RECONSIDERING THE REMEDY OF GENDER QUOTAS

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When newly elected Canadian Prime Minister Justin Trudeau was asked by surprised reporters why he appointed women as 50% of his cabinet, he responded simply, "Because it's 2015."[1] Just because. Because it's time. In fact, he implied, it is long past time for having to justify including women as one-half of the power structure when women constitute one-half of the population. American presidential candidate Hillary Clinton similarly aimed to appoint a cabinet of half women if elected.[2] At the global level, the United Nations' initiative "Planet 50-50 by 2030" challenges governments to commit to putting women in 50% of positions of economic and political power, because they are 50% of the planet.[3] All these efforts demonstrate Trudeau's point that it's time for meaningful change in shared governance through a method as simple as selecting women for half of all positions of power.[4]

This same idea of gender parity applies in everyday governance at all levels. It is long past time for justifying the need to reform American institutions that exclude women from the power structure. Rather than stumbling along the path of continued sex discrimination by the ineffective application of judicial Band-Aids to systemic problems, it is time for alteration of the power structure itself. It's time for the law to endorse the equal representation of women in all power venues in order to remedy—permanently—longstanding, resistant systemic sex discrimination.[5] And the way to achieve this goal of gender parity might be quotas.

"Quota" is a dirty word. In U.S. law and society, we are "quota-phobic," vehemently resisting an idea alleged to be based on political correctness in place of merit.[6] Quotas have been used in affirmative-action remedies to integrate schools racially in proportion to the community or to mandate a set percentage of government contractors of minority status.[7] However, quotas

have also been overturned by the Supreme Court as unconstitutionally discriminatory in and of themselves for operating on the basis of a suspect factor like race.[8] As Chief Justice Roberts famously said in striking down a school racial quota, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[9]

Quotas, however, are much more accepted in other countries, particularly European countries, where gender quotas for corporate boards, political representatives, and academic review boards are increasingly commonplace.[10] "In many jurisdictions around the world, women's past and current disadvantage is regarded as an injustice that must be corrected by various measures, including antidiscrimination law, affirmative action, and even gender quotas."[11] It is thus worth reconsidering gender quotas as a potential remedy in America.

Quotas offer the power to change the big picture of systemic discrimination. For at the broad level, sex discrimination is still apparent. The numbers reveal that women are not represented in positions of economic, professional, or political power in proportion to their percentage of the general population. Women constitute 50.8% of the American population.[12] Women are 47% of law students,[13] but only 34% of lawyers,[14] about 20% of law deans,[15] 18% of equity partners,[16] just under 30% of state judges,[17] about 25% of state legislators,[18] and about 20% of the U.S. Congress.[19] Women earn about 57% of all bachelor's degrees and 50% of science degrees, but are only 29% of the STEM workforce.[20] Women are 47% of the workforce,[21] 40% of MBAs, and 40% of managers,[22] but account for only about 20% of Fortune 500 corporate boards[23] and 5% of Fortune 500 chief executive officers.[24] The courts receive continued filings of sex discrimination complaints, not due to facially discriminatory rules like nineteenth-century coverture, but due to practices and informal norms of exclusion and denial of opportunity just the same.[25] Laws directed at malevolent individual bad actors miss the picture,

and fail to redress the more complex and embedded systemic bias, structural impediments, and gendered norms that continue to fuel gender inequality.[26] Discriminatory harms of gender inequality in employment, education, marriage, religion, pregnancy, and profession have existed since the founding of our country, and women's demands for eradication of such wrongs since the 1848 Declaration of Sentiments have not yet been realized.[27] Two hundred years of harm, and more than fifty years of modern feminist legal reform are more than enough to dispel the notion that the status quo is sufficient or that more basic measures like general prohibitions of discrimination or good-faith efforts must first be exhausted.

It's time to consider more effective, systemic, and long-lasting remedies of gender quotas. A quota remedy would require gender parity—proportional representation of women in positions of power. The proportion would match the gender distribution of the general population; so women as about 51% of the population should constitute 51% of the managers, boards, CEOs, legislatures, and law firm partners, as well as STEM majors and law students. Judges too, would then be 51% women, although Justice Ruth Bader Ginsburg suggested she would not stop there, opining that the Supreme Court would have the right number of women justices "[w]hen there are nine."[28] This idea of substantial proportionality is seen in the law in the Title IX education context where one sex is deemed underrepresented if there is a disparity between the gender composition of the institution's student body and the gender composition of its athletics.[29] This mandate of parity and proportional representation exists legally as a tenet of gender equality. One way to enforce such parity is through quotas, requiring parallel representation between population and power.

The idea of gender quotas seems farfetched at first blush. Culturally, it evokes claims of unfairness, triggering fears of unqualified candidates and reverse discrimination against men.[30]

(Though such fear itself reveals a deep gender bias in assuming women collectively would be unqualified.)[31] Some fear the potential counter-effect of restriction by a quota, for example, limiting women to 51% of college admissions even where their grades would allow them to constitute a higher percentage of the incoming class.[32] Such a result seems unlikely, and if it were to be achieved, then perhaps the remedial need for a parity mechanism would be gone. In the meantime, however, the need for a solution remains. Legally, the current Supreme Court seems to have foreclosed absolute quotas, at least in the racial context, although it has permitted "race-conscious" decisions where race is considered as one of multiple factors.[33] However, Justice Ruth Bader Ginsburg, dissenting in a case that struck down a university's affirmative action program, supported the appropriate use of racial quotas "to prevent discrimination being perpetuated and to undo the effects of past discrimination."[34] She cited contemporary human rights documents, including international treaties against gender discrimination, as laws that "draw just this line" and "distinguish between policies of oppression and measures designed to accelerate *de facto* equality."[35] Ginsburg explained elsewhere in a majority opinion that "[s]ex classifications may be used to compensate women 'for particular economic disabilities [they have] suffered,' to 'promote equal employment opportunity,' [and] to advance full development of the talent and capacities of our Nation's people."[36]

The quota idea might not be so crazy, then, when examined from a perspective of the law of remedies. This law requires a meaningful remedy for every harm, and provides the flexibility necessary to achieve tangible change.[37] As discussed in Part I, existing individualized remedies have been inadequate to redress the entrenched problems of systemic gender discrimination. Institutional and structural problems of inequality have not responded to the innocuous Band-Aids of damages and reinstatement, even if plaintiffs make it through the gauntlet of limitations

on class actions and collective relief and laws that fail to encapsulate gendered harms.[38] Second, as discussed in Part II, legal systems in other countries have recognized this entrenched ineffectiveness and have moved on to mandating quotas for meaningful and accelerated change. This precedent provides support for remedial options that force institutional change in conformance with the legal mandates of gender equality. Part III then argues that quotas are legally viable under the remedial law of prophylaxis and withstand judicial constitutional scrutiny. It is thus worth considering quotas as a judicial option in order to provide new approaches to old problems. Because it's time.

I. The Problem: Continued Harms and Inadequate Remedies

The foundational premise revealed by feminist scholars is that individualized remedies fail to sufficiently address systemic causes and effects of sex discrimination.[39] Examples of the ineffectiveness of this isolated approach are evident in the daily news, where sexist norms dominate business systems and legal slaps on the wrist against one or two actors fail to make any difference. For example, executive Ellen Pao encountered the old boys' club of Silicon Valley with its gendered assumptions about women, viewing female colleagues as potential sexual conquests and managing women with paternalism that fails to equally endorse women's power and advancement.[40] The subtleties of engrained norms failed to demonstrate to a jury that the problem was more than one woman's promotion, but rather about workplace expectations, daily treatment, workplace relations, and standards for advancement all defined by *Mad Men*-era norms of masculinity.[41] In another example, a woman federal prosecutor in Washington State, the high-ranking Deputy Criminal Chief, faced an uphill battle to prove sex discrimination by her unequal pay, isolation, and lack of authority in the workplace based on individual intent rather

than systemic male norms of workplace management.[42] Glass ceilings and workplace cultures have been resistant to the damages claims of any one individual.[43]

A key feminist insight on these systemic problems has focused on the importance of power.[44] The lack of women's power as decision makers in the workplace, politics, or science means the perpetuation of the patriarchy (yes, patriarchy) and male privilege from the top down. Generations at the top may be outdated, but they continue to transmit the same outmoded assumptions of women's inferiority and disqualification, reinvigorating a new generation with the same discriminatory norms and practices.

Scholars have discussed the inadequacy of existing remedies for gender discrimination in the tort damages context. "When viewed through a wider cultural lens, the basic structure of contemporary tort law still tends to reflect and reinforce the social marginalization of women and racial minorities and to place a lower value on their lives, activities, and potential."[45] Non-pecuniary damages are limited for emotional, dignitary, or intangible harms. "The privileged status of physical harm over emotional and relational injury found in contemporary tort law is sustained by dubious assumptions about the greater seriousness and important of this type of injury in the lives of ordinary people."[46] Legal standards of tort ask "what is reasonable" of the objective person, incorporating men who have not experienced the discrimination, lack of privilege, second-class status, or emotional toll women face, thereby rendering reactions to these consequences automatically unreasonable. Thus, remedies fail to correct action or provide incentives or leverage against discriminatory action. "[T]ort law's remedial damage scheme perpetuates existing racial and gender inequalities by compensating individuals . . . based on their race and gender. Even worse, tort law creates ex-ante incentives for potential tortfeasors to engage in future discriminatory targeting of women and minorities."[47] In addition, restrictive

procedural requirements for evidentiary proof and class action relief, which curtail actions for sex discrimination, further diminish the availability and efficacy of existing remedies.[48]

Even when systemic violations are established, the Supreme Court has been reluctant to award relief. For example, in *Manhart*, the Court found systemic discrimination from overcharging women for their retirement plan, but denied restitution and return of the wrongfully charged monies.[49] The Court did so despite Title VII's general legal rule that remedies should make the plaintiff whole.[50] In a similar case two years earlier, the Court did award such relief to remedy *men's* unequal retirement benefits resulting from a longer work time to retirement.[51] The all-male *Manhart* Court was concerned with institutional problems of the defendant's solvency and the impact on third parties, even though the defendant admitted it had sufficient existing funds to pay.[52] Governments and third parties were all weighed higher in the remedial calculus than the women who had proven discrimination.

A glimmer of remedial hope was seen in the creation of sexual harassment remedies. A series of prophylactic injunctive remedies in the 1980s turned workplace culture from *Mad Men*-era to zero tolerance.[53] Prophylactic provisions reaching facilitators of continued harm and requiring institutional change were more effective than meager damages in not only shifting the culture in one defendant's workplace, but in bringing about broader cultural shifts in norms and acceptable behavior.[54] Relief like institutional reporting and grievance structures, education of institutional behavior, and establishment of policies made the difference. Corporate defendants then rushed to voluntarily institute similar measures to insulate themselves from potential liability from future bad actors, thereby normalizing these institutional practices that meaningfully reduced sexual harassment.[55] The key was that courts realized that continuing to slap down individual aggressors and award personal damages for lost income and emotional

distress were severely inadequate to changing the gendered and sexualized workplace culture. Instead, proactive, injunctive relief altering the institutional structure and power itself was required.

II. Precedent for Solutions: Go Big or Go Home

The rest of the world is ahead of the United States on the idea of gender quotas. Quotas, sometimes phrased as the softer, and more palatable term "targets," have been adopted in many European contexts over the past twenty years in order to redress discrimination and restructure power, including corporate boards, legislative bodies, and ivory towers.[56] "Quotas represent a fast-track policy measure, in contrast to the well-known incremental-track model according to which gender equality will come in due time as a country develops. . . . [G]ender quotas are a simple answer to a very complex problem, namely that of women's historical exclusion" from political and private systems of power.[57] While the reasons and blame for women's historic and continued exclusion from power are multifaceted, quotas move beyond these entangled debates to provide a concrete and pragmatic formula for change that can be easily measured and actually achieved.

Gender quotas for corporate boards have received the most attention.[58] They began with Norway's mandate adopted a decade ago requiring 40% women on governing boards of companies and enforced by contempt-like penalties.[59] Other countries including Germany and France, as well as the European Union, have adopted gender quotas for corporate boards, requiring companies to have anywhere from 20 to 40% women directors.[60] In the United States, however, the Securities and Exchange Commission only requires companies to report the percentage of board members by gender.[61]

The corporate board quotas seem to be working. "Business people tend to hate governments telling them what to do, and the quotas on female board members imposed on companies by a handful of European countries are no different. But here's the thing: If a goal of the quotas is to bring more women into the top ranks of business, they seem to be working."[62] The number of women board members across Europe is slowly rising, from 11% in 2007 to 23% in 2015.[63] "In countries with quotas in place, it's higher: 44% in Iceland, 39% in Norway, 36% in France and 26% in Germany."[64] More importantly, "[i]t has changed the conversation—it has clearly been put on the agenda of companies."[65]

Quotas for gender have also been adopted in over one hundred countries for elections in Europe, Asia, and Africa. These electoral quotas typically require that a certain percent of political candidates be women, ranging from 20 to 50%.[66] The argument for electoral quotas is that women must be "a 'critical minority' of 30 to 40[%] of the decision-making body to have an influential voice and to make substantive contributions to the legislative process."[67] Advocates of electoral quotas do not want simply to increase the number of women in office, but also want to "diversify the types of women elected, raise attention to women's issues in policy making, change the gendered nature of the public sphere, and inspire female voters to become more politically involved."[68] Increasing the number of women to a representative majority expands opportunities for diverse representation of multiple identities of women of differing race, religion, and sexuality beyond the identities of a few women.

An increasing number of countries are also using gender quotas for scientific committees, to assess and award academic tenure and promotion.[69] "The underrepresentation of women in academia remains a cause for concern among universities and policy makers around the world. In Europe, women account for 46% of PhD graduates, 37% of associate professors and only a

mere 20% of full professors."[70] One contributing cause identified for this gender disparity has been all-male evaluation panels, and thus "a number of countries have introduced quotas requiring the presence of at least 40% of women (and men) in scientific committees."[71]

A key question debated with all of these mandates is what difference, if any, the gender quotas make. Arguments are made as to substantively different outcomes that might result. The business case for gender-balanced corporate boards is that companies' bottom lines, financial performance, and shareholder profits improve when women direct.[72] Other studies find that boards are more active when they are gender-balanced, and thus provide better productivity and CEO oversight.[73] These performance conclusions are sometimes explained by gender essentialist thinking that women are less aggressive and careless than men, and are more risk adverse, less likely to engage in fraudulent activity, and consensus focused.[74] In Prime Minister Trudeau's words, this rationale means "[l]et's start rewarding politicians and companies who aren't driven by a macho approach."[75] In another context, researchers have worked to prove that women judges reach different results. Some studies show more favorable decisions by female judges to plaintiffs in specific types of litigation.[76] Other studies show no measurable substantive difference in outcome from female judges.[77] Still others argue that the full substantive impact of women in power is not yet realized because we are nowhere near the point of shared power of 50/50 at which women have the authority to make a meaningful difference.[78]

However, "while functionalist arguments dominate the literature and the debate" over gender quotas, "the most enduring justifications are normative, and based on equality, parity and democracy."[79] Functionalist arguments contend that women make a measurable difference to performance, but this is not necessarily the point. The reason for requiring gender quotas is not for any particular outcome, but for shared power and procedural legitimacy. The normative and

"symbolic representation of women is sufficient" as a justification for quotas "because it signals a change to traditional conceptions of authority and citizenship."[80] "Symbolic representation" is "the concept that, when women are included in decision-making bodies and are therefore visible in the public sphere, this signals a change to traditional conceptions of authority, citizenship and norm creation."[81] As explained in the context of judicial gender quotas, the difference sought is not in the result per se, but in the representation in access to power, ensuring the fairness of the law, and more fully representing the human experience.[82] Fundamental interests or norms at the core of our constitutional and legal rights dictate insurance against systemic discriminatory decisions by providing the shared power base.

This systemic representative ideal emerged in the 1990s in the European discourse as "gender parity," the representation of men and women in roughly equal numbers.[83] It "was understood to be a requirement of all legitimate institutions exercising power in a democracy because each sex represented half of humanity. Thus conceived, gender balance is . . . a permanent feature of good governance."[84] This idea, referred to as "parity democracy," is "understood as fifty-fifty male-female representation in all organizations exercising power in a democratic society" and "is not primarily aimed at enhancing women's opportunities as individuals or even as a group. Its primary purpose is to legitimize the larger institution's exercise of political, economic, and social power."[85] "When governments reflect the actual demographics of the populations they are elected to represent, effective representation of the diverse interests of citizens is more likely."[86] This is a systemic understanding of power and an incorporation of the feminist goal to have women be a part of that power structure.

Yet the United States is currently far from such gender parity, stuck in practices of tokenism where firms pat themselves on the back for seeking to add one woman to the governing

power structure.[87] Parity requires change beyond the tipping point of one or two women in minority representation to reach a critical mass at which representative legitimacy and perhaps substantive difference might be possible.[88] For tokenism, an innocuous action of requiring one woman to provide lip service to inclusion, offers such minimal relief as to reflect no meaningful change.[89] Indeed, recent studies showed that such tokenism was affirmatively detrimental to equality, as the inclusion of one woman or minority made it harder for any other like candidates to be included in the power group.[90] Thus tokenism was not only ineffective, but in fact harmful to anti-discriminatory norms. Yet, tokenism remains the first-step approach to forcing systemic change, even as it is still resisted as a radical alteration of the status quo.[91] Quotas offer the potential to bypass the frozen status quo and false incrementalism to achieve actual parity. But management has to go all in: quotas must be 51 percent, not watered down to 20 percent like many of the first-generation quotas.

Access to power is a key feminist insight: that women's lack of power has been the structural block to gender equity, and that gaining access to power is an ultimate remedial goal. Women's lack of power is the historical foundation still undergirding the law. The "disqualification of women as citizens in the past was a central structural feature of the modern state, where autonomous male individuals could only thrive or continue to reproduce themselves socially by requiring women to perform tasks in the private sphere."[92] Thus patriarchy and coverture is a foundational structure of the American legal system with continuing reverberations, like the legal black hole of the private sphere of domestic violence or maternity leave, and the male privileged sphere of the workplace. Remedying this structural inequity is key to remedying the resulting and continuing harms of unequal pay, maternity discrimination, lack of promotion, and ineffective domestic violence enforcement. As Peta Spender argues, "[i]t is

only when women actively participate in the public sphere in significantly large numbers that the system will be forced to confront and solve the problems of dependency and social reproduction."[93] It's more than time for big change to the system of power itself.

III. Making the Legal Case for Judicial Gender Quotas

Most of the European precedent on gender quota is legislative, not judicial. Certainly the United States could pursue a similar legislative approach, assuming any constituencies would undertake its advancement.[94] Such political action, however, requires the support of the legislative system, which presents its own systemic barrier of significant underrepresentation of women lawmakers.[95] A legislative solution may also fall short, because any proposal that manages to achieve political consensus is often diluted, and thus fails to challenge the power balance. For example, other countries have passed legislative gender quotas at 20 or 30 or 40 percent but not at a power-shifting proportional level of 50 percent.[96]

Nor are voluntary actions the solution to entrenched systemic discrimination.[97] First, most voluntary affirmative action plans of businesses and governments have been abandoned, encountering significant political resistance. Instead, they have been replaced by watered-down "diversity management" programs that are more marketing than substance.[98] Second, voluntary actions often produce mere tokenism that does not bring about a material shift in power since it is not driven by a theory of proportional representation. Voluntary actions are also devoid of enforcement mechanisms, which have proven to be the most effective means of establishing successful quota systems, such as Norway's gender-balanced corporate boards. Voluntary efforts are simply too little, too late.

Instead, what has worked are judicial remedies of affirmative action that have opened up resistant institutions to social change. Many social justice reforms in the United States have been by judicial action, and are suited to incremental change and individual context.[99] Judicial action redresses harm within the specific context of established problems, rather than at the abstract level of policymaking. Judicial context thus provides the opportunity to consider gender quotas. The question is whether such quotas would be legal. The remedial law of prophylactic injunctions suggests that it could be, and arguably without violating constitutional commands of equal protection.

A. *Quotas as Prophylaxis*

The remedial precedent supports the use of quotas as legitimate prophylactic injunctions.[100] As I have discussed elsewhere, prophylactic injunctions are a particularly effective way to provide meaningful relief for continued harm.[101] Prophylaxis addresses the facilitators of harm and the inputs that cause continued harm, providing flexibility and tailoring to solve the problem. Because otherwise, for most instances of sex discrimination, after the fact is too late. Retrospective remedies allow the behavior to continue, perpetuating the discriminatory norms in society and to new generations with only a small nuisance value. The promise of meaningful relief is in prophylactic remedies, getting out in front of the problem and ordering the defendant to take action to avert the problem before it occurs again. Prophylaxis can address contributing factors, even when that factor in and of itself does not violate the law.[102] Such action changes the decision-making process that otherwise allows the gendered behaviors

to happen in the first place and carries with it the potential to shift the systemic power dynamic itself.

The Supreme Court has reaffirmed the availability of structural and prophylactic relief to address persistent systemic problems.[103] In *Brown v. Plata*, the Court upheld an injunction ordering California prisons to reduce their inmate population to 137.5% of the intended capacity, thus requiring the release of 37,000 prisoners.[104] The quota was designed to redress the longstanding systemic prison overcrowding that had continually resulted in severe medical malpractice and even death to inmates.[105] Prior court orders to provide adequate medical care, hire more medical workers, and build more prisons were ineffective or unworkable, and failed to remedy the constitutional violations after twenty years. [106] The Court held in situations of ongoing and continued harm, courts have power to craft injunctive remedies that reach beyond mere commands to stop the unconstitutional behavior and order specific targets to meaningfully redress the systemic problems that cause the harm.[107]

The Supreme Court has also upheld a quota as a valid prophylactic injunctive remedy. In *Swann v. Charlotte-Mecklenburg County Schools*, a unanimous Court upheld an order that the racial percentage of students in each school match the racial composition of the neighborhoods.[108] The order thus mandated that each school be 71% white and 29% black.[109] The Court explained the quota was properly within the scope of the lower court's equitable discretion given the remedial target of the segregated school system and the "total failure" of any other remedy.[110] The Court appreciated that quotas were a good "starting point" for effectuating change and provided a "reasonable, feasible and workable" solution.[111] In *Swann*, as in *Plata*, the Court conceptualized the quota as a necessary *remedy*, a response to continuing constitutional

harm, which distinguished quotas from affirmative action plans struck down in the absence of such a connection with ongoing harm.[112]

Drawing on these precedents, the idea of a gender quota seems plausible. A gender quota could be ordered as a judicial option in a case to alter a power system like a corporate board or managerial employees. Understanding the system itself as contributing to the discriminatory problem, like the overcrowded prison population in *Plata* or the segregated schools in *Swann*, explains the need to target the system for a remedy. Understanding feminist theories of power—either as gaining women access to that power resource or in ending its patriarchal domination over women—clarifies why the power structure is part of the causal nexus of the harm that is appropriately included with judicial prophylaxis. Moreover, a quota, like other prophylactic measures, is pragmatically easy. Release 37,000 prisoners or hire 50% women: the orders are finite, objective, and capable of implementation. Or as the Court said in *Swann*, "feasible and workable."[113] Ultimately, this is why judges like prophylaxis: it gives them a concrete remedial option that can provide effective relief in a meaningful way.[114]

B. *Constitutional Legitimacy*

A second legal question regarding the validity of gender quotas is whether ordering such gender-specific relief would violate constitutional parameters of equal protection as seen in the affirmative action cases.[115] Supreme Court decisions in the race context seemed to have foreclosed most affirmative action remedies like quotas in education and employment.[116] Conditioning state action based on race is said to be discriminatory and trigger strict scrutiny, thereby justifying little state action.[117] "'To be narrowly tailored, a race-conscious admissions program cannot use a quota system,' but instead must 'remain flexible enough to ensure that

each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.'"[118] Race, however, can still be used as one factor in decisions like university admissions.[119]

On the other hand, the European Court of Justice ("ECJ") has upheld gender quotas against claims that they violate equality dictates.[120] "[T]he ECJ's jurisprudence has reinforced the notion that gender quotas can only be narrowly justified by the goal of eradicating women's disadvantage. Particularly when women's underrepresentation in certain positions is explained by prejudice, stereotype, or other practices associated with women's traditional exclusion from working life, quotas tend to be upheld."[121] Viewed this way, "[q]uotas are a mechanism for combating and undoing the history and present complex structures of women's subordination."[122]

In the United States, the question turns in large part on application of the Fourteenth Amendment's Equal Protection Clause as to whether a gender quota as a judicial remedy would itself constitute discrimination. One key distinction between gender and race quotas is that the constitutional standards for sex discrimination have been distinguished from those for race.[123] The Supreme Court has applied only intermediate, not strict, scrutiny to sex-based classifications.[124] While arguments have been made over the years that sex is akin to race in its immutable and stereotypical function, and thus should demand the same level of strict scrutiny, the Court has stuck to its different standard for women.[125] As a result, the Court has shown a greater tolerance for sex-based action, articulating a need to protect women or acknowledge gendered differences.[126] And the constitutional standard has been interpreted by the Court to require women's admission to the avenues of power.[127]

What the intermediate standard of constitutional scrutiny might mean in the quota context is that sex-based action might be more tolerable than race-based action.[128] Perhaps this is the silver lining of the double-standard of intermediate scrutiny. For the Court's gender jurisprudence has recognized "the transformative potential of affirmative action and" how it "best advances the antisubordination goal of the equal protection guarantee."[129] Courts would need to identify important (but not compelling) interests justifying the sex-based action. These important interests could be derived from women's non-representative lack of power, continued subordination, lack of autonomy, and other systemic effects well-established in the feminist literature, and interests in equity, proportional representation, and balanced power which have driven global reforms.[130]

This important objective of reversing gendered and discriminatory systems by mandating shared parity of power differentiates the case of gender quotas from the women-only policy struck down in *Mississippi University for Women v. Hogan*.[131] There, a state university's nursing program was open only to women.[132] The state claimed that its single-sex admission policy "compensate[d] for discrimination against women and, therefore, constitutes educational affirmative action."[133] The Court noted, significantly, that such a justification could be an important governmental interest. "In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened."[134] However, in *Hogan*, the Court found that this compensatory remedial purpose was not in fact the state's objective. "Mississippi has made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the MUW School of Nursing opened its door or that women currently are deprived of such opportunities."[135] The Court concluded that, "[r]ather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from

admission to the School of Nursing tend[ed] to perpetuate the stereotyped view of nursing as an exclusively woman's job."[136] In addition, the Court found that "MUW's admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy."[137] Thus, the constitutional infirmity with the all-women policy in *Hogan* was that it was not remedial and not aimed at reversing systemic inequality, but rather impermissibly perpetuated gendered stereotypes.

Where affirmative remediation is the legitimate objective, the Supreme Court has upheld quota-like gender preferences. In *Johnson v. Transportation Agency*, the Court upheld an affirmative action plan of a county employer granting promotion preference to a woman against challenge under Title VII.[138] The county adopted the plan because "mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons."[139] Its "goal" (specifically designated as the softer term "goal" rather than "quota") was to achieve "a statistically measurable yearly improvement in hiring, training and promotion of minorities and women" by the use of a "benchmark by which to evaluate progress," working toward a long-term goal where its work force matched the gender composition of the area labor force, 36%.[140] At the time, just 22% of the employees were women, two-thirds of them clerical, only 7% women in administration, 9% in technical, and none in the position of the skill craft worker challenged in the lawsuit.[141] The Court upheld using the gender preference as one of the factors of employment, citing the statistical imbalance and underrepresentation of women.[142] It did not, the Court said, "unnecessarily trammel[] the rights of male employees or create[] an absolute bar to

their advancement" because positions still remained available for men and candidates, both men and women, still had to be qualified for the position.[143]

Taking these cases together, the Court has shown a willingness to consider quotas in the gender context. While it has not had the question presented directly, the Court has at least not closed the door to gender parity. Instead, as in any heightened constitutional scrutiny, it demands close and careful application of the constitutional standards to ensure that gender preferences are not mere pretexts nor avenues for future discrimination.[144]

IV. Conclusion

Prime Minister Trudeau continues to use his international platform to advocate for embracing feminism to effectuate change in politics and business for gender equality.[145] He repeated his belief that the time for such change is now. "Even within our own society, if you look back 50 years or if you leaf through a magazine from the 70s, you see horrific sexism that is overt in a way that would be unacceptable today."[146] The same might hold true, he suggested, in the future. "Even today, hopefully 20 years from now, people will look at what we think is acceptable today and find it horrifically off-base."[147]

Gender quotas offer a pragmatic way to quickly achieve what centuries of activism and decades of individualized action have not. An injunctive remedy requiring that economic and political institutions have women in 50% of positions of power is clear and concrete. Such a quota offers an objective mechanism to bring about the parity necessary for permanent eradication of longstanding sex discrimination by eliminating the dominance of biased leaders and instituting shared governance through symbolic and fair representation. These percentage requirements would likely be sustained against constitutional challenge, as this essay has argued,

when analyzed under the existing precedent of prophylactic remedies and intermediate scrutiny and viewed as remedying entrenched gender bias, sex discrimination, and inequality. Joining with other global initiatives, gender quotas offer a new promise in an old fight for tangible movement toward equality.

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[1] Elliott Hannon, *Canada's New Prime Minister Says He Picked a Cabinet That's Half Women "Because It's 2015*," SLATE (Nov. 4, 2015), http://www.slate.com/blogs/the_slatest/2015/11/04/canada_s_justin_trudeau_s_gender_equal_cabinet_because_it_s_2015.html [https://perma.cc/7YY4-PVNG]; Natasha Young, *This World Leader Has the Perfect Response to Why Feminism Matters*, REFINERY 29 (Jan. 25, 2016), http://www.refinery29.com/2016/01/101912/canada-prime-minister-says-everyone-should-be-a-feminist [https://perma.cc/XBY8-E4GB].

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[7] *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22–25 (1971) (upholding racial quotas of 71% white and 29% black for school desegregation); Richmond v. J.A. Croson Co., 488 U.S. 469, 507-08 (1989) (overturning 30% minority contractor law because not narrowly tailored to remedying past discrimination); Fullilove v. Klutznick, 448 U.S. 448, 491-92 (1980) (upholding 10% quota for minority contractors).

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[32] Suk, *supra* note 10, at 1134–39 (discussing the Swedish example of college admissions).
[33] Fisher v. University of Texas at Austin, 136 S. Ct. 2198, 2208 (2016); Grutter v. Bollinger, 539 U.S. 306, 343–44 (2003); Richmond v. J. A. Croson Co., 488 U.S. 469, 509–11 (1989).

[34] Gratz v. Bollinger, 539 U.S. 244, 301–04 (2004) (Ginsburg, J., dissenting).
[35] *Id.*; *see also Grutter*, 539 U.S. at 344 (Ginsburg, J., dissenting). Article 4 of CEDAW, the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, explicitly states that "temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention." 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).
[36] United States v. Virginia, 518 U.S. 515, 533 (1996) (quoting Califano v. Webster, 430 U.S. 313, 320 (1977) (per curiam)); California Fed. Sav. & Loan Assn. v. Guerra, 479 U.S. 272, 289 (1987)).
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[38] *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) (denying class action certification for national class of women employees claiming sex discrimination in employment).
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[45] CHAMALLAS & WRIGGINS, *supra* note 5, at 2.
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[48] *See generally* Wal-Mart Stores v. Dukes, 564 U.S. 338 (2011) (holding that the putative class of all women nationwide alleging sex discrimination in employment by Wal-Mart could not proceed as a class action under the Federal Rules of Civil Procedure because of a lack of commonality of fact).
[49] Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 722–23 (1978).
[50] Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).
[51] Tracy A. Thomas, *City of Los Angeles Dep't of Water & Power v. Manhart in* FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 233, 240 (Kathryn M. Stanchi et al., eds. 2016); Fitzpatrick v. Bitzer, 427 U.S. 455, 456–57 (1976).
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[53] *See* Tracy A. Thomas, *The Continued Vitality of Prophylactic Relief,* 27 REV. LIT. 113, 118-19 (2007) [hereinafter Thomas, *Continued Vitality*].
[54] *See id.*

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[56] *Gender Quotas: Vital for Equality or Mere Tokenism?* THE WEEK (May 15, 2015), http://www.theweek.co.uk/63678/gender-quotas-vital-for-equality-or-mere-tokenism [https://perma.cc/2YYP-9ECT] (noting that the UK adopted "targets," not "quotas").
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[59] Sullivan, *supra* note 30.
[60] Suk, *supra* note 10, at 1125–26 (noting European Commission rule prohibiting any sex to have more than 60% representation on corporate board); Sullivan, *supra* note 30 (highlighting the increasing prevalence of mandatory gender quotas in various European nations); Spender, *supra* note 30, at 110 n.85, 111 (describing the examples of France, 40% by 2016, 20% as an interim measure; and Australia, 40% targets for public sector boards).
[61] AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY 11, 104–05 (2015).
[62] Oliver Staley, *You Know Those Quotas for Female Board Members in Europe? They're Working,* QUARTZ (May 3, 2016), http://qz.com/674276/you-know-those-quotas-for-female-board-members-in-europe-theyre-working/ [https://perma.cc/98XL-C5SM].
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] Susan Franceschet et al., *Conceptualizing the Impact of Gender Quotas in* THE IMPACT OF GENDER QUOTAS, *supra* note 57, at 3–5 (noting that these include reserved seats, party quotas, and legislative quotas); Lisa Baldez, *Elected Bodies: The Gender Quota Law for Legislative Candidates in Mexico*, 29 LEGIS. STUD. Q. 231, 232 (2004); Anisa A. Somani, Note, *The Use of Gender Quotas in America: Are Voluntary Party Quotas the Way to Go*?, 54 WM. & MARY L. REV. 1451, 1454–55 (2013); Suk, *supra* note 10, at 1126.
[67] Somani, *supra* note 66*,* at 1453. Rwanda is a good example, where quotas adopted in 2003 requiring 30% women in the legislature now ranks it as the highest among all countries for its level of female political representation at 56 percent of the lower house and 39 percent of the upper house. *Id.* at 1456.
[68] Franceschet et al., *supra* note 57, at 3; *see also* Fenit Nirappil, *Edwards Blasts Democrats: "We Are Neither Post-Racial Nor Post-Gender,"* WASH. POST (MAY 24, 2016) https://www.washingtonpost.com/local/md-politics/edwards-blasts-democrats-we-are-neither-post-racial-nor-post-gender/2016/05/24/3771d24e-21e1-11e6-8690-f14ca9de2972_story.html?tid=sm_tw [https://perma.cc/5ADU-4DZL] (quoting former Representative Donna Edwards as stating, "I believe the real divide that we must come to terms with . . . is the shocking extent to which America's elected bodies . . . . do not resemble the American electorate in income, race, or gender. . . . We must be honest about the depth of the problem in order to unloose the structural barriers that contribute to it.").
[69] Manuel Bagues et. al, *Does the Gender Composition of Scientific Committees Matter?* (July 8, 2015) (unpublished manuscript at 4), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2628176 [https://perma.cc/ZUQ3-XHSP].
[70] *Id.* at 2.
[71] *Id*. at 4. Finland introduced academic gender quotas in 1995; the European Commission adopted a 40% quota for women in academic scholarships, advisory groups, and panels in 1999; Spain required academic gender quotas in 2007; and in 2014, France introduced gender quotas for all scientific communities. *Id.*
[72] Alstott, *supra* note 26, at 42; Spender, *supra* note 30, at 106.
[73] Miriam Schwartz-Ziv, *Gender and Board Activeness: The Role of a Critical Mass*, THE CLS BLUE SKY BLOG (Feb. 9, 2016) http://clsbluesky.law.columbia.edu/2016/02/09/gender-and-board-activeness-the-role-of-a-critical-mass/ [https://perma.cc/GRP6-NLVG].
[71] *See, e.g.*, Jasmin Joecks et al., *Gender Diversity in the Boardroom and Firm Performance: What Exactly Constitutes a "Critical Mass?"*, 118 J. BUS. ETHICS 61, 64 (2013) (arguing women improve performance because they are more cautious in their decision-making).

[75]Treanor & Wearden, *supra* note 4.
[76] Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 406 (2010) (finding the probability of a judge deciding in favor of the party alleging discrimination decreases when the judge is male, and that when a woman serves on a panel with men, the men are significantly more likely to rule in favor of the rights litigant); Carrie Menkel-Meadow, *Asylum in a Different Voice: Judging Immigration Claims and Gender in* REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM 202, 208 (Jaya Ramji-Nogales et al. eds., 2009) (finding female immigration judges granted asylum at a rate of 53%, while male judges granted asylum at a rate of 37.3%).
[77] *Cf.* Rosalind Dixon, *Female Justices, Feminism, and the Politics of Judicial Appointment: A Re-Examination*, 21 YALE J. L. & FEMINISM 297, 313 (2010) ("A closer inspection of this literature, however, suggests that in fact it provides far less robust support for a female-feminist correlation below the Supreme Court level than most feminists have tended to assume."); s*ee also* Bagues, *supra* note 69, at 6 (finding no empirical support from studies in Italy and Spain "to suggest that a larger presence of female evaluators in the evaluation committees has a statistically or economically significant positive effect on the chances of success of female candidates").
[78] Spender, *supra* note 30, at 96.
[79] *Id.*
[80] *Id.*
[81] *Id*. at 112–13 (emphasis omitted).
[82] *See* KENNEY, *supra* note 28, at 5–6, 175–82.
[83] Suk, supra note 10, at 1129.
[84] *Id.*
[85] *Id.* at 1131.
[86] Amelia Bell, "*Because It's 2015": Canada's Model Cabinet,* NAT'L WOMEN'S LAW CTR. BLOG (Nov. 6, 2015), https://nwlc.org/blog/because-its-2015-canadas-model-cabinet/ [https://perma.cc/GU65-FSLE]; *cf.* Fisher v. University of Texas at Austin, 136 S. Ct. 2198, 2211 (2016) (finding that a compelling interest for race-conscious college admissions policy was the "cultivation of a set of leaders with legitimacy in the eyes of the citizenry").
[87] *E.g.*, Casey Sullivan, *An NFL Rooney Rule for Law Firms?,* BLOOMBERG LAW (June 24, 2016), https://bol.bna.com/an-nfl-rooney-rule-for-law-firms/ [https://perma.cc/JNU6-RU8V] (proposing rule to require at least one woman to be considered for all law firm leadership positions); Matthew Watkins, *UT System to Require Interviews with Minority Candidates*, TEXAS TRIB. (Nov. 5, 2015), https://www.texastribune.org/2015/11/05/push-diversity-ut-system-require-interview-minorit/ [https://perma.cc/DV7V-WSTR] (discussing new university initiative requiring that one candidate for any high-ranking position be a woman or minority).
[88] *See* Julie C. Suk, *Gender Parity and State Legitimacy: From Public Office to Corporate Boards*, 10 INT'L J. CONST. L. 449, 457 (2012).
[89] *See* Rosenblum, *supra* note 6, at 2889–90.
[90] Jana Kasperkevic, *Women Have Better Chances of Being Hired When Competing Against Women,* GUARDIAN (Apr. 26, 2016), https://www.theguardian.com/money/2016/apr/26/women-job-search-hiring-interview-tips-finalist [https://perma.cc/6D5Q-Q434] (reporting that "[a] female candidate's chances of being hired are statistically zero if she is the only woman in a pool of finalists").
[91] *See, e.g.*, Sullivan, note 30*;* Aaron Gregg, *U.S. Says It Met Its Goal—for the First Time—on Awarding Contracts to Women-Owned Small Businesses*, WASH. POST (Mar. 2, 2016), https://www.washingtonpost.com/news/on-small-business/wp/2016/03/02/u-s-says-it-met-its-goal-for-the-first-time-on-awarding-contracts-to-women-owned-small-businesses [https://perma.cc/VWW9-ZWVH] (describing a target of five percent women-owned businesses); Scott Jaschik, *Requiring Diverse Pools*, INSIDE HIGHER ED (Nov. 6, 2015), https://www.insidehighered.com/news/2015/11/06/u-texas-will-require-finalists-administrator-positions-include-women-and-minorities [https://perma.cc/5ASR-H9K3].
[92] Spender, *supra* note 30, at 108–09.
[93] *Id.* at 109.
[94] *See generally* Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673 (2001) (explaining prophylactic, remedial legislation under Section 5 of the Fourteenth Amendment).
[95] Jonathan D. Salant & Jennifer Prince, *Washington's Top Lobbying Groups Hire Mostly Men,* BLOOMBERG BUS. (June 12, 2012), http://www.bloomberg.com/news/articles/2012-06-12/washington-s-top-lobbying-groups-hire-mostly-men-bgov-barometer [https://perma.cc/5ATC-KVQT].
[96] *See* Suk, *supra* note 10, at 1131, 1133; Suk, *supra* note 88, at 450–51.

[97] That being said, Sweden provides one example in which voluntary quotas have worked. In the 1980s, the Social Democratic Party adopted the "zipper system" quota of alternating men and women candidates, and the Green and Left Parties adopted a 50% quota. Sweden ranks fourth in the world for its 45% female representation in Parliament. Somani, *supra* note 66, at 1480.
[98] *See* David B. Oppenheimer, *The Disappearance of Voluntary Affirmative Action From the U.S. Workplace*, 24 J. POVERTY & SOC. JUSTICE 37, 38 (2016).
[99] *E.g.*, Brown v. Board of Education, 349 U.S. 294 (1955) ("*Brown II*") (requiring practical, flexible injunctive remedies to achieve school desegregation "at all deliberate speed" to redress unconstitutional race discrimination).
[100] *E.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971) (approving the use of mathematical racial quotas for student school assignments as a starting point for remedying past violations).
[101] Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFFALO L. REV. 301, 323 (2004) [hereinafter Thomas, *Prophylactic Remedy*]; Tracy A. Thomas, *Switching to Prophylactic Injunctions*, 90 TEX. L. REV. *SEE ALSO* 295, 309 (2012) [hereinafter Thomas, *Prophylactic Injunctions*]; Thomas, *Continued Vitality*, *supra* note 53, at 114, 118.
[102] Thomas, *Prophylactic Remedy*, *supra* note 101, at 319, 326, 330. *See* John Golden, *Injunctions as More (or Less) than "Off Switches": Patent-Infringement Injunctions' Scope*, 90 TEX. L. REV. 1399, 1450 (2012).
[103] Brown v. Plata, 563 U.S. 493, 512 (2011). *See* Thomas, *Continued Vitality, supra* note 53, at 114 (detailing courts' continued use of prophylactic relief).
[104] *Plata*, 563 U.S. at 502, 509–10.
[105] *Id.* at 499–500.
[106] *See id.* at 516.
[107] TRACY A. THOMAS ET AL., REMEDIES: PUBLIC AND PRIVATE 98 (6th ed. 2016); *see* Thomas, *Prophylactic Remedy*, *supra* note 101, at 356–57.
[108] 402 U.S. 1, 24–25 (1971).
[109] *Id*. at 24.
[110] *Id.* at 25.
[111] *Id*. at 25, 31.
[112] For examples of such affirmative action plans, see generally Parents Involved in Community Schools v. Seattle School Dist., 551 U.S. 701 (2007) (striking down school assignment plans based on race where plans did not remedy past segregation); Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) (striking down plan requiring contractors to subcontract 30% of the value of contracts to minority business owners where there was insufficient evidence that the plan was remedial in nature); Mississippi University for Women v. Hogan, 458 US 718 (1982) (striking down nursing school's single-sex admissions policy on the grounds that it entrenched stereotypes rather than remedying past discrimination).
[113] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 31 (1971).
[114] *See* Thomas, *Continued Vitality*, *supra* note 53, at 118; Golden, *supra* note 102, at 1470–72 (explaining practical value of prophylactic injunctions in patent context).
[115] Alstott, *supra* note 26, at 40.
[116] *See Parents Involved*, 551 U.S. at 747–48; Gratz v. Bollinger, 539 U.S. 244, 273–76 (2003); *Richmond*, 488 U.S. at 507.
[117] *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2417 (2013); Adarand Construction, Inc. v. Pena, 515 U.S. 200, 235–39 (1995); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978).
[118] *Fisher*, 133 S. Ct. at 2418 (quoting Grutter v. Bollinger, 539 U.S. 306, 334 (2003))
[119] *See* Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2214 (2016) ("*Fisher II*") (upholding the University's racial diversity plan as satisfying strict scrutiny); *Grutter*, 539 U.S. at 343–44 (2003) (holding that law school may use race as a factor in admissions because no acceptance is based automatically on a variable such as race).
[120] Suk, *supra* note 10, at 1128 (discussing cases). Not all countries agreed, as courts in France struck down gender quotas as a remedy for past sex discrimination. *Id*. at 1129–31.
[121] *Id.* at 1129.
[122] *Id*.
[123] *See* Ajmel Queresh, *The Forgotten Remedy: A Legal and Theoretical Defense of Intermediate Scrutiny for Gender-Based Affirmative Action Programs*, 21 AM. U. J. GENDER SOC. POL'Y & L. 797, 835–36 (2013).
[124] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197-98 (1976); *but see* Frontiero v. Richardson, 411 U.S. 677, 688–91(1973) (plurality preferring to apply strict scrutiny to gender classification); United States v. Virginia, 518 U.S. 515, 533–34 (1996) (hinting at strict scrutiny as the appropriate standard).

[125] *See Virginia*, 518 U.S. at 533; *Frontiero*, 411 U.S. at 686–87.
[126] *See, e.g.,* Nguyen v. Immigration and Naturalization Serv., 533 U.S. 53, 73 (2001) (immigration mother preference); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 475–76 (1981) (statutory rape).
[127] *See Virginia*, 518 U.S. at 533.
[128] Queresh, *supra* note 123, at 836; *see* Jason M. Skaggs, *Justifying Gender-Based Affirmative Action Under* United States v. Virginia*'s "Exceedingly Persuasive Justification" Standard*, 86 CAL. L. REV. 1169, 1175 (1998).
[129] Rosalind Berger Levinson, *Gender-Based Affirmative Action and Reverse Gender Bias: Beyond* Gratz*,* Parents Involved*, and* Ricci*,* 34 HARV. J. L. & GENDER 1, 3 (2011).
[130] *Cf.* Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 41–44 (1975) (discussing systemic reasons for the disenfranchisement of women).
[131] *See* 458 US 718, 731 (1982).
[132] *Id.* at 719–20
[133] *Id.* at 727.
[134] *Id.* at 728
[135] *Id.* at 729.
[136] *Id.*
[137] *Id.* at 730.
[138] 480 U.S. 616, 641–62 (1987); *see* Deborah C. Malamud, *The Strange Persistence of Affirmative Action Under Title VII*, 118 W. VA. L. REV. 1, 4–5 (2015).
[139] *Johnson*, 480 U.S. at 620.
[140] *Id*. at 621–22.
[141] *Id.* at 621.
[142] *Id.* The Court did opine that the proper quota proportion might not be the total number of women in the labor force, but rather the proportion of women qualified for the position in the labor force. "By contrast, had the Plan simply calculated imbalances in all categories according to the proportion of women in the area labor pool, and then directed that hiring be governed solely by those figures, its validity fairly could be called into question." *Id*. at 636. This reflects a solely remedial, rather than systemic understanding of the scope of the sex discrimination problem.
[143] *Id.* at 637–38.
[144] *Id.* at 641–42; *see* Mississippi University for Women v. Hogan, 458 US 718, 729–30 (1982).
[145] Treanor & Wearden, *supra* note 4.
[146] *Id.*
[147] *Id.*