

FARRELL: Challenging California's Gender Quotas

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California's radical gender quota discrimination law for corporate boards has been successfully challenged in court by Judicial Watch. Last year, Judicial Watch filed a lawsuit on behalf of three California taxpayers seeking to prevent the state from implementing a 2018 amendment to the Corporations Code known as Senate Bill 826. SB 826 required that publicly held corporations headquartered in California have at least one director who self-identifies as a woman on their boards by December 31, 2019, and have up to three such persons by December 31, 2021, depending on the size of the board.

However, this type of gender quota falls afoul of Article I Section 31 of the California Constitution, which states that “the State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” Thus, as the complaint states, “any expenditure of taxpayer funds or taxpayer-financed resources enforcing or otherwise carrying out the quota system is illegal.” Recently Judicial Watch won an important procedural victory in the case when a California Court affirmed the plaintiffs' standing to sue under state law. The case can now move on to discovery and plaintiffs can begin deposing state officials.

The illegality of SB 826 is utterly transparent. The preferential quota system for board members is explicitly gender-based, in violation of any clear reading of Article I Section 31. This has been known all along. When he signed the bill into law, then-Governor Jerry Brown wrote the Senate that “serious legal concerns have been raised” to the legislation and he would not “minimize the potential flaws that indeed may prove fatal to its ultimate implementation.” He implied that signing the unconstitutional bill was a symbolic gesture he thought was necessary because “recent events in Washington, D.C. - and beyond - make it crystal clear that many are not getting the message.”

These types of measures are not only discriminatory but may lead to worse outcomes than their authors intended. A 2011 study of a board quota in Norway found that “the constraint imposed by the quota caused a significant drop” in stock price, and “led to younger and less experienced boards, increases in leverage and acquisitions, and deterioration in operating performance, consistent with less capable boards.” Quotas can also lead to the “golden skirt” phenomenon, where elite women with insider access snap up multiple board memberships effectively blocking other women from advancement.

Defeating SB 826 may be inevitable, but changes are afoot in California that could undercut the legal rationale for the suit. Article I Section 31 was added to the California Constitution in November 1996 with the passage of

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initiative measure Prop. 209, the California Civil Rights Initiative. The CCRI, modeled on the language of the Federal 1964 Civil Rights Act, sought to eliminate affirmative action and quota systems from California hiring and school admissions. The CCRI has since withstood many legal challenges, and a Michigan initiative modeled on Prop 209 was affirmed by the US Supreme Court in 2014.

Opponents know the only way left to fight the CCRI is to get rid of it altogether. This fall Proposition 16 will be on the California ballot, which if passed would repeal Prop 209 and open the way for affirmative action programs and other laws granting preferential treatment based on race and gender. Proponents of Prop 16 say it is needed to “fight discrimination” but in fact it would allow discrimination to flourish. A gender quota for corporate boards might look like a rather mild requirement compared to the complex hiring and admissions quotas we would see based on gender, race, sexual orientation, citizenship status and other such categories should Prop 16 pass.

This push illustrates how the old-style liberalism that sought equality of access has been replaced by a more radical progressivism that demands equality of outcomes regardless of ability. And the experience with gender quotas in Europe shows that ill-considered government mandates often result in unforeseen consequences that are worse than the problems they seek to fix. The U.S. Constitution and numerous Federal laws may insulate California citizens from the worst excesses of the progressives' discriminatory schemes should their constitutional protections under the CCRI be removed. But politicians and activists will continue to find ways to carve out special privileges, enhancing the power of government to pick who succeeds, and who is set up for failure. In Prop 16, discrimination is alive and well.

Chris Farrell is director of investigations and research for Judicial Watch, a nonprofit government watchdog. He is a former military intelligence officer.

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