SHOULD COURTS UPHOLD CORPORATE BOARD DIVERSITY STATUTES?

Creighton R. Meland, Jr.†

Corporate board diversity statutes impose demographic requirements on the boards of directors of publicly traded corporations. This Article evaluates whether these state statutes are valid under the United States Constitution1 and under the internal affairs doctrine. It concludes that any statute that establishes either or both of sex-based and race-based quotas concerning the composition of corporate boards of directors should be found unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Corporate board diversity statutes have interstate effects and their undue burdens on interstate commerce potentially violate the Dormant Commerce Clause. A case challenging these laws under the Dormant Commerce Clause will be one of first impression. The Dormant Commerce Clause outcome will be determined by the level of scrutiny applied to the statute and this Article argues that strict scrutiny should apply. A court applying strict scrutiny should invalidate each such statute under the Dormant Commerce Clause. By regulating the activities of corporations organized in states that do not impose demographic requirements, corporate board diversity statutes also interfere with the internal affairs of corporations. Internal affairs comprise a part of state conflict of laws principles. While corporate board diversity statutes interfere materially with corporate internal affairs, litigation outcomes under the internal affairs doctrine will vary depending on the jurisdiction hearing the case and the law to be applied. Corporate board diversity statutes present issues of litigant standing. Subject to certain limitations described below, potential litigants include (1) the affected corporation, (2) directors removed from office or denied positions under the quota system, and (3) shareholders2 of the affected corporation.

† J.D., University of Michigan; B.S. in Economics, major in Finance, The Wharton School, Undergraduate Division, University of Pennsylvania.

1. This Article does not evaluate these statutes under any state constitution. While state constitutional scrutiny will be important in any constitutional challenge, it is not relevant to the analysis contained in this Article under the United States Constitution.

2. When specific references are made to Delaware corporations, “shareholders” will be referred to as “stockholders,” the term used in Delaware. For purposes of this Article, these terms are otherwise synonymous.
This Article proceeds in six sections: Section I describes the corporate board diversity statutes (both enacted and potential) and identifies the legal issues they create. Section II analyzes the validity of these laws under the Fourteenth Amendment by discussing the standards applicable to race and sex. Sections III and IV analyze the validity of these laws under, respectively, the Dorman Commerce Clause and the internal affairs doctrine. Section V identifies who may challenge these laws, including considerations of standing. Section VI evaluates the public policy consequences of corporate board diversity statutes. The statute critiqued is from California, which has recently enacted a corporate board diversity statute that creates sex-based quotas. This Article will also comment on the California legislative declarations and findings and will sometimes discuss related legislative activity in other states.

At the time of this writing, there are no race-based corporate board diversity statutes. In 2019, Illinois proposed a race and sex-based corporate board diversity statute, but modified it to include only reporting of diversity statistics and the creation of a state-run diversity ratings system, which has now been enacted into law. When discussing race-based corporate board diversity statutes, this Article refers to laws a legislature might enact that would mimic the California statute, but apply with respect to race. When this Article refers to a "corporate board diversity statute" it refers to a statute that requires a publicly traded corporation to maintain a fixed number of women and/or racial minorities on its board of directors and enforces violations by fines. This Article sometimes analyzes the Delaware General Corporation Law due to Delaware’s status as the principal state of incorporation for publicly traded corporations.

I. WHAT ARE CORPORATE BOARD DIVERSITY STATUTES?

A. CORE PROVISIONS AND PURPOSE

Corporate board diversity statutes require certain classes of corporations to maintain a minimum number of female and/or racial minority directors. California affords a transition period in which to comply. The first phase of California’s statute requires at least one...
woman on each board by the end of calendar year 2019. After the passage of the relevant time period, the corporation must comply with the requirement then in effect; in California the designated director seat must be held for “at least a portion of the calendar year.” Failure to seat a director that meets statutory requirements results in a fine enforced by the Secretary of State. The California statute contains specific terms concerning what constitutes a director qualifying for the required status. California defines a “female” as an individual who self-identifies her sex as a woman, without regard to the individual’s designated sex at birth. This differentiates between sex given at birth versus gender identity made by the candidate. The California statute does not require a removal of existing directors and replacement with women, although this is an option for the affected corporation. Rather, the statute enables the corporation to expand the board, which corporations would be free to do in any case, but which will require approvals by the board of directors and in some cases by shareholders. The California law does not set out necessarily to result in a particular percentage of women to comprise the board of directors. Instead, it imposes a minimum absolute number. However, in California, this number increases when the board reaches a certain size. The effects of these absolute size requirements will be discussed.

boards in a non-compliant manner receive no interim relief and may need to adjust their boards prior to the next annual meeting, which introduces a measure of disruption.

7. California Code § 301.3(a).
9. California empowers its Secretary of State to impose “fines” for violations, with each unfilled board seat giving rise to a violation to which a fine may attach. The fine increases for a “second or subsequent” violation, likely meaning a subsequent measurement period. See California Code § 301.3(e)(1)(C).
10. California Code § 301.3(f)(1). This definition means that anyone who merely identifies as female would qualify. The statute does not stipulate what would be necessary to self-identify. This likely would be addressed in rules issued by the Secretary of State.
11. California Code § 301.3(a).
12. See, e.g., Del. Code Ann. tit. 8, § 141(b) (“The number of directors shall be fixed by, or in the manner provided in, the bylaws unless the certificate of incorporation fixes the number of directors, in which case a change in the number of directors shall be made only by an amendment to the certificate.”). Delaware, the leading state for incorporation of public companies, is highly relevant because the California statute reaches publicly traded Delaware corporations having California headquarters.
13. Under the California Code, by year end 2019, the affected corporation must have at least one female director. By the end of calendar year 2021, if the corporation has six or more directors, it must have at least three female directors; an affected corporation with exactly five directors must have at least two female directors and an affected corporation with four or fewer directors must have at least one female director. California Code §§ 301.3(a) and (b).
B. CORPORATIONS SUBJECT TO CORPORATE BOARD DIVERSITY STATUTES

Corporate board diversity statutes apply to only a limited class of corporations. They do not apply to privately held corporations. The California statute applies to “a publicly held domestic or foreign corporation whose principal executive offices, according to the corporation’s SEC 10-K form, are located in California . . . .”14 Importantly, the statute applies to corporations both organized in California and those organized outside the state but maintaining headquarters there. This Article sometimes refers to these corporations as “foreign corporations.” The California statute applies only to corporations. Publicly traded master limited partnerships, investment trusts and other publicly traded entities not organized as corporations are not subject to the law.15 As will be discussed, this attempt to regulate foreign corporations creates issues under the Dormant Commerce Clause and under the internal affairs doctrine. Under the California corporate board diversity statute, a “publicly held corporation” includes “a corporation with outstanding shares listed on a major United States stock exchange.”16 The California statute mandates a certain number of female directors without exceptions.

II. ANALYSIS OF CORPORATE BOARD DIVERSITY STATUTES UNDER THE FOURTEENTH AMENDMENT

The Fourteenth Amendment of the United States Constitution provides in pertinent part that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.17

The Fourteenth Amendment also vests Congress with the power to enforce its provisions by appropriate legislation.18 Fourteenth Amendment jurisprudence applies different standards to construe the meaning of “equal protection of the laws” depending on the subject matter, and different standards usually apply for race and sex. This Article first discusses how courts may conceptualize and address questions of diversity in corporate boards, followed by analysis of how the

14. California Code § 301.3(a).
15. See California Code § 301.3(f)(2).
16. Id. While not specified in the statute, the New York Stock Exchange, NASDAQ and NYSE/AMEX should constitute major stock exchanges.
17. U.S. Const. amend. XIV, § 1.
Fourteenth Amendment applies to corporate board diversity statutes. This proceeds in two Subsections, the first which discusses race, followed by a sex-focused analysis.

A. MEASURING AND CONCEPTUALIZING CORPORATE BOARD DIVERSITY STATUTES

At the time of this writing, the World Bank reports that there are 4,331 companies in the United States listed on a securities exchange.然而，实际数量的公开上市公司的美国是实质性较小——在3,500公司的数量附近。\(^{19}\) 这个后者的数字排除了交易所交易基金，封闭式基金和其他投资公司公开交易。与公开公司相关的数据不仅包括公开上市公司的数量，还包括它们的市值，即流通在外所有普通股的总市值。公开上市公司的数据根据市值或收入进行排名。对于本文章的分析，将讨论Fortune 100, Fortune 500, Fortune 1000, and Russell 3000。Fortune 100, Fortune 500, 和Fortune 1000排名美国的公司，根据收入，作为前100,前500,和前1,000。公开上市公司的Fortune指数不一定是公开交易的，但绝大多数是。相反，Fortune标准是根据需要向政府机构公开报告的数据来确定的，绝大多数都与美国证券交易委员会(“SEC”)备案的普通股注册以及向该机构提交的定期报告相关联。\(^{21}\) Russell 3000是一个市值加权的指数，由FTSE Russell维护，它包含了美国公开上市公司总市值的98%。\(^{22}\) 上一句话中的百分比是公开股票市场的资本化率，而不是公开公司发行人的百分比。3000这个数字也可以是误导性的。

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21. FORTUNE 500, http://www.fortune.com/fortune500/ (last visited Aug. 27, 2019) (includes selection methodology). By way of example, Cargill, America’s largest private company, is not listed in the Fortune 500 because it does not report financial information to governmental agencies that make public this data. If Cargill were listed, it would rank fifteenth.

nomer. As of 2018, there were only 2,835 active companies (defined as companies trading on exchanges with active boards of directors) in the Russell 3000.23 Additionally, the number of companies in the index can fluctuate from time to time. For purposes of analysis, this Article will reference statistics applicable to the Russell 3000 and Fortune indices but, as explained above, the reader should note this does not include all publicly traded companies and some studies use other indices.24

Based on the very inclusive Russell 3000 index, there are approximately 25,250 public company board seats.25 Data as to composition by race and sex are available for the Fortune 500 which, as noted, does not comprise the entire universe of public companies. For 2018, this Fortune 500 data is as follows26:

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total men</td>
<td>4,392</td>
<td>77.5%</td>
</tr>
<tr>
<td>Total women</td>
<td>1,278</td>
<td>22.5%</td>
</tr>
<tr>
<td>Women and minorities</td>
<td>1,929</td>
<td>34.0%</td>
</tr>
<tr>
<td>Minority men</td>
<td>651</td>
<td>11.5%</td>
</tr>
<tr>
<td>Minority women</td>
<td>261</td>
<td>4.6%</td>
</tr>
<tr>
<td>Total minorities</td>
<td>912</td>
<td>16.1%</td>
</tr>
<tr>
<td>Total board seats</td>
<td>5,670</td>
<td></td>
</tr>
</tbody>
</table>

By race, the Fortune 500 director demographics27 are as follows:

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>African American/Black</td>
<td>486</td>
<td>8.6%</td>
</tr>
<tr>
<td>Asian/Pacific Islander</td>
<td>209</td>
<td>3.7%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>213</td>
<td>3.8%</td>
</tr>
<tr>
<td>Other</td>
<td>4</td>
<td>0.1%</td>
</tr>
<tr>
<td>White</td>
<td>4,758</td>
<td>83.9%</td>
</tr>
</tbody>
</table>

27. Id. at 19.
Because directors can and do hold multiple board seats, the number of board seats is less than the number of public company directors. Unlike admissions cases applicable to higher education, where a candidate can attend only one institution, directors may hold multiple positions. Multiple board positions are in fact desirable, both in validating qualifications and in attaining information and perspective on various industries and lines of business required to make a meaningful contribution to the board of directors. The rate at which directors hold multiple board seats across more than one company is referred to as the “recycle rate.”28 For example, if every board member served on only one board, the recycle rate would be one and if every director served on two boards the recycle rate would be two.29 Recycle rates are not evenly distributed by race and sex. African American men hold the highest recycle rate of any group—1.41.30 High recycle rates may suggest a dearth of qualified candidates or may evidence tokenism. Whatever their explanation, recycle rates above 1.0 mean the benefits of directorships will be concentrated in the hands of fewer persons than if each candidate held only one board seat.

Public companies face considerable shareholder pressure to add women and racial minorities to their boards of directors. Two examples concerning women include the California Public Employees Pension Fund and BlackRock, the former which has sent letters to public companies urging diversity as a means to improve performance and the latter which has asked companies with less than two women on their boards to explain their progress31 (but which apparently did not comment at that time on the racial makeup of those boards).

Whether attributable to investor and public pressure or other forces, the data show an emerging trend toward increasing numbers of board seats being held by women and racial minorities. The Alliance for Board Diversity has set a goal that women and racial minorities comprise 40% of board seats.32 According to this organization, at current rates of change, this goal will be met by 2024.33 The report does not state whether this percentage applies to the Fortune 500, the Fortune 100 or some other data base; however, it is being discussed in the context of the Fortune 500 and Fortune 100 and one may infer these are the reference points.

28. Id. at 24.
29. Id.
30. Id.
31. Id.
32. Id. at 6.
33. Id.
Given the considerable pressures already exerted on public companies to attain diversity, the trends noted above and benefits concentrated in an elite segment of society, enacting into law race and sex-based board diversity may be a solution in search of a problem. Director candidates are typically drawn from a narrow societal segment consisting of occupants of the executive suite. The benefits of corporate board diversity statutes will therefore overwhelmingly flow to those already holding positions of power who typically carry above average income and personal wealth. The Supreme Court of the United States has expressed concerns over ulterior purposes behind diversity laws\(^\text{34}\) and corporate board diversity statutes should heighten this review, given their limited benefit to a small and elite segment of society.

In addition to the intent to redress what is characterized as a problem, corporate board diversity statutes may be identified as leading to superior corporate outcomes. Supporters contend that corporations with diverse boards of directors perform better than those that lack diversity. The first problem with this thinking is that board quality is imperfectly correlated to corporate outcomes. Good businesses managed by the best managers perform best. Assuming for purposes of discussion that diversity at the board level improves results (a questionable conclusion), this benefit would largely amount to a subsidy to private enterprise. While business profit is generally better for society than business loss, this goal should not be one that enjoys constitutional approval. This has yet to be addressed by courts. A desire to aid private enterprise also evinces paternalism. If diversity truly improves performance, competent managers would pursue and attain diversity without government mandate. But because they do not, the state must act for their benefit. Under conventional microeconomic thought, if one accepts that diversity improves performance, then there would be no need for legal redress for a lack of diversity. Instead, companies would need only enlightenment to understand that by attaining diversity they better their bottom line. If diversity does not improve performance, then forcing firms to attain diversity either harms them or does no good. On the other hand, if diversity improves performance, the market will see this and solve the problem on its own. In that environment, any legal mandate will be needless and promote no state interest. Worse, a quota requirement could (1) simply serve the interest of a small industry of experts and professionals profiting from the diversity mandate and (2) foment resentment and stigmatic harm.\(^\text{35}\)


\(^{35}\) See GAO Study, supra note 24, at 21.
How will the judiciary respond to corporate board diversity statutes? Should courts indulge in reviewing the evidence of whether race and sex-based diversity improve corporate results, they will find themselves navigating rock-strewn waters. There are now studies examining the effects of diversity on corporate results. There are multiple plausible explanations for superior corporate performance when accompanied by race and sex-based diversity. The first is that diversity for its own sake improves outcomes. Another rationale would be that companies that make the effort to be diverse are more enlightened and talented. This enlightenment and talent causes them to appoint diverse boards but those appointments are unrelated to success. What of companies lacking enlightenment? A corporate board diversity statute still would do nothing to promote better results because benighted management would gain no talent or insight by being forced to appoint a racially and sexually diverse board of directors. The mandate would not turn bad managers into good ones. It is possible the new, diverse directors would press for greater competency, but this would be to indulge in speculation. Yet another rationale would explain the superior performance by the fact that corporations that appoint racially and sexually diverse boards of directors have the resources to do so. They do so because they can. This third explanation also means there is a conflation of cause and effect. The superior performance causes the diversity; the diversity does not cause the superior performance.

B. CORPORATE BOARD DIVERSITY STATUTES: RACE-BASED ANALYSIS

1. The Present State of Fourteenth Amendment Jurisprudence

This subsection examines corporate board diversity statutes that would impose racial preferences. As noted, thus far, there have been only attempts to pass race-based statutes without actual enactment into law. The author expects these attempts will persist and ripen into passage of race-based corporate board diversity statutes. For this reason, they are, for now, momentarily discussed in a hypothetical setting. They are also useful in drawing a contrast to sex-based statutes.

The United States Supreme Court’s racial preference jurisprudence under the Fourteenth Amendment focuses on a variety of are-

nas including (among other things) education,\textsuperscript{37} voting districts,\textsuperscript{38} government contracting,\textsuperscript{39} employment,\textsuperscript{40} and jury selection.\textsuperscript{41} A race-based case will apply strict scrutiny to the statute or practice under review. Strict scrutiny requires the law or practice to advance a compelling state interest and be narrowly tailored to address the wrong sought to be corrected.\textsuperscript{42} The Supreme Court has struggled to furnish helpful guidance both as to what constitutes a compelling state interest and the contours of the tailoring necessary to advance that interest but not unduly harm those impacted in the non-minority community.

In the government contracting cases,\textsuperscript{43} federal courts have often invalidated reverse discriminatory laws and practices in the absence of demonstrated past discrimination. In contrast, \textit{Fulilove v. Klutznik},\textsuperscript{44} upheld a 10\% minority set aside requirement for federal government contracts. The \textit{Fulilove} court assigned weight to Congress’ determination of the existence of past discrimination and Congress’ power to legislate under Section 5 of the Fourteenth Amendment.\textsuperscript{45} Corporate board diversity statutes involve state laws having no such federal constitutional authority as that upheld in \textit{Fulilove}. Nineteen years after \textit{Fulilove}, \textit{City of Richmond v. J.A. Croson Co.},\textsuperscript{46} invalidated a city minority contractor set aside.\textsuperscript{47} Lacking the

\begin{footnotes}


42. \textit{Adarand}, 515 U.S. 200, 227.

43. \textit{Supra} note 39.

44. 448 U.S. 448 (1980).

45. \textit{Id.} at 499-502.


\end{footnotes}
congressional findings and powers on which the Court relied in *Fulilove*, the Court rejected the city’s generalized assertion of past discrimination that lacked any substantiation. Race-based quotas may be applied only in cases where there is sufficient evidence of past discrimination and must function as a remedy, narrowly tailored to address the past discrimination. This further means the school desegregation cases that remedied clearly demonstrated past discrimination are inapposite to the setting reviewed here. The first reverse discrimination case in education decided by the Supreme Court, *Regents of the University of California v. Bakke*, notes this important distinction and expressly refused to follow the school desegregation cases, reasoning that those cases involved clearly-determined constitutional violations. A properly-decided review of a corporate board diversity statute should therefore not look to guidance from the school desegregation cases.

In *Adarand Constructors, Inc. v. Pena*, the Supreme Court addressed a Fifth Amendment challenge to a Federal Small Business Act rule that mandated federal contracting with a certain percentage of “economically disadvantaged individuals.” The plaintiff, Adarand Constructors, Inc., was denied the contract despite its low bid. Instead, the contract was awarded to Gonzalez Construction Company by reason of its “economically disadvantaged” status. For this purpose, “economically disadvantaged individuals” included enterprises controlled by persons of African American, Asian, and Hispanic descent, together with women. In *Adarand*, the Supreme Court invalidated on Fifth Amendment grounds a racial preference regulation of the United States Department of Transportation. The case reaffirmed that any preference based on race must receive a most searching examination and that any classification that treats a person differently on account of race or ethnic origin is inherently suspect. In so doing, the Court rejected any notion that there are “benign” racial classifications such as those that might arise under reverse discrimination against whites. Additionally, the case overruled *Fulilove* to the extent it established a separate, federal racial classification. It further expressly overruled *Metro Broadcasting v. FCC*, a case that applied affirmative action to the granting of broadcasting licenses. In a con-

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49. *Id.*
51. *Id.* at 295.
54. *Id.* at 226.
55. *Id.* at 235.
currving opinion in *Adarand*, Justice Scalia sharpened the attention on the stakes presented by racial quotas, noting that reverse discrimination will establish debtor and creditor races:

To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege, and race hatred. In the eyes of the government, we are just one race here. It is American.\(^{57}\)

More recently, the United States Court of Appeals for the District of Columbia Circuit upheld a challenge to a Small Business Administration statute that accorded preferences to disadvantaged groups in government contracting. Pivotal to the court in *Rothe Development, Inc. v. United States Department of Defense*\(^ {58}\) was the statute’s phraseology conferring its preferences to certain disadvantaged groups. While the statute used race-neutral language, the definition of disadvantaged groups was presumed to include various ethnic minorities and women merely by virtue of their status. What in effect amounted to a quota escaped strict scrutiny because of what, in the circuit court’s view, was a race and sex-neutral statute. The D.C. Circuit distinguished contrary precedent on these grounds. The court rejected the contractor’s challenge because the statute operated from the perspective of disadvantaged persons and did not stipulate contracting based on race or sex. The court also found a number of procedural ways to dispose of the case, noting that the contractor challenged only the statute and not underlying regulations. The decision leaves some unsatisfying and unresolved questions. First, the *Rothe* facts were largely indistinguishable from *Adarand*. In both cases, Congress and administrative agencies couched the laws in the form of a preference for disadvantaged groups. The *Rothe* certiorari petition noted that 99% of the contracts placed went to racial minorities, making the regime tantamount to a quota.\(^ {59}\) But the petition failed to effectively connect the *Rothe* case to *Adarand*. The only way to doctrinally square *Rothe* with *Adarand* is to conclude the Supreme Court will indulge the doctrinal legerdemain of a quota parading under the banner of disadvantaged status in government contracting matters.

The disadvantaged group, when applied without regard to true disadvantaged status, is a racial quota in disguise. However, even under the form-over-substance regime of a quota clothed as a disadvantaged group, the fact remains that the Supreme Court has not vali-

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57. *Adarand*, 515 U.S. at 239.
dated legal regimes that present themselves so baldly as quotas without a genuine finding of past discrimination. The author will explore these immediately below. Before doing so, the author reminds the reader that corporate board diversity statutes do not benefit disadvantaged persons; they benefit the privileged occupants of the executive suite and are phrased unambiguously to establish quotas by sex and race.

The Supreme Court has struggled to develop a coherent methodology for determining when a racial preference program in education amounts to nothing more than a disguised quota system. *Bakke* invalidated the race-based admissions criteria of the University of California at Davis Medical School. The policies of the medical school did not withstand scrutiny because no matter how strong a candidate's qualifications, non-minorities would not be considered for specific admissions slots.60 This, the Court observed, amounted to unacceptable reverse discrimination for its own sake.61 The methodologies used in reverse discriminatory admissions criteria by institutions of higher learning call into question whether the program provides a narrowly tailored, minimally-intrusive solution.

A question that should arise is whether the reverse discrimination can survive an attack based on its contribution to a diverse environment in the relevant setting (here, higher education). *Gratz v. Bollinger*62 expressly rejected the notion that a “single characteristic automatically ensured a specific and identifiable contribution to a university’s diversity.”63 This reaffirmed that quotas are unacceptable. The *Gratz* Court invalidated the University of Michigan's undergraduate admissions program that awarded points for minority status. Troubling to the Court was the award of points without reference to other factors such as underprivileged status independent of a suspect classification and of concern was the undue weight given to race. The Court construed the points system as tantamount to a racial quota because the race points tipped the scales so heavily to minorities without regard to any other considerations. Conversely, in *Grutter v. Bollinger*,64 the Court upheld the admissions policies of the University of Michigan Law School, holding that for strict scrutiny purposes a government interest in student body diversity in higher education is compelling.65 The Court observed that the Law School admissions program included race as a mere factor and not a classification that

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60. *Bakke*, 438 U.S. at 319.
61. *Id.* at 307.
64. 539 U.S. 306 (2003).
would insulate a racial minority from any competition by non-minority candidates. The Court also assigned near touchstone significance to Justice Powell’s reference to the Harvard University admissions program discussed approvingly in Bakke. More recently, a less-than-fully-constituted Supreme Court then upheld the undergraduate affirmative action admissions program at the University of Texas, as will be discussed in the next paragraph.

In Fisher v. University of Texas, the University of Texas operated a bifurcated undergraduate admissions criteria. This featured a substantially automatic offer of admission from anyone occupying the top 10% of his or her graduating high school class. This first tier applied without regard to race. The second tier of the bifurcation operated differently with respect to race as an admissions factor. Once the school had applied the top 10% criteria, it then applied an academic and personal achievement index to remaining candidates. The index categorically included palpably well-qualified applicants and rejected palpably unqualified applicants. For those falling in between these poles, the admissions criteria included race as one of its factors. Fisher II was preceded by an earlier Supreme Court decision in the same case that vacated the Fifth Circuit’s application of an overly deferential good faith standard to the question of the constitutionality of the admissions program. Fisher II contained plentiful admonitions underpinning the strict scrutiny the case purported to apply. Justice Kennedy warned that “[f]ormalistic racial classifications may sometimes fail to capture diversity in all its dimensions and when used in a divisive manner, could undermine the educational benefits the University values.” The opinion went on to condemn policies simply aimed at “enrolling a certain number of minority students.” The Court assigned weight to university studies showing stagnation in minority admissions and rejected Fisher’s argument that the top ten program sufficed to attain the diversity underlying the compelling state interest.

As Justice Alito warned in his dissent, in upholding the program, the case recognized the need for diversity without demonstrable evidence that the program attained that goal. Notes 66

66. Id. at 334. “[U]niversities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks.” Id.
67. Id.
68. 136 S. Ct. 2198 (2016).
70. Fisher II, 136 S. Ct. at 2210.
71. Id.
72. Id. at 2216.
produced studies, it did not explain and justify why diversity was a compelling state interest and whether it was attained. The dissent viewed the Court as too deferential to the admissions policies of institutions of higher learning. Statistical analysis affirms that this deference has led to findings inconsistent with case outcomes. One study demonstrated that the law school admissions methodology upheld in *Grutter* gave greater weight to race than the admissions program invalidated in *Gratz*.\(^7\) This caused the study’s authors to conclude that when it comes to affirmative action programs for admission in institutions of higher learning, the Supreme Court will not require the institutions to produce evidence of narrow tailoring and instead will largely defer to each school’s determinations.\(^7\) This further means the Court cares only for the appearance of the program as not constituting a quota and not the actual substance of the policy. Because the Court has never expressly stated this is all it will require, the schools, the lower courts, applicants, and the general public will lack guidance needed to operate (or challenge) these programs. With the jurisprudence now identified, this Article turns to the question of how courts should treat the corporate board diversity statutes under the Fourteenth Amendment.

2. *Fourteenth Amendment Analysis of Race-Based Corporate Board Diversity Statutes*

Despite the discord, critical to understanding the constitutional methodologies will be an ability to differentiate between racial favoritism and outright quotas. In circumstances of racial favoritism, strict scrutiny will require the government to use the smallest racial preferences necessary to attain a compelling governmental objective. However confused the racial favoritism cases may be, the present law remains that actions amounting to a quota (other than as a properly drawn remedy for discrimination) will not survive strict scrutiny. And even if a quota is justified, it must bear a relationship to the harm it corrects and be narrowly tailored. This is where race-based corporate board diversity statutes will suffer fatally under the Fourteenth Amendment. Race-based corporate board diversity statutes create board positions in which only racial minorities may compete. In so doing, they constitute an absolute bar to admission identical to that condemned in *Regents of the University of California v. Bakke*\(^7\) and therefore violate the Fourteenth Amendment. And societal disparities

\(^7\) Ian Ayres & Sydney Foster, *Don’t Tell, Don’t Ask: Narrow Tailoring After Grutter and Gratz*, 85 Tex. L. Rev. 517, 540 (2007).

\(^7\) Id. at 559.

\(^7\) 438 U.S. 265 (1978).
in the composition of a given community, standing alone, are insufficient evidence of past discrimination.\textsuperscript{76}

What if the statutes are couched as race-based remedial measures? In this case, the state must demonstrate past discrimination. In the government employment setting, a reviewing court may consider statistical differences in the labor pool by examining differences between those employed and those in the labor pool.\textsuperscript{77} Even if the court would permit these to be applied in the private sector, underrepresentation only exists if there are statistically significant disparities between the qualified director pool and those employed. But even if the court entertains these methods, the statute fails to narrowly tailor because the board addition does not equate to the required remedy. Instead, the minority candidate would be awarded a mechanistically-determined fixed number of quota-based positions. In the Supreme Court’s efforts to harmonize the outcome in \textit{Fulilove v. Klutznik}\textsuperscript{78} with \textit{City of Richmond v. J.A. Croson Co.},\textsuperscript{79} the Court noted the exceptions to the minority set asides for availability and price that existed in \textit{Fulilove}.\textsuperscript{80} No such exceptions exist with a strict quota that applies rigidly in all cases.

Having discussed the law, are there factual features of corporate board diversity statutes that may cause nuanced or different outcomes? Where should courts look for guidance in reviewing the constitutionality of race-based corporate board diversity statutes? The circumstances surrounding corporate boards resembles neither the educational affirmative action cases nor the government contracting cases. Corporate boards differ in admissions criteria and societal effects. Corporations are also not state actors. Courts must fashion new standards for what comprises a compelling governmental interest as well as what will constitute narrow tailoring. Any absolute mandate for appointment of minorities should, however, fail as an unconstitutional quota.

This analysis merits some attention to the question of narrow tailoring. Imposing a specific racial figure applying pervasively to all publicly traded concerns subject to the law’s jurisdiction fails to narrowly tailor the program. Instead of a thoughtful, evidence-based solution, the numeric assignment is one that merely applies at random.

\textsuperscript{76} See \textit{Wygant v. Jackson Bd. of Educ.}, 476 U.S. 267, 276 (1986) (rejecting the need for role models as a compelling state interest and reaffirming that societal discrimination alone has never justified a racial classification; societal discrimination is too amorphous a basis for a racially classified remedy).

\textsuperscript{77} Conlin v. Blanchard, 890 F.2d 811, 816 (6th Cir. 1989).

\textsuperscript{78} 448 U.S. 448 (1980).

\textsuperscript{79} 488 U.S. 469 (1989).

One cannot deduce the sufficiency of such a methodology and this further means such a system cannot survive strict scrutiny. Some focus on the workings of director appointments will follow in the next paragraph.

While the appointment of corporate directors values high competency and other attributes, it does not form a market like the competitive bidding involved in the government contracting cases. Neither does it adhere to a set of relatively objective standards like academic performance and test scores seen in the education affirmative action cases. Instead, the director selection process is one of competency, relationship, and fit.81 The competency criteria means that most director candidates must hold offices in the executive suite or have experience there. The relationship criteria typically requires a relationship or high visibility with the chief executive officer or the nominating machinery of the enterprise. Insider directors are an example of relationship criteria but also may meet competency criteria by virtue of executive competencies and experience with the business. The fit criteria includes subjective factors such as temperament and ability to work in a collaborative setting. Fit also has an element of diversity, but not in the sense of race or sex. Instead, the diversity may feature critical perspectives. Industry experience is one example and if the enterprise is a conglomerate, a director with a perspective or experience on each business segment is a plus. Geography also adds to fit and if the enterprise has revenues in multinational markets, the enterprise may benefit from someone with experience in those markets. There is also the critical criteria of technical functions such as law, accounting, finance, engineering, public relations, marketing, and similar categories. These criteria, which bear no relationship to race or sex, should furnish the foundations for director selection in a healthy enterprise. None of these traditional criteria lend themselves to mandating board selection by race. Accordingly, racial preferences contained in corporate board diversity statutes should not survive strict scrutiny and be invalidated as unconstitutional racial quotas. And if as the author postulates, decisions will turn on the superficial appearances of a racial preference program, racial quotas still fail because they do not project an appearance a reviewing court will uphold.

C. CORPORATE BOARD DIVERSITY STATUTES: SEX-BASED ANALYSIS

1. Present State of Fourteenth Amendment Jurisprudence

In contrast to the race-based cases, the sex-based Fourteenth Amendment cases most often do not concern affirmative action. While

81. See GAO Study, supra note 24, at 13.
they may address discrimination, unlike the race-based education cases, the discrimination generally does not involve competition for a finite number of admissions slots or government contracts. Instead, these cases challenge the constitutionality of sex-based distinctions in such areas as single-sex educational institutions,82 health and welfare benefits,83 age of majority,84 criminal justice and jury selection,85 immigration,86 family law,87 and property rights.88 In addition, Person nel Administrator v. Feeney89 upheld a challenge to a sex-neutral law that favored hiring of military veterans in the context of civil service hiring. Unlike the statutes making express sex-based distinctions, Feeney addressed the question of the consequences of having a sexually disparate impact, because the great majority of veterans were men. Feeney held that a facially sex-neutral statute that disproportionately benefitted men met the standards set out by the Fourteenth Amendment discussed in the next paragraph. In Feeney, the Court viewed the law merely as a preference for veterans of either sex over nonveterans of either sex.90

In Craig v. Boren,91 the Supreme Court of the United States applied intermediate scrutiny to a challenge brought by male litigants that allowed Oklahoma women to consume 3.2% beer at age eighteen but allowed men to do so only at age twenty-one. Intermediate scrutiny lies between the strict scrutiny applied to race-based cases and the rational basis inquiry that would apply when suspect categories are not involved. The announced test requires a law or practice (1) to relate to an important governmental interest, and (2) advance that

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89. 442 U.S. 256 (1979).
91. 429 U.S. 190 (1976).
interest by means substantially related to the interest. The Court invalidated the statute and concluded the sex-based denial of equal access denied equal protection. The state introduced evidence in the form of statistics showing that young males were more prone to harm caused by excessive drinking. The Court rejected this evidence, observing that these were merely broad-based sociological propositions, which the Court characterized as “dubious business.”

In *Mississippi University for Women v. Hogan*, the Supreme Court again applied intermediate scrutiny to a challenge by a male applicant to an all-female nursing school. In invalidating the policy, the Court stated that parties seeking to uphold a statute that classifies by sex must carry a burden showing “exceedingly persuasive justification” for the classification. The practice must meet important governmental objectives with the discriminatory means substantially related to the attainment of those objectives. The Court rejected the school’s argument that the same-sex nursing school was intended to redress past discrimination. Any casual observer would know that nursing is a female-dominated field and therefore it is easy to understand why the Court rejected such post-hoc rationalizations. Similarly, the Court invalidated the all-male admissions policy of the Virginia Military Institute in *United States v. Virginia*.

The level of scrutiny in sex-based cases also depends on whether the case involves affirmative action. A sex-based quota absolutely barring men from director positions should be viewed as an affirmative action program. Through the use of cast iron, numeric goals, a quota may either be overreaching or insufficient to redress the harms identified by the legislature. Viewed in this manner, rather than intermediate scrutiny, corporate board diversity statutes that establish positions for women should be reviewed under a strict scrutiny standard. As the following discussion will show, corporate board diversity statutes favoring women are constitutionally invalid under either intermediate scrutiny or strict scrutiny.

2. *Fourteenth Amendment Analysis of Sex-Based Corporate Board Diversity Statutes*

Corporate board diversity statutes fit imperfectly into the jurisprudence that examines sex-based distinctions. The sex-based education cases implicitly recognize that physiological differences between

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92. Craig, 429 U.S. at 197.
93. Id. at 204.
95. Hogan, 458 U.S. at 724.
97. Brunet v. City of Columbus, 1 F.3d 390, 403-04 (6th Cir. 1993).
men and women are, in general, irrelevant to higher education. In cases such as statutory rape, where physiological differences matter, the court may affirm different treatment of the sexes. Corporate board diversity statutes do not invoke relevant differences between the sexes and, therefore, the results should be like the education cases, where the Court insisted on sex-neutral policies. In these rulings, the Court did not require the schools to attain percentages of participation by the formerly excluded sex. Rather, the rulings opened these institutions to participation by all sexes in a sex-neutral manner. For this reason, courts should invalidate the sex-based quotas imposed by the corporate board diversity statutes. Courts do not uphold quotas except in cases of discrimination by the affected body and come especially into relevance in cases of egregious transgressions.

One might liken an all-male board of directors to the all-male policies of the Virginia Military Institute or the all-female policies of the Mississippi University for Women, each of which were invalidated by the Court. There are differences. Government-controlled educational institutions are state actors subject to constitutional limitations on their actions. Private persons such as publicly traded corporations are not state actors and any regulation of their affairs respecting the Fourteenth Amendment could only be regulated by Congress under Section 5 of the Fourteenth Amendment. Indeed, Congress has legislated pursuant to these powers in the enactment of, among other things, federal employment and education discrimination laws. States have no similar power to create an absolute bar to male participation in the candidate pool. There is another important difference between the segregated education cases and today's corporate board setting. In the education cases, the school was open exclusively to one sex. In contrast, there is no evidence that any public corporation makes a policy of excluding director candidates by race or sex. To the contrary, corporate America publicizes its attainment of diversity at all levels and applies considerable resources to attain diversity. Mere disparities in participation between men and women, standing alone, do not evidence discrimination. The education cases opened sexually segregated government institutions to integration and opportunities for the opposite sex to attend. They did not impose quotas to redress the harms brought about by previously segregated institutions.


As applied to sex, corporate board diversity statutes are unconstitutional under the Fourteenth Amendment. The practice does not meet important state interests with the discriminatory means substantially related to the attainment of those state interests. The state’s best argument to uphold the statutes under intermediate scrutiny is that diversity is an acceptable state interest and the quota, while imperfect, substantially relates to that interest. Under intermediate scrutiny, the reviewing court must take the state to task concerning state interest and not accept it at face value. It should ask first if the state interest is proper, second after a finding of propriety, if there are non-discriminatory means to attain the state interest and if not, if the discriminatory means actually attain the state interest. The main problems with the state interests are: (1) the goals of improved corporate performance must be proved and not conflate cause and effect, and (2) diversity for its own sake (including role models) may not be acceptable to the Supreme Court. If the wisdom can be demonstrated, then a court should turn to the question of whether state interests can be attained by alternative means. This Article documents but a few of the very material influencers in the private sector driving publicly traded corporations to diversity. Courts should therefore easily find that there are alternative means to attain the goal. There is a final concern that these laws create harms—harms that would not exist with private market-based solutions that are now playing out very actively. The statute may actually work against its goals to the extent corporations merely fill a quota position, whereas without quotas, a corporation might otherwise go farther and thoughtfully consider many more female candidates. Harms also include resentment by classes that do not qualify for the special status and the inevitable stigma of being token appointees. While intermediate scrutiny does not require narrow tailoring, the quota methodology remains problematic. The quota bears little relation to the state interest (if accepted as a valid state interest) and therefore fails to meet the requirement that the means be substantially related to the state interest. A constitutionally-valid program would require the state to explain and justify the relationship between the problem and the numeric solution required.

The previous paragraph demonstrates that invalidity should take place under intermediate scrutiny. However, this writer contends strict scrutiny identical to that in race cases should also apply to corporate board diversity statutes because they create a pernicious quota regime. Viewed in that manner, the invalidity of these statutes would apply with even greater force, with the analysis proceeding as previ-

ously described with respect to race. A court’s application of the standard of scrutiny will be important procedurally as to how and what litigation findings are required. In any case, as is the case with the race-based corporate diversity statutes, sex-based quotas should be struck down under the Fourteenth Amendment under either methodology.

III. ANALYSIS OF CORPORATE BOARD DIVERSITY STATUTES UNDER THE DORMANT COMMERCE CLAUSE

A. DORMANT COMMERCE CLAUSE JURISPRUDENCE

Article I Section 8 of the United States Constitution grants to Congress the power to “regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.”102 In addition to the grant of power to regulate interstate commerce, the Dormant Commerce Clause recognizes the limitations on a specific state’s regulation of interstate commerce in cases where Congress has not legislated. Much of the litigation of the Dormant Commerce Clause concentrates on taxation,103 movement of goods, and transportation in interstate commerce.104

A leading United States Supreme Court case involving a Dormant Commerce Clause challenge to a corporate statute is Edgar v. MITE Corp.105 In Edgar, the court invalidated an Illinois corporate tender offer law as both preempted by the Williams Act106 and violative of the Dormant Commerce Clause. The case involved a tender offer made by a Delaware corporation having its headquarters in Connecticut aimed at the shares of an Illinois corporation headquartered in Illinois and having 27% of its shareholders resident in Illinois. The Illinois tender offer statute applied because (among other reasons) the corporation met the statutory requisites based on shares held by Illinois residents. The Supreme Court ruled the Illinois law federally preempted because it frustrated and conflicted with the Williams Act. Rather than resolve the case solely under the preemption, the Court went further and found that the Illinois statute regulated corporate share control transactions across state lines. The State of Illinois’s interest in protecting resident shareholders did not justify the stat-

102. U.S. Const. art. I, § 8, cl. 3.
ute’s significant effects on interstate commerce and the Court invalidated the statute under the Dormant Commerce Clause.

Five years after Edgar, the Court changed course in CTS Corp. v. Dynamics Corp. of America. In CTS, the Court reviewed an Indiana takeover control statute applicable to an Indiana corporation under the Williams Act and the Dormant Commerce Clause. Distinguishing Edgar, the Court found the Indiana statute consistent with the Williams Act and therefore not preempted by it. The Court also found no Dormant Commerce Clause violation because it viewed the Indiana statute as one that simply concerned the internal affairs of an Indiana corporation. Unlike Edgar, which involved a statute with clear extraterritorial reach, the Indiana statute did not apply to out-of-state corporations. Under this view, the statute, while potentially having an effect on shareholders and other constituencies outside Indiana, did not offend the Dormant Commerce Clause. The Court rested its decision in part on the internal affairs doctrine, citing, among other things, Section 304 of the Restatement (Second) of Conflict of Laws. In Section IV, this Article will discuss the internal affairs doctrine as applied to the corporate board diversity statutes. Courts apply the internal affairs doctrine to attempts by states to regulate the internal affairs of foreign corporations doing business within their boundaries. These internal affairs cases generally decide whether or not the law of the place of incorporation should govern a matter. CTS did something different. The CTS Court imported this state corporate law doctrine to help resolve the issue under the Dormant Commerce Clause.

In actuality, CTS did not even involve an attempt by a state to regulate the internal affairs of a foreign corporation. The corporation involved was organized in Indiana and there was no attempt by any other state to regulate its internal affairs. CTS was not really about internal affairs, but the Court relied on the internal affairs doctrine to resolve the matter. In addition to its novel reliance on a state corporate law concept, CTS has been criticized for failing to examine the protectionist effects of the Indiana statute. However, the CTS opinion acknowledges that the Dormant Commerce Clause invalidates state statutes that “may adversely affect interstate commerce by subjecting activities to inconsistent regulations.”

108. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, at 93.
109. CTS, 481 U.S. at 89.
111. CTS, 481 U.S. at 88.
In the corporate arena, the 1980s surge in hostile corporate takeover activity prompted some states to enact legislation impeding hostile takeovers. This, in turn, invited additional attacks that invalidated state anti-takeover statutes as undue burdens on interstate commerce, many of which preceded CTS. In *TLX Acquisition Corp. v. Telex Corp.*,112 a Delaware corporation was the subject of a tender offer that triggered an Oklahoma control share acquisition statute that applied to corporations with principal offices or substantial assets in Oklahoma, together with the presence of at least one of the three following conditions: (1) more than 10% of shareholders reside in Oklahoma, (2) Oklahoma residents own more than 10% of the corporation’s shares, or (3) at least 10,000 of the corporation’s shareholders reside in Oklahoma.113 The Court held that by creating an impermissible risk of inconsistent regulation and imposing an indirect burden on interstate commerce that is excessive in relation to the state’s interest in protecting its residents, the Oklahoma statute violated the Dormant Commerce Clause.114 The Court focused on the frustration of shareholder voting rights, noting that state attempts to regulate voting rights in foreign corporations will be subject to the laws of more than one state. This, in the Court’s view, presented an impermissible risk of inconsistent regulations by different states that may adversely affect interstate commerce.115 An earlier Tenth Circuit case, *Mesa Petroleum Co. v. Cities Service Co.*116 also invalidated the same Oklahoma statute under the Dormant Commerce Clause.

The takeover cases also looked behind state statutes that purported not to discriminate against interstate commerce. In *Mesa Partners II v. Unocal Corporation*,117 a bidder for corporate control challenged on Dormant Commerce Clause grounds an Oklahoma law that purported to regulate the transfer of energy properties. The law required approval by the Corporation Commission of Oklahoma for transfers of energy properties within the state. The law contained numerous exemptions, including transfers of properties valued at less than $75 million. The Court rejected the state’s arguments that the law regulated even-handedly, noting that “[a]ny true conservation legislation so riddled with exemptions, exceptions and limitations does not realistically seem to be structured with conservation as its main

114. TLX, 679 F. Supp. at 1033.
115. Id. at 1030-31.
116. 715 F.2d 1425 (10th Cir. 1983).
goal." The opinion noted both the adverse effects on interstate commerce and the statute's improper, ulterior purposes. This is critical to the level of scrutiny the reviewing court will apply to the statute. In this case, because the regulation was not even-handed, the Court applied exacting scrutiny.

Dormant Commerce Clause jurisprudence can generally be reduced to cases involving statutes that discriminate against interstate commerce (whether facially, by their purpose or practical effects) and those that incidentally burden interstate commerce. In the first category, the Court should invalidate the statute unless the state can show it advances a legitimate local purpose that cannot be served by reasonable, non-discriminatory means. This is a form of strict scrutiny that usually results in the statute's being invalidated. The second category and the legal standard applicable to it was announced by the Court in *Pike v. Bruce Church, Inc.*: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." This standard, referred to as "Pike balancing," applies lesser scrutiny, and the reviewing court should uphold the statute unless it presents excessive burdens in relation to local benefits. The term "Pike balancing" is apt, given that the case revolved around a statute's discriminatory purpose, meaning there was nothing to balance. And there are many cases purporting to apply *Pike* balancing that do not actually do so that are in reality cases about discriminatory purpose. Nevertheless, as the discussion will show, *Pike* balancing will be relevant to the Dormant Commerce Clause scrutiny of corporate board diversity statutes.


119. *Colon Health Centers of America L.L.C. v. Hazel*, 813 F.3d 145, 152 (4th Cir. 2016). There is authority for a third classification, namely, that of extraterritorial reach. See *Pharm Res. & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 79 (1st Cir. 2001). The author believes these extraterritorial reach cases should be classified with the discrimination cases, and these matters should be subjected to the same scrutiny.

120. *Or. Waste Systems, Inc. v. Dep't of Env't Quality*, 511 U.S. 93, 100-01 (1994). See also *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996) (invalidating a North Carolina intangibles tax that granted a deduction proportionate to the income generated in North Carolina by the companies creating the tax and rejected the state's contention that the law served to develop a capital market in North Carolina; the statute was facially discriminatory and, citing *Oregon Waste*, the court noted that facially discriminatory statutes are *per se* invalid).


123. See *Regan*, *supra* note 104 at 1220.
B. Applying the Dormant Commerce Clause to Corporate Board Diversity Statutes

On a superficial level, the closest precedent to the corporate board diversity statutes involves the 1980s hostile takeover cases, discussed in Subsection A, which evaluate either or both of protectionist purpose or adverse effects on interstate commerce. Those cases differ from corporate board diversity statutes because in certain cases the states that passed the statutes did so in order to protect industry in their states. This further meant the cases applied the strict scrutiny required in cases of discriminatory statutes. While corporate board diversity statutes discriminate based on race and sex, this is not the concern of the Dormant Commerce Clause. These laws do not focus on procuring directorships for residents of any state; rather, they discriminate based on race and sex. The takeover cases remain relevant to the extent they examined the burdens of the statutes on interstate commerce. These burdens will be discussed in this Subsection. Before doing so, the author will describe in the next paragraph the scope of interstate commercial activities associated with corporate board diversity statutes and then explain why they impose considerable burdens on interstate commerce.

A threshold question is whether the composition of a board of directors and underlying voting rights affect interstate commerce. Director activities should be viewed as a service and, in a large number of cases, one that is arranged and rendered across state lines. This should suffice to constitute a service in interstate commerce. The solicitation and rendering of proxies of public companies involve the instrumentalities of interstate commerce, and shareholders reside in a multiplicity of jurisdictions. But there are even larger implications for interstate commerce. A court should also consider the full effects of corporate board diversity statutes on corporate governance. For example, a mandatory change in director composition could mean corporate prerogatives of an undefined nature could result from the mandated shift in board composition. As this Article will show, these effects could be serious and costly. By way of example, California will by operation of its sex-based director quotas tell foreign corporations how to govern their corporate affairs (or at least materially influence them). Whether viewed from the perspective of director placement or corporate governance generally, these statutes affect interstate commerce.

Corporate board diversity statutes fall into the second category of statutes that regulate interstate commerce even-handedly but which have adverse effects on interstate commerce. It is these effects that are the concern with corporate board diversity statutes. The cases
regulating interstate transportation\textsuperscript{124} and prices\textsuperscript{125} are of relevance to the Dormant Commerce Clause analysis of corporate board diversity statutes. Both \textit{Kassel v. Consolidated Freightways Corp.}\textsuperscript{126} and \textit{Southern Pacific Co. v. Arizona}\textsuperscript{127} invalidated state regulation of transportation, one case involving length limits on truck trailers and the other length limits on trains, in each case operating in interstate commerce. Both considered the burden on interstate commerce and concluded the practices imposed an undue burden, not justified by the local interest involved. In \textit{Brown Forman Distilling Corp. v. New York State Liquor Authority},\textsuperscript{128} the United States Supreme Court invalidated a New York liquor pricing law that required sale at a price no higher than any other state, reasoning that such law will affect prices in other states and therefore unduly burden interstate commerce.

To illustrate unreasonable burdens on interstate commerce, the author posits a hypothetical. This hypothetical will involve a corporation organized in State A with headquarters in State B, and more than 25\% of its business (measured by sales and assets) in each of States C and D. State A (like Delaware) has no corporate board diversity statute. States B, C, and D have corporate board diversity statutes and States C and D apply them to a corporation having more than 25\% of its business in the state. Because the corporation is headquartered in State B, that state also seeks to apply its statute. This means all noted states will view their laws as applicable. In this hypothetical, some states have a broad range of diversity statutes, including quotas based on sexual orientation. This means there are three corporate board diversity statutes for which compliance is needed (States B, C, and D) and failure to comply results in fines. The hypothetical corporation has six directors. The hypothetical states differ as to their diversity requirements and this is displayed as follows:

\begin{footnotesize}
\begin{enumerate}
\item[126.] 450 U.S. 662 (1981).
\item[127.] 325 U.S. 761 (1945).
\item[128.] 476 U.S. 573 (1986).
\end{enumerate}
\end{footnotesize}
State B prefers to add someone from each special category where State D, like California, requires only women. However, State D (like the California law after the passage of the requisite time period) requires three women for a board of directors of this size. Depending on the composition of the candidates, the corporation will be required to add between four and eight directors. Four can be attained if the three required women also satisfy another category of ethnicity and/or identify as LGBT.\textsuperscript{129} For example, this could occur with an Asian woman, African American woman, and an Hispanic lesbian. This would leave only the need for an indigenous seat. Eight additional directors will be needed if the three women happen to be white and do not identify as LGBT and if all the other directors are male. Here, the board additions would consist of an Asian male, an African American male, an Hispanic male, an indigenous male, a gay white male, and three white women.

If the existing directors of the corporation resign to make way for the new directors, then the corporation has undergone a change of control. If the corporation alternatively decides to expand the board, any addition of six or more directors will also result in a change of control. This may have a variety of consequences under shareholder agreements, provisions in classes of preferred stock, loan and lease covenants, and other material contracts. At a minimum, such a momentous event will require considerable due diligence and a determination of the effects of such an abrupt change. Capital markets and institutional shareholders may also react unfavorably to the event or, at a minimum, require explanations. These factors would, however, be relatively superficial compared to the fundamental transition of the business brought about by the corporate board diversity statutes. The newly empowered board may unceremoniously sack a CEO with whom the shareholders are largely content. Or, more likely, the new directors, who may owe their positions to the CEO, will defend him

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\textsuperscript{129} This Article does not examine how LGBT classifications would be handled under the various legal regimes discussed. Instead, this is intended as an example of the potential breadth that corporate board diversity statutes may assume when taken to logical ends.
against legitimate shareholder\textsuperscript{130} criticism. This also potentially more than doubles director fees if the board opts to expand to accommodate new candidates and if compensation rates per director remain the same. These multi-state entanglements are the type of stifling effects that caused the Supreme Court to invalidate the interstate transportation statutes.

The foregoing illustration is but one of the Dormant Commerce Clause concerns presented by corporate board diversity statutes. There is at least one other important one to consider. Suppose a state having legally-cognizable contacts (e.g., shareholders, offices, or businesses) with the affected corporation passes a statute that requires corporations to exclude race and sex as criteria for board positions (“the equal opportunity statute”),\textsuperscript{131} Assume further that like the corporate board diversity statutes, violations are punishable by fines but also permit a private cause of action against the corporation by injured parties. In requiring the corporation to disregard race and sex, this law will conflict with corporate board diversity statutes. A corporation that complies with the corporate board diversity statutes will violate the equal opportunity statute, exposing it to liability no matter what course of action it takes. The corporation will then have no choice but to challenge one or both of the laws. The end result will be that one state or a handful of states will dictate the policies applicable to other states, a classic problem under the Dormant Commerce Clause and its concerns with extraterritorial reach.

In the context of takeovers and proxy contests, the above scenario also presents a problem. A bidder for corporate control may be unable to seat its desired slate of directors without incurring fines. This impedes the market for corporate control addressed in the takeover cases. The stakes, however, are much smaller than the takeover cases because the bidder or proxy contestant would only be required to pay fines. Also, the workings of these entanglements do not have an economically protectionist purpose. Rather, they discriminate on the basis of sex and race.

Whether these problems actually materialize is not relevant to a reviewing court. In other words, the situation need not ripen into a problem such as those described above for a court to invalidate a cor-

\textsuperscript{130}. In doing this, corporate board diversity statutes may actually lessen shareholder influence because those advocating diversity may (incorrectly) assume the mission has been accomplished. This would require empirical study.

\textsuperscript{131}. A state should be free to enact legislation to require race and sex neutrality. See Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291 (2014).
Having demonstrated the considerable burden on interstate commerce, this Article now turns to the legal conclusion under the Dormant Commerce Clause. Under *Pike* balancing, the incidental but very material burden on interstate commerce would need to be weighed against the local state interest. The difficulty with this balancing analysis is it will involve determinations over two entirely different sets of considerations. Justice Scalia phrased this as akin to "judging whether a particular line is longer than a particular rock is heavy" and whether "three apples are better than six tangerines." The impossibility of weighing the burdens against benefits, putative or otherwise, still means the court must arrive at a level of scrutiny over the state statute. Relevant considerations would be statutory goals and efficacy in attaining those goals. While the case law can be categorized, there is no controlling authority over the levels of scrutiny. Instead, the Supreme Court and the lower courts have demonstrated latitude to arrive at outcomes driven by particular circumstances. There is no evolving pattern or direction when courts must balance to attain results.

To resolve the question, the courts must identify the potential level of scrutiny that will apply. The options range from a highly deferential rational basis standard to one of heightened scrutiny. Under rational basis review, the courts will defer to the legislature's determinations. This means it will accept at face value the wisdom of the statute. Likewise, in these cases, the courts will not examine the efficacy of the statute in any meaningful fashion because it will not be equipped to make findings. If rational basis review applies to corporate board diversity statutes, the statutes should be upheld under the Dormant Commerce Clause. The courts would accept the benefits to the state proffered, such as diversity, creating racial and gender role models, and improving business performance of companies headquartered in the relevant state. On the other hand, a searching level of scrutiny would review the motives and wisdom of the statute. Does it

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132. See Wyoming v. Oklahoma, 502 U.S. 437, 453-54 (1992); *Healy*, 491 U.S. 324 (noting the dangers of reciprocal, restrictive legislation in neighboring states but not demanding proof of actual enactment of those statutes); *TLX*, 679 F. Supp. 1022, 1031 (stating that "[t]he actual existence of inconsistent regulation is not a prerequisite to constitutional infirmity.").


intend to attain lofty goals, or is it merely a quest to empower specific identity groups? With respect to efficacy, the courts would consider whether other options that do not impinge on interstate commerce could be pursued. Assumptions that diversity improves corporate performance would require proof and a demonstration that cause and effect are not conflated. Could corporations be motivated to attain diversity on their own terms and timelines by requiring public disclosure of diversity data, as now supported by much of the investor community? Also, courts would need to consider stigmatic harm, potential for tokenism, inherent limitations presented by the quotas, and other adverse effects.

This Article argues that heightened scrutiny should apply because of the momentous equal protection questions presented by state regulation appearing in the form of race-based and sex-based quotas. Under this approach, the scrutiny would mirror whatever scrutiny is being applied under the Fourteenth Amendment. This would be strict scrutiny in the case of race and perhaps intermediate scrutiny in the case of sex. The author believes strict scrutiny should apply to both race and sex because the laws create quotas. Except for their guidance concerning corporate board diversity statutes’ effects on takeovers and proxy contests, the takeover cases are largely unhelpful. There is no Dormant Commerce Clause precedent. The danger of importing Fourteenth Amendment scrutiny to this realm is that it will bootstrap other bodies of precedent to an area of entirely different concern. According to this thinking, the Dormant Commerce Clause regulates state incursions into interstate commerce, and that should be the focus. Viewed in that manner, the statutes, which are invalid under the Fourteenth Amendment, could be upheld under the Dormant Commerce Clause. The author would invite the courts to apply strict scrutiny in the face of clear constitutional violations. This would enable the courts to treat these matters as sui generis without doing violence to precedents in other contexts. A ruling in such manner could be decided on narrow grounds. A strict scrutiny standard is appropriate because the benefits the state purports to attain are pursued by unconstitutional means.

IV. ANALYSIS OF CORPORATE BOARD DIVERSITY STATUTES UNDER THE INTERNAL AFFAIRS DOCTRINE

A. INTERNAL AFFAIRS JURISPRUDENCE

The internal affairs doctrine is a conflict of laws principle of corporate law. When operative, it requires that the internal affairs of a

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135. See infra notes 212-14 and accompanying text.
corporation be governed by the laws of the place of its incorporation and no other. The purpose of the internal affairs doctrine is to eliminate intolerable confusion and uncertainties that will intrude on the domain of a state with a superior supervisory interest.\textsuperscript{136} Section 302 of the Restatement (Second) Conflict of Laws\textsuperscript{137} furnishes a general rule that the rights and liabilities of corporations are generally to be determined by the law of the state of incorporation. The comments to Section 302 attempt to put flesh on the general rule, stating that the rule would apply to matters “peculiar to corporations,” including internal affairs. “Internal affairs” include “relations, inter se of the corporation, its shareholders, directors, officers or agents.”\textsuperscript{138} The comments to Section 302 enumerate the activities that fall within the scope of Section 302, and this includes, among other things, “the election or appointment of directors.”\textsuperscript{139} Section 313 imposes a similar standard as to the circumstances in which courts should exercise their jurisdiction over an internal affairs matter.\textsuperscript{140} The comments to Section 313 provide, in relevant part, that “a court will not usually entertain a suit to annul\textsuperscript{141} by its decree an election, held outside its territory, of the directors of a foreign corporation . . . .”\textsuperscript{142} As a general rule, the nomination and election of corporate directors should be considered part of the internal affairs of the corporation.

While deferential to the laws of the state of incorporation, the Restatement leaves room for the laws of other states to apply, even in matters of internal affairs. There are no clear rules for when the laws of another state should apply. Instead, the Restatement furnishes a factors-based regime:

Application of the local law of the state of incorporation will usually be supported by the choice of law factors favoring the needs of interstate and international systems, certainty, predictability and unfairness of result, protection of the justified expectations of the parties and ease in the application of the law to be applied.\textsuperscript{143}

The Restatement does not weigh these factors, leaving them as mere considerations to be applied to the specific case. The sharehold-

\begin{itemize}
  \item \textsuperscript{136} McDermott Inc. v. Lewis, 531 A.2d 206 (Del. 1987) (citing CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987)).
  \item \textsuperscript{137} Restatement (Second) of Conflict of Laws § 302 (amended June 2019) [hereinafter “Restatement”].
  \item \textsuperscript{138} Id. § 302 cmt. a.
  \item \textsuperscript{139} Id.
  \item \textsuperscript{140} Id. § 313.
  \item \textsuperscript{141} No action to annul would occur in the circumstances examined. Instead, the corporation would challenge fines, so the authority is merely analogous and not controlling.
  \item \textsuperscript{142} Id. § 313 cmt. c.
  \item \textsuperscript{143} Id. § 302 cmt. e.
\end{itemize}
ers of the business, who commit capital to it, may choose any number of jurisdictions in which to incorporate. Their justified expectation in forming and funding the corporation is that the law of the place of incorporation will govern its internal affairs. This is a critical consideration in making the decision to form the corporation.

B. THE INTERNAL AFFAIRS DOCTRINE AND RELEVANCE TO CORPORATE BOARD DIVERSITY STATUTES

1. Internal Affairs Issues Presented by Corporate Board Diversity Statutes

   The internal affairs doctrine will be relevant to attempts to impose corporate board diversity statutes on a foreign corporation where the law of the state of incorporation would not impose the same diversity requirement. Because the corporate board diversity statutes merely impose fines, there is some question whether these statutes, applied to a corporation from a different state, would invoke internal affairs issues at all. Comment (e) to Section 302 of the Restatement clarifies this in the context of director appointments, noting this is not something that can be “determined differently in different states.”

   The state would contend that unless the fine is one that leaves no realistic choice, there may be no internal affairs issue. The choice of the law of the state of incorporation is not absolute. Whether to apply a law other than the law of the state of incorporation is also factor-dependent. Among the factors considered to apply another law are:

   (1) the nature and extent of the corporation’s relationship with the state of incorporation, (2) the nature and extent of the corporation’s relationship with the state whose law is sought to be applied and (3) whether the act . . . cannot practically be governed by local law of more than one state.

   A secretary of state or other governmental body of a state defending a corporate board diversity statute being applied to a foreign corporation might contend that the statute should survive an internal affairs challenge under these factors. Important to this argument would be the idea that the corporation is free to govern its affairs for a price: if it fails to comply it can still seat its board and must merely pay a fine. The secretary of state or other governmental body of a state would attempt to frame the argument in terms of a mere condition to doing business, with little or no bearing on internal affairs. The official would assert further that the state has a compelling and superior interest in the imposition of the diversity requirement.

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144. Id.
145. Id.
When a foreign corporation seeks approval to do business in a state other than where it is organized, it must agree to a number of undertakings, including the appointment of an agent for service of process and submission to the taxing jurisdiction of the state. This would be merely one of a list of regulatory requirements having little relation to internal affairs.

A litigant defending the fine would contend that a fine frustrates the expectations of shareholders to an extreme, significantly limiting or curtailing altogether choice in the appointment of directors. And a nominating committee will have no choice but to appoint a less desirable candidate to avoid the fine. A decision may also rest with the size of the fine and its consequences. For public companies, reputational risk is among the most concerning to the enterprise. Paying a fine may take on a life of its own, forcing management to publicly defend its decision. Most managers will be loath to spend time doing this. If the fine results in debarment\textsuperscript{146} from government contracts or private sector boycotts, the law will function as an iron-clad requirement to appoint a director of the required sex and race. Material contracts will require representations of compliance with law that are periodically brought down to the present. These representations may be untrue, even if the corporation pays the fine. Breach of a representation in a material contract can result in a large number of adverse consequences for the corporation, so management will face immense pressures to re-shuffle the board at the point of a bayonet rather than merely pay the fine. Viewed in this manner, the statute presents a very real internal affairs issue that should be resolved in favor of invalidation or a defense to imposition of the fine. The magnitude and frequency of the fine should also be relevant.

2. Contrasting State Views

California’s corporate board diversity statute applies “to a foreign corporation that is a publicly held corporation to the exclusion of the law of the jurisdiction in which the foreign corporation is incorporated.”\textsuperscript{147} This statute resolves the question of how a California court would rule over an internal affairs issue. However, the contrasting views of the courts of California and Delaware remain relevant to the problem described above. In the leading Delaware case, \textit{VantagePoint Venture Partners 1996 v. Examen, Inc.},\textsuperscript{148} the Delaware Supreme

\textsuperscript{146}. The California statute defines its penalty as a “fine.” California Code § 301.3(e)(1). Debarment typically requires criminality or fraud. \textit{See}, \textit{e.g.}, 2 C.F.R. § 417.800 (2019).

\textsuperscript{147}. California Code § 2115.5(a).

\textsuperscript{148}. 871 A.2d 1108 (Del. 2005).
Court decided the question of whether different classes of stock were to approve a merger in aggregate across all classes or by a majority of each class voting separately. The case involved a corporation organized in Delaware and subjected to a California statute triggered by the corporation’s business and stockholder presence in California. If Delaware law applied, the merger could be approved by a mere majority of all classes voting collectively. If California law applied, each class would be required separately to approve the merger. This difference determined the outcome of the case. Invoking the internal affairs doctrine, the Delaware Supreme Court held that Delaware law applied, resulting in approval of the merger.149 Like the California corporate board diversity statute, at issue was a law that imposed a California governance regime based on contacts with California. These contacts differed in several material respects from the California corporate board diversity statute and expressly excluded publicly traded companies. However, the corporate governance statute reviewed in Vantage-Point and the California corporate board diversity statute each contain express triggers to apply California law to foreign corporations based on contacts with California. When a state exerts its regulatory powers in this manner, a court will need to evaluate the competing considerations noted above under the Restatement. California courts must follow California’s clear statutory mandate and give effect to the California corporate board diversity statute in the event of an internal affairs challenge. Other states, including New York, have also exerted authority in areas that might arguably be deemed internal affairs of foreign corporations and many have upheld the additional regulation.150

150. See, e.g., Sadler v. NCR Corp., 928 F.2d 48 (2d Cir. 1991) (states are not prohibited from enacting laws more stringent than elsewhere, upholding a shareholder’s right to a Maryland corporation shareholder list under New York law); Norlin Corp. v. Rooney, Pace, Inc., 744 F.2d 255 (2d Cir. 1984); Republic Systems & Programming, Inc. v. Computer Assistance, Inc., 440 F.2d 996 (2d Cir. 1971); Tyco Int’l, Ltd. v. Kozlowski, 756 F. Supp. 2d 553 (S.D.N.Y. 2010), appeal denied, No. 02 Civ. 7317(TPG), 2011 WL 2038763 (S.D.N.Y. May 24, 2011) (rejected application of law of country of organization (Bermuda) to constructive fraud and forfeiture claims because New York had a greater interest in the outcome); Univ. of Montreal Pension Plan v. Banc of America Sec., L.L.C., 446 F. Supp. 2d 163 (S.D.N.Y. 2006) (rejected application of the law of corporate organization in a case where the corporation was dissolved; however, recognized in dicta that the internal affairs doctrine exists to prevent directors from facing conflicting demands); Resolution Tr. Corp. v. Gregor, 872 F. Supp. 1140 (E.D.N.Y. 1994); See also RS Invs. Ltd. v. RSM US, LLP, No. 1-17-2410, 2019 WL 1004690 (Ill. App. Ct. Feb. 28, 2019) (declining to apply internal affairs principles to shareholder claims against corporate accountants).
Delaware would rule differently, and there are numerous cases in Delaware and elsewhere upholding the internal affairs doctrine. Following VantagePoint, a Delaware court should view the selection of directors as the sole province of the state of incorporation. A properly decided Delaware case should ignore the California statute but to what effect? The corporation can constitute its board any way it wants in compliance with Delaware law—it must merely pay the fine for failure to attain diversity. Delaware courts likely will not want to adjudicate questions concerning the imposition of fines arising in other states, and there may be questions of personal jurisdiction over the state of California in Delaware. Beyond California, also relevant to any internal affairs determination will be whether the state attempting to regulate the foreign corporation has enacted a statute that gives effect to the law of the state of incorporation concerning internal affairs matters. This will tilt the scales toward respect for the law of the state of incorporation.

While corporate board diversity statutes interfere with corporate internal affairs, as the preceding contrast shows, whether a challenge to them under internal affairs theories prevails will be largely dependent on the jurisdiction where the case is heard, and the law the court chooses to apply.

V. STANDING AND WHO MAY CHALLENGE CORPORATE BOARD DIVERSITY STATUTES

This Section identifies what parties may bring an action to challenge a corporate board diversity statute and contains two main Subsections. Subsection A furnishes a general discussion of standing that will be required to enable any litigant to bring a challenge. Subsection B applies these principles to three classes of litigants that may be enabled to bring an action. Potential litigant classes include (1) the corporation, (2) directors removed from office or denied positions under the quota system, and (3) shareholders.

151. See, e.g., BBS Norwalk One, Inc. v. Racolta, Inc., 205 F.3d 1321 (2d Cir. 2000) (applied Delaware law to breach of fiduciary duty claims applicable to corporation organized there); Kravetz v. Bridge to Life, Ltd., No. 16 CV 9194, 2017 WL 4074016 (N.D. Ill. Sept. 14, 2017); Rein v. ESS Grp., Inc., 184 A.3d 695 (R.I. 2018) (following VantagePoint to hold that stockholder meetings and maintenance of books and records of a Delaware corporation were internal affairs governed by Delaware law); Johnson v. Johnson, 272 Neb. 263 (Neb. 2006) (Supreme Court of Nebraska applied Delaware law over Nebraska law in oppression of minority shareholder case); VantagePoint, 871 A.2d 1108; McDermott Inc. v. Lewis, 531 A.2d 206 (Del. 1987) (favoring local law over the law of the state of incorporation will result intolerable confusion, inequalities, uncertainty and will intrude on the domain of a state with a superior interest and declining to follow Norlin Corp. v. Rooney, Pace, Inc., 744 F.2d 255).

Because of practical realities, standing will be among the most important factors to determine if a challenge is even brought. There are very considerable business disincentives for a corporation or an aggrieved director to bring an action. In the vast majority of cases, a corporation will opt either to pay the fine as a cost of doing business or create the necessary room on the board. The cost of bringing suit alone could exceed the fines and will needlessly distract management. More importantly will be the reputational risk brought on by a challenge. This risk to reputation is dependent on a number of factors, including company size and industry. Large, visible corporations in industries with high contact with the general public will be incentivized to avoid the attention of activist groups, whether representing consumers, employees, investors, or other constituencies. Public shaming, including conclusory labels of “racist,” “sexist,” and “misogynist” will assuredly follow. While courts can shrug off these forces, businesses cannot. In the great majority of cases, no competently managed business will challenge these statutes. Aggrieved directors, while assuredly harmed, will be even less likely to challenge the statutes. In their clubby world, one rarely wants to cultivate a reputation for litigiousness. Just as important will be the role and status of the typical director, who does not rely on the board position as his principal livelihood and instead does it to network and maintain visibility and relevance. Well-fed horses do not rampage and the same is true for well-paid directors. Anyone challenging a statute will be shut out of consideration for director spots and consigned to pariah status. This leaves the shareholders as the only class that can and will, in the real world, seek to challenge these laws.

A. The Standing Requirement

Judicial power extends to cases and controversies as set forth in Article III, Section 2 of the United States Constitution. The constitutional requirement of an actual case or controversy forms one of two requirements litigants must satisfy to have standing to bring a case or controversy. In addition to the requirement of a case or controversy, there exists a prudential requirement that there be a judicially cognizable injury in fact and that the litigant seeks personal redress rather than recovery on behalf of another. An injury in fact requires an

allegation of (1) an injury that is concrete, particularized, and either actual or imminent, (2) a causal connection between the alleged injury and the defendant’s conduct, and (3) a likelihood that a favorable decision will redress the injury. 156 As illustrated by the discussion in Subsections B through D, standing requirements will vary based on the possible theories under which a litigant may challenge a corporate board diversity statute. Standing requirements may differ depending on whether the case arises under the Fourteenth Amendment, the Dormant Commerce Clause, or the internal affairs doctrine. As noted, the three potential classes of litigants include: (1) the affected corporation; (2) directors asked to step down and director candidates passed over due to failure to meet the quota criteria; and (3) shareholders of the affected corporation. What may suffice to confer standing under a given theory for one class may not suffice for another.

B. Standing Under the Fourteenth Amendment

In *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*,157 the United States Supreme Court allowed to go forward a challenge to a municipal minority contractor set aside program, even though the plaintiff could not demonstrate that but for the offending statute, it would have been awarded the contract. This reasoning is relevant to corporate board diversity statutes, where the state may contend there was no harm from a reverse discriminatory practice, given that an alternative state of affairs cannot be firmly demonstrated. The opinion followed *Regents of the University of California v. Bakke*,158 which also did not require a rejected medical school applicant to demonstrate that the reverse discrimination was the but for cause of his injury. Corporate board diversity statutes should be construed in the same manner in a Fourteenth Amendment standing challenge.

1. Standing of the Corporation

Corporations are persons for purposes of the Fourteenth Amendment.159 The corporation should be able to allege that the imposition of the fines arising from a Fourteenth Amendment violation caused or

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will cause the corporation to suffer concrete economic harm in the form of the fine. Even a compliant corporation will potentially face measurable injury. If the corporation, acting in its best interest, decides to expand the board to accommodate the directors required by the diversity quotas, it will incur additional director fees and recruiters' fees to locate and place candidates. Additional expenses associated with this change include legal fees to prepare and implement board resolutions and possibly bylaw and charter amendments, together with filings with the Securities and Exchange Commission (“SEC”). Charter amendments will also entail payment of the fees to the secretary of state or other state body concerned with the organization and governance of the corporation. If, alternatively, the board removes directors to satisfy the quotas, they will still at a minimum incur the cost of SEC disclosures and legal fees to prepare board of directors resolutions and expenses of communications such as printing, telephone, and travel. As noted, on many occasions, placement fees must be paid to locate and seat the new directors. Less tangible but far more significant would be changes in governance practices and corporate direction brought about by the changes to the board. The corporation may also face a situation of potential non-compliance if various corporate board diversity statutes conflict with equal opportunity statutes. In that case, there is assured non-compliance and payment of a fine in one or more states, further inflicting certain monetary loss to the corporation. A declaration of invalidity of the relevant corporate board diversity statute would remediate these injuries. This should suffice to confer standing on the corporation to bring an action under the Fourteenth Amendment.

2. Standing of Director Candidates

If the corporation fails to expand its board of directors to accommodate the required number of women and racial minorities, it will need to remove sufficient numbers of directors to cause compliance. These removed directors have a cognizable grievance and standing to challenge the statute. Then there is the other circumstance where the corporation opts to expand its board of directors and retain all existing directors. In that case, under Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, director candidates (other than sitting directors) who do not qualify based on race or sex have grievances at least sufficient to confer standing for the lost placement opportunity caused by a discrimi-

160. This Article does not examine rights of directors and obligations of corporations under employment law.
natory practice. Having standing does not mean such persons will prevail on the merits but rather means the courthouse door is open to hear their complaints.

3 Standing of Shareholders

By imposing race-based and sex-based quotas on the composition of the board of directors, corporate board diversity statutes limit a shareholder’s ability to elect the most worthy possible candidates. Incursions on the rights of shareholders to elect directors deprive shareholders of one of the most important rights available to the owners of the business. Therefore, shareholders are injured directly, and not derivatively, by corporate board diversity statutes.¹⁶² Corporate boards of directors serve at the pleasure of shareholders.¹⁶³ While there is little doubt that limited director choice affects material shareholder rights, a defending state official may point out that other than in a proxy contest or where there are large insider share concentrations, shareholders of publicly traded corporations rarely locate and select a slate of directors. This instead is the role of the nominating committee of the board of directors or other appointing body within the corporation. The official might contend it would be the nominating committee that would need to bring the action on behalf of the corporation and that shareholders lack standing to assert the rights of others. This would be a question of fact, but if established as true, it would not affect the legal conclusion that the shareholder has been deprived of one of the most important rights associated with share ownership. Whether the shareholder nominates the candidate, the fact would remain that the shareholder has lost an opportunity to approve a board comprised of different and, in the view of the shareholder, better candidates. Shareholders approve directors in their sole discretion, without outside compulsion, for any reason or no reason. This well-established legal regime would collide with corporate board diversity statutes, when a longstanding director with whom the shareholder is pleased, is asked to step down to effectuate statutory compliance. Election of directors is a legally-recognized right, and losing the right to select one or more directors constitutes an actual and immediate injury. Shareholders, therefore, have standing to challenge corporate board diversity statutes under the Fourteenth Amendment.

¹⁶². See, e.g., RK Ventures v. City of Seattle, 307 F.3d 1045, 1057 (9th Cir. 2002) (finding that a shareholder will have standing under 42 U.S.C. § 1983 to bring an action for constitutional violations when the shareholder has been injured directly and independently from the corporation); Soranno’s Gasco, Inc. v. Morgan, 874 F.2d 1310 (9th Cir. 1989); Cooper v. McBeath, 11 F.3d 547 (5th Cir. 1994), cert. denied, 512 U.S. 1205 (1994).

¹⁶³. See, e.g., DEL. CODE ANN. tit. 8, § 141(k).
If a court persists in viewing the right to challenge as vested in the nominating committee, the shareholder has an additional line of attack. While a party must generally assert his or her own legal rights and not those of others, this rule “assumes that the party with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation.”\textsuperscript{164} To qualify for this special status, (1) the litigant must have a close relationship with the person who possesses the right and (2) there must exist a hindrance to the possessor’s ability to protect its own interest.\textsuperscript{165} As to the first element, the shareholder has a close relationship with the nominating committee because the nominating committee determines the slate of directors under normal circumstances, and this relationship is crucial to shareholder welfare. To satisfy the second requirement requires a demonstration that the nominating committee, exercising its business judgment, will opt to appoint someone that meets the diversity requirement to avoid calumny and buy peace. This can be demonstrated. Additionally, the charter of the nominating committee may not authorize it to bring this sort of litigation. This exception clashes with notions of derivative shareholder rights, where shareholders must demand that the board of directors handle these matters and parties engage in endless squabbles over the need to make demand on the board and/or assert demand futility. This Article takes the position that the right to vote for directors is a fundamental one as concerns corporate matters and vests solely in the shareholder. It should not be necessary, therefore, to invoke the rights described in this paragraph, but even if the nominating committee is deemed the injured party, the shareholder can still bring the action under the exception because the shareholder has a vital relationship with the nominating committee, and the nominating committee is hindered in its ability to act for the shareholder’s benefit.

C. Standing Under the Dormant Commerce Clause

\textit{Franchise Tax Board v. Alcan Aluminum}\textsuperscript{166} addresses shareholder standing under the Commerce Clause. In \textit{Franchise Tax Board}, a shareholder challenged a taxation scheme under the Foreign Commerce Clause. The United States Supreme Court denied relief to foreign parent company Alcan Aluminum on other grounds but in dicta noted the aggrieved foreign parent company had standing to challenge the scheme because it had experienced an economic injury.

\textsuperscript{165}. \textit{Id}. at 130.
\textsuperscript{166}. 493 U.S. 331 (1990).
in the form of a loss of value of its shareholdings.\textsuperscript{167} Under this view, 
\textit{Franchise Tax Board} extends broader standing to shareholders than 
state law, which often relegates these claims to derivative actions. 
\textit{Franchise Tax Board}, a Foreign Commerce Clause case, serves as in-
fluential precedent for Dormant Commerce Clause disputes. The For-
eign Commerce Clause has at least the same breadth as the 
Commerce Clause, and several opinions speculate that it may have 
greater breadth.\textsuperscript{168} Any difference in breadth, however, should not 
affect questions of standing.

1. \textbf{Standing of the Corporation}

The harms to the corporation described in the Fourteenth Amend-
ment analysis will also confer standing under the Dormant Commerce 
Clause. An additional question is whether these damages occur in an 
activity involving interstate commerce. Incremental director's fees, 
placement fees, legal fees, publication costs, SEC filings, and the use 
of the instrumentalities of interstate commerce to attain them should 
normally be deemed incurred in interstate commerce. Material shifts 
in governance also affect interstate commerce.

2. \textbf{Standing of Director Candidates}

Director standing for Dormant Commerce Clause grievances 
would need to rely on loss of a position for those directors making 
room for the special-status candidate or for denial of placement of 
someone competing for a director position that does not have special 
status in each case occurring in interstate commerce. The complaint 
should allege that the undue burdens on interstate commerce created 
by the corporate board diversity statutes have denied the candidate a 
placement opportunity through a categorical exclusion from consider-
anation. This position is more strained than the one taken under the 
Fourteenth Amendment because the director is losing his position or 
not attaining one due to an undue burden on interstate commerce 
caused by reverse discrimination. This analytical leap presents a 
question whether directors or director candidates have standing to 
challenge a corporate board diversity statute under the Dormant Com-
merce Clause.


3. Standing of Shareholders

Franchise Tax Board furnishes precedent for shareholder standing in connection with a Dormant Commerce Clause claim. That case recognized that the adverse effects on interstate commerce that injure the value of shareholdings will confer standing on shareholders experiencing such loss. The adverse effects on a shareholder’s right to elect a preferred slate of directors, and not one drawn from a quota, will remain cognizable under the Dormant Commerce Clause. Additionally, under the dicta contained in Franchise Tax Board, the shareholder may allege diminution in value of his or her shares associated with payment of fines or, alternatively, the appointment of substandard directors and incurrence of incremental costs to appoint them that the corporation must shoulder. These claims would be classic derivative claims under state corporation law, but can be asserted directly under the view set forth in Franchise Tax Board. Given that this authority comes in the form of dicta, the law remains unsettled on this question.

D. Standing Under the Internal Affairs Doctrine

Standing in an internal affairs-based challenge will be a question of the governing state conflicts rules to be applied. Rather than exhausting legal outcomes for all fifty states, this Article will concentrate on standing requirements of Delaware courts, which adjudicate a high percentage of these matters. Delaware courts and the courts of other states that apply Delaware law will normally accommodate internal affairs-based challenges made by affected corporations. Though some of these cases involve directors and director liability, the cases have not been brought by directors. In order to have standing, Delaware stockholders were traditionally required to allege a special injury; this requirement can be satisfied by a particular right being asserted by the stockholder. Examples of these rights include the exercise of preemptive rights, determinations of corporate control, and other rights directly affecting the stockholder. In Tooley v. Donaldson, Lufkin, & Jenrette, Inc., the Delaware Supreme Court modified the special injury test and replaced it with the following formulation: “The stockholder’s claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate

170. See, e.g., cases cited supra note 151.
173. 845 A.2d 1031 (Del. 2004).
that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation.”174

The Tooley test does not alter the fact that stockholder rights will be directly and uniquely impaired by the operation of the corporate board diversity statutes and as explained in this Subsection, separate from the injury to the corporation. However, stating the legal test as triggered by breach of a duty is awkward in the setting of challenging an actual or threatened fine. Corporate board diversity statutes violate rights, but do not breach duties. Whether the Delaware Supreme Court intended this distinction between rights and duties has been clarified somewhat in a later appellate court case where the court stated that the Tooley test considers: “(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually).”175 The Tooley test plays a role in determining if a stockholder may bring an action directly or must do so derivatively. While this Article does not explore the use of derivative litigation in challenging corporate board diversity statutes, it recognizes that the Tooley test will present questions of standing for the challenge brought by a stockholder. In every case, an internal affairs challenge can be brought only in the circumstance of a foreign corporation subject to conflicting requirements imposed by another state. There should be no internal affairs issue when the law of the state of incorporation imposes the requirement because the diversity quota would be encapsulated in the governance regime of the state of incorporation, resulting in no conflict of the laws. Therefore, the analysis below assumes each situation involves regulation of a foreign corporation by a state such as California that imposes a corporate board diversity statute.

1. Standing of the Corporation

The previously-identified harms to the corporation associated with the directorship quotas imposed by corporate board diversity statutes should suffice for purpose of an internal affairs challenge. The corporation cannot manage among the most important of its affairs and responsibilities without assurances that its nominating committee may act without uncertainty and undue restraint. The injury experienced by the corporation is different from those incurred by the shareholder. The corporation loses the ability to function with the board of directors it nominates and incurs either costs or fines, as well as undergoing a change in governance. On the other hand, the share-
holders lose the ability to approve a board of directors of their choosing.

2. Standing of Director Candidates

Directors made to step down or excluded candidates for directorship suffer injury as already described. However, it is an open question whether this injury can be redressed through an internal affairs challenge. Many of the internal affairs cases concerning directors focus on which states should adjudicate their various misdeeds. Internal affairs law is intended to attach reliable and predictable bodies of law to internal corporate affairs and not to redress harms going beyond those goals. The best argument for director standing under an internal affairs theory is that the directors’ fiduciary duties are compromised by the corporate board diversity statutes. Typically, the nominating committee of the board of directors presents a slate of candidates. By compromising director latitude in nominating candidates, corporate board diversity statutes force directors comprising that committee to breach fiduciary duties when forced to appoint a less than optimal candidate to satisfy the quota. It would seem to the author that such contention could be made only by the members of the nominating committee and not directors at large. Also, somewhat perversely, this claim could only be brought by those directors not removed by operation of the quotas. Removed directors would have been relieved of their fiduciary responsibilities to the corporation.

The discussion of director standing brings into focus the differences in standing that may exist for statutory claims versus constitutional claims. Constitutional claims may generally confer broader standing due to the need to redress the constitutional violation. Statutes, on the other hand, typically require the litigant to fall under the zone of interests protected by the statute. In this instance, the director would need to bring an action under the corporate law of the state of incorporation, which will be frustrated or even thwarted by the corporate board diversity statutes of another state. In the context of the Federal Administrative Procedure Act, the United States Supreme Court’s decision in *Sierra Club v. Morton* illustrates this potential different treatment for purposes of standing. In that case, the Supreme Court held that the Sierra Club lacked standing to allege a violation of the federal statute, concluding the Sierra Club experienced no legal harm and had instead a mere interest in the outcome. In doing so, the Court required (in addition to the customary Article III

177. 405 U.S. 727 (1972).
and prudential requirements) that an injury arising from a statutory violation fall within the zone of interests intended to be protected by the statute.\textsuperscript{178} Due to the indeterminate identity of the statute on which a case would be brought, this Article makes no attempt to determine whether this conduct falls within the statutory zone of interests, which is also a question of the state law chosen to apply. This would be a case of first impression.

3. Standing of Shareholders

In states such as Delaware, even stockholders suffering tangible monetary injury may not bring actions in their own name to recover those losses. Instead, the stockholders must sue derivatively. This is the general rule in states that follow the Delaware line of thinking. In a derivative action, the stockholder sues to compel the board of directors to take appropriate action in the name of the corporation to redress the stockholder's injury. To escape this requirement, the stockholder must meet the \textit{Tooley} test of suffering injury independent of the corporation and receive the benefit of the remedy requested. A stockholder's right to vote is a right conferred by statute on the stockholder\textsuperscript{179} and not the corporation. The interference with a stockholder's right to vote presented by the corporate board diversity statutes is sufficient to satisfy the independent injury requirement and a defense to the fine or invalidation of the statute would redress the harm. This should confer standing to bring an internal affairs challenge, but the previously-discussed \textit{Tooley}-required breach of duty versus violation of a right may remain an issue.

VI. PUBLIC POLICY CONSIDERATIONS

This Section discusses the public policy considerations pertaining to corporate board diversity statutes. This Section will show that corporate board diversity statutes advance no meaningful public policy and do harm. The analysis in Subsection A examines legislative findings concerning the California law, which vivify the questionable assumptions underlying corporate board diversity statutes. Subsection B identifies and analyzes key areas where corporate board diversity statutes either do not solve problems or actually cause problems. With respect to the California discussion, the California law creates quotas only for women and therefore the analysis only concerns women. While much of the logic will also apply to race, this Article does

\textsuperscript{178} Sierra Club v. Morton, 405 U.S. 727, 733 (1972).

\textsuperscript{179} See, e.g., Del. Code Ann. tit. 8, § 212(a).
not attempt to differentiate the two in Subsection A that immediately follows.

A. THE CALIFORNIA LEGISLATIVE FINDINGS AND DECLARATIONS: FACTS AND FALLACIES

This Subsection will identify and evaluate the legislative findings contained in Section 1 of the California Declarations and Findings. Section 1(a) provides:

More women directors serving of boards of directors of publicly held corporations will boost the California economy, improve opportunities for women in the workplace and protect California taxpayers, shareholders and retirees, including retired California state employees and teachers whose pensions are managed by CalPERS and CalSTRS. Yet studies predict that it will take 40 or 50 years to achieve gender parity, if something is not done proactively.180

This California Declaration and Finding functions as a preamble. Section III of this Article analyzes corporate board diversity statutes under the Dormant Commerce Clause. It concludes corporate board diversity statutes do not discriminate against interstate commerce but have material adverse effects on interstate commerce. The California Declaration and Finding, which provides that the law protects California taxpayers, shareholders, and retirees, creates an issue of whether it does so in a manner that discriminates against interstate commerce. The author believes these protections to be illusory or incapable of proof in a legal sense and therefore should not be an issue under the Dormant Commerce Clause. And even if such benefits existed, it would be difficult to conclude a Dormant Commerce Clause violation results solely from these California-directed benefits. Instead, the Dormant Commerce Clause issues arise from the interstate entanglements created by the statutes. There is, however, another legal question. Advancing women in the workplace raises issues of director loyalty and whether the director acts for shareholders or employees. Directors who must answer to multiple constituencies will be conflicted and not serve exclusively the interests of shareholders. Apropos of shareholders, the references to California Public Employees' Retirement System (“CalPERS”) and California State Teachers' Retirement System (“CalSTRS”) arouse curiosity. These entities have considerable power over companies whose shares they hold and are perfectly capable of pressing for diversity, as they are now doing. The timetable of attaining gender parity and the wisdom of this goal is discussed below.

180. California Declarations and Findings, supra note 3, at § 1(a).
Section 1(c) of the California Declarations and Findings provides: Numerous independent studies have concluded that publicly held companies perform better when women serve on their boards of directors, including:

(1) A 2017 study by MSCI found that United States' (sic) companies that began the five-year period from 2011 to 2016 with three or more female directors reported earnings per share that were 45 percent higher than those companies with no female directors at the beginning of the period.

(2) In 2014, Credit Suisse found that companies with at least one woman on the board had an average return on equity (ROE) of 12.2 percent, compared to 10.1 percent for companies with no female directors. Additionally, the price-to-book value of these firms was greater for those with women on their boards: 2.4 times the value in comparison to 1.8 times the value for zero-women boards.

(3) A 2012 University of California Berkeley study called “Women Create a Sustainable Future” found that companies with more women on their boards are more likely to “create a sustainable future” by, among other things, instituting strong governance structures with high levels of transparency.

(4) Credit Suisse conducted a six-year global research study from 2006 to 2012, with more than 2,000 companies worldwide, showing that women on boards improve business performance for key metrics, including stock performance. For companies with market capitalization of more than $10 billion, those with women directors on boards outperformed shares of comparable businesses with all-male boards by 26 percent.

(5) The Credit Suisse report included the following findings: (A) There has been a greater correlation between stock performance and the presence of women on a board since the financial crisis of 2008. (B) Companies with women on their boards of directors significantly outperformed others when the recession occurred. (C) Companies with women on their boards tend to be somewhat risk averse and carry less debt, on average. (D) Net income growth for companies with women on their boards averaged 14 percent over a six year period, compared with 10 percent for companies with no women directors.\textsuperscript{181}

This Article contends that corporate benefits alleged to spring from diversity conflate cause and effect. The data collected from the Russell 3000, which shows greater diversity in the larger companies in the index, suggests that diversity is a function of resources and suc-

\textsuperscript{181} Id. at § 1(c).
cess and not a cause of success. For example, in 2018, for the largest companies in the Russell 3000, women held 294 board seats, amounting to 25.3% of the total, which resulted in an average of just under three women directors per board. At the smallest end of the Russell 3000, 868 women held 13% of board seats, amounting to an average of one per company. The size contrast continues with initial public offerings (“IPOs”). In 2017, slightly less than half of IPOs occurred with no women on the boards. The lack of IPO diversity has been attributed to lack of pressure by securities underwriters to alter the composition of IPO boards. This makes sense. A large, seasoned public company functioning as a well-oiled machine with the bureaucracies to handle the administration of an ever-changing board is much better equipped to make room for newcomers than a start up or a smaller company struggling against brutal competition. The case of a dithering, diverse board of directors at Wells Fargo discussed below also explains the reluctance of venture concerns and IPOs to hand over governance of their businesses to untested and unfamiliar persons. Decisions at these concerns must be made quickly and nimbly. IPO underwriters will never risk their handsome fees with people unfamiliar with the business and who do not inspire their confidence. When stabilized and seasoned, the company can then experiment with newcomers. This is not to suggest that women and people of color are incapable of overseeing an IPO at the board level. Rather, the author is asserting that these businesses must remain focused and work with the people who built the business because of their intimate familiarity with it. Only when stabilized and seasoned, can firms transition to untested and less experienced newcomers. Inserting outsiders by legislative fiat may prove very harmful to these concerns or, at a minimum, add execution risk to a complicated and time-sensitive transaction. No underwriter will ever publicly admit this, but it is the reality.

As to the contention that women on boards cause superior performance, this Article has discussed the paternalistic nature of this position. But what of the studies cited? Besides conflation of cause and effect, the studies do not have clear and meaningful control mechanisms for performance factors such as size, industry, access to capi-

182. 2020 Women on Boards Report, supra note 23, at 4. A competing explanation for disparities between large and small is that smaller concerns escape pressure from institutional investors. This is plausible, but this also would explain why a legal mandate is not needed. There is plenty of market pressure and all that need happen is to broaden its scope. See Missing Pieces Report (2018), supra note 26 and accompanying text.
184. Id. at 7.
185. Id.
tal, and many other material factors. A consumer staples business will perform much better in a financial crisis than a manufacturer of heavy equipment or other economically-sensitive business. The studies do not adjust meaningfully for these factors and for this reason are unreliable. A better benchmark would be to compare results in the same company transitioning to diversity. If better results show after the change, this could be some evidence of influence, but it could also simply be a function of success, which breeds the capacity to bring in others.

Section 1(d) of the California Declarations and Findings provides:
Other countries have addressed the lack of gender diversity on corporate boards by instituting quotas mandating 30 or 40 percent of seats to be held by women directors. Germany is the largest economy to mandate a quota requiring that 30 percent of public company board seats be held by women; in 2003, Norway, was the first country to legislate a mandatory 40 percent quota for female representation on corporate boards. Since then, other European nations have legislated similar quotas include (sic) France, Spain, Iceland and the Netherlands.186

This California Declaration and Finding is telling in its use of the word “quota,” thus admitting the law being proposed creates one. That Europe has imposed diversity quotas is not legally relevant or helpful. Europe does not have a Fourteenth Amendment. European corporate governance differs considerably from the American model and importing bits and pieces of it to America does not fit. Norway has had its laws on the books for more than fifteen years. The McKinsey Study187 observes that Norway has not attained its goal of gender parity.188 The author believes America should not look to Europe for guidance in these matters, but were it to examine Norway’s sixteen year history of board quotas, it would find that its diversity measures have failed. What has resulted, instead, is what the author contends—benefits flowing to a small, elite group with no societal benefits. Following Europe is nothing more than an act of legislative mimicry, lacking in critical analysis.

Section 1(e) of the California Declarations and Findings provides:
One-fourth of California’s public companies in the Russell 3000 index have NO (sic) women on their boards of directors; and for the rest of the companies, women hold only 15.5 per-

186. California Declarations and Findings, supra note 3, at § 1(d).
188. Id. at 25.
percent of the board seats. A 2017 report being (sic) prepared by Board Governance Research LLC, conducted by University of San Diego professor Annalisa Barrett, found the following:

1. As of June 2017, among the 446 publicly traded companies included in the Russell 3000 index and headquartered in California, representing nearly $5 trillion in market capitalization, women directors held 566 seats, or 15.5 percent of seats, while men held 3,089 seats, or 84.5 percent of seats.

2. More than one-quarter, numbering 117, or 26 percent, of the Russell 3000 companies based in California have NO (sic) women directors serving on their boards.

3. Only 54, or 12 percent, of these companies have three or more female directors on their boards.

4. Smaller companies are much more likely to lack female directors. Among the 50 California-based companies with the lowest revenues, with an average of $13 million in 2015 revenues, only 8.4 percent of the director seats are held by women, and nearly half, or 48 percent, of these companies have NO (sic) women directors. Among the 50 largest California companies, with an average of nearly $30 billion in 2015 revenues, 23.5 percent of the director seats are held by women. All of the 50 have at least one woman director.189

The importance of this legislative finding and whether it misleads depends on the measurement universe for publicly traded companies. If market capitalization is a proxy for importance, then (assuming solely for purposes of this limited discussion that gender parity is desirable) this is not a problem. As noted, women already hold more than a quarter of the board seats on the largest 100 companies in the Russell 3000.190 Women have lesser representation at smaller companies that may for any number of good and legal reasons, not want to tinker with the composition of their boards merely for the sake of change. The study also appears to include companies that do not trade publicly in any meaningful way, identifying the smallest group as averaging $13 million in revenues.

Section 1(f) of the California Declarations and Findings provides:
If measures are not taken to proactively increase the numbers of women serving on corporate boards, studies have shown that it will take decades, as many as 40 or 50 years, to achieve gender parity among directors, including:

1. A 2015 study conducted by the United State Government Accountability Office estimated that it could take

189. California Declarations and Findings, supra note 3, at § 1(e).
190. See supra note 182 and accompanying text.
more than 40 years for the numbers of women on boards to match men.

(2) The 2017 Equilar Gender Diversity Index (GDI) revealed that it will take nearly 40 years for the Russell 3000 companies nationwide to reach gender parity – the year 2055.

(3) Nearly one-half of the 75 largest IPOs from 2014 to 2016 went public with NO (sic) women on their boards. Many technology companies in California have gone public with no women on their boards, according to a 2017 national study by 2020 Women on Boards.\(^{191}\)

The Government Accountability Office study\(^{192}\) (“GAO Study”) referenced in this California Declaration and Finding was derived from interviews with 19 “stakeholders” such as money managers, pension fund sponsors, institutional investors, corporate issuers, and other experts and specialists. The GAO Study considered data collected by Institutional Shareholder Services (“ISS”) from the S&P 1500 index and various other components.\(^{193}\) The GAO Study states: “Some research has found that gender diverse boards may have a positive impact on a company’s financial performance, but other research has not.”\(^{194}\) While stakeholders generally agreed Securities Exchange Commission (“SEC”) disclosure should expressly include information on board diversity, all but three stakeholders opposed government-imposed diversity quotas. The GAO Study states:

Several [stakeholders] suggested that quotas may have unintended consequences—boards may strive to meet the quota, but not exceed it; boards may appoint directors who are not the best fit for the board just to meet the quota; and there may be the perception that women did not earn their board seat . . . .\(^{195}\)

The GAO Study also notes that CEOs are most frequently considered as part of the traditional pool of board candidates. Several stakeholders suggested that “boards recruit high performing women in other senior executive level positions, or look for qualified female candidates in academia or the nonprofit and governmental sectors.”\(^{196}\) In so doing, the stakeholders admit there is a shortage of qualified candidates. The study fails to address the consequences of tapping talent from academia, nonprofits, and government. While such persons may

\(^{191}\) California Declarations and Findings, supra note 3, § 1(f).

\(^{192}\) GAO Study, supra note 24.

\(^{193}\) Id. at 2. The smaller universe of issuers resulted in an estimate of only 14,000 board seats. Id. at 28.

\(^{194}\) Id. at 5.

\(^{195}\) Id. at 21.

\(^{196}\) Id. at 18.
be competent in those spheres, they may lack entirely the experience and skill sets needed to serve as a director of a publicly traded, for-profit corporation. Public companies also face requirements to disclose if they have appointed to their audit committees “audit committee financial experts”197 which require specific competencies independent of sex or race.

Even more fundamentally perilous than the questionable justifications and damage done by directors attaining positions on factors other than merit, the California Declarations and Findings imply that gender parity should be the law’s objective. This collides with constitutional jurisprudence198 and is not workable as a matter of public policy. The most fundamental difficulty with this finding is that women’s participation should match that of men with no examination of the pool of qualified women in relation to men or consideration of material differences in interests to pursue a board position. It simply assumes women have the same qualifications and interests as men, which requires specific proof. A recent Wall Street Journal interview with Ilana Weinstein, a prominent recruiter of hedge fund talent, dramatizes this reality:

**WSJ:** Of the largest 50 U.S. hedge funds, only two have women as their top investment executives. Why is that?

**Ms. Weinstein:** It comes back to people needing to see people like themselves as role models. This creates a Catch 22. I gave a lecture at Wharton a few years ago. There were probably 100 M.B.A.s in the room. Toward the end, a woman asked why there are so few women and what I was doing about it?

I turned to the class and said, “I want to ask the men, how many of you are interested in coming into the hedge fund industry?” I’d say 70%, 80% of the hands went up. Then I asked the women and it was three or four hands. I turned to her and said, “That’s the problem.”199

Women comprise 47% of Wharton’s class of 2021.200 Ms. Weinstein’s response can be viewed at two levels. The first is that women

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198. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501 (1989) (stating that when special qualifications are required to fill specific jobs, comparisons to the general population—rather than the smaller group who possess the necessary qualifications—may have little probative value).
200. The Wharton School, *Wharton MBA Class Profile*, https://mba.wharton.upenn.edu/class-profile/ (last visited Sept. 16, 2019). Parenthetically, the author notes Wharton’s misleading 36% class composition for “U.S. students of color” includes Asians, and there is no further public refinement of racial or ethnic classification. The school’s approach is perfectly understandable, however. If it breaks out in a
require role models. If so, does someone appointed by force of law serve as a role model? On the second level, the response speaks loudly about differing interests between the sexes. Every Wharton graduate has numerous and exceptional career opportunities. If Wharton placement patterns differ by sex, attributing them to discrimination strains credulity. Some may explain this by differences in male and female socialization. If true, this is not discrimination and cannot be corrected by legislation (nor should it even be viewed as a problem). Moreover, there is nothing wrong with divergent interests and every woman who failed to raise her hand will assuredly be placed in an excellent position and nearly all will have multiple, attractive opportunities. But the proponents of corporate board diversity statutes believe directorships should be set with the mathematical exactitude of a quota, which has been rejected by the United States Supreme Court.201

While interests across race and sex may correlate, they do not move in lockstep. The law’s focus on directors and not the general populace also attracts concern. Why not impose a gender parity requirement to add women to the workforce of bricklayers or men to the workforce of nurses? Following the logic of the finding, the legislature should simply pass an omnibus gender parity law for all trades and professions. This raises the question of how far these laws could logically extend. On review, the appellate panel’s first question to counsel for the state might be: “Would a statute directing the corporation to have a diverse executive suite be constitutional?” To truly attain the statute’s purposes, a quota for executive suite members would then furnish (at least on paper) qualified candidates for positions as directors. The state should address the question whether the law could go this far and why it is not a better solution for the alleged dearth of women directors.

Section 1(g) of the California Declarations and Findings provides:

Further, several studies conclude that having three women on the board rather than just one or none, increases the effectiveness of boards, including:

Mass on Corporate Boards: Why Three or More Women Enhance Governance," attaining critical mass going from one or two women directors to at least three women directors, creates an environment where women are no longer seen as outsiders and are able to influence the content and process of board discussions more substantially. (B) Boards of directors need to have at least three women to enable them to interact and exercise an influence on the working style, processes and tasks of the board, in turn positively affecting the level of organization within the firm they govern.

(2)(A) A 2016 McKinsey and Company study entitled “Women Matter” showed nationwide that companies where women are most strongly represented at board or top-management levels are also the companies that perform the best in profitability, productivity and workforce engagement. (B) Companies with three or more women in senior management functions score even more highly, on average, on the organizational performance profile, than companies with no women on boards or in the executive ranks. When there are at least three women on corporate boards with an average membership of 10 directors, performance increases significantly.202

The critical mass theory posits that a single woman will be viewed as a token and three or more will not. But adding directors by force of law is the essence of tokenism, in which the position is not earned. Adding to the number of women to eliminate their being seen as tokens suggests other possibilities. Either the new group of women will form a faction, Balkanizing the board, or benighted male directors will experience a great awakening, suddenly embracing with open arms newcomers with whom there is little or no prior relationship. Permeating the California Declarations and Findings is the notion that there should be gender parity at the board level. At bottom, female status is not an accomplishment. The rest of the finding concerns improved performance, which has been discussed. As an anecdotal matter, the most director diverse company in the Fortune 500, Wells Fargo,203 has some of the largest and most glaring deficiencies in board oversight.204 Neither the diverse board nor diverse senior man-

202. California Declarations and Findings, supra note 3, at § 1(g).
203. Missing Pieces Report (2018), supra note 26, at 25. Of Wells Fargo’s 19 directors, 7 are women, 2 African American, 1 Asian, and 3 Hispanic; broadest diversity is defined as having at least one director from each of the four major racial/ethnic groups defined by the census and at least one woman director. Id.
204. On February 8, 2018, Wells Fargo entered into a consent order with the Board of Governors of the Federal Reserve System (“FRB”) requiring the Wells Fargo board of directors to submit to the FRB a plan to enhance governance and oversight. On April 20, 2018, Wells Fargo entered into a consent order with the Consumer Financial Protection Bureau (“CFPB”) and the Office of the Comptroller of the Currency (“OCC”) to pay $1 billion in civil monetary penalties to resolve matters concerning Wells Fargo’s com-
agement teams at Wells Fargo were able to prevent its many failings and the board has now been identified as a contributor to the corporate malaise now affecting that institution.205

Concerning the authorities backing the California Declarations and Findings, the ninety-two page McKinsey Study,206 while laden with macroeconomic statistics and statements from luminaries, contains no concrete support for superior performance. Most of the data is global, not American and performance studies deal with soft skills like interpersonal behavior that cannot be measured in a meaningful way.207 But it is authoritative because McKinsey put its name on it. The report may be a helpful elucidation of barriers to diversity and solutions for same, but these do not support quota systems for corporate boards and was, therefore, used improperly by California lawmakers. The report also contains some internal inconsistencies. In one segment, it suggests gender parity as paramount and in others notes that women possess different career aspirations that affect their participation. The McKinsey Study assumes anything less than gender parity to be less than ideal without explaining that interests of men and women may differ for reasons other than oppression and discrimination. The study’s reference to “battlefield” conditions concerning pursuit of study and careers in science, technology, engineering, and mathematics encapsulates this bias: “[P]arity remains a battlefield in the scientific and technical sectors, with fewer women joining STEM disciplines . . . .”208 This hyperbolic phraseology from a serious firm like McKinsey suggests a bias toward equality of outcomes rather than equality of opportunity.

205. Rachel Louise Ensign & David Benoit, Top CEO Picks Reject Wells Fargo, WALL. ST. J., June 12, 2019, at A2 (noting the Wells Fargo board took weeks just to appoint a search firm to locate a new CEO).
207. Id. at 13-15.
208. Id. at 12.
B. PUBLIC POLICY PROBLEMS WITH CORPORATE BOARD DIVERSITY STATUTES

1. Corporate Board Diversity Statutes Do Not Attain Diversity

This Article examines two types of corporate board diversity statutes: ones that advance only women and ones that advance racial minorities (or a combination of both categories). With respect to racial minorities, what happens if only one minority is favored? For example, a statute that favors only African Americans. Excluded minorities would include Asians, Hispanics, and indigenous Americans. Beyond race, this disparity could also apply to special needs/disabled, veteran, as well as lesbian, gay, and transgender classifications. These additional classes are either statistically tracked or the subject of protective legislation. Yet this type of corporate board diversity statute offers no place for these other groups. In so doing, corporate board diversity statutes would fail to attain diversity in any meaningful sense by exclusion of minorities and other special classes of persons. This makes them very much unlike (and more insidious than) the statutes heretofore challenged under the Fourteenth Amendment, where women and a panoply of racial minorities were accorded disadvantaged status or selected under outright quotas. A reviewing court would be correct to conclude that rather than embody a sincere attempt to attain diversity, a limited corporate board diversity statute merely manifests the greater power of certain identity groups. If this were the case, a court should be hard pressed to conclude that the laws protect a disenfranchised minority or remediate past discrimination. And if this were the conclusion, then the laws lack any state interest—compelling or otherwise. Interpreted in this manner, corporate board diversity statutes favoring only one minority would cause harm by excluding other groups worthy of protection. Laws that impose quotas often result in harmful resentment and back-biting by excluded groups or groups that do not share in their benefits.209 Courts should assign weight to this reality and the likelihood it will occur.

2. The Private Marketplace Is Insisting on and Attaining Diversity

There are numerous examples of forceful efforts by institutional investors, proxy firms, corporate governance advisors, consultancies, and other professionals to impose their notions of diversity on the boards of directors of public companies. As noted, BlackRock has made specific requests of companies who fail to attain minimum acceptable standards. At March 31, 2019, BlackRock had approximately

209. See, e.g., GAO Study, supra note 24, at 21.
$6.52 trillion of assets under management, roughly half of which were comprised of equities of publicly traded companies. These assets place BlackRock as the world's largest asset manager at the time of this writing. The Russell 3000 index, which comprises 98% of the United States stock market as measured by market capitalization, is valued at approximately $30 trillion. As a major holder of this market capitalization, BlackRock alone can exert considerable influence and, in some cases, determine whether a slate of directors will be approved. Of course, neither corporate issuers nor institutional holders want a public fight over director selection, so changes will occur behind the scenes, with management and nominating committees poised to please. But rest assured, these forces have great influence and changes are occurring. The Missing Pieces Report, an annual study co-authored by Deloitte and the Alliance for Board Diversity, traces the progress of women and minorities in attaining directorships in companies comprising the Fortune 100 and the Fortune 500. Because of various private market forces, diversity commands considerable attention in the executive suite. While these market forces may themselves foment conflict and resentment, they are merely the exercise of power conferred upon shareholders that have the right to hire managers like BlackRock that impose their will on companies comprising the portfolios they manage. These market forces work well. According to ISS Analytics, for the first half of 2019, women comprised 43% of newly-elected directors in the Russell 3000. Through its lack of legitimacy and accountability, a legally-imposed diversity quota presents a different set of forces unrelated to underlying property rights.

3. The Quantum of Diversity Is Unclear and Cannot Be Ascertained

One rejoinder to the problems identified in Subsection B(1) above is that some diversity is preferable to no diversity. This line of reasoning would acknowledge that corporate board diversity statutes are imperfect in their attempts to attain diversity, but nonetheless have

213. The Fortune 100 is comprised of the 100 largest companies in America, as measured by annual revenues.
214. The Fortune 500 is comprised of the 500 largest companies in America, as measured by annual revenues. Subsumed within the Fortune 500 is the Fortune 100.
merit in making the incremental progress necessary to attain acceptable diversity. This reasoning has not been embraced by courts and also suffers from randomness. Some examples from the diversity industry may prove helpful in understanding this randomness. The Alliance for Board Diversity has set a goal that 40% of all board seats in the Fortune 500 be occupied by women and/or minorities by 2020.\textsuperscript{216} The Alliance for Board Diversity does not explain how it arrived at this percentage. It makes no comparisons to the general population or to the population of qualified director candidates. Another organization, 2020 Women on Boards, has partnered with Equilar, a corporate governance consultant, to report diversity statistics for various classes of public companies. In its 2020 Women on Boards Gender Diversity Index\textsuperscript{217} the authors set a goal for women to comprise 20% of all corporate boards by 2020. The report states: “Board diversity is not a social issue, it is a strategic imperative.”\textsuperscript{218} The material in this report includes women and excludes racial minorities. This may explain the divergence of this goal from that articulated by the Alliance for Board Diversity. Also, the 20% is to be achieved by 2020 and so there is a temporal aspect to the goal. Nevertheless, no attempt is made to explain the purpose or desirability of the goal. It amounts to nothing more than a request for more.

4. Corporate Board Diversity Statutes Benefit a Privileged Few

Corporate board diversity statutes benefit directly only a very small number of selected persons. Based on Russell 3000 data, the roughly 25,000 public company director seats\textsuperscript{219} equals approximately half the student population at Michigan State University\textsuperscript{220} or the population of a medium-sized suburb. If the seats are to be filled in proportion to each group’s percentage of the population at large, these numbers are about half that small number. These numbers are even further reduced by recycle rates, in which a single person hoards director positions, making the actual number of persons holding seats even smaller. What is more, the benefitted population is not a cross section of America. It is, instead an educated elite having considerable resources, both financial and influential. These persons are the antithesis of a disadvantaged group. In general, neither the wealth nor the standing of new directors will be affected in any material way by a board position. Laying bare these laws as to who benefits suggests an ulterior purpose to gather power for a particular class of per-

\textsuperscript{216} Missing Pieces Report (2018), supra note 26, at 11.
\textsuperscript{217} 2020 Women on Boards Report, supra note 23.
\textsuperscript{218} Id. at 1.
\textsuperscript{219} See supra note 25 and accompanying text.
sons based on suspect categories. Such conditions, if realized, will be counterproductive to the diversity goal and do real harm. Because qualifications matter very much to board appointments and there is a limited supply, rather than adding more persons from the nominally protected class to boards, the more likely outcome is that existing directors from the special, protected class will simply take on additional assignments. If true, this means two things. First, the benefit will not extend to newcomers in any meaningful way. Second, already busy directors may be unduly burdened by the new responsibilities, diluting the quality of their contributions.

CONCLUSION

Through their imposition of race and sex-based quotas, corporate board diversity statutes are invalid under the Fourteenth Amendment. Corporate board diversity statutes impose unreasonable restraints on interstate commerce. Whether they are invalid under the Dormant Commerce Clause depends on the level of scrutiny assigned to purported state interests. A rational basis level of scrutiny will confer validity under the Dormant Commerce Clause but strict scrutiny will not. This Article argues that strict scrutiny should apply to the state’s interest in determining the outcome under the Dormant Commerce Clause. Corporate board diversity statutes interfere with corporate internal affairs. An internal affairs-based challenge to a corporate board diversity statute presents a question of conflict of laws. Outcomes will vary based on the forum where the case is presented and the law chosen to be applied. California courts will apply California law to any internal affairs challenge, while Delaware should not. While these inconsistent outcomes may be abhorrent as a doctrinal matter, this is the reality of the internal affairs question.

Three classes of litigants will potentially have standing: (1) the corporation, (2) director candidates passed over on the basis of race or sex and directors removed from the board because of their race or sex, and (3) shareholders. In practice, one would expect only shareholders will bring actions to challenge the statutes. All three injured classes have standing under the Fourteenth Amendment. Under the Dormant Commerce Clause, there is doubt whether removed directors and director candidates have standing, but shareholders and the corporation do. Internal affairs challenges also present unique issues of standing, with serious doubt whether directors would have standing.

Corporate board diversity statutes represent bad public policy for a number of reasons. First, they are unnecessary. Private market forces are already operating to cause desired diversity with far fewer collateral effects. The policy underpinnings that diversity improves
corporate performance are not proven and conflate cause and effect. Moreover, for purposes of establishing a governmental interest, corpo-
rate performance is not relevant to public policy for private enter-
prises in the hands of managers highly motivated to make a profit. Corporate board diversity statutes do real harm in the form of stig-
matic injury to classes they purport to assist as well as fomenting deep-seated resentment by those pushed aside by their effects. Fi-
nally, corporate board diversity statutes benefit a privileged few and accordingly depart from remedial programs traditionally aimed at helping the disadvantaged.