corporate executive boards. Antiquated sex-based stereotypes deeming women incapable of leadership, stemming back to the 1800s when women's only societal role was to reproduce, are ever-present; however, the problem is fixable. The United States should look internationally to nations establishing gender quotas on executive boards for examples of the importance of gender equality and for the tools necessary to work toward gender parity. The conversation surrounding the legislative history in creating quotas in Norway, France, and Germany is helpful, even though creating quotas may be unconstitutional in the United States. This same international insight can be used to form a similar, but constitutional, alternative to redress historically discriminatory practices: affirmative action, which can be narrowly tailored to increase the number of women on executive boards.

Instead of establishing an improbable and unconstitutional quota, the United States should introduce a two-step program utilizing Congress's spending power, allowing private companies to opt into a voluntary program encouraging equality among the sexes and receiving a benefit for doing so. First, the United States should encourage companies to borrow from the United Kingdom a voluntary program promoting and encouraging the socially responsible business practice of equal representation on executive boards. Then, a tax benefit would be granted to companies successfully reaching their goals in incorporating women into their boards, expanding involvement in the voluntary program. The affirmative action-based legislation suggested in this Note will not introduce change as quickly as required by quotas in Norway or Germany, but will bring attention to a problem often ignored. Filling seats at the executive board table with women will not only bring the United States into the equality conversation being held by many other developed nations, but will also promote business success in the global market through the benefits received from a gender-diverse corporate board.