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**REMEDYING SYSTEMIC SEX DISCRIMINATION
BY GENDER QUOTAS: JUST BECAUSE**

Tracy A. Thomas*

When newly-elected Canadian Prime Minister Justin Trudeau was asked by surprised reporters why he appointed women as fifty percent of his new cabinet, he responded simply, “Because it’s 2015.”¹ Just because. Because it’s time. In fact, he suggested, it is long past time for having to justify including women as one-half of the power structure when women constitute one-half of the population. And it’s time for meaningful change in shared governance by something as pragmatically simple as selecting fifteen women and fifteen men for appointments.²

Similarly, it is long past time for justifying the need to reform American institutions that exclude women from the power structure. Rather than stumbling along the path of continued sex discrimination by the ineffective application of judicial band-aids to systemic problems, it is time for alteration of the power structure itself. It’s time for the law to endorse the equal representation of women in all power venues in order to remedy—permanently—longstanding and resistant, systemic sex discrimination.³ And the way to get there might be quotas.

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¹ Elliott Hannon, *Canada’s New Prime Minister Says He Picked a Cabinet That’s Half Women “Because It’s 2015,”* SLATE, Nov. 4, 2015, at http://www.slate.com/blogs/the_slatest/2015/11/04/canada_s_justin_trudeau_s_gender_equal_cabinet_because_it_s_2015.html; Natasha Young, *This World Leader Has the Perfect Response to Why Feminism Matters*, Jan. 25, 2016, <http://www.refinery29.com/2016/01/101912/canada-prime-minister-says-everyone-should-be-a-feminist>.

² Trudeau explained, “I personally convinced a number of extraordinary women to step forward, as well as a number of extraordinary men, at a time when politics can be very very divisive.” Jill Treanor & Graeme Wearden, *Embrace Feminism to Improve Decision-Making, Trudeau Says*, GUARDIAN, Jan. 22, 2016, <http://www.theguardian.com/world/2016/jan/22/embrace-feminism-to-improve-decision-making-says-justin-trudeau>

³ Catharine A. MacKinnon, *Toward a Renewed Equal Rights Amendment: Now More Than Ever*, 37 HARVARD J. LAW & GENDER 569 (2014); MARTHA CHAMMALLAS & JENNIFER WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER AND TORT LAW* (2010).

“Quota” is a dirty word. In U.S law and society, we are “quota-phobic,” vehemently resisting an idea alleged to be based on political correctness in place of merit.⁴ Quotas have been used in affirmative-action remedies to integrate schools racially in proportion to the community or to mandate a set percentage of government contractors of minority status.⁵ And quotas have been overturned by the Supreme Court as discriminatory in and of themselves.⁶ However, quotas are much more accepted in other countries, particularly Europe, where gender quotas for corporate boards, political representatives, and academic review boards are increasingly commonplace.⁷ “In many jurisdictions around the world, women's past and current disadvantage is regarded as an injustice that must be corrected by various measures, including antidiscrimination law, affirmative action, and even gender quotas.”⁸ It is thus worth reconsidering gender quotas as a potential remedy in America.

Quotas offer the power to change the big picture of systemic discrimination. For at the broad level, sex discrimination is still apparent. Women constitute 50.8% of the American population.⁹ Yet, women are 47% of law students, but 34% of lawyers, 18% of equity partners, 25% of judges, 20% of law deans, and 25% of lawmakers.¹⁰ Women earn 57% of all bachelor's

⁴ See Darren Rosenblum, *Loving Gender Balance: Reframing Identity-Based Inequality Remedies*, 76 FORDHAM L. REV. 2873, 2884 (2008).

⁵ *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

⁶ *Parents Community Schools v. Seattle School Dist.*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

⁷ Julie C. Suk, *Gender Quotas After the End of Men*, 93 B.U.L. Rev. 1123 (2013).

⁸ *Id.* at 1124.

⁹ U.S. Census Bureau, Quick Facts, July 1, 2014.

¹⁰ ABA Commission on Women, Statistics, *A Current Glance at Women in the Law* (July 2014), http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_july2014.authcheckdam.pdf; Lauren Stiller Rickleen, *Women Partners Continue to Lag Behind Male Colleagues*, National Association of Women Lawyers Annual Survey Report (2015), file:///C:/Users/thomast/Downloads/NAWL%202015%20SURVEY_FINAL.pdf; Women in State Legislatures for 2015, <http://www.ncsl.org/legislators-staff/legislators/womens-legislative-network/women-in-state-legislatures-for-2015.aspx>; Women in U.S. Congress 2015 (20%), <http://www.cawp.rutgers.edu/women-us-congress-2015>; see also Amber Phillips, *The Sad State of Black Women in State Political Office*, WASH. POST, Dec. 5, 2015, <https://www.washingtonpost.com/news/the-fix/wp/2015/12/05/the-sad-state-of-black-women-in-statewide-political-office/> (reporting that black women are 7.4% of the population, but 3.5% of the legislators and 1% of mayors).

degrees, 50% of science degrees, but are only 25% of the STEM workforce.¹¹ And women are 47% of the workforce, 55% of business consumers, 40% of MBAs, 40% of business managers, but less than 20% of corporate boards and 15% of Chief Executive Officers.¹² The courts receive continued filings of sex discrimination complaints, not due to facially-discriminatory rules like nineteenth-century coverture, but due to practices and informal norms of exclusion and denial of opportunity just the same.¹³ Laws directed at malevolent individual bad actors miss the picture, and fail to redress the more complex and embedded systemic bias, structural impediments, and gendered norms that continue to fuel gender inequality.¹⁴ Discriminatory harms of gender inequality in employment, education, marriage, religion, pregnancy, and profession have existed since the founding of our country, and women's demands for eradication of such wrongs since the 1848 Declaration of Sentiments have not yet been realized.¹⁵ Two hundred years of harm, and more than fifty years of modern feminist legal reform are more than enough to dispel the notion that the status quo is sufficient or that more basic measures should first be tried.

It's time to consider more effective, systemic, and long-lasting remedies of gender quotas. A quota remedy would require gender parity—proportional representation of women in positions of power. The proportion would match the gender distribution of the general

¹¹ State of Girls and Women in STEM, Nat'l Girls Collaborative Project, <https://ngcproject.org/statistics>.

¹² Women in the Professional Workforce, Feb. 2015, <http://dpeaflcio.org/professionals/professionals-in-the-workplace/women-in-the-professional-and-technical-labor-force>; Marcus Noland & Tyler Moran, *Study: Firms With More Women in the C-Suite are More Profitable*, HARV. BUS. REV., Feb. 8, 2016, <https://hbr.org/2016/02/study-firms-with-more-women-in-the-c-suite-are-more-profitable>; Kitty Lindsay, *Coca-Cola CEO Touts Feminist Business Model as Secret to Success*, MS. BLOG, Dec. 3, 2015 (noting that women comprise 70 percent of Coke drinkers, but only two board members and fewer than 20 senior leadership positions at the corporation) <http://msmagazine.com/blog/2015/12/03/coca-cola-ceo-touts-feminist-business-model-as-secret-to-success/>.

¹³ *E.g.*, *Young v. United Parcel Service*, 575 US __ (2015); *Bolton v. Lynch*, No. 2:15-CV-294 (E.D. Wash. Oct. 21, 2015).

¹⁴ Anne L. Alstott, *Gender Quotas for Corporate Boards: Options for Legal Design in the United States*, 26 PACE INT'L L. REV. 38, 39 (2014); MacKinnon, *supra*; CHAMMALLAS & WRIGGINS, *supra*.

¹⁵ Declaration of Sentiments, in Proceedings of the First Convention on Woman's Rights, Seneca Falls, New York, July 14 & 15, 1848.

population; so women as about 51% of the population should constitute 51% of the managers, boards, CEOs, legislatures, and law firm partners, as well as STEM majors and law students. Judges too, would then be 51% women, although Justice Ruth Bader Ginsburg suggested she would not stop there, opining that the Supreme Court would have the right number of women justices “When there are nine.”¹⁶ This idea of substantial proportionality is seen in the law in the Title IX education context where one sex is deemed underrepresented if there is a disparity between the gender composition of the institution’s study body and the gender composition of its athletics.¹⁷ This mandate of parity and proportional representation is exists legally as a tenet of gender equality. One way to enforce such parity is through quotas, requiring a parallel representation between population and power.

The idea of gender quotas seems farfetched at first blush. Culturally, it evokes claims of unfairness, triggering fears of unqualified candidates and reverse discrimination.¹⁸ (Though such fear itself reveals a deep gender bias in assuming women collectively would be unqualified).¹⁹ There is also a concern about their counter-effect, for example, limiting women to 51% of college admissions even though their grades should place them at a much higher percent over men.²⁰ Legally, the current Supreme Court seems to have foreclosed quotas, at least in the racial

¹⁶ SALLY KENNEY, GENDER & JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER (2012); *When Will There Be Enough Women on the Supreme Court? Justice Ginsburg Answers That Question*, PBS NewsHour, Feb. 5, 2015, <http://www.pbs.org/newshour/bb/will-enough-women-supreme-court-justice-ginsburg-answers-question/>; Debra Cassens Weiss, *Justice Ginsburg Says Nine Women on the Supreme Court Would be Enough*, ABA J., Oct. 27, 2010.

¹⁷ *Cohen v. Brown University*, 991 F.2d 888 (1st Cir. 1993); Rosenblum, *supra*, at 2883-84; Deborah Brake, *The Struggle for Sex Equality in Sport and The Theory Behind Title IX*, 34 U. MICH. J. L. REFORM 13 (2000).

¹⁸ Peta Spender, *Gender Quotas on Boards—Is It Time for Australia to Lean In?*, 20 DEAKIN L. REV. 95, 101 (2015); Ruth Sullivan, *Can Gender Quotas Get More Women in the Boardroom?*, July 1, 2015, www.bloomberg.com; Susan Smith Blakely, *Boosting Diversity Through Quotas—Is This a Good Idea for Women Lawyers?*, Ms. JD Blog, Apr. 20, 2015, http://ms-jd.org/blog/article/boosting-diversity-through-quotas-is-this-a-good-idea-for-women-lawyers?utm_content=buffer39b8c&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer;

¹⁹ For a humorous take on such gendered assumptions, see Twitter @manwhohasitall, Nov. 8, 2015 (“I have absolutely nothing against male bank managers, as long as they have some grasp of financial matters.”).

²⁰ Suk, *supra*, 1134-39 (discussing the Swedish example of college admissions).

context.²¹ However, Justice Ruth Bader Ginsburg, dissenting from the Court’s racial affirmative action cases, distinguished the use of race in a “color conscious” way “to prevent discrimination being perpetuated and to undo the effects of past discrimination.”²² She cited contemporary human rights documents, including international treaties against gender discrimination, as laws that “draw just this line” and “distinguish between policies of oppression and measures designed to accelerate de facto equality.”²³

The quota idea might not be so crazy, however, when examined from a perspective of the law of Remedies. This law requires a meaningful remedy for every harm, and provides the flexibility necessary to achieve tangible change.²⁴ As discussed in Part I, existing individualized remedies have been inadequate to redress the entrenched problems of systemic gender discrimination.²⁵ Institutional and structural problems of inequality have not responded to the innocuous band-aids of damages and reinstatement, even if plaintiffs make it through the gauntlet of limitations on class actions and collective relief and laws that fail to encapsulate gendered harms.²⁶ Second, as discussed in Part II, legal systems in other countries have recognized this entrenched ineffectiveness and have moved on to mandating quotas for meaningful and accelerated change.²⁷ This precedent provides support for remedial options that

²¹ Gratz v. Bollinger, 539 U.S. 244 (2003); Richmond v. J. A. Croson Co., 488 U.S. 469 (1989); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

²² Gratz v. Bollinger, 539 U.S. 244, 302 (2004) (Ginsburg, J., dissenting).

²³ *Id.* at 302; Grutter v. Bollinger, 539 U.S. at 344 (Ginsburg, J., dissenting). Article 4 of CEDAW, the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, explicitly states that “temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention.” 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

²⁴ Marbury v. Madison, 5 U.S. 137 (1803); Tracy A. Thomas, *Restriction of Tort Remedies and the Constraints of Due Process: The Right to an Adequate Remedy*, 39 AKRON L. REV. 975 (2006); Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633 (2004).

²⁵ See *infra*.

²⁶ Wal-Mart Stores, Inc. v. Dukes, 564 U.S. ____ (2011) (denying class action certification for national class of women employees claiming sex discrimination in employment).

²⁷ See *infra*.

force institutional change in conformance with the legal mandates of gender equality. Part III then argues that quotas are legally viable under the remedial law of prophylaxis and withstand judicial constitutional scrutiny.²⁸ It is worth consideration of these judicial options in order to provide new approaches to old problems. Because it's time.

I. The Problem: Continued Harms and Inadequate Remedies

The foundational premise detailed by feminist scholars is that individualized remedies fail to sufficiently address systemic causes and effects of sex discrimination.²⁹ Examples of the continuing system harms as seen in the daily news, where sexist systems operate in a microcosm, and legal slaps fail to make any difference. For example, executive Ellen Pao encountered the old boys club of Silicon Valley with its gendered assumptions about women, viewing female colleagues as potential sexual conquests, with management by paternalistic fatherly figures who failed to equally support women's power and advancement.³⁰ The subtleties of engrained norms failed to demonstrate to a jury that the problem was more than one woman's promotion, but rather about workplace expectations, daily treatment, workplace relations, and standards for advancement all defined by Mad-Men era norms of masculinity. In another example, a woman federal prosecutor in Washington State, the high-ranking Deputy Criminal Chief, faced an uphill battle to prove sex discrimination by her unequal pay, isolation, and lack of authority in the workplace based on individual intent rather than systemic male-norms of workplace

²⁸ *See infra*.

²⁹ CHAMMALLS & WRIGGINS, *supra*; MacKinnon, *supra*.

³⁰ David Streitfeld, *Ellen Pao Loses Silicon Valley Bias Case Against Kleiner Perkins*, NY TIMES, Mar. 27, 2015, http://www.nytimes.com/2015/03/28/technology/ellen-pao-kleiner-perkins-case-decision.html?_r=0; Cassidy Tucker, *Pao '91 Loses Discrimination Lawsuit*, DAILY PRINCETONIAN, Mar. 29, 2015, <http://dailyprincetonian.com/news/2015/03/pao-91-loses-discrimination-lawsuit/>.

management.³¹ Glass ceilings and workplace cultures have been resistant to the damages claims of any one individual.

The feminist insight as to these systemic problems is the importance of power.³² The lack of women's power as decision makers in the workplace, politics, or science means the perpetuation of the patriarchy (yes patriarchy) and male privilege from the top down. Generations at the top may be outdated, but they continue to transmit the same outmoded assumptions, reinvigorating a new generation with the same discriminatory norms and practices.

Scholars have discussed the inadequacy of existing remedies for gender discrimination in the tort damages context. "When viewed through a wider cultural lens, the basic structure of contemporary tort law still tends to reflect and reinforce the social marginalization of women and racial minorities and to place a lower value on their lives, activities, and potential."³³ Non-pecuniary damages are limited for emotional, dignitary, or intangible harms. "The privileged status of physical harm over emotional and relational injury found in contemporary tort law is sustained by dubious assumptions about the greater seriousness and importance of this type of injury in the lives of ordinary people."³⁴ Legal standards of tort ask "what is reasonable" of the objective person, incorporating men who have not experienced discrimination, the lack of privilege, second-class status, or emotional toll, thereby rendering reactions to these consequences automatically unreasonable. Thus, remedies fail to correct action or provide incentives or leverage against discriminatory action. "Under the status-quo, tort law's remedial damage scheme both perpetuates existing racial and gender inequalities and creates ex-ante

³¹ Bolton v. Lynch, No. 2:15-CV-294 (E.D. Wash. Oct. 21, 2015); Kip Hill, *Female Ex-Federal Prosecutor Files Gender Discrimination Lawsuit*, THE SPOKESMAN REV., Oct. 21, 2015, <http://www.spokesman.com/stories/2015/oct/21/female-prosecutor-in-us-attorneys-office-in-spokan>.

³² Feminist Perspectives on Power, Stanford Encyclopedia of Philosophy (Mar. 9, 2011), <http://plato.stanford.edu/entries/feminist-power/>.

³³ CHAMALLAS & WRIGGINS, *supra*.

³⁴ *Id.*

incentives for potential tortfeasors to engage in future discriminatory harm (discriminatory targeting) towards women and minorities.”³⁵

Elsewhere in the law, it is difficult to prove systemic gendered harm based on proof, jury bias, and new limitations of class action cases.³⁶ Even when systemic violations are established, the Supreme Court has been reluctant to award relief. For example, in *Manhart v. Department of Power*, the Court found systemic denial from overcharging women for their retirement plan, but denied restitution and return of the wrongfully charged monies.³⁷ Even though the general legal rule was that Title VII remedies should “make the plaintiff whole.” And even though in a similar case two years earlier, the Court did award such relief to remedy *men’s* unequal retirement benefits resulting from a longer work time to retirement.³⁸ The all-male Court was concerned with institutional problems of defendant’s solvency and impact on third parties, even where the defendant admitted it had sufficient existing funds to pay.³⁹ Governments and third parties were all weighed higher in the remedial calculus than the women who had proven discrimination.

A glimmer of remedial hope was seen in the creation of sexual harassment remedies. A series of prophylactic injunctive remedies in the 1980s turned workplace culture from Mad Men era to zero tolerance.⁴⁰ Prophylactic provisions reaching facilitators of continued harm and requiring institutional change were more effective than meager damages in not only shifting the culture in defendant’s workplace, but in bringing about broader cultural shifts in norms and acceptable behavior.⁴¹ Relief like institutional reporting and grievance structures, education of

³⁵ Ronen Avraham, *Is Race- and Sex-Based Targeting Efficient? A Closer Look at Tort Law’s Discriminatory Damage Awards*, available at www.ssrn.com.

³⁶ *Wal-Mart Stores v. Dukes*, 564 U.S. ____ (2011).

³⁷ 435 U.S. 702 (1978); Tracy A. Thomas, *Manhart*, in *THE U.S. FEMINIST JUDGMENTS PROJECT* (Cambridge Press 2016).

³⁸ *Id.*; see *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Fitzpatrick v. Bitzer*, 427 U.S. 455 (1976).

³⁹ 435 U.S. at 720-23.

⁴⁰ Thomas, *Continued Vitality*, *supra*, at 119.

⁴¹ *Id.*

institutional behavior, and establishment of policies made the difference. As a corollary, the courts developed a safe harbor for corporate defendants who adopted these institutional changes, insulating them from vicarious liability for punitive damages for the bad acts of employees.⁴² The key was that courts realized that continuing to slap down individual aggressors and award personal damages for lost income and emotional distress were severely inadequate to changing the gendered and sexualized workplace culture. Instead, proactive, injunctive relief altering the institutional structure and the power itself was required.

II. Precedent for Solutions: Go Big or Go Home

The rest of the world is ahead of the U.S. on the idea of gender quotas. Quotas, sometimes phrased as the softer, and more palatable term “targets,” have been adopted in many European contexts over the past twenty years in order to redress discrimination and restructure power including corporate boards, legislative bodies, and ivory towers.⁴³ “Quotas represent a fast-track policy measure, in contrast to the well-known incremental-track model according to which gender equality will come in due time as a country develops. . . . [G]ender quotas are a simple answer to a very complex problem, that of women’s historical exclusion” from political and private systems of power.⁴⁴

Gender quotas for corporate boards have received the most attention in America.⁴⁵ It began with Norway’s mandate adopted a decade ago requiring 40% women on governing boards

⁴² Kolstad v. American Dental Association, 527 U.S. 526, 545–46 (1999).

⁴³ *Gender Quotas: Vital for Equality or Mere Tokens?* THE WEEK, May 15, 2015, <http://www.theweek.co.uk/63678/gender-quotas-vital-for-equality-or-mere-tokenism> (UK adopted “targets” not “quotas”).

⁴⁴ SUSAN FRANCESCHET, ET. AL., EDS., *THE IMPACT OF GENDER QUOTAS* vii (2012).

⁴⁵ See, e.g., Julie C. Suk, *Gender Quotas After the End of Men*, 93 B.U.L. REV. 1123 (2013); Anne L. Alstott, *Gender Quotas for Corporate Boards: Options for Legal Design in the United States*, 26 PACE INT’L L. REV. 38, 39 (2014); Deborah L Rhode & Amanda K Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?* 39 DELAWARE J. CORP. LAW 377, 383 (2014); Julie C Suk, *Gender Parity and State Legitimacy:*

of companies and enforced by penalties. Other countries including Germany, France, as well as the European Union have adopted gender quotas for corporate boards, requiring companies to have anywhere from 20 to 40 percent women directors.⁴⁶ In the United States, the Securities and Exchange Commission requires companies to report the percentage of board members by gender, but nothing further.⁴⁷

Quotas for gender have also been adopted in over one hundred countries for elections in Europe, Asia, and African. These electoral quotas typically require a certain percent of political candidates be women, ranging from 20 to 50 percent.⁴⁸ The argument for electoral quotas is that women must be “a ‘critical minority’ of 30 to 40 percent of the decision-making body to have an influential voice and to make substantive contributions to the legislative process.”⁴⁹ Advocates of electoral quotas do not want simply to increase the number of women in office, but also “diversify the types of women elected, raise attention to women’s issues in policy making, change the gendered nature of the public sphere, and inspire female voters to become more politically active.”⁵⁰

From Public Office to Corporate Boards, 10 INT’L J. CON. LAW 449, 452 (2012); Larelle Chapple & Jacquelyn E Humphrey, *Does Board Gender Diversity Have a Financial Impact? Evidence Using Stock Portfolio Performance*, 122 J. BUS. ETHICS 709, 711 (2014); Kevin Campbell & Antonio Minguez-Vera, *Gender Diversity in the Boardroom and Firm Financial Performance*, 83 J. BUS. ETHICS 435 (2008) (finding that greater gender diversity on boards increased firm values); Valentina Zarya, *New Proof That More Female Bosses Equals Higher Profits*, FORTUNE, Feb. 8, 2016, <http://fortune.com/2016/02/08/women-leadership-profits/>

⁴⁶ Suk, *End of Men*, *supra*, at 1125-26 (noting European Commission rule prohibiting any sex to have more than 60% representation on corporate board); Sullivan, *supra*; Spender, *supra*, at 110-11 (describing the examples of France, 40 percent by 2016, 20 percent as interim measure; Australia, 40 percent targets for public sector boards);

⁴⁷ AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY (2015).

⁴⁸ FRANCESCET, *supra*, vii, 3-5 (these include reserved seats, party quotas, and legislative quotas); Suk, *supra*, 1126; Anisa A. Somani, Note, *The Use of Gender Quotas in America: Are Voluntary Party Quotas the Way to Go?*, 54 WM. & MARY L. REV. 1451 (2013); Lisa Baldez, *Elected Bodies: The Gender Quota Law for Legislative Candidates in Mexico* (2004), <http://www.quotaproject.org/aboutQuotas.cfm>.

⁴⁹ Somani, *supra*, at 1153, 1155 (citing the successful example of Rwanda which incorporated a gender quota into its constitution in 2003, reserving at least 30 percent of the seats for women, and now ranks highest among all countries for its level of female political representation in its national legislature, with women comprising 56 percent of the lower house and 39 percent of the upper house).

⁵⁰ FRANCESCET, *supra*, 3.

An increasing number of countries are also using gender quotas for scientific committees, to assess and award academic tenure and promotion.⁵¹ “The underrepresentation of women in academia remains a cause for concern among universities and policy makers around the world. In Europe, women account for 46% of PhD graduates, 37% of associate professors and only a mere 20% of full professors.”⁵² One contributing cause identified for this gender disparity has been all-male evaluation panels, and thus “a number of countries have introduced quotas requiring the presence of at least 40% of women (and men) in scientific committees.”⁵³

A key question debated with all of these mandates is what difference, if any, the gender quotas make. Arguments are made as to substantively different outcomes that might result. The business case for gender-balanced corporate boards is that companies’ bottom lines, financial performance, and shareholder profits improve when women direct.⁵⁴ Other studies find that boards are more active when they are gender-balanced, and thus provide better productivity and CEO oversight.⁵⁵ These performance conclusions are sometimes explained by gender

⁵¹Manuel Bagues, et. al, *Does the Gender Composition of Scientific Committees Matter?*, July 8, 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2628176.

⁵² *Id.* at *2.

⁵³ Finland introduced gender quotas in 1995 through the amendment of the Finnish Act on Equality between Women and Men. In 1999, the European Commission stated the aim to achieve at least a 40% representation of women in Marie Curie scholarships, advisory groups, assessment panels and monitoring panels. In 2007, gender quotas were introduced in Spain within the Equality Law. More recently in 2014, France has also introduced quotas in all scientific committees. *Id.* at *4 n.5.

⁵⁴ DHIR, *supra* (study of Norwegian quota model demonstrates the important role diversity can play in enhancing the quality of corporate governance); Alstott, *supra*, at 42; Linda-Eling Lee, et al., Women on Boards: Global Trends in Gender Diversity on Corporate Boards, MSCI, Nov. 2015, <https://www.msci.com/documents/10199/04b6f646-d638-4878-9c61-4eb91748a82b>; Spender, *supra*, at 106; Deborah L Rhode & Amanda K Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?* 39 DELAWARE J. CORP. LAW 377, 383 (2014); Julie C Suk, *Gender Parity and State Legitimacy: From Public Office to Corporate Boards*, 10 INT’L J. CON. LAW 449, 452 (2012); Larelle Chapple & Jacquelyn E Humphrey, *Does Board Gender Diversity Have a Financial Impact? Evidence Using Stock Portfolio Performance*, 122 J. BUS. ETHICS 709, 711 (2014); Kevin Campbell & Antonio Minguez-Vera, *Gender Diversity in the Boardroom and Firm Financial Performance*, 83 J. BUS. ETHICS 435 (2008) (finding that greater gender diversity on boards increased firm values); Valentina Zarya, *New Proof That More Female Bosses Equals Higher Profits*, FORTUNE, Feb. 8, 2016, <http://fortune.com/2016/02/08/women-leadership-profits/> (discussing new study concluding that companies with 30% female leaders have net profit margins up to 6% higher); Noland & Moran, *supra*.

⁵⁵ Miriam Schwartz-Ziv, *Gender and Board Activeness: The Role of a Critical Mass*, J. FIN. & QUANTITATIVE ANALYSIS (forthcoming); Miriam Schwartz-Ziv, *Gender and Board Activeness: The Role of a Critical Mass*, The

essentialist thinking that women are more risk adverse, less likely to engage in fraudulent activity, and consensus focused.⁵⁶ As Prime Minister Trudeau put it, “Let’s start rewarding politicians and companies who aren’t driven by a macho approach.”⁵⁷

In another context, researchers have worked to prove that women judges reach different results. Some studies show more favorable decisions to plaintiffs in sexual harassment cases or more sympathetic rulings to plaintiffs in immigration cases.⁵⁸ Other studies show no measurable substantive difference in outcome for from female judges.⁵⁹ Still others argue that the full substantive impact of women in power is not yet realized because we are nowhere near the point of shared power of 50/50 at which women have the authority to make a meaningful difference.⁶⁰

However, “while functionalist arguments dominate the literature and the debate” over gender quotas, “the most enduring justifications are normative, and based on equality, parity and democracy.”⁶¹ Functionalist arguments contend that women make a measurable difference to performance, but this is not necessarily the point. The reason for requiring gender quotas is not for any particular outcome, but for shared power and procedural legitimacy. The normative and

CLS Blue Sky Blog, Feb. 9, 2016, <http://clsbluesky.law.columbia.edu/2016/02/09/gender-and-board-activeness-the-role-of-a-critical-mass/>.

⁵⁶ Alstott, *supra*, at 42; Spender, *supra*, at 106.

⁵⁷ Treanor & Graeme Wearden, *supra*.

⁵⁸ Christina L. Boyd, Lee Epstein, and Andrew Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AMER. J. POL. SCI. 389 (2010) (finding the probability of a judge deciding in favor of the party alleging discrimination decreases by about 10 percentage points when the judge is a male, and that when a woman serves on a panel with men, the men are significantly more likely to rule in favor of the rights litigant); Carrie Menkel-Meadow, *Asylum in a Different Voice: Judging Immigration Claims and Gender* in REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM (Jaya Ramji-Nogales, Andrew I. Schoenholz & Philip G. Schrag, eds., NYU Press 2009) (finding female immigration judges granted asylum at a rate of 53%, while male judges granted asylum at a rate of 37.3%.)

⁵⁹ Rosalind Dixon, *Female Justices, Feminism, and the Politics of Judicial Appointment: A Re-Examination*, 21 YALE J. L. & FEMINISM 297 (2010) (concluding in a study of Canadian judges that “the current literature on judicial behavior in fact reveals little if any meaningful connection between a judge’s gender and her pro-feminist views, in a jurisprudential sense”); *see also* Bagues, *supra*, 6 (finding no empirical support from studies in Italy and Spain “to suggest that a larger presence of female evaluators in the evaluation committees has a statistically or economically significant positive effect on the chances of success of female candidates”).

⁵⁹ Spender, *supra*, at 96.

⁶⁰ KENNEY, *supra*.

⁶¹ Spender, *supra*, at 96.

“symbolic representation of women is sufficient” as a justification for quotas “because it signals a change to traditional conceptions of authority and citizenship.”⁶² “Symbolic representation” is “the concept that, when women are included in decision-making bodies and are therefore visible in the public sphere, this signals a change to traditional conceptions of authority, citizenship and norm creation.”⁶³ As explained in the context of judicial gender quotas, the difference sought is not in the result per se, but in the representation in access to power, ensuring the fairness of the law, and more fully representing the human experience.⁶⁴ Fundamental interests or norms at the core of our constitutional and legal rights dictate insurance against systemic discriminatory decisions by providing the shared power base.

This systemic representative ideal emerged in the 1990s in the European discourse as “gender parity,” the representation of men and women in roughly equal numbers. It “was understood to be a requirement of all legitimate institutions exercising power in a democracy because each sex represented half of humanity. Thus conceived, gender balance is . . . a permanent feature of good governance.”⁶⁵ “Parity democracy,” understood as fifty-fifty male-female representation in all organizations exercising power in a democratic society, “is not primarily aimed at enhancing women's opportunities as individuals or even as a group. Its primary purpose is to legitimize the larger institution's exercise of political, economic, and social power.”⁶⁶ This is a systemic understanding of power and an incorporation of the feminist goal to have women be a part of that power structure.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ KENNEY, *supra*.

⁶⁵ Suk, *supra*, at 1129.

⁶⁶ *Id.* at 1130.

Even if functional difference could justify gender-balanced power, such outcome difference is not likely to occur in advance of gender parity. For, it is only through symbolic representation that functional difference even becomes possible. “When governments reflect the actual demographics of the populations they are elected to represent, effective representation of the diverse interests of citizens is more likely. Without women in high level government positions, issues that are important to women are less likely to be addressed in a meaningful way.”⁶⁷ Women need to advance out of tokenism, beyond the tipping point of minority representation to a critical mass at which such substantive difference might then be possible (though not required).⁶⁸ For tokenism, an innocuous action of requiring one woman to provide lip service to inclusion and homogeneity, offers such minimal relief as to reflect no meaningful change.⁶⁹ Indeed a recent study showed that such tokenism was affirmatively detrimental to equality, as the inclusion of one woman or minority made it harder for any other like candidates to be included in the power group. Despite its ineffectiveness, tokenism remains the first-step approach to forcing systemic change, and even it is still resisted as a radical alteration of the status quo.⁷⁰ Quotas offer the potential to bypass the frozen status quo and false incrementalism to achieve actual parity. It thus has to be all in: quotas must be 51 percent, not watered down to 20 percent like many of the first generation quotas.

Access to power is a key feminist insight, that women’s lack of power has been the structural block to gender equity, and that gaining access to power is an ultimate remedial goal. Women’s lack of power is the historical foundation still undergirding the law. The

⁶⁷ National Women’s Law Center, “*Because It’s 2015*”: *Canada’s Model Cabinet*, Nov. 6, 2015, at www.nwlc.org.

⁶⁸ Jasmin Joecks, Kerstin Pull & Karin Vetter, *Gender Diversity in the Boardroom and Firm Performance: What Exactly Constitutes a “Critical Mass?”* 118 J. BUS. ETHICS 61, 65 (2013).

⁶⁹ Rosenblum, *supra*, at 2890.

⁷⁰ Scott Jaschik, *Requiring Diverse Pools*, Nov. 6, 2015, www.insidehighered.com.

“disqualification of women as citizens in the past was a central structural feature of the modern state, where autonomous male individuals could only thrive or continue to reproduce themselves socially by requiring women to perform tasks in the private sphere.”⁷¹ Thus patriarchy and coverture is a foundational structure of the American legal system with continuing reverberations, like the legal black hole of the private sphere of domestic violence or maternity leave, and the male privileged sphere of the workplace. Remedying this structural inequity is core to remedying the resulting and continuing harms of unequal pay, maternity discrimination, lack of promotion, and ineffective domestic violence enforcement. “It is only when women actively participate in the public sphere in significantly large numbers that the system will be forced to confront and solve the problems of dependency and social reproduction” engrained in the public/private structure.⁷² It’s more than time for big change to the system of power itself.

III. Making the Legal Case for Judicial Gender Quotas

Most of the European precedent on gender quota is legislative, not judicial. Certainly the United States could pursue a similar legislative approach, assuming any constituencies would undertake its advancement.⁷³ Even if there was political support for such a move, a legislative option encounters the same systemic barrier; results are constrained by the lack of decisional power in legislatures where women represent only 20% of lawmakers and 29% of lobbyists.⁷⁴ A legislative solution is also often benign, because any solution that manages to achieve political consensus is often diluted, and fails to challenge the power balance. For example, other

⁷¹ Spender, *supra*, 108-09.

⁷² Spender, *supra* note, at 109.

⁷³ See Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673 (2001) (explaining prophylactic, remedial legislation under Section 5 of the Fourteenth Amendment).

⁷⁴ Jonathan D. Salant & Jennifer Prince, *Washington's Top Lobbying Groups Hire Mostly Men*, BLOOMBERG BUSINESS, June 12, 2012.

countries have passed legislative gender quotas at 20, 30, and 40%, but not at a power-shifting proportional level of the majority of 50%.⁷⁵

Nor are voluntary actions sufficient to remedy the systemic problems.⁷⁶ Voluntary actions are also often mere tokenism, like the University of Texas's recent initiative to require one candidate for any high-level position to be one woman or minority.⁷⁷ Any increase over existing low representation of women at 15% and 20%, is more, but does not make a material shift in power, nor is it based on a theory of proportional representation. Instead, the most successful mechanisms of quota systems have been that like Norway's corporate board quota, which resembles a judicial remedy in its establishment of contempt-like enforcement penalties with warnings and fines, escalating to dissolving company. It requires specific remedial action, rather than simply providing abstract guarantees.

Affirmative action remedies have been a key way of opening up resistant institutions to social change. Social justice reforms in America have been by judicial action, and are suited to incremental change and individual context.⁷⁸ They redress harm as that harm is adjudicated in the specific context of established problems, rather than at the abstract level of policymaking. Judicial context thus provides the opportunity to consider gender quotas. The question is whether such quotas would be legal. The remedial law of prophylactic injunctions suggests that it could be, and arguably without violating constitutional commands of equal protection.

⁷⁵ Suk, *supra*.

⁷⁶ Though one example where voluntary quotas have worked is in Sweden. There in the 1980s, the Social Democratic Party adopted the "zipper system" quota of alternating men and women candidates, and the Green and Left Parties adopted a 50 percent quota. Sweden ranks fourth in the world for its 45 percent female representation in Parliament. Somani, *supra* note, at 1480.

⁷⁷ Matthew Watkins, *UT System to Require Interviews with Minority Candidates*, TEXAS TRIB., Nov. 5, 2015.

⁷⁸ *E.g.*, *Brown v. Board of Education*, 347 U.S. 483 (1954).

A. *Quotas as Prophylaxis*

The remedial precedent supports the use of quotas as legitimate prophylactic injunctions.⁷⁹ As I have discussed elsewhere, prophylactic injunctions are a particularly effective way to provide meaningful relief for continued harm.⁸⁰ Prophylaxis addresses the facilitators of harm, the inputs that cause continued harm, providing flexibility and tailoring to solve the problem. Because otherwise for most instances of sex discrimination, after the fact is too little too late. Retrospective remedies allow the behavior to continue, perpetuating the discriminatory norms in society and to new generations with only a small nuisance value. The promise of meaningful relief is in prophylactic remedies, getting out in front of the problem and ordering the defendant to take action to avert the problem, before it occurs again. Prophylaxis can address contributing factors, even when that factor in and of itself, standing alone, does not violate the law.⁸¹ Such action changes the decision-making process that otherwise allows the gendered behaviors to happen in the first place. And carries with it the potential to shift the systemic power dynamic itself.

The Supreme Court recently reaffirmed the availability of structural and prophylactic relief to respond to an entrenched, systemic problem unremedied by lesser remedies.⁸² In *Brown v. Plata*, a divided Court upheld an order to release a certain number of prisoners to remedy the prison overcrowding that continued to systemically cause the problems with the

⁷⁹ *Swann*, 402 U.S. 1 (1971).

⁸⁰ Tracy A. Thomas, *The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief*, 52 BUFFALO L. REV. 301 (2004); Tracy A. Thomas, *Switching to Prophylactic Injunctions*, 90 TEX. L. REV. SEE ALSO 295 (2012); Tracy A. Thomas, *The Continued Vitality of Prophylactic Relief*, 27 REV. LIT. 99 (2007); Tracy A. Thomas, *Understanding Prophylactic Remedies Through the Looking Glass of Bush v. Gore*, 11 WM. & MARY BILL RTS. J. 343 (2002).

⁸¹ Thomas, *Prophylactic Remedy*; John Golden, *Injunctions as More (or Less) than “Off Switches”*: Patent-Infringement Injunctions’ Scope, 90 TEX. L. REV. 1399 (2012).

⁸² *Brown v. Plata*, 563 US 493 (2011); see also Tracy A. Thomas, *The Continued Vitality of Prophylactic Relief*, 27 REV. LIT. 99 (2007) (detailing courts’ continued use of prophylactic relief).

State's inability to provide adequate medical and psychiatric care to inmates.⁸³ As Justice Kennedy noted, the inadequate care, and deaths from such care, which continued unabated for decades, demanded more relief when the commands to improve care failed to alter the harm.⁸⁴ Thus, in situations of continued harm, courts have power to craft injunctive remedies that reach beyond mere cessation commands to redress the systemic problems that cause the harm.⁸⁵

The Supreme Court has also upheld a quota as a valid prophylactic injunctive remedy. In *Swann v. Charlotte-Mecklenburg County Schools*, a unanimous Court upheld an order that the racial percentage of students in each school match the racial composition of the neighbors.⁸⁶ The order thus mandated that each school be 71% white and 29% black.⁸⁷ The Court explained the quota was properly within the scope of the court's equitable discretion given the remedial target of the segregated school system and the total failure of any other remedy.⁸⁸ The Court appreciated that quotas were a good "starting point" for effectuating change and provided a "reasonable, feasible, and workable" solution.⁸⁹

Drawing on these precedents, the idea of a gender quota seems plausible. A gender quota could be ordered as a judicial option in a case to alter a power system like a corporate board or managerial employees. Understanding the system itself as contributing to the discriminatory problem, like the overcrowded population in *Plata* or the segregated schools in *Swann*, explains the need to target the system for a remedy. Understanding feminist theories of power – either as gaining women access to that power resource or in ending its patriarchal domination over women

⁸³ 563 US 493 (2011).

⁸⁴ *Id.*

⁸⁵ Thomas, *Prophylactic Remedy*, *supra*; DAVID LEVINE, DAVID JUNG & TRACY A. THOMAS, REMEDIES: PUBLIC AND PRIVATE (West 5th ed. 2009).

⁸⁶ 402 U.S. 1 (1971).

⁸⁷ *Id.* at 24.

⁸⁸ *Id.*

⁸⁹ *Id.* at 25.

– clarifies why the power structure is part of the causal nexus of the harm that appropriately is included with judicial prophylaxis. Moreover, a quota, like other prophylactic measures, is pragmatically easy. Release 30,000 prisoners or hire 50% women: the orders are finite, objective, and capable of implementation. Or as the Court said in *Swann*, “feasible and workable.” Ultimately, this is why judges like prophylaxis: it gives them a concrete remedial option that can provide effective relief in a meaningful way.⁹⁰

B. *Constitutional Legitimacy*

A second legal question as to the validity of gender quotas is whether ordering such gender-specific relief would violate constitutional parameters of equal protection as seen in the affirmative action cases.⁹¹ U.S. Supreme Court decisions in the race context seemed to have foreclosed most affirmative action remedies like quotas in education and employment.⁹² Conditioning state action based on race is said to be discriminatory and trigger strict scrutiny, thereby justifying little state action.⁹³ “To be narrowly tailored, a race-conscious admissions program cannot use a quota system,’ but instead must ‘remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or

⁹⁰ See Thomas, *Continued Vitality*, *supra*; Golden, *supra* (explaining practical value of prophylactic injunctions in patent context).

⁹¹ Alstott, *supra*, at 40.

⁹² *Parents Community Schools v. Seattle School Dist.*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

⁹³ *Fisher v. University of Texas*, 570 U.S. ___, 133 S.Ct. 2411 (2013), *remanded to*, 758 F.3d 633, 5th Cir. (2014) (with instructions to apply strict scrutiny correctly), *rehearing en banc denied*, 771 F.3d 274, 5th Cir., *cert. granted*, 135 S.Ct. 2888 (2015); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); *Adarand Construction, Inc. v. Peña*, 515 U.S. 2000 (1995).

ethnicity the defining feature of his or her application.”⁹⁴ Race, however, can still be used as one factor in decisions like university admissions.⁹⁵

On the other hand, the European Court of Justice has upheld gender quotas against claims that they violate equality dictates.⁹⁶ The “ECJ’s jurisprudence has reinforced the notion that gender quotas can only be narrowly justified by the goal of eradicating women’s disadvantage.

Particularly when women’s underrepresentation in certain positions is explained by prejudice, stereotype, or other practices associated with women’s traditional exclusion from working life, quotas tend to be upheld.”⁹⁷ “Quotas are a mechanism for combating and undoing the history and present complex structures of women’s subordination.”⁹⁸ Not all countries agreed, as courts in France struck down gender quotas as a remedy for past sex discrimination.⁹⁹

In the U.S., the question turns in large part on application of the Fourteenth Amendment’s Equal Protection Clause as to whether a judicial remedy of a gender quota would itself constitute discrimination. One key distinction between gender and race quotas is that the constitutional standards for sex discrimination have been distinguished from those for race.¹⁰⁰ The Supreme Court has applied only intermediate, not strict, scrutiny to sex-based classifications.¹⁰¹ While arguments have been made over the years that sex is akin to race in its immutable and stereotypical function, and thus should demand the same level of strict scrutiny,

⁹⁴ *Fisher*, 133 S.Ct. at 2418 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 334, 123 S.Ct. 2325 (2003)).

⁹⁵ *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that law school may use race as a factor in admissions because no acceptance is based automatically on a variable such as race).

⁹⁶ *Suk*, *supra*, at 1128 (discussing cases).

⁹⁷ *Id.*

⁹⁸ *Id.* at 1129.

⁹⁹ *Suk*, *supra*, at 1130.

¹⁰⁰ Ajmel Queresh, *The Forgotten Remedy: A Legal and Theoretical Defense of Intermediate Scrutiny for Gender-Based Affirmative Action Programs*, 21 AM. U. J. GENDER SOC. POL’Y & L. 797 (2013).

¹⁰¹ *Reed v. Reed*, 404 U.S. 71, 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Craig v. Boren*, 429 U.S. 190 (1976); *but see* *United States v. Virginia*, 518 U.S. 515, 533 (1996) (Ginsburg, J.) (hinting at strict scrutiny as the appropriate standard).

the Court has stuck to is different standard for women.¹⁰² As a result, the Court has shown a greater tolerance for sex-based action, articulating a need to protect women or acknowledge gendered differences.¹⁰³ The constitutional standard has been interpreted by the Court to require women's admission to the avenues of power. Thus, in *United States v. Virginia*, the Court held that the Virginia Military Institute must grant women equal access to the military education, not simply provide them a separate school.¹⁰⁴

What the intermediate standard of constitutional scrutiny might mean in the quota context is that sex-based action might be more tolerable than race-based action.¹⁰⁵ Perhaps this is the silver lining of the double-standard of intermediate scrutiny. For the Court's gender jurisprudence has recognized "the transformative potential of affirmative action" and how it "best advances the antistatutory goal of the equal protection guarantee."¹⁰⁶ Courts would need to identify important (but not compelling) interests justifying the sex-based action. These important interests could be derived from women's non-representative lack of power, continued subordination, lack of autonomy, and other systemic effects well-established in the feminist literature, and interests in equity, proportional representation, or balanced power which have driven the other global reforms.¹⁰⁷

This important objective of reversing gendered and discriminatory systems by mandating shared parity of power differentiates the case of gender quotas from the women-only policy

¹⁰² *Virginia*, 518 U.S. at 533; *Frontiero*, 411 U.S. 677.

¹⁰³ *E.g.*, *Nguyen v. Immigration and Naturalization Serv.*, 533 US 53 (2001) (immigration mother preference); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981) (statutory rape).

¹⁰⁴ 518 U.S. at 533.

¹⁰⁵ *Queresch*, *supra*, at 799; Jason M. Skaggs, *Justifying Gender-Based Affirmative Action Under United States v. Virginia's "Exceedingly Persuasive Justification" Standard*, 86 CAL. L. REV. 1169, 1171 (1998); *contra Somani*, *supra*, at 1453.

¹⁰⁶ Rosalind Berger Levinson, *Gender-Based Affirmative Action and Reverse Gender Bias: Beyond Gratz, Parents Involved, and Ricci*, 34 HARV. J. L. & GENDER 1 (2011).

¹⁰⁷ Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975).

struck down in *Mississippi University for Women v. Hogan*.¹⁰⁸ There, a state university's nursing program was open only to women.¹⁰⁹ The state claimed that its single-sex admission policy "compensates for discrimination against women, and therefore constitutes educational affirmative action."¹¹⁰ The Court noted, significantly, that such a justification could be an important governmental interest. "In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened."¹¹¹ However, in *Hogan*, the Court found that this compensatory remedial purpose was not in fact the state's objective. "Mississippi has made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the MUW School of Nursing opened its door, or that women currently are deprived of such opportunities."¹¹² "Rather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."¹¹³ In addition, the Court found that "MUW's admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy."¹¹⁴ Thus, the constitutional infirmity with the all-women policy in *Hogan* was that it was not remedial, not aimed at reversing systemic inequality, but rather to the contrary, impermissibly perpetuated gendered stereotypes.

Where affirmative remediation is the legitimate objective, the Supreme Court has upheld quota-like gender preferences. In *Johnson v. Transportation Agency*, the Court upheld an

¹⁰⁸ 458 US 718 (1982).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 727.

¹¹¹ *Id.*

¹¹² *Id.* at 729.

¹¹³ *Id.* at 729.

¹¹⁴ *Id.* at 730.

affirmative action plan of a county employer granting promotion preference to a woman against challenge under Title VII.¹¹⁵ The country adopted the plan because “mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons.”¹¹⁶ It’s “goal” (specifically designated as the softer term “goal” rather than “quota”) was to achieve “a statistically measurable yearly improvement in hiring, training and promotion of minorities and women” by the use of a “benchmark by which to evaluate progress,” working toward a long-term goal where its work force matched the gender composition of the area labor force, 36%.¹¹⁷ At the time, only 22% of the employees were women, two-thirds of them clerical, only 8% women in administration, 7% in technical, and none in the position of the skill craft worker challenged in the lawsuit.¹¹⁸ The Court upheld using the gender preference as one of the factors of employment, citing the statistical imbalance and underrepresentation of women.¹¹⁹ It did not, the Court said, “unnecessarily trammel[] the rights of male employees or create[] an absolute bar to their advancement” because positions still remained available for men (64%) and candidates, both men and women, still had to be qualified for the position.¹²⁰

Taking these cases together, the Court has shown a willingness to consider quotas in the gender context. While it has not had the question presented directly, the Court has at least, not closed the door to gender parity. Instead, as in any heightened constitutional scrutiny, it

¹¹⁵ 480 U.S. 616 (1987); see Deborah C. Malamud, *The Strange Persistence of Affirmative Action Under Title VII*, 118 W. VA. L. REV. 1 (2015).

¹¹⁶ *Johnson*, 480 U.S. at 620.

¹¹⁷ *Id.* at 621-22.

¹¹⁸ *Id.* at 621

¹¹⁹ *Id.* The Court did opine that the proper quota proportion might not be the total number of women in the labor force, but rather the proportion of women qualified for the position in the labor force. “By contrast, had the Plan simply calculated imbalances in all categories according to the proportion of women in the area labor pool, and then directed that hiring be governed solely by those figures, its validity fairly could be called into question.” *Id.* at 636. This reflects a solely remedial, rather than systemic understanding of the scope of the sex discrimination problem.

¹²⁰ *Id.* at 637-38.

demands close and careful application of the constitutional standards to ensure that gender preferences are not pretexts nor avenues for future discrimination.¹²¹

IV. Conclusion

Speaking at the World Economic Forum in Davos in January 2016, Prime Minister Justin Trudeau continued to advocate embracing feminism in order to effectuate change in politics and business.¹²² He predicted that by looking back, we might begin to see the need for change more clearly. “Even within our own society, if you look back 50 years or if you leaf through a magazine from the 70s, you see horrific sexism that is overt in a way that would be unacceptable today.”¹²³ The same might hold true, he suggested, in the future. “Even today, hopefully 20 years from now, people will look at what we think is acceptable today and find it horrifically off-base.”¹²⁴

¹²¹ *Id.*; *Hogan*, 458 US 718, 729 (1982).

¹²² Treanor & Wearden, *supra*.

¹²³ *Id.*

¹²⁴ *Id.*