

A ROCK AND A HARD PLACE: WHY REQUIRING CORPORATIONS TO ADD WOMEN TO BOARDS IS THE BEST OPTION

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ABSTRACT

In this article, we assess SB 826, California’s legislation surrounding women on corporate boards. We weave in findings from a study we conducted on perceptions of women in leadership generally, and SB 826 specifically.

I. INTRODUCTION

“\$12 trillion could be added to global GDP by 2025 if the gender gap is narrowed,” reported the McKinsey Global Institute.¹ Numerous independent studies have shown that company performance improves when women serve as directors or as leaders² and that corporations with

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¹ Georges Desvaux, Sandrine Devillard, Eric Labaye, Sandra Sancier-Sultan & Cecile Kossof, *Women Matter: Time to Accelerate*, MCKINSEY & CO. 1, 8 (2017), <https://www.mckinsey.com/featured-insights/gender-equality/women-matter-ten-years-of-insights-on-gender-diversity/de-de>.

² Teresa Johnson, Diem-Mi Lu & Kit Reynolds, *Hurdles Ahead for California’s Female Director Mandate*, LAW360 (Oct. 5, 2018, 1:50 PM), <https://www.law360.com/articles/1089555>; Meggin Thwing Eastman, Damion Rallis & Gaia Mazzucchelli, *The Tipping Point: Women on Boards and Financial Performance*, MSCI 1, 6–9 (2016), <https://www.msci.com/documents/10199/fd1f8228-cc07-4789-acee-3f9ed97ee8bb>; Julia Dawson, Richard Kersley & Stefano Natella, *The CS Gender 3000: The Reward for Change*, CREDIT SUISSE RSCH. INST. 1, 22–29 (2016), https://evolveetfs.com/wp-content/uploads/2017/08/Credit-Suisse-Reward-for-Change_1495660293279_2.pdf; see also, *Why Diversity and Inclusion Matter: Financial Performance (Quick Take)*, CATALYST (June 24, 2020), <https://www.catalyst.org/research/why-diversity-and-inclusion-matter> (reviewing studies examining the relationship

female directors show more positive outcomes, such as increased sustainability of the corporation, improved stock performance, and higher earnings, than corporations without female directors.³ However, other studies have also shown that gender diversity has no marked effect on company performance, yet adversely affects stock prices in the first two years after women join the board.⁴ Based on our research, one potential explanation for this seeming discrepancy may be negative external perceptions of females in leadership roles.⁵ Regarding the impact of women on corporate boards, there are two predominant approaches to evaluating the overall benefits: (1) economically rational, believing the board member should primarily drive business, and (2) social preference, believing board diversity is driven by social factors influenced by the decisions and biases of decision makers.⁶ This Note aims to shed more light on these evaluators and perceptions and proposes that traditional measurements of a “most qualified” board member and economic-based analyses of subsequent impact may not capture women’s full contributions to corporate boards.

between diversity in corporate leadership and company performance); Michael Hatcher & Weldon Latham, *States Are Leading the Charge to Corporate Boards: Diversify!*, HARV. L. SCH. F. CORP. GOVERNANCE (May 12, 2020), <https://corpgov.law.harvard.edu/2020/05/12/states-are-leading-the-charge-to-corporate-boards-diversify>.

³ S. 826, 2017-2018 Reg. Sess., § 1(c) (Cal. 2018) (enacted); see Viviane de Beaufort & Lucy Summers, *Women on Boards: Sharing a Rigorous Vision of the Functioning of Boards, Demanding a New Model of Corporate Governance*, 4 J. RSCH. GENDER STUD. 101, 101 (2014); David A. Carter, Frank D’Souza, Betty J. Simkins & W. Gary Simpson, *The Gender and Ethnic Diversity of US Boards and Board Committees and Firm Financial Performance*, 18 CORP. GOVERNANCE: AN INT’L REV. 396, 410 (2010); Douglas Cumming, T.Y. Leung & Oliver Rui, *Gender Diversity and Securities Fraud*, 58 ACAD. MGMT. J. 1572, 1574 (2015); Elise Perrault, *Why Does Board Gender Diversity Matter and How Do We Get There? The Role of Shareholder Activism in Deinstitutionalizing Old Boys’ Networks*, 128 J. BUS. ETHICS 149, 149 (2015).

⁴ *Does Gender Diversity on Boards Really Boost Company Performance?*, KNOWLEDGE@WHARTON (May 18, 2017), <https://knowledge.wharton.upenn.edu/article/will-gender-diversity-boards-really-boost-company-performance> [hereinafter *Does Gender Diversity*].

⁵ See *infra* Figure 1, Figure 2, Figure 3.

⁶ Arun Upadhyay & María del Carmen Triana, *Drivers of Diversity on Boards: The Impact of the Sarbanes-Oxley Act*, 60 HUM. RES. MGMT. 517, 519–21 (2020).

Compared to men, few women have served on corporate boards.⁷ Although women are over half the workforce,⁸ far fewer women are on boards.⁹ The percentage of women holding director positions on the boards of the largest U.S. corporations hovered in the mid-teens a decade ago¹⁰ and has stalled around roughly twenty-five percent in recent years.¹¹ To better understand this problem, it is important to understand why this might be the case. Both the exclusionary and societal barriers women face externally, as well as intrapersonal barriers, are key components of the imbalance.

Though many see companies taking action to further equality and believe the problem will resolve itself, women are still underrepresented at each level of employment, starting with entry level, and progress has stalled at many times.¹² Balancing boards to achieve gender equality without quotas would take forty to fifty years, studies estimate, and SB 826 states.¹³ Companies

⁷ Jacqueline Concilla, Note, *A Glimmer of Hope for California's "Well-Intentioned" Attempt to Put More Women in the Boardroom*, 93 S. CAL. L. REV. 603, 604 (2020) ("Of the companies that comprised the Russell 3000 Index, which is made up of 'most public companies on major U.S. stock exchanges, 485, or 17%,' were run by all-male boards in 2018."); Laurel Wamsley, *California Becomes 1st State to Require Women on Corporate Boards*, NPR (Oct. 1, 2018, 4:47 PM), <https://www.npr.org/2018/10/01/653318005/california-becomes-1st-state-to-require-women-on-corporate-boards#:~:text=California%20will%20be%20the%20first,by%20the%20end%20of%202019;> Steven Davidoff Solomon, *As California Goes, So Goes the Nation? The Impact of Board Gender Quotas on Firm Performance and the Director Labor Market*, HARV. L. SCH. F. CORP. GOVERNANCE (Mar. 8, 2019), <https://corpgov.law.harvard.edu/2019/03/08/as-california-goes-so-goes-the-nation-the-impact-of-board-gender-quotas-on-firm-performance-and-the-director-labor-market>.

⁸ Perrault, *supra* note 3, at 149.

⁹ See Johnson et al., *supra* note 2.

¹⁰ Perrault, *supra* note 3, at 149.

¹¹ Solomon, *supra* note 7; Jena McGregor, *After Years of 'Glacial' Change, Women Now Hold More than 1 in 4 Corporate Board Seats*, WASH. POST (July 17, 2019, 8:01 AM), <https://www.washingtonpost.com/business/2019/07/17/after-years-glacial-change-women-now-hold-more-than-corporate-board-seats>.

¹² Sarah Coury, Jess Huang, Ankur Kumar, Sara Prince, Alexis Krivkovich & Lareina Yee, *Women in the Workplace 2020*, MCKINSEY & CO. (Sept. 30, 2020), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace>, at Exhibit 1.

¹³ S. 826, *supra* note 3, at § 1(a); Felix von Meyerinck, Alexandra Niessen-Ruenzi, Markus Schmid & Steven Davidoff Solomon, *As California Goes, So Goes the Nation? Board Gender Quotas and the Legislation of Non-Economic Values*, EUR. CORP. GOVERNANCE INST. (Jan. 20, 2021), <https://ssrn.com/abstract=3303798>; Johnson et

need to address *perceptions* of the status quo to accelerate faster.¹⁴ Because the move toward a balance of men and women on corporate boards will likely not happen in a reasonable amount of time without quotas, and because quotas are meaningless without government involvement, mandates, referred to by some as “‘feminization’ laws,”¹⁵ may be a necessary evil.

Even though California is often considered a state amiable to women’s empowerment, California actually had, prior to 2019, fewer women on boards than in other parts of the country.¹⁶ Approximately one in four Russell 3000 publicly traded companies with headquarters in California had zero women on the board prior to SB 826.¹⁷ The list included Apple and Facebook.¹⁸ This is due, in part, to the fact that California tried a softer approach in 2013.¹⁹ This “precatory resolution” was called Senate Concurrent Resolution 62, and it urged public companies in California to put more women on corporate boards.²⁰ The resolution, however, was not able to meet its goal of at least one woman on a five-person board of directors within three years, with the numbers of women increasing as the size of the board increased.²¹ While shareholder activism is a healthy and positive

al., *supra* note 2; *Corporate Boards: Strategies to Address Representation of Women Include Federal Disclosure Requirements*, U.S. GOV’T ACCOUNTABILITY OFF. (Dec. 2015), <https://www.gao.gov/assets/680/674008.pdf> [hereinafter *Strategies*]; *Boards Will Reach Gender Parity in 2055 at Current Pace*, EQUILAR BLOG (Jan. 31, 2017), <https://www.equilar.com/blogs/212-boards-will-reach-gender-parity-in-2055.html>; Teal N. Trujillo, *Do We Need to Secure a Place at the Table for Women? An Analysis of the Legality of California Law SB-826*, 45 J. LEGIS. 324, 333 (2019).

¹⁴ Coury et al., *supra* note 12, at 20.

¹⁵ de Beaufort & Summers, *supra* note 3, at 103.

¹⁶ Johnson et al., *supra* note 2 (claiming merely 15.5% of board seats in California are filled by women, whereas, the national average is 16.2% for the Russell 3000 and 19.8% for the Fortune 1000).

¹⁷ S. 826, *supra* note 3, at § 1; Johnson et al., *supra* note 2.

¹⁸ Johnson et al., *supra* note 2.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

way to create a change—and is perhaps more effective, lasting, and reaches beyond state borders—it cannot change the landscape as quickly as the mandate has.²²

In response, California implemented Senate Bill No. 826 (“SB 826”) in September 2018,²³ mandating that by the end of the 2019 calendar year, each subject corporation must have at least one female director on its board of directors.²⁴ By the end of 2021, subject corporations must have at least one female director for a four-person board, two female directors for a five-person board, or three female directors for a board of six or more directors.²⁵ For corporations unwilling to meet these conditions, the initial penalty is a fine of \$100,000; subsequent annual offenses will result in a fine of \$300,000.²⁶ For 2019, fines only applied if a woman was not on the board for “at least a portion of the year.”²⁷ At the time of the mandate, 761 publicly traded companies had California headquarters.²⁸ SB 826’s constitutionality has been called into question.²⁹ And as expected, lawsuits have already spawned from SB 826 and its potential to discriminate against men.³⁰

Though SB 826 is a quota, it does not require corporations to remove men from their current positions; rather, corporations may simply add women to their boards to meet the requirements.³¹ Quotas have problems,³² but quotas are sometimes necessary to compensate for

²² *Id.*

²³ S. 826, *supra* note 3.

²⁴ *Id.* (adding sections 301.3 and 2115.5 to the California Corporations Code).

²⁵ *Id.* (defining female as an individual who self-identifies her gender as a woman).

²⁶ *Id.*

²⁷ Johnson et al., *supra* note 2.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Jill Stewart, *Women Joining Corporate Boards in Record Numbers After Legislative Push*, FAIR WARNING (Feb. 16, 2021), <https://www.fairwarning.org/2021/02/women-joining-corporate-boards-in-record-numbers-after-legislative-push>.

³¹ Johnson et al., *supra* note 2.

³² *Id.*

historical wrongs with lingering consequences. The Supreme Court justified this logic in *Califano v. Webster* with the rationale that there has been longstanding disparate treatment of women in America.³³ Because the job market was not as accommodating to women as it was to men with the exception of the bottom tier of employment, the Court decided that tipping the scales toward women in this regard was justified.³⁴

This Note explores the genesis, impact, and public reception of California's Senate Bill 826 which mandated—and is currently mandating—that corporations increase the number of women on their boards.

II. BACKGROUND

Though many American business groups have been set against quotas³⁵ they are commonplace in several European countries including Norway, France, and Germany.³⁶ In Norway and France, forty percent of a board must be composed of females.³⁷ Norway's mandate was implemented in 2003 and required boards to meet the quota by 2008.³⁸ In Germany, the mandate is thirty percent.³⁹ In Spain, a directive for forty percent of boards to be female by 2015

³³ *Califano v. Webster*, 430 U.S. 313, 317–18 (1977); Lauren Kim, Note, *Mandating Women: Defending SB 826 and Female Quotas in the Corporate Workplace*, 53 LOYOLA L. REV. 685, 688 (2020).

³⁴ Kim, *supra* note 33, at 688.

³⁵ *Does Gender Diversity*, *supra* note 4.

³⁶ Johnson et al., *supra* note 2; Kim, *supra* note 33, at 686; *How to Deal with Board Gender Quotas*, THE ECONOMIST (Dec. 12, 2019), <https://www.economist.com/business/2019/12/12/how-to-deal-with-board-gender-quotas>; *Strategies*, *supra* note 13, at 6-7; de Beaufort & Summers, *supra* note 3, at 103; Felix von Meyerinck, Alexandra Niessen-Ruenzi, Markus Schmid & Steven Davidoff Solomon, *As California Goes, So Goes the Nation? Board Gender Quotas and Shareholders' Distaste of Government Interventions*, EUR. CORP. GOVERNANCE INST. (Sept. 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3303798 [hereinafter *Shareholders' Distaste*].

³⁷ Johnson et al., *supra* note 2; *Shareholders' Distaste*, *supra* note 36, at 2; de Beaufort & Summers, *supra* note 3, at 112.

³⁸ *Strategies*, *supra* note 13, at 7; Renée B. Adams & Patricia Funk, *Beyond the Glass Ceiling: Does Gender Matter?*, 58 MGMT. SCI. 219, 219 (2012); *Shareholders' Distaste*, *supra* note 36, at 2.

³⁹ Johnson et al., *supra* note 2; *see Shareholders' Distaste*, *supra* note 36, at 2.

was issued in 2007.⁴⁰ France mandated in 2010 that corporations had six years to have the country's boards reach forty percent female.⁴¹ Importantly, these mandates have resulted in significant improvements in gender diversity on corporate boards; however, below this level where the inclusion of women is not mandated, gender diversity on executive committees has been significantly slower to develop.⁴²

A. CASE HISTORY

This Note focuses on the psychological and sociological issues surrounding SB 826 and its potential to spread to other states, but this Section will briefly elucidate the legal aspect of the mandate. Though SB 826's constitutionality may be tenuous,⁴³ there are reasons from case law to believe the mandate has hope of surviving the Court.⁴⁴ The significant legislative history behind SB 826 leaves the mandate's fate in a place of uncertainty.⁴⁵

In the United States, sex-based discrimination met approval in the U.S. Supreme Court⁴⁶ until fifty years ago with the case *Reed v. Reed*.⁴⁷ Until 1971, the U.S. Supreme Court justified

⁴⁰ Trujillo, *supra* note 13, at 332; Simona Comi et al., *Note: Where Women Make a Difference: Gender Quotas and Firms' Performance in Three European Countries*, 73 ILR REV. 768, 770 (2020).

⁴¹ Adams & Funk, *supra* note 38, at 219; *see Shareholders' Distaste*, *supra* note 36, at 2.

⁴² *See de Beaufort & Summers*, *supra* note 3, at 113.

⁴³ *See Stewart M. Landefeld, Evelyn Cruz Sroufe, Allison C. Handy & Christopher Wassman, Accelerating Gender Diversity on Boards: Reviewing Legislative Action*, 28 CORP. GOV. ADVISOR 1, 3 (2020).

⁴⁴ *See Reed v. Reed*, 404 U.S. 71, 76–77 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Meland v. Padilla*, No. 2:19-cv-02288-JAM-AC, 2020 U.S. Dist. LEXIS 69114 (E.D. Cal. Apr. 20, 2020).

⁴⁵ *See Reed*, 404 U.S. 71, at 76–77 (overruling a state law giving preference to a father over a mother regarding deceased son's estate); *Frontiero*, 411 U.S. 677; *Meland*, No. 2:19-cv-02288-JAM-AC, 2020 U.S. Dist. LEXIS 69114; *Concilla*, *supra* note 7, at 623 (“...since its 1971 decision in *Reed v. Reed*, the Court has consistently overturned laws it found to be based on “fixed notions concerning the roles and abilities of males and females.”); *See, e.g., Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

⁴⁶ *Concilla*, *supra* note 7, at 606; *see Bradwell v. Illinois*, 83 U.S. 130, 139 (1872) (upholding an Illinois statute prohibiting women from practicing law).

⁴⁷ *See Reed*, 404 U.S. 71, 77 (invalidating an Idaho law giving preferential treatment to males over females in administering estates based on the Equal Protection Clause of the Fourteenth Amendment).

sex-based discrimination against women with invocations of “perceived biological differences” and definitions of women foremost as mothers and homemakers.⁴⁸ In *Reed*, the Court broadened the scope of the Fourteenth Amendment to encompass sex discrimination.⁴⁹ From there, the level of scrutiny for sex-based discrimination has continued to increase through the years.

In *Reed*, the Court ruled against an Idaho law giving men preference over women when deciding who would administer an estate.⁵⁰ Even though the Court claimed to be using rational basis review,⁵¹ the level of review applied was stricter. As a new interpretation of the Equal Protection Clause emerged, the Court had found a justification based in the Constitution for prohibiting sex-based actions by the state.⁵² *Reed* is a landmark case because it was the first time since the ratification of the Fourteenth Amendment, over a century prior, that the Court held that the Constitution prohibits sex-based discrimination.⁵³ The Court’s logic for showing that men should not be given preference over women could be applied to SB 826 to show that now women should not be given preference over men.

Two years after *Reed*, the Court reinforced its heightened standard of review for sex-based discrimination.⁵⁴ In *Frontiero v. Richardson*, the Court evaluated whether female service members’ dependency benefits could be treated differently than those of their male counterparts, or if that would violate the Fifth Amendment’s Due Process Clause.⁵⁵ Potentially considered unfortunate for

⁴⁸ Concilla, *supra* note 7, at 606.

⁴⁹ *Id.* at 607; *See Reed*, 404 U.S. 71, 76–77; Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 954 (2002).

⁵⁰ *Reed*, 404 U.S. 71 at 72–74 (“males must be preferred to females”).

⁵¹ *Id.*

⁵² Siegel, *She the People*, *supra* note 49, at 953–54.

⁵³ Reva B. Siegel, *Constitutional Culture, Social Movement Culture and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1336 n.39, 1377 (2006).

⁵⁴ *See Frontiero v. Richardson*, 411 U.S. 677, 690–91 (1973).

⁵⁵ *Id.*

SB 826, Justice Brennan, writing for the plurality, accepted ACLU director Ruth Bader Ginsburg's argument that this differential treatment did, in fact, violate due process because sex and race are both "immutable characteristic[s]."⁵⁶ This opinion, however, failed to become law.⁵⁷

Three years later, the equal protection case *Craig v. Boren* heightened the standard of review even further.⁵⁸ The case involved a different age for lawful alcohol consumption between men and women.⁵⁹ Ruth Bader Ginsburg argued that using gender to make a legal distinction was owed "close[] review[]." ⁶⁰ *Craig* was the first case to use the terminology "intermediate scrutiny"; ⁶¹ classifications based on gender subsequently became more suspicious to courts.

Then, in 1979, Ruth Bader Ginsburg argued before the Court in the case *Duren v. Missouri*.⁶² The significance of this case was the Court's finding that a law that exempted women from jury duty for domestic responsibilities led to fewer women serving on juries.⁶³ Ginsburg argued that exempting women from jury duty devalued their contributions to juries.⁶⁴ Ginsburg continued promoting equality in the workplace for women in *Ledbetter v. Goodyear Tire & Rubber Co.*; although dismissed for a statute of limitations issue, the case made the important point that

⁵⁶ *Id.* at 686; Siegel, *Constitutional Culture*, *supra* note 53, at 1371; Erin Blakemore, *Ruth Bader Ginsburg's Landmark Opinions on Women's Rights*, HISTORY (Sept. 18, 2020), <https://www.history.com/news/ruth-bader-ginsburgs-landmark-opinions-womens-rights-supreme-court>.

⁵⁷ Siegel, *She the People*, *supra* note 49, at 954.

⁵⁸ See *Craig v. Boren*, 429 U.S. 190, 192 (1976).

⁵⁹ *Id.* at 191–92.

⁶⁰ *More Perfect: Sex Appeal*, WNYC STUDIOS (Nov. 23, 2017), <https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/sex-appeal>.

⁶¹ *Craig*, 429 U.S. at 218.

⁶² See generally *Duren v. Missouri*, 439 U.S. 357 (1979).

⁶³ Blakemore, *supra* note 56.

⁶⁴ *Id.*

gender-based discrimination is a long process, often covert, and was built into the corporate machine.⁶⁵

The next analysis to consider is the treatment of race-based affirmative actions by the Court. This is relevant because a case has not yet been decided on the issue of affirmative action with respect to women.⁶⁶ In *Regents of the University of California v. Bakke*, the Court applied strict scrutiny to a university admissions racial quota.⁶⁷ *Bakke* marked the first time the Court used strict scrutiny for race classifications—the current standard still today.⁶⁸ The Court is clear on the application of strict scrutiny for race-based discrimination.⁶⁹ The distinction between race- and gender-based classifications initially arose because Justice Powell argued that there are “only two possible classifications” of gender.⁷⁰ This rationale would likely not hold in today’s Court, as there are more classifications of gender. Justice Powell argued that the intermediate standard for sex-based discrimination should continue to be used.⁷¹ Justice Powell additionally argued that racial classifications are particularly “odious”—distinct, therefore, from gender-based classifications.⁷²

Ruth Bader Ginsburg explored this distinction between race and sex when she asked in an amicus brief, “Why . . . did the framers of the 14th Amendment regard racial [discrimination] as

⁶⁵ *Id.*

⁶⁶ Concilla, *supra* note 7, at 608.

⁶⁷ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 290, 300 (1978).

⁶⁸ Rosalie Berger Levinson, *Gender-Based Affirmative Action and Reverse Gender Bias: Beyond Gratz, Parents Involved, and Ricci*, 34 HARV. J.L. & GENDER 1, 1–3 (2011).

⁶⁹ *Id.* at 1.

⁷⁰ *Bakke*, 438 U.S. at 302–03.

⁷¹ *Id.*

⁷² *Id.* at 303.

odious? Because a person's skin color bears no necessary relationship to ability. Similarly . . . a person's sex bears no necessary relationship to ability."⁷³

B. THE INTERNAL AFFAIRS DOCTRINE

An argument against SB 826 is that it reaches beyond California even though it is only a California mandate.⁷⁴ Though a corporation may be headquartered in California, many are incorporated in Delaware.⁷⁵ This triggers the internal affairs doctrine.⁷⁶ Through case law, the internal affairs doctrine developed under the commerce clause as a conflict-of-laws principle.⁷⁷ The internal affairs doctrine may be relevant to SB 826 because SB 826 regulates companies headquartered in California regardless of their location of incorporation. In contrast with the mandate, the internal affairs doctrine states that only a corporation's state of incorporation—often, Delaware—can regulate the corporation's "internal affairs."⁷⁸ Thus, the question becomes whether the gender makeup of the corporation's board is an internal or an external issue.

The reach of a corporation extends well beyond the formal boundaries of the corporation itself. In everything from advertising to hiring, corporations affect our lives. Corporations ultimately affect morality on a broad level: "Corporate boards are the collective keepers of Big Business' fiscal and moral compass, and yet they do not reflect our country [United States]. Rather, they remain largely populated by older white men."⁷⁹

⁷³ Serena Mayeri, *'When the Trouble Started': The Story of Frontiero v. Richardson*, WOMEN AND THE LAW STORIES, 70, (Feb. 4, 2011), <https://ssrn.com/abstract=1583064>; Blakemore, *supra* note 56.

⁷⁴ Johnson et al., *supra* note 2.

⁷⁵ *Id.*; Kim, *supra* note 33, at 700.

⁷⁶ Johnson et al., *supra* note 2.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Krista B. Lewellyn & Maureen I. Muller-Kahle, *The Corporate Board Glass Ceiling: The Role of Empowerment and Culture in Shaping Board Gender Diversity*, 165 J. BUS. ETHICS 329, 329 (2019) (quoting Mac-Dougall, 2017).

A corporate board is separate from a corporation, since the Sarbanes-Oxley Act,⁸⁰ and this creates a separation clear enough to distinguish SB 826 from traditional government meddling.⁸¹ Further, “whether women are represented at the highest levels of business is a matter that has consequences for all women and the broader public.”⁸² Specifically for women in executive positions, board diversity had a “trickle-down effect.”⁸³ One study investigated 1387 organizations and found that adding female board members does, in fact, lead to more females in executive positions.⁸⁴

So, which is it? Does California’s new board gender diversity statute infringe on an internal corporate affair or does it regulate an external matter? The reality is that there is truth to both perspectives. Who sits on a board of directors surely implicates internal corporate affairs. But . . . whether women are represented at the highest levels of business is a matter that has consequences for all women and the broader public. And in that sense, it is an external matter. Putting aside whether legislatively mandated gender quotas are good policy or can withstand constitutional muster, the point is that Delaware and California may reasonably hold different perspectives on whether a gender quota for corporate boards is subject to the internal affairs doctrine.⁸⁵

The idea of representatives from different sexes is constitutional and socially accepted as essential because we know that, when monumental decisions will impact all of us, all of us should feel represented. Why, then, would representation on corporate boards not be equally important? A corporation’s board votes to make decisions about the company’s direction, which ultimately impacts citizens. If full regulation seems overbroad, perhaps at least there should be a higher

⁸⁰ Upadhyay & del Carmen Triana, *supra* note 6, at 517–19.

⁸¹ See Mohsen Manesh, *The Contested Edges of Internal Affairs*, 87 TENN. L. REV. 251, 298 n.269 (2020).

⁸² *Id.* at 301. n.275-7300.777.

⁸³ Upadhyay & del Carmen Triana, *supra* note 6, at 517; Jill A. Gould, Carol T. Kulik & Shruti R. Sardeshmukh, *Trickle-Down Effect: The Impact of Female Board Members on Executive Gender Diversity*, 57 HUM. RES. MGMT. J. 931, 931 (2018), <https://doi.org/10.1002/hrm.21907>.

⁸⁴ Gould et al., *supra* note 83, at 931.

⁸⁵ Manesh, *supra* note 81, at 300.

standard for boards of corporations, such as Amazon, that are influential and reach a higher percentage of the population, in order to create gender diversity at the top faster than current trends allow.

The response from the office of SB 826's authors has been to draw an analogy between SB 826 and Section 2115 of the California Corporations Code ("Section 2115") to argue that SB 826 does not overreach into corporations' internal affairs.⁸⁶ Though Section 2115 does in fact impose requirements for non-California corporations, this argument may be vulnerable in that Section 2115 has points of contention legally which prevent a straightforward green-light analogy for SB 826.⁸⁷

C. THE EQUAL PROTECTION CLAUSE AND ARTICLE I OF THE CALIFORNIA CONSTITUTION

One of the primary criticisms of SB 826 is that employment decisions are based only on one classification of diversity, violating the U.S. Constitution's Fourteenth Amendment's Equal Protection Clause and California's Constitution.⁸⁸ The law must treat persons in similar situations equally.

The Equal Protection Clause of the Fourteenth Amendment guarantees that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."⁸⁹ The California Constitution states the same: "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."⁹⁰ This protection is about

⁸⁶ Johnson et al., *supra* note 2.

⁸⁷ *Id.*

⁸⁸ U.S. CONST. amend. XIV, § 1; CAL. CONST. art. 1, § 7; Trujillo, *supra* note 13, at 335.

⁸⁹ U.S. CONST. amend. XIV, § 1; Trujillo, *supra* note 13, at 335.

⁹⁰ CAL. CONST. art. 1, § 7.

individuals and not to be viewed holistically.⁹¹ Therefore, a protection, if given to one citizen, must also be given to another.⁹² All individuals must be given the same protection, or the protection cannot be said to be equal.⁹³

Article I of California's Constitution prohibits "disqualifying a person from employment on the basis of their sex."⁹⁴ Opponents of SB 826 claim that giving women board positions essentially disqualifies a more qualified man just because he is a man. However, proponents of SB 826 point out that rather, SB 826 gives corporations the option to keep the same number of men on the board, regardless of the addition of women.⁹⁵

Does mandating a quota prohibit a more qualified man from having protection to be in this position? Perhaps that is not the most pressing question. Through the Court's application of the Equal Protection Doctrine, a nuance has arisen between race and gender which may provide enough of a distinction for SB 826 to stand against the Equal Protection Clause.⁹⁶ According to a California legislative report, because of cases involving race-based affirmative action programs, "using race as a 'factor' to reap the benefits of diversity is permissible, but using a 'quota,' or anything like it, is not a narrowly tailored means."⁹⁷

⁹¹ Trujillo, *supra* note 13, at 335.

⁹² *Id.*; Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289–90 (1978) (Powell, J.) (plurality opinion).

⁹³ Trujillo, *supra* note 13, at 335.

⁹⁴ Johnson et al., *supra* note 2.

⁹⁵ S. 826, *supra* note 3.

⁹⁶ Concilla, *supra* note 7, at 606.

⁹⁷ *Corporations: Boards of Directors: Hearing on SB 826 (As Amended May 25, 2018) Before the State Assemb. Comm. on Judiciary*, 2017 Legis. Bill Hist. CA S.B. 826 (Cal. 2018) (citing Grutter v. Bollinger, 539 U.S. 306 (2003), Gratz v. Bollinger, 539 U.S. 244 (2003), and Bakke, 438 U.S. 265).

III. ISSUES SURROUNDING SB 826

Certainly, many arguments both supporting and contesting the mandate exist. Had the European implementation of the mandate been a pure success, the arguments would be more straightforward, but that has not been the case.⁹⁸ Other critics of the mandate have pointed to studies which show that the relationship between women on boards and “subsequent positive corporate outcomes” is perhaps only correlative and not causal.⁹⁹ The forthcoming sections will address both sides of the debates surrounding SB 826.

A. GENDER DIVERSITY IN LEADERSHIP IS ECONOMICALLY RATIONAL IN THE LONG TERM

Studies show that a board’s gender diversity yields mixed corporate “performance” and economic results.”¹⁰⁰ The economically rational argument suggests that whether diversity is expected to benefit or cost the organization ultimately determines whether the board will be diversified or not—apart from mandates.¹⁰¹ Rewards attached to board diversity include greater creativity and profitability stemming from more diverse sources of knowledge, experience, and values.¹⁰² Indeed, research has shown female directors to be more benevolent, less power-oriented, and less risk-averse than male directors, and these value orientations may be more appealing to stakeholders.¹⁰³ Conversely, risks attached to board diversity include difficulties in communicating and conflicts stemming from divergent perspectives.¹⁰⁴ A negative effect could be that a diversity of opinions makes decision-making less efficient and thus be more of a hindrance than a help to

⁹⁸ Johnson et al., *supra* note 2.

⁹⁹ *Id.*

¹⁰⁰ See Solomon, *supra* note 7; de Beaufort & Summers, *supra* note 3, at 102.

¹⁰¹ Upadhyay & del Carmen Triana, *supra* note 6, at 519.

¹⁰² See *id.*; Adams & Funk, *supra* note 38, at 219.

¹⁰³ Adams & Funk, *supra* note 38, at 219, 231.

¹⁰⁴ See *id.*; see also Carter et al., *supra* note 3, at 410.

financial goal achievement for less complex organizations.¹⁰⁵ Diversity can produce positive effects, no effects, or negative effects on overall productivity.¹⁰⁶

To elaborate on some of the positive effects, the differing opinions that may result from an increase in diversity may create a more thoughtful and socially-aware corporation.¹⁰⁷ Proponents of the economically rational perspective argue that diversity may be more important in organizations that are more organizationally complex.¹⁰⁸ In other words, heterogeneous ways of problem-solving are often more beneficial when organizational operations are multifaceted, meaning that financial gain incentivizes more complex corporations to create gender-diverse boards.¹⁰⁹

B. GENDER DIVERSITY IN LEADERSHIP HAS NON-ECONOMIC BENEFITS

Another issue surrounding SB 826 is how gender diversity affects a corporation overall. Gender diversity in corporate leadership improves a corporation's non-financial metrics.¹¹⁰ For example, the varying perspectives women share with the board, and thus to the company, foster innovation.¹¹¹

An organization's stakeholders are adversely affected by homogenous corporate boards, even if not fiscally, then ethically.¹¹² Among these adverse impacts are "less effective governance,

¹⁰⁵ Upadhyay & del Carmen Triana, *supra* note 6, at 520.

¹⁰⁶ Carter et al., *supra* note 3, at 410.

¹⁰⁷ *See id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *See* Johnson et al., *supra* note 2.

¹¹¹ *Id.*

¹¹² Lewellyn & Muller-Kahle, *supra* note 79, at 329.

ethical lapses such as securities fraud, and negative financial performance outcomes,” studies show.¹¹³

One major concern commonly held by SB 826 naysayers is that a position should always go to the most qualified person, regardless of gender. The only problem with this “most qualified” mentality is that those who determine who is most qualified will often apply their own personal definitions of most qualified, which grow from their own understanding of qualifications. Are we measuring “most qualified” from a biased origin?

Perhaps qualifications to lead should not be measured only with traditional leadership characteristics. Traditional leadership characteristics are often incongruous with typical female attributes.¹¹⁴ Stereotypical traits of women, such as being caring and nurturing, appear inconsistent with traits expected of people in leadership positions, such as being assertive and competitive. Women who display such agentic characteristics are perceived as not only violating female gender roles, but also not fitting people’s expectations of a good leader. Imagine a mystical land of all green-colored people who need to blend in with trees to catch food. There, the “most qualified” people are those whose skin most closely matches a tree’s leaves. However, in another land of blue people, the most advantageous skin tone is the one which most closely matches the water, so fishing is easy. If the goal is camouflage in hunting, a blue-colored person will never be “most qualified.” According to Eagly and Karau, women who occupy leadership roles are evaluated less favorably than men occupying those same roles. Additionally, behaviors that typify a leader are

¹¹³ *Id.*

¹¹⁴ See Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 *PSYCH. REV.* 573, 573 (2002); Stephan Braun, et al., *Think Manager—Think Male, Think Follower—Think Female: Gender Bias in Implicit Followership Theories*, 47 *J. APPLIED SOC. PSYCH.* 377, 377 (2017).

perceived less favorably when performed by a woman as opposed to a man.¹¹⁵ As one vice president of a consumer products company noted, “I had to learn to offer opinions in a way that they could be heard because I wasn’t necessarily given the right to have an opinion.”¹¹⁶ Importantly, men are more likely than women to rate women as lower in agentic features.¹¹⁷

However, perhaps characteristics more commonly attributed to women, such as empathy and attentiveness, would create a more fruitful mix in a board.¹¹⁸ Including women on boards improves performance, and without legislative action, achievement of diversity would take too long.¹¹⁹ We want to choose the “most qualified” directors, but how many women have we excluded from the pool of “most qualified” applicants by not dismantling barriers to entry from the start?

C. CHANGE IS HAPPENING BUT TOO SLOWLY WITHOUT A MANDATE

Gender-based mandates break catch-22 loops of male governance created in patriarchal society. Kathy Higgins Victor, who in 1999 was the only woman on Best Buy’s board of directors, described the rate of increase in the number of female directors over the prior two decades as happening at a “glacial pace.”¹²⁰ Though that pace has increased greatly in recent years—likely because of the push started by SB 826 and continued with investors and the media—it hovered at just sixteen percent for several years and then slowly crawled up to around one in four.¹²¹

¹¹⁵ Eagly & Karau, *supra* note 114, at 573; Braun et al., *supra* note 114, at 379.

¹¹⁶ Belle Rose Ragins, Bickley Townsend & Mary Mattis, *Gender Gap in the Executive Suite: CEOs and Female Executives Report on Breaking the Glass Ceiling*, 12 ACAD. MGMT. EXEC. 28, 30 (1998).

¹¹⁷ Tanja Hentschel, Madeline E. Heilman & Claudia V. Peus, *The Multiple Dimensions of Gender Stereotypes: A Current Look at Men’s and Women’s Characterizations of Others and Themselves*, 10 FRONTIERS PSYCH. 1, 12 (2019).

¹¹⁸ See de Beaufort & Summers, *supra* note 3, at 107.

¹¹⁹ Landefeld et al., *supra* note 43, at 2.

¹²⁰ McGregor, *supra* note 11.

¹²¹ *Id.* (citing data from ISS Analytics).

Research shows that change is not happening fast enough, though institutions and some parts of Europe have had moderate success without a mandate.¹²² SB 826 is far from the only externality pushing for more women to be on corporate boards.¹²³ Institutional investors, for one, have made significant efforts to increase gender diversity in leadership.¹²⁴ For example, the largest public pension fund as well as the largest teachers' retirement fund in the United States—both of which happen to be in California—suggested that more women should be on the boards of those companies in which the funds invest.¹²⁵ Additionally, BlackRock, the world's largest asset management company, created a “proxy voting guideline” which proactively expects—barring a credible explanation—every board to include, at minimum, two females.¹²⁶

Other countries, such as the United Kingdom, have avoided implementing quota systems, deferring to the companies themselves to increase the diversity of their corporate boards.¹²⁷ These individual initiatives, however, have been met with mixed success.¹²⁸ In the United Kingdom, for example, the number of women on corporate boards has increased, but not as quickly as originally thought.¹²⁹ The Lord Davies Report, which published findings on the representation of women on

¹²² See Lord Davies of Abersoch, *Women on Boards: Davies Review Annual Report 2015*, 1, 4 (Mar. 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/415454/bis-15-134-women-on-boards-2015-report.pdf.

¹²³ See Johnson et al., *supra* note 2; Equilar *GDI: One-Third of New Board Members Were Women in Q1 2018*, EQUILAR BLOG (May 9, 2018), <https://www.equilar.com/press-releases/101-equilar-gender-diversity-index-q1-2018.html>.

¹²⁴ Johnson et al., *supra* note 2; see Joseph A. Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826* 9, (Stanford L. Sch. & the Rock Center for Corp. Governance, Working Paper No. 232, 2018), <https://www-cdn.law.stanford.edu/wp-content/uploads/2018/09/SSRN-id3248791.pdf>.

¹²⁵ *Id.*

¹²⁶ Grundfest, *supra* note 124, at 10 n.45.

¹²⁷ Davies, *supra* note 122, at 4.

¹²⁸ See *id.*

¹²⁹ See *id.*

FTSE 100 boards, found that women made up 23.5% of board membership, still short of the goal of 25%.¹³⁰

Societal pressure also plays a role in accelerating board diversity. Even though a corporation headquartered in California could possibly sue under the Equal Protection Clause, “it is increasingly unlikely that the board of directors of a publicly held corporation would choose to be identified as opposing a gender equality requirement.”¹³¹ But is all this external stimulus enough to move boards to a more balanced gender dynamic quickly enough? Evidence suggests that it is not.¹³²

Without a mandate in more states, the selection process for board members will likely continue to be predominantly circular, meaning the current demographic composition of predominantly men would remain.¹³³ One reason for this is that male directors’ selection bias influences them to choose other male board directors.¹³⁴ Females that are selected for board positions often fail to support other women trying to climb the corporate success ladder—a phenomenon referred to as the “queen bee phenomenon.”¹³⁵

Other states have now begun to emulate California’s mandate, for example Washington with the passage of Senate Bill 6037.¹³⁶ As of May 2020, at least eleven states had enacted or were

¹³⁰ *Id.* at 2.

¹³¹ Landefeld, *supra* note 43, at 4.

¹³² See Upadhyay & del Carmen Triana, *supra* note 6, at 517.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Braun et al., *supra* note 114, at 377.

¹³⁶ Landefeld, *supra* note 43, at 1; S. 6037, 66th Leg., 2020 Reg. Sess. (Wash. 2020).

considering board diversity legislation.¹³⁷ However, California remained unique in its push to mandate a minimum number of women on each corporate board of directors.¹³⁸

Another encouraging fact is that only one firm in the S&P 500 still has not added at least one woman to its board.¹³⁹ This contrasts with the situation in 2009, when approximately one in ten firms in the S&P 500 boards had zero women.¹⁴⁰ However, while this certainly represents a victory for women's forward progress, this needs to be put into perspective by noting that, as of last year, one in ten firms in the Russell 3000 index still has no women on its board.¹⁴¹

Conversely, it is important to recognize that the mandate itself, though well-intentioned, may undermine women's ability to solve this problem through the continued achievements that have already been shown. The idea of a government hero coming to save the day may perpetuate the same stereotype underlying the lack of women on corporate boards. The U.S. Court of Appeals for the Ninth Circuit recognized that “[t]he notion that women need help in every business and profession is as pernicious and offensive as its converse, that women ought to be excluded from all enterprises because their place is in the home.”¹⁴²

The term “glass ceiling” is used to describe the phenomenon of women only advancing to a certain point in a corporation because of bias and attitudes toward women in leadership.¹⁴³ Corporate executives and women themselves have traditionally adopted very different

¹³⁷ Hatcher & Latham, *supra* note 2.

¹³⁸ *Id.*

¹³⁹ McGregor, *supra* note 11.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Associated Gen. Contractors of Cal., Inc. v. City and County of San Francisco*, 813 F.2d 922, 941 (9th Cir. 1987).

¹⁴³ Ragins et al., *supra* note 116, at 28.

perspectives for why the glass ceiling has been slow to break, thereby prohibiting women from advancing.¹⁴⁴ More of these reasons are explored below.

D. CORPORATE CULTURES AND BIASES CAN EXCLUDE WOMEN FROM BOARD APPOINTMENTS

The gender composition of corporate boards is driven by social factors influenced by the decisions and the biases of powerful decision makers. Chief executive officers (“CEOs”) often pick whomever they want. Even if these decisions are subconscious, people often select others similar to them.¹⁴⁵ Without more women in upper leadership roles, the cycle will likely continue.

On one side of the debate are those who argue that the problem lies with women themselves, who simply have not had enough experience to advance to higher levels of leadership within a company.¹⁴⁶ This is referred to as the “pipeline perspective”: in one study, 64% of CEOs believed that women had “not been in the pipeline long enough” compared to only 29% of the women themselves.¹⁴⁷ There is evidence to support that not enough women are in upper leadership positions from which to choose; women continue to be underrepresented at all leadership levels in U.S. corporations.¹⁴⁸ Though the number of female CEOs doubled in the decade after 2007, this was an increase from 2.8% to 5.4%.¹⁴⁹ Relatedly, one positive impact of SB 826 is that perhaps a trickle-down effect would cause recruiters to seek out more women for other levels of corporate

¹⁴⁴ *Id.*

¹⁴⁵ Upadhyay & del Carmen Triana, *supra* note 6, at 521.

¹⁴⁶ Ragins et al., *supra* note 116, at 34.

¹⁴⁷ *Id.*

¹⁴⁸ Trujillo, *supra* note 13, at 325.

¹⁴⁹ *Id.*; Drew Desilver, *Few Women Lead Large U.S. Companies, Despite Modest Gains Over Past Decade*, PEW RSCH. CTR. fig.1 (Sept. 26, 2018), <https://www.pewresearch.org/fact-tank/2018/09/26/few-women-lead-large-u-s-companies-despite-modest-gains-over-past-decade> (“In 2017, 27 companies in the S&P 500 (or 5.4%) had women CEOs, up from 14 (2.8%) in 2007.”).

leadership.¹⁵⁰ Alternatively, however, some wonder if SB 826 will create red tape and otherwise unnecessary work for recruiters looking to fill board seats.¹⁵¹ Some worry that finding candidates for these positions who meet the gender quota will be an undue burden on corporations.¹⁵²

Though women finish college more often than men, they tend to work in “middle-skill occupations” with minimal training requirements.¹⁵³ A study by McKinsey shows that the number of women in leadership positions decreases as seniority increases,¹⁵⁴ and only one in five C-level—corporate or executive level—employees is a woman.¹⁵⁵

Women point to the corporate culture as the reason for their lack of success in breaking the glass ceiling, highlighting variables such as men’s fears of reverse discrimination, exclusion by male peers, and gender bias.¹⁵⁶ Men serving on corporate boards may need to be aware they may have subconscious biases.

Having a mandate will allow more women to serve as members of corporate boards of directors, but it will not address issues of how they can be treated as equals to the men who already make up these boards. Even if explicit biases are not evident, implicit biases will be. A mandate will also not address the fact that some women board members do not advocate the upward advancement of other women.

¹⁵⁰ Johnson et al., *supra* note 2.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Kim, *supra* note 33, at 686.

¹⁵⁴ See Alexis Krivkovich, Kenley Robinson, Irina Starikova, Rachel Valentino & Lareina Yee, *Women in the Workplace 2017*, MCKINSEY & CO. 1, 3 ex.1 (Oct. 2017) <https://www.mckinsey.com/~/media/McKinsey/Industries/Technology%20Media%20and%20Telecommunications/High%20Tech/Our%20Insights/Women%20in%20the%20Workplace%202017/Women-in-the-Workplace-2017-v2.ashx>.

¹⁵⁵ *See id.*

¹⁵⁶ Ragins et al., *supra* note 116, at 34–36, 38.

To address these and related issues, several strategies are necessary. First, training is needed to help current board members, mostly male, overcome their implicit biases against female board members. The first step toward this is recognizing the existence of these biases and the effect that they have on the perceptions and treatment of female colleagues. A second step toward accomplishing this goal might be implementing perspective-taking within diversity training. For some male CEOs and board members, the first time they understand the obstacles women have faced advancing in the corporate world is when they have daughters or friends who must navigate these difficult situations.¹⁵⁷ Rather than waiting for these circumstances, companies can implement perspective training workshops whereby individuals are taught to imagine the experiences of diverse others. This process can facilitate the recategorization process by which women as members of the out-group come to be viewed as in-group members.

Second, mentors are critical for the success of both men and women advancing through the corporate ranks of a company.¹⁵⁸ Particularly for women, mentors can help them navigate situations in which they feel ostracized, ignored, or stigmatized simply because they are women. Although men can and do serve as important mentors to women, female mentors are particularly important, because female mentors are familiar with the struggles involved in advancing to positions of senior leadership and can empathize with mentees wanting to break the glass ceiling.¹⁵⁹ However, the lack of a female presence at higher executive levels has limited the number

¹⁵⁷ See Ragins et al., *supra* note 116, at 39.

¹⁵⁸ *Id.* at 32.

¹⁵⁹ *Id.* at 28.

of women who are available to serve in this capacity, highlighting the fact that the glass ceiling remains an impediment to women in many corporations.¹⁶⁰

Separately, the mandate may create dissonance within corporations.¹⁶¹ The presence of women on traditionally male boards immediately casts them as members of an out-group because they differ from the existing group members on a salient attribute—gender.¹⁶² Many male board members may desire to maintain the status quo, leading to a selection bias whereby current male leaders tend to promote employees who are similar to them.¹⁶³ The very presence of women in positions traditionally held by men may create an unpleasant arousal state known as dissonance that people are motivated to reduce.¹⁶⁴ To be relegated to this out-group status interferes with effective group decision-making, so male board members must find a way to recategorize women as members of the in-group.¹⁶⁵ To do this, board members who are men can change their attitudes toward women on the board.¹⁶⁶ One way in which men may do this is to focus on ways in which the women are similar to them, such as shared experiences or similar educational backgrounds.¹⁶⁷ People relate to one another through unit bonds.¹⁶⁸ While gender commonalities can be a basis for this unit bond, so can other commonalities such as sharing an alma mater or serving on another

¹⁶⁰ *Id.*

¹⁶¹ David H. Zhu, Wei Shen & Amy J. Hillman, *Recategorization into the In-Group: The Appointment of Demographically Different New Directors and Their Subsequent Positions on Corporate Boards*, 59 ADMIN. SCI. Q. 240, 244 (2014).

¹⁶² *Id.* at 245.

¹⁶³ Braun et al., *supra* note 114, at 377.

¹⁶⁴ Zhu et al., *supra* note 161, at 244–45.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*; see also Muhaiminul Islam & Sultana Nasira, *Attitude Towards Women Leadership In Organizations: A Study on Government Sector of Bangladesh*, IOSR J. BUS. & MGMT. 112, 112 (2016).

¹⁶⁷ Braun et al., *supra* note 114, at 383–84; see Islam & Nasira, *supra* note 166, at 112, 126.

¹⁶⁸ F. HEIDER, THE PSYCHOLOGY OF INTERPERSONAL RELATIONS 17 (1958).

board together.¹⁶⁹ While gender alone may create an “out-group,” it is possible to form new “in-groups” through shared experiences.¹⁷⁰ Research on group dynamics suggests that once points of similarity are identified, notable differences such as gender are minimized.¹⁷¹

E. IMPRESSION MANAGEMENT IS AN INHIBITOR

Impression management, also known as self-presentation, refers to the process by which people attempt to make intended impressions on others. Although the desired impressions are most often favorable, they could also be unfavorable if negative impressions allow an individual to achieve desired outcomes.¹⁷² Jones and Pittman described five self-presentational strategies in which people engage, each accompanied by a specific goal: (1) ingratiation (the goal is to be liked); (2) self-promotion (the goal is to be perceived as competent); (3) exemplification (the goal is to be perceived as moral); (4) intimidation (the goal is to be perceived as threatening); (5) and supplication (the goal is to be perceived as helpless).¹⁷³ Of most relevance to women serving on corporate boards is the self-presentational strategy of self-promotion. To be a leader, one must act like a leader, and women have consistently had a much more difficult time than men being perceived as leaders.¹⁷⁴ Characteristics that lead to favorable impressions of men vying for a board

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See Zhu, *supra* note 161, at 240, 262.

¹⁷² Mark R. Leary & Robin M. Kowalski, *Impression Management: A Literature Review and Two-Component Model*, 107 PSYCH. BULL. 34, 41 (1990).

¹⁷³ Edward E. Jones & Thane S. Pittman, *Toward a General Theory of Strategic Self-Presentation*, in 1 PSYCHOLOGICAL PERSPECTIVES ON THE SELF 231 (Jerry Suls ed., 1982).

¹⁷⁴ See Braun et al., *supra* note 114, at 377; Bobby J. Calder, *An Attribution Theory of Leadership*, in NEW DIRECTIONS IN ORGANIZATIONAL BEHAVIOR 179, 188–89 (Barry M. Staw & Gerald R. Salancik eds., 1977).

position—for example, assertiveness and decisiveness—are evaluated differently when exercised in by women, leading to unfavorable impressions of those women.¹⁷⁵

Evaluated in terms of the role congruity theory of prejudice, women who engage in self-promotion to be perceived as a leader are evaluated more negatively than men who engage in the same behaviors. Researchers have argued that self-promotion among women, but not men, seeking leadership positions triggers implicit biases among supervisors that lead to more negative outcomes for women. The explanation is that self-promotion among women signals overconfidence, which is perceived to be incompatible with femininity and the female role.¹⁷⁶ “Research supports role congruity theory by demonstrating that women in leadership positions often face a double bind, in that they must present themselves as agentic (i.e., competent, assertive, confident) if they want to be perceived as leader-like, but they must also present themselves as communal (i.e., modest and submissive) or risk a backlash for not conforming to prescribed gender roles.”¹⁷⁷

Corporations, too, engage in impression management,¹⁷⁸ referred to as “organizational impression management.”¹⁷⁹ Few, if any, companies want to be perceived as blatantly discriminatory by excluding women from their boards of directors. The question is whether these companies are simply projecting an image of gender inclusivity or actively seeking to make sure that women are respected, integral board members whose opinions are as valued as those of any

¹⁷⁵ De Beaufort & Summers, *supra* note 3, at 104.

¹⁷⁶ See Phillip W. Braddy et al., *Gender Bias Still Plagues the Workplace: Looking at Derailment Risk and Performance with Self-Other Ratings*, 45 *GRP. & ORG. MGMT.* 315, 317, 319 (2020).

¹⁷⁷ *Id.* at 319.

¹⁷⁸ See Edward H. Chang et al., *Diversity Thresholds: How Social Norms, Visibility, and Scrutiny Relate to Group Composition*, 62 *ACAD. MGMT. J.* 144, 144 (2019).

¹⁷⁹ See *id.*

other board member. Research suggests that the tendency may be toward the former: S&P 500 boards were unlikely to continue to add women to their boards once they had met the social norm of two women, a phenomenon referred to as “tokenism,” meaning that the need for the “token” woman on the board should actually be two women.¹⁸⁰ This practice was particularly salient among companies that were highly visible in the media, highlighting the companies’ impression management concerns.¹⁸¹ If corporations are considering themselves to have met the social norm once only two women are placed on boards, that is further evidence that a mandate is necessary to move the state and hopefully the nation beyond this artificial hurdle. Another problem is that many women do not want to be the “token” female on any board. Women do not want to have their opinions dismissed just because men feel they have already met their duty by allowing women to be on the board.

Importantly, organizations use the same impression management strategies as individuals. One paper divided organizational impression management techniques into two categories: assertive and defensive.¹⁸² Assertive organizational impression management strategies are proactive and designed to promote a positive image of a company.¹⁸³ They include the positive strategies of ingratiation, organizational promotion, exemplification, and supplication. Defense strategies, on the other hand, emerge in response to self-presentational predicaments that threaten a company’s positive image and include apologies and restitution.¹⁸⁴ One study examined the use

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² A. Amin Mohamed, William L. Gardner & Joseph G.P. Paolillo, *A Taxonomy of Organizational Impression Management Techniques*, 7 *ADVANCES IN COMPETITIVENESS RSCH.* 108, 111 (1999).

¹⁸³ *Id.*

¹⁸⁴ Jones & Pitman, *supra* note 173; Leon Windscheid, Lynn Bowes-Sperry, Karsten Jonsen & Michèle Morner, *Managing Organizational Gender Diversity Images: A Content Analysis of German Corporate Websites*, 152 *J. BUS. ETHICS.* 997, 999 (2018).

of these tactics on corporate websites as a means of highlighting gender diversity to potential applicants.¹⁸⁵ Applied to corporate board diversity, ingratiation at the organizational level involves highlighting a company's role in mentoring, networking, and providing work-life balance. Organizational promotion involves touting gender diversity within the company, which would be expected to be more salient among more visible companies. Exemplification reflects the organization's attempt to highlight its normative culture of diversity as a social responsibility. Finally, supplication is the company's highlighting that the organization's success relies on the diversity of its board and employees.¹⁸⁶

F. WOMEN MAY FEEL INTRAPERSONAL BARRIERS TO ACCEPTING BOARD APPOINTMENTS

One reason for the lack of women on corporate boards may be the lack of role models in these positions.¹⁸⁷ Another theory is that some female directors, termed "Queen Bees," are purposely blocking the promotion of other women, but this theory has been found to have little support in empirical economics literature.¹⁸⁸ Alternatively, many women are plagued by the imposter syndrome: worrying that if they rise to senior leadership roles, others will find out they are actually not competent to do the job.¹⁸⁹ Notably, for some women, the lack of confidence they feel "appears not to be due [to] a feeling of personal inadequacy, but rather a lack of confidence in their companies' corporate culture in supporting their career progression"¹⁹⁰ In a survey of

¹⁸⁵ Windscheid et al., *supra* note 184, at 997.

¹⁸⁶ *Id.* at 1006.

¹⁸⁷ Carol Stewart, *How Diverse Is Your Pipeline? Developing the Talent Pipeline for Women and Black and Ethnic Minority Employees*, 48 *INDUST. & COM. TRAINING* 61, 63 (2016).

¹⁸⁸ Luca Flabbi, Mario Macis, Andrea Moro, & Fabiano Schivardi, *Do Female Executives Make a Difference? The Impact of Female Leadership on Gender Gaps and Firm Performance*, 129 *ECON. J.* 2390, 2419 (2019).

¹⁸⁹ De Beaufort & Summers, *supra* note 3, at 109.

¹⁹⁰ *Id.*

2242 individuals in five European countries, 42% of men reported that they were likely to reach a top executive position, compared to only 25% of women, even though approximately equal numbers of men and women seek out these positions.¹⁹¹

Some women prefer not to associate certain character qualities and behaviors with their gender and would rather focus on the fact that each person is unique and offers a distinctive set of skills.¹⁹² Additionally, and perhaps relatedly, the executive search firm Heidrick & Struggles, in a 2011 study, found that “most of women would find it insulting to be approached for a board seat on the sole or primary basis of gender.”¹⁹³

IV. SURVEY ON PERCEPTIONS OF WOMEN AND CORPORATE BOARDS

In a study with over 250 participants that examined men’s and women’s perceptions of women on corporate boards, researchers found that women were more likely than men to believe others held negative perceptions of women on corporate boards.¹⁹⁴ Perhaps this is one explanation for why challenges to SB 826 have been brought only by men. Specifically, relative to men, women are significantly more likely to think that people believe women are less qualified or less suited to be corporate board members.¹⁹⁵ People (1) believe women would not want to serve on corporate boards because doing so conflicts with traditional views of femininity; (2) believe men on a corporate board would treat women on that board worse—as outsiders—because of their gender;

¹⁹¹ Sandrine Devillard, Sandra Sancier-Sultan, Alix de Zelicourt & Cécile Kossoff, *Women Matter 2016 Reinventing the Workplace to Unlock the Potential of Gender Diversity*, MCKINSEY & CO. 1, 21 ex.7 (Dec. 2016), <https://www.mckinsey.com/~media/mckinsey/featured%20insights/women%20matter/reinventing%20the%20workplace%20for%20greater%20gender%20diversity/women-matter-2016-reinventing-the-workplace-to-unlock-the-potential-of-gender-diversity.ashx>.

¹⁹² de Beaufort & Summers, *supra* note 3, at 103–04.

¹⁹³ *Id.*

¹⁹⁴ *See infra* Figure 1, Figure 2, Figure 3.

¹⁹⁵ *Id.*

(3) believe women alter a corporate group dynamic in a negative way; (4) perceive a corporation more negatively if women are on the board; and (5) believe adding more women to a corporate board would be difficult for people to accept.¹⁹⁶

No significant gender differences were found when rating their agreement/disagreement with the following items: (1) people believe women would not want to serve on corporate boards because of women's lifestyle preferences, such as choosing to stay home with children; (2) people believe women's fears of being judged more critically because of their gender would lead them not to want to serve on corporate boards; and (3) people have a conscious or subconscious bias toward selecting men over women when it comes to qualifications for corporate boards.¹⁹⁷ Of course, it is possible that both men and women have exactly the same views of women on corporate boards, but it also seems possible that—even on a completely anonymous survey—respondents feel a need to portray themselves as not holding biases themselves despite acknowledging that such biases clearly exist in the world. When asked the extent to which they personally agreed or disagreed with each of the above statements, no significant differences were observed between male and female respondents.¹⁹⁸

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*



Figure 1: *Sporrer & Kowalski findings on beliefs about barriers to women on corporate boards*

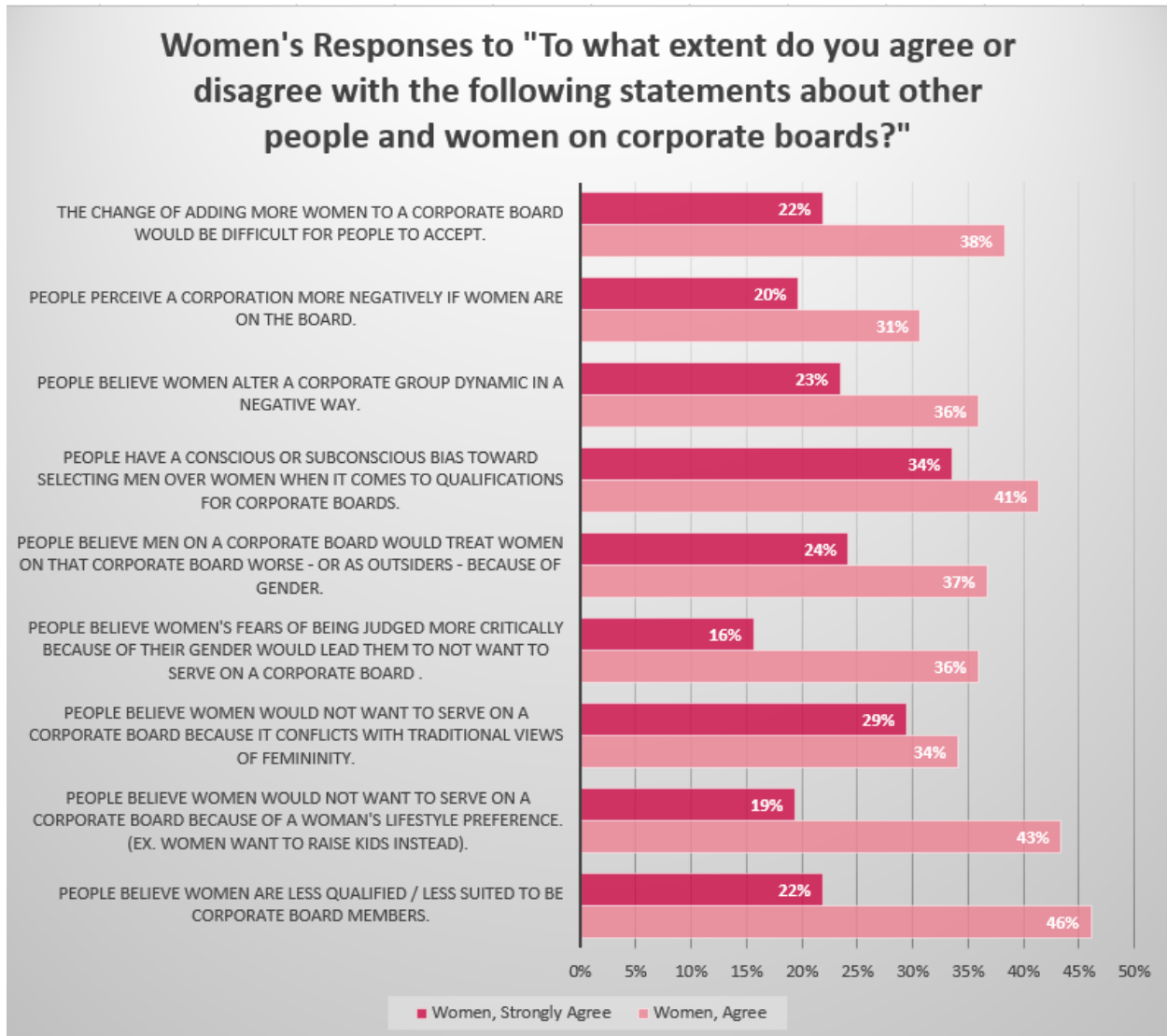


Figure 2: *Sporrer & Kowalski. Responses from women about barriers for women on corporate boards*

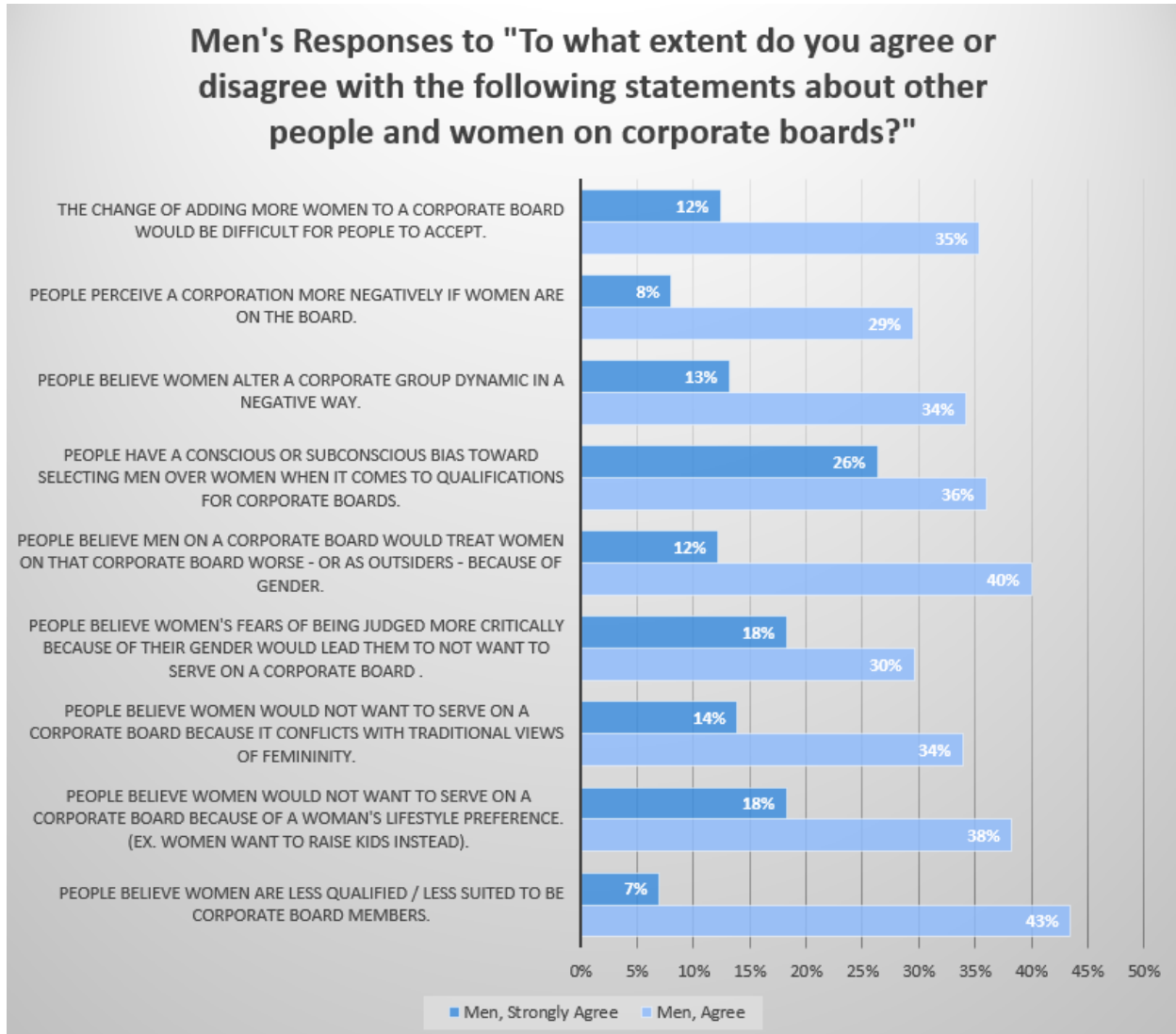


Figure 3: *Sporrer & Kowalski. Responses from men about barriers for women on corporate boards*

V. PROPOSALS

Creative solutions should always be welcome when it comes to finding solutions for imbalances in gender, race, or sex. Although SB 826 has been perceived as radical by some, the

intentions behind the mandate are good¹⁹⁹ and have sparked many non-mandated movements; for example, companies are now more commonly including a diversity rider in deal term sheets to encourage diversity from the outset.

SB 826's impact has been powerful. With at least eleven states considering some form of California's mandate, the mandate's intention has spread. Some states are proposing sunshine laws requiring disclosure of the number of women on boards and resolutions to encourage corporations to diversify their boards.²⁰⁰ Sunshine laws facilitate transparency by making disclosures mandatory.²⁰¹

Challenges to the mandate are currently present in the judicial system. Judicial Watch, a conservative activist group, for one, has raised issue with SB 826.²⁰² This case could be settled within 2021.²⁰³ A company shareholder separately brought a lawsuit contesting SB 826 through the Pacific Legal Foundation, but the case was dismissed at the trial level.²⁰⁴ That case, however, is next heading to the Ninth Circuit Court of Appeals.²⁰⁵ Both Judicial Watch and the Pacific Legal Foundation claim that SB 826 is unconstitutional because it forces companies to choose board members based on gender, which they consider gender discrimination.²⁰⁶

At this point, however, it appears as if the idea of placing more women on boards has gained enough traction that the constitutionality of SB 826 is a fairly moot point according to

¹⁹⁹ See Concilla, *supra* note 7, at 630.

²⁰⁰ J. Stewart, *supra* note 30.

²⁰¹ Hatcher & Latham, *supra* note 2; Adam Hayes, *Sunshine Laws*, INVESTOPEDIA (Feb. 24, 2021), <https://www.investopedia.com/terms/s/sunshinelaws.asp>.

²⁰² Hatcher & Latham, *supra* note 2.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

leading experts.²⁰⁷ Although SB 826's constitutionality has been challenged, balancing gender representation at the corporate board level is of high public interest, and companies would benefit from staying ahead of the mandate even if it were later overturned.²⁰⁸

There are many examples of this forward progress.²⁰⁹ One is with Nasdaq.²¹⁰ In December 2020, Nasdaq decided to require over 3000 firms listed on its exchange to “have at least one woman or member of an underrepresented minority on their boards, within two years—or explain why not.”²¹¹ Nearly immediately following this announcement, BlackRock Inc., a multinational investment firm, announced it would “vote against directors who fail to increase gender and ethnic diversity on their boards.”²¹²

“Other ecosystems are doing it now, with BlackRock saying, ‘We are going to vote against board members who don’t understand diversity,’” says Coco Brown, founder and CEO of Athena Alliance, which coaches senior-level women on moving higher in corporations and into boardrooms. Brown says, “What’s happened is a movement not just led by women, but one that has taken hold within the power system.”²¹³

In an ideal world, this mandate would not exist. Women would have an equal opportunity to rise to positions of corporate governance. To allow more women to take upper management roles requires changes in the structure of the work environment. These changes include (1) making work more sustainable for mothers; (2) increasing flexibility in scheduling and strengthening the work-life balance line; and (3) actively working to minimize gender bias.²¹⁴ Given that we are not

²⁰⁷ *Id.*

²⁰⁸ Johnson et al., *supra* note 2.

²⁰⁹ See J. Stewart, *supra* note 30.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 3.

²¹³ *Id.*

²¹⁴ Coury et al., *supra* note 12.

living in an ideal world, mandating the narrowing of the gender gap may be the best way to counter-balance gender diversity not only on corporate boards but in all aspects of corporate leadership. After all, if people are more likely to believe an applicant is qualified because the applicant is similar to them on one or more dimensions, would it not make sense to balance leadership at the top to come closer to optimizing balance throughout corporations? Evidence shows that a mixed style of leadership is the solution to increasing gender diversity in corporations.²¹⁵

VI. CONCLUSION

Even though challengers to SB 826 raise valid arguments especially in regards to its constitutionality, the mandate has shed light on an imbalance which has not yet been resolved through the ordinary course of business. Without intervention, the cycle of men in leadership positions being appointed to board seats and then others viewing all-male boards as the status quo, will continue. The beliefs held by many about the limitations women in leadership face compared to men—even though disproven by numerous studies—is cause for alarm. This falsely held belief that others may perceive women in power less positively than men is holding women back.

A mandate is clearly an inferior solution to an organic, systemic movement towards gender-balanced boards. But without governmental requirements, corporations are slow to change despite the evidence showing women in leadership positively affect the bottom line.

Understanding the factors that contribute to this endemic problem will help us move away from the old system of business, but only if we actively work to make these changes. Understanding the factors that contribute to this endemic problem will help us move away from

²¹⁵ de Beaufort & Summers, *supra* note 3, at 102.

the old system of business, but only if we actively work to make these changes. That needs to start by each of us assessing our own biases and beliefs about women in positions of power.