
Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions

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INTRODUCTION

To force an end to the seemingly interminable war with Sparta, Lysistrata, the title character in Aristophanes' comedy, exhorts the women of Athens to achieve peace by arousing their husbands' desires while refusing them any gratification. This political act would force the men to end the war: "[d]oesn't matter what they threaten to do — even if they try to set fire to the place — they won't make us open the gates except on our own terms."¹

Two thousand three hundred years later, democracy and gender still have a tortured relationship. Although most democracies provided women with the right to vote and stand for office long ago, in most countries, democracy means government by, and possibly for, men. The United States' gendered political system is typical² — eighty-five years

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¹ ARISTOPHANES, *LYSISTRATA* 189 (Alan Sommerstein trans., Penguin Books 1973). The text is quite explicit about the arousing of the men's desires: "Well, just imagine: we're at home, beautifully made up, wearing our sheerest . . . negligees and nothing underneath, and with our triangles carefully plucked; and the men are all like ramrods and can't wait to leap into bed, and then we absolutely refuse — that'll make them make peace soon enough, you'll see." JOHN STOLTENBERG, *REFUSING TO BE A MAN* 28 (1989). Scientists generally agree that there are seven gender traits that constitute one. Grutter v. Bollinger, 539 U.S. 306, 311 (2003). "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Id.* These seven variables classify the distinct elements of gender identity: 1) Chromosomes; 2) Gonads; 3) Hormones; 4) Internal reproductive organs; 5) External genitalia; 6) Secondary sexual characteristics; and 7) Self identity. Douglas K. Smith, *Transsexualism, Sex Reassignment Surgery and the Law*, 56 CORNELL L. REV. 963, 972 (1971). Fifteen years later, the New York Supreme Court of New York County used the exact formulation cited above in *Maffei v. Kolaeton Industries, Inc.*, 626 N.Y.S.2d 391 (Sup. Ct. 1995) (holding that pre-operative transgendered female was protected by New York City's sex discrimination statute as member of class of males). See Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, SCI., Mar.-Apr. 1993, at 21 (promoting notion of multiple gender factors).

² Carolina Rodriguez Bello, *Women and Political Representation: Facts and Figures*, Nov. 2003, <http://www.whrnet.org/docs/issue-women-politics.html#Facts>. This level of representation is similar to that in the United States, many European countries, and Japan.

after women won the right to vote, they constitute less than one-fifth of elected representatives.³ Women occupy few political offices, not merely in one nation, but around the world.

To combat this electoral gender inequality,⁴ various democracies⁵ with the support of international organizations, have adopted quota requirements for legislatures or political parties,⁶ ensuring that women actually participate in politics, rather than play the role of "a few tokens in political life."⁷ Scanning women's representation worldwide, Scandinavian countries have levels generally above 40%.⁸ Ireland

Certain countries, such as those in Scandinavia, as well as those which have adopted Parity provisions, have more, even significantly more, than this level.

³ Women make up 51.1% of the national populous, but only 15.5% of the House of Representatives and 14% of the Senate. MILDRED L. AMER, CONG. RES. SERVICE REP. FOR CONG., MEMBERSHIP OF THE 109TH CONGRESS: A PROFILE 5 (2004), available at <http://fpc.state.gov/documents/organization/40873.pdf>.

⁴ Here, I use the term "electoral gender inequality" to refer to the gendered nature of elected offices given the wide gap between men and women.

⁵ The term deployed in France and other countries is referred to as "quotas" in Brazil, possibly because the program in Brazil did not incorporate a full level of equality, and possibly because the term "quota" has a distinctly negative meaning in other languages. Through the UN's Decade of Women, beginning in Mexico City in 1975 and ending in Nairobi in 1985, a program was designed to promote a plan for gender equality and full participation of women in political entities and the peace making process. The Suzanne Mubarak Women's International Peace Movement Homepage, <http://www.womenforpeaceinternational.org/News/UNFile.htm> (last visited Nov. 27, 2005). The Global Database of Quotas for Women is a joint project of the International Institute for Democracy and Electoral Assistance ("International IDEA") and Stockholm University. Int'l IDEA, Global Database of Quotas for Women, *About the Project*, <http://www.quotaproject.org> (last visited Feb. 6, 2006). The project was created as a way of exploring the obstacles to the political participation of women through the world. *Id.* at <http://www.quotaproject.org/about.cfm> [hereinafter *About the Project*] (taking into account social and economic regimes of countries, as well as their different political structures, to obtain greater insight into levels of women representation in world, specifically through analyzing use of quotas).

⁶ *About the Project*, *supra* note 5. The four most common quotas for women's representation are: (1) Constitutional Quota for National Parliament; (2) Election Law Quota or Regulation for National Parliament; (3) Political Party Quota for Electoral Candidates; and (4) Constitutional or Legislative Quota for Sub-National Government.

⁷ Int'l IDEA, Global Database for Women, *About Quotas*, <http://www.quotaproject.org/aboutquotas.cfm> (last visited Feb. 7, 2006).

⁸ Mary Becker, Essay, *The Sixties' Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209, 269 (1998). Sweden leads the world with the highest proportion of women in parliament: 40.4%. This result was achieved by a commitment from the five leading political parties that women and men alternate positions on party lists. Finland's parties adopted a 40% quota for women in 1995, and political parties in Norway regularly field 50% women candidates either by tradition or party rules. Norway, Spain, and the Netherlands have roughly 36% of their government comprised of

enacted a quota that requires parties select women to fill 40% of candidacies.⁹ Simultaneously, other democracies, such as Argentina¹⁰ and Brazil¹¹ also adopted quota laws, albeit with limited enforcement. Despite these apparent successes, most countries have extremely low levels of female representation — with the lowest levels in countries with Islamic governments.¹²

France had the most assertive response to electoral gender inequality, enacting the Parity Law (“Parity”) in 2000. Parity amended the French Constitution to require that political parties select women as half of their candidates for public office.¹³ French parties have to field women candidates or face fines or exclusion from the ballot.¹⁴ The United States, in contrast, maintains a steadfast refusal to debate issues of women’s representation. It is surprising, then, that the United States placed a quota for women’s representation in the draft constitution for the

women. Rwanda also has a very high proportion of women in government, in excess of its quota of 30%, in part due to the aftermath of the 1994 genocide.

⁹ SÔNIA MALHEIROS MIGUEL, *POLÍTICA DE COTAS POR SEXO* 21 (2000); Becker, *supra* note 8, at 268.

¹⁰ *About the Project*, *supra* note 5; see Maria Jose Lubertino, *Pioneering Quotas: The Argentine Experience and Beyond*, http://www.quotaproject.org/CS/CS_Lubertino_27-11-2003.pdf (last visited Sept. 21, 2005).

¹¹ Becker, *supra* note 8, at 268; see also Clara Araújo, *Mulheres e Representacao Política: A Experiencia das Cotas no Brasil* [Women and Political Representation: The Quotas Experiment in Brazil], in 6 *REVISTA ESTUDOS FEMINISTAS* 71-90 (1998); Mala N. Htun, *Mujeres y Poder Político en Latinoamérica*, in *MUJERES EN EL PARLAMENTO: MÁS ALLA DE LOS NÚMEROS*, 19-44 (Myriam Mendéz-Montalvo & Julie Ballington eds., 2002). Although Brazil’s size and racial diversity would serve as an interesting comparison to the United States, its quota law has few enforcement mechanisms. To the extent that quota laws, such as Brazil’s, involve “soft law” mechanisms, they may provide an interesting contrast to a relatively “hard law” such as Parity.

¹² Int’l IDEA, Global Database of Quotas for Women, <http://www.quotaproject.org/country.cfm?SortOrder=electoralSystem> (last visited Nov. 28, 2005). Egypt also has an extremely low amount of women’s participation, with only 11 out of 454 seats occupied by women (2.4%). In Algeria the amount of women in politics is only 6.2%, a mere 24 seats out of 389. Tunisia has a somewhat better showing of women in government with 21 out of 182 seats filled by women (11.5%). Pakistan has a high number of women involved in politics with 72 of 214 seats filled by women (21.1%).

¹³ Law No. 99-569 of July 8, 1999, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], July 9, 1999, p. 10175, available at <http://www.legifrance.gouv.fr/WAspad/RechercheExperteJorf.jsp> (retrieve text by law number).

¹⁴ See Law No. 2000-493 of June 6, 2000, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], June 7, 2000, p. 8560, available at <http://www.legifrance.gouv.fr/WAspad/RechercheExperteJorf.jsp> (retrieve text by law number); *Effets directs et indirects de la loi du 6 juin 2000: un Bilan Contrasté*, http://www.observatoire-parite.gouv.fr/travaux/rapport_08/rapport_2005.pdf.

Republic of Iraq.¹⁵ Chapter Four, Article 30 (C) of the Iraqi Constitution states that “[t]he electoral law shall aim to achieve the goal of having women constitute no less than one-quarter of the members of the National Assembly.”¹⁶ Drafters insisted on this provision, fearing that: “if women are frozen out of a nascent Iraqi government, their chances of breaking through later are slim to none.”¹⁷ Apparently, even to the current United States administration, gender does matter in democracy.¹⁸

This Article seeks to situate remedies for electoral gender inequality in the context of liberal democratic theory. This Article does not attempt to present a complete argument for the existence of electoral gender inequality. However, it does presume that gender inequality, in particular electoral gender inequality, raises fundamental questions.

Essentialism, the metaphysical theory that an object or person’s essential properties can be distinguished from those that are incidental to it, or learned, has served as a third-rail for feminist theory for decades, as

¹⁵ Quota, in this case, includes the broader category of goals. *See infra* Part I.B.

¹⁶ LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD ch. 4, art. 30, § C (2004), *available at* <http://www.cpa-iraq.org/government/TAL.html> [hereinafter TRANSITIONAL ADMINISTRATION OF IRAQ] (emphasis added) (propagated by Coalition Provisional Authority in March of that year).

¹⁷ Swanee Hunt & Cristina Posa, *Iraq’s Excluded Women*, FOREIGN POL’Y, July-Aug. 2004, *available at* http://www.foreignpolicy.com/story/cms.php?story_id=2580&page=0. On January 30, 2005, 86 women won seats on Iraq’s National Assembly, constituting 31% of elected officials. This number exceeded the goal of 25% of women representation, stated in the March 8, 2004 Transitional Administrative Law. TRANSITIONAL ADMINISTRATION OF IRAQ, *supra* note 16. Many argue success of women representatives is a result of this “1 of 3” quota initiative. The National Assembly’s main objectives are to draft a Constitution, appoint national leaders and promote legislation. ELISABETH REHN & ELLEN JOHNSON SIRLEAF, WOMEN, WAR AND PEACE (2002), <http://www.womenwarpeace.org/iraq/iraq.htm> (linking to the Independent Experts Assessment on the Impact on Armed Conflict on Women). The newly elected Iraqi government also has an increased representation of women in appointed positions. On May 3, 2005, twenty-nine women were sworn into posts such as Minister of Culture, Minister of Environment and Acting Minister for Human Rights. *Id.*

¹⁸ REHN & JOHNSON, *supra* note 17. Although popular support exists for women’s rights, immediate political representation alone can ensure the long-term goals of educational programs, job-skills training, and rights awareness. *Id.* Architects of the new Iraq are concerned that involving women in politics may become “considerably more difficult after United States forces entrench conservative religious clerics and tribal leaders in positions of power.” *Id.* In fact, vocal minorities have and continue to thwart the representation of women in Iraq. *Id.* Women’s representation, some believe, can even “provide Iraq with a stabilizing force needed to stave off the potentially disastrous division of the country into ethnic states.” *Id.* In this vision, Iraqi women might unite for equality within their country, overriding political and economic differences among them, furthering a greater societal stability. *Id.*

scholars and activists debate whether certain traits may be ascribed to women. Essentialist theory has found ample support in French feminism.¹⁹ To institute a quota, it would appear that one must assume “woman” means something different from “man,” and that women, as a class, differ from men. Separating essentialism from quotas, this Article suggests that fluid remedies for group inequality may serve the anti-essentialist normative goals of anti-subordination.

Women’s quotas do not necessarily depend on an essential identity of women.²⁰ An anti-subordination argument would emphasize women’s exclusion from significant levels of political power, and argue that quotas of some sort, for some duration, are necessary to reverse this equality.²¹ This Article draws on the contrast between France and the United States to inquire how democracy and identity, gender identity in particular, relate to each other. An appropriately fluid remedy for electoral gender inequality would adhere to the tradition of United States group inequality remedies, remedies which already coexist with neutrality principles.

Part I examines Parity’s strangeness to United States observers. United States sex discrimination law ignores political representation issues. United States voting rights law contains no provisions for gender inequality. Most importantly, leading United States thinkers of all stripes roundly reject quotas.

Part II details the Parity debate and its relationship to French democracy. The democracies of the United States and of France share Eighteenth Century Enlightenment origins. They also share some form of universalism (labeled “neutrality” in the United States by Cass Sunstein)²² establishing the equality of all citizens before the law. Parity

¹⁹ Scholars such as Luce Irigaray and Hélène Cixous surface as the most prominent of these theorists.

²⁰ ANNE PHILLIPS, *POLITICS OF PRESENCE* 168 (1995).

²¹ Jane Mansbridge, *The Descriptive Political Representation of Gender: An Anti-Essentialist Argument*, in *HAS LIBERALISM FAILED WOMEN? ASSURING EQUAL REPRESENTATION IN EUROPE AND THE UNITED STATES* 19 (Sytte Klausen & Charles S. Maier eds., 2001) [hereinafter *HAS LIBERALISM FAILED WOMEN?*].

²² See generally Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1 (1992). “Neutrality” as predominantly defined, is believed to be of natural origin and therefore just. *Id.* Sunstein, however, finds this “baseline” belief incorrect because the notion of what is neutral is instead a culmination of old biases and stereotypes. *Id.* at 3-4. The notion of “equality” cannot be detached from references to old values and distributions because the concept is dependent upon how the government normally ensures “equality” rather than how it should be accomplished. *Id.* at 6-9. Sunstein argues that the baseline of determining what

serves as a good counterpoint to the United States because of similarities between the French and U.S. democracies. Parity aims to reflect a gendered democracy, not institute a quota.²³ France's universalism refuses even the acknowledgement of the existence of racial, ethnic, or religious minorities, even at the cost of inflaming ethnic inequalities.²⁴ These elements of France's conceptualization of the relationship between democracy and identity (gender or racial), stimulate a revisiting of the quota debate here.

Part III turns back to the United States. The United States and France share a fundamental respect for the neutrality of the state with regard to group rights. Parity affords a fresh perspective on the relationship between remedies for group inequality and the neutrality of the state. Inserting fluidity into quotas provides an anti-essentialist method to situate remedies for group inequality within the context of the neutral state.²⁵ United States jurisprudence already incorporates some fluidity. Reviewing electoral gender inequality in light of these arguments allows us to revisit descriptive representation, based on the identity of the voter, and interest representation, based on the ideas of the voter.²⁶ Revisiting

is neutral arises from what is considered "natural," and what is natural, originates in what the government normally does. In order to make change, the baseline of neutrality, in a constitutional context, must be adjusted through a substantive debate that is not reliant upon what is considered "natural." *Id.* at 13.

In particular, women are discriminated by legal rules that are based on male norms. *Id.* at 2. Sexual inequality is largely a consequence of women's reproductive capacity. Legal practices have relied on the social norm to justify inequality in the workplace where women are discriminated in job placement and advancement because of the traditional notion of women being the caretakers and men being the breadwinners. *Id.* at 16. Moreover the physical capacities of men are used as the baseline to determine the treatment of women, instead of changing the baseline to view women in their own context. *Id.* at 3. The issue of abortion concerns freedom from discrimination rather than a woman's right to privacy. *Id.* at 49. The norm is to view the situation from what society considers a woman's natural role, but this is a stereotype. Thus, the concept of neutrality allows the biological differences between men and women to transcend into the legal sphere of constitutional rights. *Id.* at 49-52.

²³ Joan Scott addresses the complexity of the Parity law and its relationship to other recent developments in French democracy. See Joan Wallach Scott, *French Universalism in the Nineties*, 15 DIFFERENCES: J. OF FEMINIST CULTURAL STUD. 34, 42 (2004).

²⁴ Many blame these inequalities for the riots that began in largely French-Arab and French-African suburbs of France on October 27, 2005. Mark Landler & Craig S. Smith, *French Officials Try to Ease Fear as Crisis Swells*, N.Y. TIMES, Nov. 8, 2005, at A1; see *infra* Part II.B on French universalism.

²⁵ Liberal in this Article references liberal democratic theory, not the more popular use of "liberal" as opposed to "conservative." Mansbridge, *supra* note 21, at 30.

²⁶ "Interest representation" occurs when a representative advocates for the interests of a body of voters. Lani Guinier, *No Two Seats: The Quest for Political Equality*, 77 VA. L. REV.

descriptive representation suggests that remedies for electoral gender inequality may not foster essentialism or violate neutrality. Parity may not be the right remedy for the United States, but some remedy is required. Instead of relying on dualistic notions that men and women should possess equal political power, remedies should address the gendered nature of electoral power, including the political, as well as cultural, exclusion of women.

I. THE PARIAH OF PARITY

Parity marks an enormous cultural and legal gulf between France and the United States, inviting comparative inquiry. Part I analyzes the reasons why Parity appears at first so outlandish to United States legal culture.²⁷ Under United States jurisprudence, gender-based rights and electoral rights are mutually exclusive. That is, sex discrimination law has never incorporated voting rights, and voting rights law has excluded consideration of gender-based rights. Quotas arouse a strong and broad aversion among both critical and liberal thinkers.²⁸

A. Parity, a Profoundly Foreign Concept

Parity seems so very foreign due to the juxtaposition of two rarely joined areas of legal inquiry: political representation and gender. Sex discrimination and political representation law are mutually exclusive in the United States.

1. Sex Discrimination, Not Representation

Despite deep electoral gender inequality, sex discrimination theory has centered on employment and public accommodation, rather than

1413, 1462 (1991) [hereinafter Guinier, *No Two Seats*]. In contrast to interest representation, “descriptive representation” occurs when a group is represented by one or more members of that group. Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1102 n.114 (1991) [hereinafter Guinier, *Tokenism*].

²⁷ This “foreign-ness” raises the question of comparative methodology. Comparative projects tend to select, implicitly or explicitly, subjects that involve difference between the legal culture of the observer’s country and some element of that of the observed country. The fact that the comparison arises from the perception of difference raises the question of objectivity.

²⁸ Critical thinkers such as Lani Guinier question quotas for an emphasis on descriptive representation; liberal thinkers such as Bruce Ackerman attack quotas as undermining the neutrality of the liberal state.

electoral power. The two principal sources for sex discrimination law, the Fourteenth Amendment and the Civil Rights Act of 1964,²⁹ do not address electoral exclusion.³⁰ In addition, the United States' failure to pass the Equal Rights Amendment over two decades ago reflects a profound reluctance to realize some national project for gender equality.³¹ As one scholar put it, "although the United States sees itself as the world leader of sex equality, it has fallen behind other nations in its willingness to experiment with various ways to achieve electoral equality for women."³² In contrast, Parity demonstrates France's willingness to experiment.

Sex discrimination law in the United States adheres to a vision of negative rights — the right to be free from sex discrimination, primarily in public accommodations and the workplace.³³ The expansive theory and practice in these areas has achieved impressive results in a variety of areas of public and private life. However, sex discrimination law has not incorporated the positive rights that would include electoral equality. As a consequence, state intervention in gender inequality falls to preventing discrimination rather than promoting inclusion in the political process. Accordingly, affirmative action discourse in the United States centers on race-based remedies rather than gender-based remedies.³⁴ Sex discrimination law evidences a blind spot toward a more

²⁹ See 42 U.S.C. § 2000 (2005). Another potential source for antidiscrimination doctrine is the Nineteenth Amendment, as addressed by Reva Siegel. Her work on the Nineteenth Amendment persuasively revives the meaning of that Amendment, which, in concert with the Fourteenth Amendment, can place sex discrimination law on its own ground, moving beyond the still-present dependence on race-based analogies. However, Siegel's work uses the Nineteenth Amendment to fortify the "negative" rights conception behind United States sex discrimination law. Reva B. Siegel, *She the People: The Nineteenth Amendment Sex, Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 947-1046 (2002). For more discussion of Siegel's work with regard to women's representation, see *infra* Part III.D.

³⁰ See Becker, *supra* note 8, at 271.

³¹ Joan A. Lukey & Jeffrey A. Smagula, *Do We Still Need an Equal Rights Amendment?*, 44 BOSTON B.J. 10, 28 (2000) (concluding that equal rights amendment would "remove any instability and uncertainty regarding judicial protection of legal equality of women").

³² *Id.*

³³ To utilize the somewhat dated dichotomy of positive and negative rights that distinguished social democracies from liberal democracies, negative rights, typically described as rights to be free from state intervention, typify liberal democracy. Positive rights, such as the right to education or healthcare, arise in social democracies.

³⁴ Another key area in which this analogy has thrived to the detriment of sex discrimination doctrine and an awareness of intersectional possibilities is affirmative action. United States affirmative action policies do apply to women, but women and the rectification of gender inequalities have had marginal import upon affirmative action discourse. The United States Supreme Court, despite several interventions into race-based

expansive set of gender rights.

2. Voting Rights Law and Gender

Whereas in France, Parity targets electoral gender inequality, United States remedies centered on the dramatic exclusion of blacks from voting until the Civil Rights Movement succeeded in forcing passage of the Voting Rights Act of 1965 (the "VRA").³⁵

a. Political Representation Remedies Center on Race

The passage of the Fifteenth Amendment gave blacks the right to vote in name alone.³⁶ A century later, armed with the VRA, civil rights

affirmative action, only once squarely considered the legality of gender-based affirmative action programs. Even then, the Court did not explicitly address the constitutional dimensions of gender-based affirmative action, but confined its discussion to the legitimacy of such programs under Title VII of the Civil Rights Act of 1964. Kendall Thomas, *The Political Economy of Recognition: Affirmative Action Discourse and Constitutional Equality in Germany and the U.S.A.*, 5 COLUM. J. EUR. L. 329, 329-31 (1992). Thus, gender-based affirmative action programs find their support outside the more grounded foundations of race-based affirmative action. Affirmative action, however, is not a likely vehicle for the advancement of women's political representation in the United States, in contrast to France. In Britain, perhaps the most similar democracy to the United States, the Labor Party, has quotas requiring 40% women at all party levels and it ran women in 50% of the open or "winnable" seats, but this policy was struck by a court in a challenge from rejected male candidates who argued that it discriminated against men. See Gail Russell Chaddock, *Quotas Boost Women Polls*, CHRISTIAN SCI. MONITOR, May 14, 1997, at 1. Nevertheless, the number of women in the Parliament nearly doubled in the May 1, 1997 election. See *id.* The ruling came after some candidates had been slated and many local parties resented the ruling and selected women in spite of it. See *id.*

³⁵ See Voting Rights Act, 42 U.S.C. § 1973 (1965). During discussion of the Voting Rights Act Amendments of 1982, the committee declined to add sex discrimination as an activity prohibited under section 2 of the VRA. The vote was 16-2. See S. REP. NO. 97-417 (1982), available at 1982 WL 25033 (summarizing legislative history of Voting Rights Act Amendments of 1982).

³⁶ Scott Gluck, *Congressional Reaction to Judicial Construction of Section 5 of the Voting Rights Act of 1965*, 29 COLUM. J.L. & SOC. PROBS. 337, 343 (1996). "[I]n the years between the ratification of the [Fifteenth] Amendment and passage of the Voting Rights Act, blacks were denied any real opportunity to register and vote throughout much of the United States, especially in the South." Gluck notes that at the time the Act was signed into effect the registration numbers for blacks in the South were remarkably low. In Georgia, over 57% of all whites were registered, compared to only 25% of all voting age blacks; in Alabama, the percentage of whites registered to vote was 66.2%, compared to 18.5% of blacks; in Mississippi, the registration numbers were 66.1% for whites, while only 6.4% for blacks. *Id.* at 338 n.6 (citing *Voting Rights: Hearings on H.R. 6400 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. 9, 32 tbl.B-5 (1965)); see also *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966) ("[R]egistration of voting-age Negroes in Alabama rose only from 14.2% to 19.4% between 1958 and 1964; in Louisiana it barely inched ahead

litigators enforced this basic right to vote in the first “generation” of voting rights litigation, removing barriers such as poll taxes and literacy tests.³⁷ Later, Congress also regulated districting to prevent structural limits on the voting potential of a racial or language minority.³⁸ Section 2 of the VRA institutes a formal process that empowers minorities to challenge VRA violations,³⁹ while Section 5 details jurisdictions with discriminatory histories that require particular attention by the Justice Department.⁴⁰

The Voting Rights Act specifically allows racial minorities⁴¹ to elect representatives of their choice,⁴² the enforcement of which inspired a “second generation” of voting rights litigation.⁴³ After the VRA’s success

from 31.7% to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964.”)

³⁷ See 42 U.S.C. § 1973(a) (prohibiting states from using “any voting qualification, or prerequisite to voting, or standard, practice, or procedure” to deny or abridge black voting rights); see also *Holder v. Hall*, 512 U.S. 874, 893-94 (1994) (Thomas, J., concurring) (describing original VRA as intended to eradicate racial barriers to ballot access).

³⁸ 42 U.S.C. § 1973.

³⁹ Section 2 of the Voting Rights Act provides a basis for challenging all discriminatory election practices and procedures, focusing on the effects of the challenged practice instead of requiring the challenger to establish that the intent in imposing the requirement was to discriminate against a protected group. See 42 U.S.C. § 1973(b). For an analysis of section 2 enforcement, see Laughlin McDonald, *The 1982 Amendments of Section 2 and Minority Representation*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 66 (Bernard Grofman & Chandler Davidson eds., 1992) [hereinafter *CONTROVERSIES IN MINORITY VOTING*].

⁴⁰ 42 U.S.C. § 1973. Section 5 provisions protect minority voting rights in specific jurisdictions by requiring that the United States Department of Justice (“Justice Department”) “preclear” the jurisdiction’s districting plans prior to implementation. See *Drew S. Days III, Section 5 Enforcement and the Department of Justice*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 39, at 52. Section 5 of the Voting Rights Act focuses on certain areas of the country, requiring pre-clearance by the Attorney General or United States District Court for the District of Columbia of any proposed districting plan for jurisdictions that previously erected barriers to black political participation. S. REP. NO. 97-417, at 5 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 182; see also *United Jewish Orgs. v. Carey*, 430 U.S. 144, 156 (1977) (upholding race-based New York apportionment scheme challenged by Hasidic minority in jurisdiction).

⁴¹ The Voting Rights Act was designed to remedy racial discrimination in voting rights. S. REP. NO. 97-417, at 182. To pursue this goal, “based on an extensive record filled with examples of the barriers to registration and effective voting encountered by language-minority citizens in the electoral process, Congress expanded the coverage of the Voting Rights Act to protect such citizens from effective disenfranchisement.” *Id.* at 186.

⁴² “Men and women from racial and ethnic minorities now hold public office in places where that was once impossible.” *Id.* at 181.

⁴³ See, e.g., *Holder v. Hall*, 512 U.S. 874, 893-914 (Thomas, J., concurring); T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 629 (1993); Samuel Issacharoff, *Supreme Court*

in permitting blacks to vote almost immediately,⁴⁴ representation required additional efforts to thwart white majorities that regularly diluted black votes, rendering the formal right to vote meaningless.⁴⁵ Although the VRA has measurably improved minority representation,⁴⁶ some question the utility of increasing numerical representation without

Destabilization of Single-Member Districts, 1995 U. CHI. LEGAL F. 205, 210, 217. Some conservatives criticize this approach. Justice Thomas, together with Justice Scalia, objected to the shift in voting rights litigation toward effectiveness of minority representation. See 42 U.S.C § 1973 (defining violations of VRA in terms of results). This generational metaphor for the evolution of voting-rights enforcement is used by many commentators.

⁴⁴ Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING*, *supra* note 39, at 7, 21 (“[I]n the five years after passage [of the VRA], almost as many blacks registered in Alabama, Mississippi, Georgia, Louisiana, North Carolina, and South Carolina as in the entire century before 1965.”).

⁴⁵ Vote dilution occurs where the value of an individual’s vote may rise or fall based on how that vote is aggregated. See *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”). Dilution may occur even if disenfranchisement no longer does. See Davidson, *supra* note 44, at 22 (differentiating disenfranchisement from dilution). As the Supreme Court stated in *Thornburg v. Gingles*, “[d]ilution of racial minority group voting strength [is] caused by [fragmenting] the dispersal of blacks into districts in which they constitute an ineffective minority of voters [,] or [by packing,] the concentration of blacks into districts where they constitute an excessive majority.” 478 U.S. 30, 46 (1986); see also Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001) (analyzing individual rights-based doctrine and its connection to group-based claim of vote dilution).

⁴⁶ See *2004 Election Brings New Blacks to Congress*, JET, Nov. 22, 2004, at 10. See generally MILDRED L. AMER, CONG. RES. SERVICE REP. FOR CONG., *BLACK MEMBERS OF THE UNITED STATES CONGRESS (1870-2004)*, <http://www.congressionalblackcaucus.net> (last visited Nov. 28, 2005) (providing data on African-Americans elected to Congress). The following chart illustrates changes in representation:

Group	Population (% of U.S.)	# reps. / % of House	# Senators = % of Senate	# Women by Race/Ethnicity
Blacks	12.9%	42 / 9%	1	14
Hispanics	13.3%	26 / 5.9%	2	7
Asians	4.4%	6 / 1.4%	2	1
Women	51.1%	68 / 15.5%	14	79 (including white women)

These statistics combine census data and information from the 109th Congressional Membership Profile. AMER, *supra* note 3; RENÉE E. SPRAGGINS, U.S. CENSUS BUREAU, *WOMEN AND MEN IN THE UNITED STATES: MARCH 2002 POPULATION CHARACTERISTICS* (2003), available at <http://www.census.gov/prod/2003pubs/p20-544.pdf>; U.S. Census Bureau, *PEOPLE: Race and Ethnicity*, http://factfinder.census.gov/jsp/saff/SAFFInfo.jsp?_pageId=tp9_race_ethnicity (last visited Feb. 6, 2006).

commensurate interest representation.⁴⁷

b. Existing Political Representation Remedies Do Not and Cannot Apply to Women

Unlike other successes of the Civil Rights Movement that have furthered gender equality,⁴⁸ the voting rights paradigm cannot stretch to endorse a remedy for electoral gender inequality. Women are not a protected group,⁴⁹ and have had functioning suffrage for over 85 years. Proving second generation remedies of vote dilution depend on black voters' strong preference for black candidates.⁵⁰ In contrast, women do not vote as a block, face no substantial geographical segregation, and do not necessarily prefer women candidates by substantial margins.⁵¹ Sexist

⁴⁷ Guinier, *Tokenism*, *supra* note 26, at 1103.

⁴⁸ See Thomas, *supra* note 34.

⁴⁹ Under the definitive Supreme Court case on vote dilution under the Voting Rights Act, *Thornburg v. Gingles*, the central remedy for dilution is the creation of majority-minority single-member districts. 478 U.S. 30, 84-85 (1986). To satisfy the three prongs of the *Gingles* test, a minority group must demonstrate that it is both geographically concentrated and sufficiently numerous to constitute a majority of a single-member district, that it is politically cohesive, and that its electoral success is being impeded by majority bloc voting. *Id.* at 48-51. It should be noted that the existence of the three *Gingles* factors is necessary, but not sufficient, proof of a section 2 violation under the Voting Rights Act. See *Johnson v. De Grandy*, 114 S. Ct. 2647, 2657 (1994); *Thornburg*, 478 U.S. at 50. Women do not live in concentrated areas, so it would be impossible for them to meet the first prong of the *Gingles* test. The second prong of the *Gingles* test is that the minority group must be politically cohesive. *Id.* at 52-73. Such cohesiveness is demonstrated by a high "correlation between the race of the voter and the voter's choice of certain candidates." *Id.* at 53. It may be said that women fail this prong of the test because they are not necessarily politically cohesive — statistical studies, following the popular anti-essentialist feminist theory, hold that being a woman does not have fixed political consequences. The third and final prong of the *Gingles* test requires that the minority group's preferred candidate be defeated by majority bloc voting. *Id.* at 51. "[T]he minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it -- in the absence of special circumstances, such as the minority candidate's running unopposed -- usually to defeat the minority's preferred candidate." See generally BERNARD GROFMAN ET AL., *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 61-81 (1992) (tracing vote dilution standard after *Gingles*). A minority group must therefore be sufficiently large and geographically compact to constitute a majority in a hypothetical single-member district.

⁵⁰ Guinier, *No Two Seats*, *supra* note 26, at 1415-16.

⁵¹ Unfortunately, although it would be interesting, no studies have been performed on the inclination of women to vote solely on gender association. If it were the case that women consistently voted more for women candidates, this prong may reflect the cause of under-representation. Recent studies show there is not an overall preference by women to vote for women candidates. *Women Running for Office Face Many Obstacles*, USA TODAY, Mar. 19, 2001, available at <http://www.usatoday.com/news/washington/2001-03-19-women.htm>. The research was sponsored by the Barbara Lee Foundation and was

men cannot gerrymander away women's representation, so second generation litigation, the remedy for minority vote dilution, cannot combat electoral gender inequality.

In short, sex discrimination doctrine has never centered on gender and political representation. Similarly, voting rights established for racial and ethnic minorities cannot incorporate gender issues, either in form or in substance. Comparative equality scholarship points to ways in which different legal cultures handle similar issues. With Parity, France responded directly to electoral gender inequality, inconceivable from the United States perspective where gender discrimination law and voting rights do not intersect. However, the most outlandish element of Parity is the larger question of quotas themselves.

B. Quotas: *The Universal Anathema*

Quotas, at least those labeled as such, constitute a pariah among policies. Across the ideological spectrum, conservative, liberal, and critical legal thinkers in the United States generally reject the idea of quotas, which "insulate all nonminority candidates from competition from certain seats." Parity arouses such broad opposition in the United States because it is viewed as a quota.

1. Liberal Rejection of Quotas

For liberal theorists, quotas violate constitutional doctrine's neutrality.⁵² Normatively speaking, liberals assert that no group merits better treatment than any other group. "Classical liberal theory was preoccupied enough with issues of extending equality that it rarely discussed difference."⁵³ Liberals presume that one group's benefit

gathered by pollsters Lake and DiVall, and political strategist Mary Hughes. The statistical information was gathered from interviews, campaign managers, exit polls, and polls from over 1,375 potential voters. The May 2000 poll has a 3% margin of error. However, certain groups of female voters, such as young women and educated women, substantially prefer women candidates. In contrast, married women who are homemakers tend to prefer male politicians. Vaishalee Mishra, *Guide Places Keys to Statehouses in Women's Reach*, <http://www.womensenews.org/article.cfm/dyn/aid/578/context/cover/> (last visited Nov. 1, 2005). Although it would be possible to demonstrate that women consistently lose for a particular seat, given that women do not collectively rally behind women candidates, the inability to elect a female candidate cannot qualify as a *Gingles* violation.

⁵² Sunstein, *supra* note 22.

⁵³ Charles S. Maier & Sytte Klausen, *Introduction to HAS LIBERALISM FAILED WOMEN?*, *supra* note 21, at 3,5.

disadvantages other groups.⁵⁴ A second, deeper liberal concern arises with the Rawlsian question of *how* to determine which groups deserve different treatment. The Rawlsian process places the decision-maker behind the “veil of ignorance” as to his or her social position, maximizing objectivity and removing self interest. Liberals assert that no objective answer that certain groups deserve beneficial treatment would result.⁵⁵

A third liberal concern is that ideas, rather than identity, should determine representation, reflecting “a general reluctance to mandate equality (or proportionality) of outcomes rather than alleged equality of opportunity.”⁵⁶ Insistence on the sanctity of the liberal democratic process leads to an insistence on equality of opportunity, not equality of outcome.⁵⁷ Bruce Ackerman, for example, argues that neutrality should be strictly applied, in a way that resembles the French universalism discussed in Part II.⁵⁸ Inequitable treatment, he argues, cannot achieve equality.⁵⁹ Ackerman criticizes those who prioritize identity politics over class issues.⁶⁰ Ackerman’s proposal for equitable distribution of national wealth explicitly rejects any affirmative action.⁶¹ Ackerman argues that

⁵⁴ This argument arose in the case of *Shaw v. Reno*, 509 U.S. 630 (1993), in which white voters sued to overturn a majority-minority district.

⁵⁵ A wide range of liberal thinkers agree on this — Hannah Pitkin, Rian Voet, Amy Gutmann, and Dennis Thompson. See Mansbridge, *supra* note 21, at 26.

⁵⁶ *Id.* at 5.

⁵⁷ *Id.*

⁵⁸ See BRUCE A. ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* 237-49 (1999).

⁵⁹ See BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 237-49 (1980).

⁶⁰ Equal opportunity in the workplace, Ackerman contends, cannot suffice to rectify the trend of increasing inequality: “Americans have always had an uncertain love affair with equal opportunity. We believe in it, we know it really doesn’t exist in today’s world, and yet we have learned to live comfortably in the gap between ideal and reality.” *Id.*

⁶¹ To this end, Ackerman proposes giving eighty thousand dollars [to each citizen] will do much to aid the plight of women and minorities, but it will not serve as the “be all and end all in the struggle for real equality of opportunity.” *Id.* at 62. Ackerman suggests that minority group members will be the so-called winners from stakeholding. Currently, one-third of all households have no net financial wealth. In the black community, this is increased to 61%. This disparity holds true for middle-class blacks, who earn about 70% of their white counterparts, but only own 15% of the white middle-class wealth. See *id.* at 60-61. Ackerman, however, rejects implementing affirmative action techniques in his stakeholding proposal:

[w]hen each citizen comes forward to make her claim, it ought to be enough for her to say that she too is an American, involved in the common enterprise of redeeming the great words of the Declaration of Independence. This is a time for women and men, blacks and whites, to join in a mutual recognition of their standing as free and equal citizens without distracting references to the

focusing on inequality directs focus away from the ultimate goal of equality.⁶²

2. Critical Theory Rejection of Quotas

Liberal and critical thinkers generally clash in many settings,⁶³ but may agree in rejecting quotas. Critical (and critical race) theorists question quotas because they encourage tokenism and preserve essentialist understandings of identity. Whereas liberals view quotas as violating neutrality, critical theorists believe neutrality serves to maintain the inequality of the status quo.

Quotas focus on numerical representation, which has led to “tokenism” in the context of majority-minority districting. Tokenism depends on descriptive representation, in which the identity of the representative matches that of the represented.⁶⁴ As one critical race scholar asserts, quotas foster “equality of representation based simply on the election of descriptively black representatives.”⁶⁵ Although proportionally accurate, placing any thirteen black people in the Senate would not necessarily represent black communities. Supporters of affirmative action have argued for incrementalist programs while criticizing quota-defined affirmative action as malignant, inherently wrong and unjustifiable.⁶⁶

Fearing the same essentialism decried by critical race theorists, many feminists hesitate to support quotas. For critical theorists, one cannot

differences and injustices that still tear them apart.

Id.

⁶² See *id.* Moving away from the hypothetical, however, and returning to reality, an argument could be made in favor of actions and programs designed to put minorities on equal footing. As opposed to the hypothetical, in reality, citizens do not begin on equal ground.

⁶³ For example, the central assumption of critical race theorists is “that American society and its institutions, including its legal institutions, are fundamentally racist, and that racism is not a deviation from the normal operation of American society.” Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, in *CRITICAL RACE THEORY: CASES, MATERIALS AND PROBLEMS* 2, 3 (Dorothy A. Brown ed., 2003).

⁶⁴ See Guinier, *Tokenism*, *supra* note 26, at 1103.

⁶⁵ *Id.* Although proportional representation may aid minority representation, as a neutral voting system, it does not necessarily aid minorities.

⁶⁶ Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1067.

presume that women better represent women.⁶⁷ With regard to gender, descriptive representation would presume that one's sex has a political meaning.

3. Quotas, Descriptive Representation, and Essentialism

Quotas for political representation require identity-based or "descriptive" representation. Descriptive representation involves "a descriptive likeness between representatives and those for whom they stand."⁶⁸ In this sense, "[a] representative legislature, like a map or a mirror, is essentially an inanimate object, a representation of the people in the sense that a painting is a representation of what it depicts."⁶⁹ Like a painting, descriptive representation presents a static portrait of a society.⁷⁰

As quotas require descriptive representation, descriptive representation appears to presume an essentialist understanding of identity, and argument that will be revisited in Part III. For identity to determine ideas, the category "women" must possess a concrete meaning. Even presuming women's under-representation based on low numbers of legislators ascribes to some essentialist notions of identity and representation. Women's representation quotas, likewise, presume that only a woman can represent women. Quotas rely on essentialism.

Feminist debate has raged over essentialism and anti-essentialism, whether women inherently differ from men. Some feminists, many of

⁶⁷ Guinier, *Tokenism*, *supra* note 26, at 1102-03.

Authentic black representation, or "descriptive" representation, is the first important building block for black electoral success theory. Authenticity refers to community-based and culturally rooted leadership. The concept also distinguishes between minority-sponsored and white-sponsored black candidates. Basically, authentic representation describes the psychological value of black representation. The term is suggestive of the essentialist impulse in black political participation: because black officials are black, they are representative. Thus, authenticity reflects the importance of race in defining the character of black political participation.

Id.

⁶⁸ Hanna F. Pitkin, *The Concept of Representation*, in REPRESENTATION 10 (Hanna F. Pitkin ed., 1969).

⁶⁹ *Id.* at 11. Thinking of political representation as art, a descriptive legislature must mirror the public, and "what qualifies a man to represent is his representativeness — not [for] what he does, but [because of] what he is, or is like." *Id.* at 10.

⁷⁰ Guinier, *Tokenism*, *supra* note 26, at 1102, n.114.

them French, argue that the sexes are fundamentally different.⁷¹ This fixed idea of womanhood fosters cohesion at the cost of reducing the gender identity's fluidity. Anti-essentialist feminism holds that no essential notion of "womanhood" exists.⁷² Black feminists such as bell hooks and Kimberlé Crenshaw have emphasized the "white nature" of such concepts, asserting that race and gender are intertwined.⁷³ Gender theorists, led by United States thinkers such as Judith Butler, argue that notions of "womanhood" depend exclusively on cultural constructs. The use of "gender" rather than "sex" reflects a constructed, rather than biological, phenomenon.⁷⁴ For example, anti-essentialists reject presumptions that women are hard-wired nurturers, ascribing such behaviors to cultural constructs.

Concerns about tokenism lead to calls for emphasizing interest representation. Representing ideas rather than identity allows fluidity,⁷⁵ prioritizing political perspective over identity.⁷⁶ Given the diversity among women, it may be difficult to determine "women's interests." Although social science reflects some preferences among women for

⁷¹ See *infra* Part II.A.1.

⁷² Judith Butler has argued that agency is created at the site of political struggle; it is not necessarily preexistent. Judith Butler, *Contingent Foundations*, in FEMINIST CONTENTIONS: A PHILOSOPHICAL EXCHANGE 35, 47-51 (Seyla Benhabib et al. eds., 1995); Mansbridge, *supra* note 21, at 6.

⁷³ See BELL HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM 1-13, 119-58 (1981); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and the Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

⁷⁴ The construction of gender cannot be discussed without consideration of transgendered identity. Transgendered identity demonstrates the mutability of gender. Transgendered people expose the fallacy of the presumption that humanity is composed solely of men and women. The "gender binarism" calls into question the viability of a fifty-fifty scheme for representation unless there is some implicit recognition of how to include transgendered people in this scheme. KWAME ANTHONY APPIAH, IN MY FATHER'S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE 45 (1992). The fluidity of racial identity and, as a consequence, of remedies for race-based discrimination, surfaces in Part III. See generally Darren Rosenblum, "Trapped" in *Sing Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499 (2000). Although the essentialism debate primarily arises with regard to gender, many have raised such questions with regard to race.

⁷⁵ Guinier, *No Two Seats*, *supra* note 26, at 1462 (discussing advantages of interest representation, in which community's ideas find representation).

⁷⁶ It is worth noting that essentialist identities could also lead to interest representation: another critique of descriptive representation centers on the fact that "it is not clear what characteristics of the electorate need to be mirrored to insure a fair sample." Bernard Grofman, *Should Representatives Be Typical of Their Constituents?*, in REPRESENTATION AND REDISTRICTING ISSUES 98 (Grofman, et al. eds., 1982). Thus, while anti-essentialism necessitates interest representation, interest representation does not require an anti-essentialist understanding of identity.

some policies,⁷⁷ these preferences may not be easily predictable. “The advocacy of descriptive representation can emphasize the worst features of essentialism.”⁷⁸

To answer these questions, given Parity’s ambitions, demands closer study of the French example. Does Parity serve to de-essentialize essentialism? How does France constitute the relationship between women and the universal? What can French legal culture about our own structures and systems? Does Parity point toward a reconfiguration of the essentialism/anti-essentialism, descriptive/interest dichotomies? Can some provisions for women’s representation be constructed to reflect the United States’ profound antipathy toward quotas?

II. FRENCH PARITY: OBTAINING WOMEN’S EQUALITY THROUGH DIFFERENCE

Parity’s history and the debate surrounding its passage provide an instructive context for evaluating the relationship between gender and democracy in the context of liberal constitutionalism. “Parity” is defined as “perfect equality.”⁷⁹ In the political sphere, it requires “the equality of representation of women and men.”⁸⁰ This Part will first address the history of women’s suffrage and development and experience of Parity. Second, it will engage the role of France’s universalism in representing women while ignoring other differences, including race, ethnicity and religion. Finally, this Part will explore how feminist theory transformed the understanding of France’s universalism.

This Part draws on several comparative methodologies.⁸¹ Although this study reveals interesting parallels and contrasts with the United States’ legal system, it enters the subject, France, through the broader context of French constructs of group inequality and difference.⁸² This highly contextual analysis attempts to avoid the “epistemological

⁷⁷ Within the United States, studies by the Barbara Lee Foundation also reflect preferences of women voters as different from those of men. See Lindsay Crudele, *Under the Wings of Women*, Mar. 2, 2005, available at http://www.barbaraleefoundation.org/aboutus/aboutus_show.htm?doc_id=263758.

⁷⁸ Mansbridge, *supra* note 21, at 30.

⁷⁹ FRANÇOISE GASPARD ET AL., *AU POUVOIR, CITOYENNES! LIBERTE, EGALITE, PARITE* 129 (1992).

⁸⁰ *Id.*

⁸¹ See Annelise Riles, *Wigmore’s Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT’L L.J. 221, 232 (1999).

⁸² See *id.* at 242.

imperialism⁸³ that has drawn criticism from some scholars. The discussion emphasizes Parity's intellectual underpinnings, not only to reveal the nature of French discourse, but also to add nuance and depth to the United States' own construction of universalism and difference.⁸⁴

A. *Parity: History, Passage, and Effectiveness*

Parity capped a long movement for women's suffrage and electoral equality. French women achieved suffrage after World War II, but found that their numbers in government remained low. A second movement to institute some quotas obtained limited success after the Socialist Party victory of 1981, but the legislation was struck down by the Constitutional Court. Parity advocates reshaped their agenda to meet these constitutional concerns, reframing the debate and ultimately succeeding in 2000. Parity's implementation has met with marked success in some elections and more modest advances in others, and continues itself to be the subject of much debate.

1. French Consideration of Parity from the 1880s to the Early 1990s

The idea of Parity dates back to 1884, when Hubertine Auclert, a leading French suffragist, wrote that women should have half the seats in the Assembly.⁸⁵ Auclert proposed that the Assembly should simply divide its seats between the sexes. She called for a political equality that would mean the "recognition of women *as such* as the other part of the sovereign people," where men and women could constitute the electorate equally together.⁸⁶

Despite ceaseless efforts to attain suffrage, French men represented women in their household for sixty years after Auclert's declaration, far longer than in most other democracies.⁸⁷ During the First World War, one politician proposed unsuccessfully that widows should vote, because the men through whom they were represented no longer could. It was only after Vichy's collapse in 1944 that French women obtained the vote, well after the Nineteenth Amendment's passage in the United

⁸³ Teemu Ruskola, *Legal Orientalism*, 101 MICH L.REV. 179, 190 (2002).

⁸⁴ See Riles, *supra* note 81, at 246-47.

⁸⁵ See Isabelle Giraud & Jane Jenson, *Constitutionalizing Equal Access: High Hopes, Dashed Hopes?*, in HAS LIBERALISM FAILED WOMEN?, *supra* note 21, at 69.

⁸⁶ SYLVIANE AGACINSKI, PARITY OF THE SEXES 154 (2001).

⁸⁷ GASPARD ET AL., *supra* note 79, at 102.

States.⁸⁸

In France, as in the United States, a powerful feminist movement grew out of the political upheaval of the late 1960s, a movement which ultimately led to Parity's passage.⁸⁹ At that time women wanted to be elected to government because of their differences with men, not in spite of them. It was their hope that they would be elected so that they could say and do things other than what the men had done in previous years.⁹⁰ As a strategic move, in 1975 Françoise Giroud, Secretary for Women's Condition, introduced 100 measures for women, including a bill limiting the candidates on a list to 80% for either of the two sexes.⁹¹ A subsequent version passed, but was overturned by the Constitutional Council in a 1982 ruling.⁹² However, voluntary commitments to women's

⁸⁸ *Id.* at 21.

⁸⁹ Yvonne Knibiehler, *Democratie, desir des Femmes*, in LA DEMOCRATIE 'A LA FRANCAISE' OU LES FEMMES INDESIRABLES 23 (Eliane Viennot ed., 1996).

⁹⁰ *Id.*

⁹¹ The original language reserved 20% for women, but this language was removed at the advice of attorneys concerned about such a quota. Four years later, the Minister for Family and Women's Conditions proposed a 20% minimum for towns with populations above 2,500. GILL ALLWOOD & KHURSHED WADIA, *WOMEN AND POLITICS IN FRANCE 1958-2000*, at 192 (2000); GASPARD ET AL., *supra* note 79, at 136-37. Although the Assembly approved the bill, the session ended before the Senate could debate it. The French legislative process involves a number of different steps. The first step is the Initiative in which Deputies and the Government are entitled to initiate legislation. The bills that are introduced by Deputies are called *propositions de loi* (Members' Bills) and the bills introduced by the government are called *projets de loi*. Once a bill has been initiated it gets sent for consideration in one of six standing committees, thus starting the second step. While the bill is in the committee, it will be studied and debated by a *rapporteur*, one of the members of the committee who is appointed to present his opinion on the bill. Then the committee will adopt the report and make a statement either recommending or rejecting the bill. During the third step, the inclusion of matters on the agenda, the bills are included into the Assembly's agenda and the bills are considered in the order determined by the Government. Next the bills are given over for consideration on the floor of the Assembly. There are times when procedural motions can be made, however, where the result is that the bill may be rejected before it is debated. If not rejected, the bill will be considered clause by clause. After a few more motions, the fifth step requires that before a bill can be adopted by Parliament it must be passed in an identical form by both assemblies (the Senate and the Assembly). If changes are made then the bill will "shuttle" back and forth between the assemblies, known as the *navette*. Once the bill has been adopted, the Act of Parliament will be passed on to the Government and the President of the Republic will make the Act public within 15 days. See Assemblée Nationale.fr, *Legislative Role — Parliament's Law Making Powers* (2005), <http://www.assemblee-nationale.fr/english/8ag.asp>. For a detailed explanation of the French legislative process, in French, see Assemblée Nationale.fr, *La Procédure Législative*, <http://www.assemblee-nationale.fr/connaissance/procedure.asp> (last visited Jan. 25, 2006).

⁹² The *Conseil Constitutionnel* favors a notion of formal equality over equality of chances with the law. Decision 34, *Feminine Quotas* denied the proposed amendment to

representation arose among left-wing political parties throughout the 1980s.⁹³

2. Parity, from Idea to Reality: 1992-2000

In the early 1990s, Parity began to gain momentum.⁹⁴ In March, 1992, a roundtable meeting was organized to serve as a “network for Parity.”⁹⁵ Months later, in *Au Pouvoir, Citoyennes! (To Power, Women Citizens!)*, Françoise Gaspard argued that the Revolution, the suffrage movement, and the postwar period all failed to address the issue of outcome-based women’s participation in elected bodies.⁹⁶ This persuasive argument by an independent-minded former member of the National Assembly jump-started the movement. The Socialist Party accepted Parity as a voluntary goal.⁹⁷ Still in the formative stage at this point, Parity continued to undergo significant changes.⁹⁸ The following year, *Le Monde*, the French daily newspaper, published the “Manifesto of 577 for Paritary Democracy,” placing Parity on the national stage, forcing political parties to respond.⁹⁹ The left endorsed Parity, while some on the right attempted to ignore it.¹⁰⁰

modify election rules requiring at least 25% of the candidates on the list be women. The *Conseil* believed that a “text that reserved a certain number of places for women . . . without doing the same for men . . . would be contrary to the principle of equality.” A. F. Thompson, *From Restoration to Republic, in FRANCE: GOVERNMENT AND SOCIETY* 207, 211 (J.M. Wallace Hadrill & J. McManners eds., 1970).

⁹³ In the mid-1980s, political parties of the far left, including the Green party and the Communist Party, adopted voluntary commitments to Parity. The Green Party placed Parity of the sexes in its by-laws. Later in the 1980s, European institutions began considering the issue, with the Council of Europe adopting a Parity goal in 1989 as the most democratic way to represent both sexes.

⁹⁴ See Giraud & Jenson, *supra* note 85, at 73.

⁹⁵ CLAUDE DE GRANRUT, *ALLEZ LES FEMMES!: LA PARITE EN POLITIQUE* 34 (2002).

⁹⁶ See GASPARD ET AL., *supra* note 79.

⁹⁷ *Id.* at 173.

⁹⁸ See *id.* Gaspard also proffered the novel power-sharing idea of doubling uninominal positions, thus requiring each party to propose a male and a female candidate for a given post.

⁹⁹ GRANRUT, *supra* note 95, at 34.

¹⁰⁰ The parties of the left, including the Socialist, Communist, Citizens’ Movement, and Workers’ Struggle parties, imposed upon themselves the Parity rule for the European Parliament elections in 1994, and the Green Party instituted it in its general rules. The parties of the right, however, attempted to ignore the issue. Well-regarded conservative women, such as Simone Veil, then Minister of Health and the City, argued in favor of a constitutional amendment for Parity. *Id.* Legislators proposed a version of progressive but non-mandatory Parity. Leading male politicians came out in favor of Parity, including two candidates in the 1995 Presidential race. One conservative candidate, Edouard Balladur,

Confronting potential victory, Parity advocates began to take into account the concerns in the Constitutional Council's 1982 decision, shifting from guaranteeing legislative seats to requiring parties to guarantee half their candidacies. It was argued that quotas imposed on parties rather than on the legislature permitted a great deal more room for voters to express their choice for candidates.¹⁰¹

3. Arguments for Parity

During the mid-to-late 1990s, Parity advocates employed a variety of arguments, from the historical and the sociopolitical to the philosophical, to assert that women had a right to political representation which accurately reflected their numbers.¹⁰²

a. Critique of France's "Monosexual Democracy"¹⁰³

The "maleness" of the political class, Parity advocates argued, constituted a "monosexual" democracy, in which men acquire political power early in their lives, often based on social position and family. "In

proposed a 30% quota for women in party list-elections. The other conservative candidate, then-mayor of Paris, Jacques Chirac, supported the creation of a national commission for Parity, with financial incentives for implementation by political parties. Lionel Jospin, the Socialist candidate, also supported financial incentives for implementation of Parity even though the Socialists had accepted Parity as a voluntary goal. *Id.* These campaign promises led to little action, despite token efforts by then Prime Minister Alain Juppé. *Id.*

¹⁰¹ ALLWOOD & WADIA, *supra* note 91, at 211.

¹⁰² During this period, Parity advanced by virtue of other political events. President Chirac dissolved Parliament in April 1997 to force elections, hoping to increase his majority. Instead, the Socialists capitalized on discontent in part by sticking to its commitment to have women as at least 30% of its candidates. GRANRUT, *supra* note 95, at 35-36. Parity received support from polling numbers culled by advocates that demonstrated that large majority of the French believed that women and men should have equal representation. *See generally* Guillame Frechette et al., Endogenous Affirmative Action: Gender Bias Leads to Gender Quotas (June 17, 2005) (unpublished manuscript), available at <http://homepages.nyu.edu/~gf35/print/fmm.pdf> (last visited Feb. 6, 2006); Interview with Françoise Gaspard, in N.Y., N.Y. (Jan. 24, 2005). The new Prime Minister, Lionel Jospin, declared in June 1998 that he would propose a constitutional amendment regarding Parity yielding several competing proposals. One suggested an expansive set of actions, including the creation of a delegation of women's rights and equal opportunities in each chamber of the legislature, term limits, university training for political participation, and the suppression of any obstacle to women's and young women's participation in politics. Jospin rejected the breadth of these actions, leaving the requirement that 50% of a party's candidates be women as the principal feature of the law.

¹⁰³ MARIETTE SINEAU, PROFESSION FEMME POLITIQUE: SEXE ET POUVOIR SOUS LA CINQUIEME REPUBLIQUE 240 (2001).

certain families, being a deputy is passed down from father to son."¹⁰⁴ At the highest political spheres, the non-participation of women is "the rule rather than the exception,"¹⁰⁵ including at the level of language itself, in which the term for politician, "homme politique," references men.¹⁰⁶

With women's levels of electoral representation hovering at below 10% in many jurisdictions, Parity advocates claimed that women were being subjected to the rule of men.¹⁰⁷ "The monopolization of power by a group, by a clique, as well as by a sex is an usurpation."¹⁰⁸ Parity advocates made a simple assertion: a democracy without women is not a democracy.¹⁰⁹ "France believes itself to be a democracy, but it is not one. Even if women vote, it is the men who make the law."¹¹⁰ Men's political supermajority lent moral force to the Parity movement, obliging opponents to assent to Parity in word, if not by deed.¹¹¹ Parity advocates responded by demanding inclusion: "On the social level as on the legal level, it is for women to demand to occupy not second place in the scope of humanity, but the first, in equality with men."¹¹² This male supermajority represented part of a deeper problem with French democracy.

b. Parity as a Solution to a Crisis of Democracy

Many French commentators decried what they called a crisis of

¹⁰⁴ GRANRUT, *supra* note 95, at 45. This family trend is not unique to France. Currently in the U.S. Congress, Senator Edward Kennedy (D-Mass) and his son Representative Patrick Kennedy (D-RI), sisters Representative Linda Sanchez (D-CA) and Representative Loretta Sanchez (D-CA), and brothers Senator Ken Salazar (D-CO) and Representative John Salazar (D-CO) all serve in Congress. AMER, *supra* note 3, at n.13.

¹⁰⁵ GASPARD ET AL., *supra* note 79, at 122.

¹⁰⁶ Indeed, the most commonly used word for "politician" in French is "homme politique," or "political man," not "politicien," which would be the equivalent of politician in English, revealing a widespread presumption that a politician will be a man.

¹⁰⁷ Such assertions ignored the fact that many of the voters who had elected these men were themselves women. Women's advocates thus conflated representation with descriptive representation, presuming, at least to some extent, that only women can represent women. See *supra* Part I.B.3, regarding the concept of descriptive representation and its role in the Parity debate.

¹⁰⁸ GASPARD ET AL., *supra* note 79, at 181.

¹⁰⁹ SINEAU, *supra* note 103, at 242.

¹¹⁰ GASPARD ET AL., *supra* note 79, at 19.

¹¹¹ For example, President Chirac's support for Parity seemed to many to be superficial at best. This could be because although Chirac stated that he supported Parity, his center-right coalition ran less than 20% female candidates during the elections of 2002. See Garance Franke-Ruta, *Liberte, Egalite, Sororite*, LEGAL AFF. 30 (2003).

¹¹² GASPARD ET AL., *supra* note 79, at 124.

democracy,¹¹³ ascribing social problems to failures of the democratic system.¹¹⁴ Economic crises led to a “crisis of political representation,”¹¹⁵ in which the elected lost their legitimacy due to their failure to imagine an “other” alternative future.¹¹⁶ A more participatory democracy, with “new blood”¹¹⁷ many asserted, would ameliorate these problems. Advocates assured that “[o]ur bet is that only a larger demand for justice can regenerate democracy.”¹¹⁸

Parity, advocates argued, would not only correct electoral gender inequality, but would remedy broader sociopolitical ills. Advocates proffered the essentialist argument that women better understand the problems of poverty, youth, and unemployment,¹¹⁹ and would pursue different policies with regard to environment, military, and welfare spending.¹²⁰ Women’s family experience, it was argued, was “a sort of training ground for leading action oriented toward others and, ultimately, the public.”¹²¹ Women would open up government, raising issues that otherwise would have gone ignored, bridging the gap between the people and the political class.¹²²

¹¹³ ALLWOOD & WADIA, *supra* note 91, at 213. “The main indicators of this crisis included the growing gap between the concerns of the French people and the political elite, repeatedly demonstrated by public opinion polls; rising abstention rates; the failure of the parties to recruit new members; and public disaffection with a political class in which scandals seemed endemic.” *Id.*

¹¹⁴ *See generally* GASPARD ET AL., *supra* note 79.

¹¹⁵ SINEAU, *supra* note 103, at 245-46.

¹¹⁶ *Id.* at 246.

¹¹⁷ GRANRUT, *supra* note 95, at 58-59.

¹¹⁸ GASPARD ET AL., *supra* note 79, at 181.

¹¹⁹ *Id.* at 182.

¹²⁰ SINEAU, *supra* note 103, at 488; *see also* ALLWOOD & WADIA, *supra* note 91, at 204.

¹²¹ GRANRUT, *supra* note 95, at 59-60. Granrut also argues:

[w]oman is built starting from experiences, traditions, of respect for life but also for self worth and for the faculty of erasing oneself before the birth of another. Maternity obligates her to develop a method of thinking and a rhythm of action turned toward the future, medium or long-term. She belongs to an intellectual discipline that is neither bureaucratic nor technical but which demands programmed objectives, a lot of love, will, and realism.

Id. at 60.

¹²² ALLWOOD & WADIA, *supra* note 91, at 214. Some advocates even asserted that Parity in the legislature would serve as a model for other organizations, including those in the private sector. *See, e.g.,* GASPARD ET AL., *supra* note 79, at 28. Others held that French politics in general would benefit with more women elected to public office. *See* Giraud & Jenson, *supra* note 85, at 80; *see also* ALLWOOD & WADIA, *supra* note 91, at 205. Still others recognized that a change in the legislature would not make a real difference in the “sites of

“The debate on Parity only served to restart the question of the renewal of democracy by women.”¹²³ Advocates succeeded in tying this dichotomy between the represented and the representatives to the existence of democracy itself, arguing: “[w]e say very simply that as long as the Parity of the sexes is not adopted, there will be no democracy.”¹²⁴ Parity advocates also pointed to polls indicating 70% support among the electorate, with no difference between women and men. These arguments ultimately succeeded, leading to passage of Parity.¹²⁵

4. Passage of Parity

The final version of the law amended the Constitution of the Fifth Republic of 1958, and provided for legislation that would implement the constitutional changes.¹²⁶ Following Parity’s passage, law Number 2000-493 of June 6, 2000, favoring the equal access of women and men to electoral office and elected functions, was executed to implement the constitutional transformation.¹²⁷

power in contemporary France.” *Id.* at 205.

¹²³ SINEAU, *supra* note 103, at 246.

¹²⁴ *Id.* at 14.

¹²⁵ Scott, *supra* note 23, at 32, 44.

¹²⁶ Law No. 99-569 of July 8, 1999, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 9, 1999, p. 10175, available at <http://www.legifrance.gouv.fr/WAspad/RechercheExperteJorf.jsp> (retrieve text by law number). The language of law Number 99-569, follows:

Article 1 – Article 3 of the Constitution of October 4, 1958 is completed by a paragraph as follows: “The law favors the equal access of women and men to elected office and elected functions.”

Article 2 – Article 4 of the Constitution of October 4, 1958 is completed by a paragraph as follows: “They will contribute to the execution of the principal enunciated in the last paragraph of Article 3 of the Constitution under conditions determined by the law.” GRANRUT, *supra* note 95, at 39-40.

¹²⁷ Law No. 2000-493 of June 6, 2000, Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 7, 2000, p. 8560, available at <http://www.legifrance.gouv.fr/WAspad/RechercheExperteJorf.jsp> (retrieve text by law number). Title I of law Number 2000-493 states:

Dispositions related to elections following a list method, that is to say the principal elections: On each of the lists, the differential between the number of candidates of each sex cannot be higher than one. At the head of each group of six candidates in the order of presentation of the list should figure an equal number of candidates of each sex. For senatorial elections and for the European Parliament, on each of the lists, the differential between the number of candidates of each sex cannot be higher than one. Each list is composed

This transformation required enforcement mechanisms depending on the election in question. In France's semi-proportional system, municipal, regional, European and some senatorial elections use party slates, while others, notably National Assembly elections, require voters to select a particular candidate. In a list proportional election, instituting Parity appeared relatively simple — every other name had to correspond to the “other” sex. Should a party fail to present candidates of alternating gender, the prefecture would refuse to present the list on the ballot. Parties were required to name women to half their candidacies or lose entirely the ability to field any candidates at all.¹²⁸

French voters elect executive posts or National Assembly seats in single-candidate elections, as in the United States. For these elections, a party's candidates overall must be half women and half men. A party whose candidates number less than 50% women will face a reduction in the state's financial support by the percentage equal to half of the difference between male and female candidates.¹²⁹ For example, if a

alternately of a candidate of each sex.

Title II states: “Dispositions related to the declarations of candidacy: Henceforth, candidates are required to make a declaration including their signature, stating their name, sex, date and location of birth, residence, and profession.”

Title III states:

Dispositions related to the aide given to political parties and groups. If, for a political party or group, the difference between the number of each sex, having declared party affiliation, since the last election of the National Assembly, conforming to the second paragraph of Article 9, goes beyond 2% of the total number of candidates, the total of the first fraction which is attributed in application of articles 8 and 9 is diminished by a percentage equal to the half of this difference related to the total number of candidates. . . . This reduction is not applicable to political parties and groups having presented exclusively overseas candidates if the difference in the number of candidates of each sex related to the party is not superior to one. . . . A report of evaluation of the instant law will be presented by the Government to the Parliament in 2002, and each three years afterward. It includes as well a detailed study of the evolution of the feminization of regional elections, of senatorial and municipal elections not affected by the law, deliberative bodies of intercommunal structures, and local executive.

Title IV states that the law will enter into force as of the next elections of the relevant legislative bodies. GRANRUT, *supra* note 95, at 39-41.

¹²⁸ JANINE MOSSUZ-LAVAU, ASSOCIATION DES FEMMES DE L'EUROPE MERIDIONALE, RAPPORT NATIONAL FRANÇAIS 43 (2000) (noting elections by list where three or fewer candidates appear to also avoid Parity rules).

¹²⁹ Law No. 2000-294 of Apr. 5, 2000, Journal Officiel de la République Française [J.O.]

party has 55% men and 45% women candidates, its financial support will be reduced by 5%.¹³⁰

5. Parity Results: Advancement, but Not Equality

The elections conducted since the passage of Parity reveal both sharp improvements in women's representation in some elections and less marked increases in other areas, revealing both the efficacy and limitations of the recent law. Unsurprisingly, the same requirement of 50% yields different results depending on the enforcement method. Political parties avoided losing all possibility of victory in list elections, in which voters elect a list, usually determined by a political party, but made a markedly smaller effort in elections where the risk was only financial.

a. List Elections: Revolutionary Electoral Change for Women

List elections, with their draconian enforcement mechanisms, saw the greatest successes for Parity. The French Senate, composed of 320 members elected to nine-year staggered terms, utilizes an irregular combination of list-ballots and direct elections.¹³¹ In 2001, Senators seeking re-election were able to effectively skirt Parity requirements by claiming different party affiliations.¹³² Thus, they ensured opposing candidates fewer chances for success and ensured their own victory. As enforcement has met with structural obstacles, this practice has become more widespread.¹³³ Despite male incumbents skirting Parity by running

[Official Gazette of France], Apr. 6, 2000, p. 5238, art. 141, available at <http://www.legifrance.gouv.fr/WAspad/RechercheExperteJorf.jsp> (retrieve text by law number). "Le mandat de député est incompatible avec l'exercice de plus d'un des mandats énumérés ci-après: conseiller régional, conseiller à l'assemblée de Corse, conseiller général, conseiller de Paris, conseiller municipal d'une commune d'au moins 3500 habitants." *Id.* There is no Parity provision for elections in localities under 3500 inhabitants.

¹³⁰ CATHERINE SOPHIE DIMITROULIAS & MICHELINE GALABERT, ASSOCIATION DES FEMMES DE L'EUROPE MERIDIONALE, LA REPRESENTATION EUROPEENNE AU FEMININ: PORTRAIT D'ÉLUES D'ESPAGNE, DE FRANCE, DE GRECE, D'ITALIE ET DU PORTUGAL 4-5 (2000) [hereinafter LA REPRESENTATION] (stating that 18 of 33 members of cabinet are women).

¹³¹ See *Effets directs et indirects de la loi du 6 juin 2000: un Bilan Contrasté*, http://www.observatoire-parite.gouv.fr/travaux/rapport_08/rapport_2005.pdf (last visited Feb. 1, 2006). Approximately one-third of Senators are eligible for re-election every three years. Of the 102 seats up for election in 2001, 74 were list seats. The senatorial term was reduced to six years in 2003. *Id.*

¹³² Frechette et al., *supra* note 102, at 6.

¹³³ Among these obstacles are: (1) ballot reform adopted in July 2003 whereby the threshold was raised beyond that which proportional representation applies (a system

in newly-created political parties, the number of women elected tripled from 6.9% to 21.5%.¹³⁴ While nearly a third of new Senators were women, the percentage of women's representatives increased only marginally due to staggered senatorial elections.¹³⁵

The most dramatic success for Parity has been in municipal elections where women have obtained near-Parity in many positions.¹³⁶ Interestingly, municipalities governed by conservative parties showed the most marked improvements. Parity has also led to a cultural change, whereby the inclusion of women in executive positions is expected.¹³⁷ Parity's continued effect will be seen in future municipal elections.¹³⁸ More importantly, these local elections create larger numbers of experienced politicians to run for higher offices.

b. Parity's Single Candidate Election Failure

In May 2002, with over 16 candidates up for the first round of the Presidential election, the French electorate's vote was fractured with the shocking result that, after incumbent Chirac, the second-highest number of votes went to extreme-right wing National Front leader Jean-Marie Le Pen. This inspired the largest anti-fascist protests in decades, leading to

which is effective only in the 30 Departments who elect at least four senators – "Less proportional representation, therefore less Parity," "Malgré les reticences des élus, la parité gagne du terrain au Palais du Luxembourg, *Le Monde*") and (2) the practice of separate listing as discussed above.

¹³⁴ In numbers, there were 22 women, up from 7.

¹³⁵ In 2001, the number of women Senators increased from 20 to 35, representing an increase from 6.25% to 10.9%. See MOSSUZ-LAVAU, *supra* note 128. In the 2004 Senatorial elections, women Senators increased by 7.7%, again gaining nearly a third of all newly elected seats. See also L'Observatoire, *La parité en Europe*, http://www.observatoire-parite.gouv.fr/portail/list_parite.htm (last visited Feb. 6, 2006). The proportion of newly elected members went up from less than 8% to 24.2%.

¹³⁶ In March 2001, women's presence among the elected went from 21.7% to 47.5%. They have even won positions as mayor of their localities.

¹³⁷ For example, Paris's mayor, Bertrand Delanoë, who is France's first openly-gay mayor, placed women in a majority of his cabinet posts. LA REPRESENTATION, *supra* note 130, at 2-3.

¹³⁸ The effectiveness of the Parity Law became clear during the cantonal, or regional, elections held on the same dates of 2001. In those elections, which are not yet covered by the Parity Law, women's share rose from 8.4% to 9.8%, despite the fact that women candidates increased by over a third. This was augmented in the 2004 elections to a disappointing 10.91%. Out of 100 Departments, 19 did not elect a single woman. AIFP, *Demain la Parité*, <http://www.int-evry.fr/demain-la-parite> (last visited Feb. 6, 2006).

Chirac's 82% victory, a result that presaged an equally significant conservative win in the June 2002 legislative elections, the first single-name ballot election after Parity's passage. Women represented 38.5% of the candidates for the National Assembly in first round elections and only 23.9% in the second round. These figures suggest that parties placed relative inexperienced newcomers (women) in positions competing against undefeatable (male) opponents who were much more likely to win.¹³⁹ In the end, only 71 women were elected, leaving many observers extremely disappointed after the unquestionable success of the prior year's municipal elections.¹⁴⁰

c. Parity Across the Political Parties

Parity has varied across the political spectrum, with parties on the left respecting the law more (with 40% of candidates) than parties on the right (with 25%). Large parties preferred to keep male candidates and lose funding. For example, the Union pour la Majorité Présidentielle (UMP) lost over five million dollars in state funding because less than a quarter of its candidates were women.¹⁴¹ Smaller parties, relying more on state funding, more closely match the goals of Parity.¹⁴² The success of small party leaders in finding and fielding women candidates reveals the inaccuracy of assertions by large parties that it is difficult to find women candidates.¹⁴³

¹³⁹ LA REPRESENTATION, *supra* note 130, at 3-4.

¹⁴⁰ The total 71 women deputies in the National Assembly in 2002 amounted to only a small increase over prior elections: there were 35 women deputies in 1995 and 59 in 1997. No less a source than *Elle* magazine succinctly voiced its disappointment with the outcome of the 2002 elections: its lead editorial was titled, *Parity, not charity*. The editorial criticized the political parties for their failure to include as many women as Parity required, arguing that whenever there is danger, teams close ranks, and men, reacting to the threat posed by the National Front, saw Parity as "a luxury." Michèle Fitoussi, *La Parité Pas La Charité*, ELLE MAG., June 3, 2002, at 7.

¹⁴¹ Jacqueline Remy, *Parité bien ordonnée*, L'EXPRESS (Fr.), Jun. 20, 2002, at 36-37. The UMP lost €4,264,738, or \$5,117, 686 in state funding. See MARIE-JO ZIMMERMAN, EFFETS DIRECTS ET INDIRECTS DE LA LOI DU 6 JUIN 2000: UN BILAN CONTRASTÉ, (2005), available at http://www.observatoire-parite.gouv.fr/travaux/rapport_08/rapport_2005.pdf.

¹⁴² For example, the Green Party, Communist Party, and National Front all presented more than 45% women candidates. Curiously among these was the National Front, which won no seats in the final legislature. See Frontnational.com, *Legislatives - Les Résultats*, http://www.frontnational.com/lefn_resultats_legislatives.php (last visited Nov. 28, 2005). Le Pen blamed Parity for the loss of any representation, arguing that in naming inexperienced women as candidates, the National Front suffered at the polls.

¹⁴³ MOSSUZ-LAVAU, *supra* note 128, at 3-4; Fitoussi, *supra* note 140. The party of President Chirac, which had supported Parity, only had women for one-fifth of its

6. Results Below Parity: Two Interpretations

Several explanations point to the basis for Parity's failure to lead to substantially higher women's representation in the National Assembly. Activists and Parity supporters blame an ineffective law and the male establishment's fervent defense of incumbency. Empirical explanations, however, point to a broader preference among the French for male candidates that colored the enactment as well as the enforcement of the law.

a. Male Legislators Resisting Parity

Parity advocates blame several factors for Parity's limited success. First, although the law passed, it did not include other provisions to improve women's access to representation. Prior versions of the law included provisions to promote women's representation in ways that would involve training and education, not just electoral requirements. Second, male party leaders and incumbents manipulate the system in several ways. They select fewer women than is required by law, incurring fines instead of fielding women candidates. In list elections, incumbents create new political parties to be able to run on different lists, protecting their incumbency. Male party leaders select women from civil society, which may make the women more dependent on party leaders once in the legislature, and may make them less effective legislators. The Parity Observatory, established by the law to manage enforcement, faces severe underfunding and understaffing. Taken together, these actions demonstrate both active and passive resistance to the goals of Parity.¹⁴⁴

b. Empirical Explanations: Voters' Preference for Male Candidates

Empirical studies suggest another basis for the failure of Parity's goals — male deputies who seek to preserve their incumbency and an electorate that consistently prefers men to women candidates.¹⁴⁵ A study of Parity's adoption by Frechette, Morelli & Maniquet suggests different reasons both for the passage of Parity and for its inability to force an

candidates. Although the positions are nominated, rather than elected, one-quarter of the Prime Minister's cabinet were women.

¹⁴⁴ GASPARD ET AL., *supra* note 79.

¹⁴⁵ Frechette et al., *supra* note 102, at 5.

increase in women's representation in the National Assembly.¹⁴⁶ First, this empirical model provides an alternate explanation as to why a male legislature approved Parity. In this study, incumbents favor a Parity law based on two assumptions: 1) that they, the men already representing their districts, will fill the male slot; and 2) voters prefer male candidates. For incumbent male politicians, this study asserts, male politicians will prefer to compete in a Parity context rather than one with no Parity.¹⁴⁷ The second reason centers on the requirement that political parties that fail to meet Parity requirements must pay a fee. This element of the law favors larger political parties as they can afford to pay the fees and gain an advantage over smaller parties by doing so.¹⁴⁸

The Frechette study shows that the success of men after the passage of Parity demonstrates the preference for male candidates. "For a male, having an opponent of opposite gender increases the probability of winning — and for a woman it decreases it."¹⁴⁹ Both critics and supporters of Parity point to women's political newness as a factor. The empirical data show that while women candidates are less experienced, this factor only proved relevant: "the male advantage exists among young new candidates and incumbent candidates, and in both cases there should be a relatively homogenous experience across genders."¹⁵⁰ Overall, the data shows that voters (not parties) favor male candidates — a male candidate has a 22% higher chance of winning than a female candidate.¹⁵¹ As a consequence, particularly in a tight race, political

¹⁴⁶ *See id.*

¹⁴⁷ *Id.* at 9.

¹⁴⁸ *Id.* at 12-13.

[P]arties are coalitions of strategic incumbents, so they strategically choose their preferred institutional system at time 0, and they play strategically at the list composition stage. A district where a party is almost sure to win is also one where it has an incumbent, and hence, for the values of the parameter we look at, it is rational for the party to have the incumbent running there. However, there is no room in the model for male conspiracy, which would bias the party list composition decisions in favor of men just because of their gender. Only self interest matters.

Id. at 13.

¹⁴⁹ *Id.* at 18.

¹⁵⁰ *Id.* at 20. The authors of the study go on to state that this issue of experience is tangential to their point: "[O]ur story is in no way tied to this observation. Even if the male bias was the product of perceived experience differences, our model would still apply, since it relies on the existence of a male advantage, not on a specific source of it." *Id.*

¹⁵¹ *Id.* at 20.

parties pay close attention to a candidate's gender. Where a race either appears to be an easy win or loss, gender does not figure significantly. Where the race is a very close one, the 22% male advantage carries significant weight.¹⁵²

In the senatorial elections, where each party list had to have complete balance of genders, Parity led to the proliferation of parties. In one case where there were two incumbents from the same party, the incumbents split into two parties so that they could both present themselves in different districts. Thus, they permitted their new parties to maintain gender balance but also permitted the voters to express their pro-male bias and re-elect both incumbents.¹⁵³

c. Looking Forward: Increased, but Not Equal, Representation

Competing explanations arise as to Parity's failures. The national elections of 2002 disappointed expectations after the prior year's sharp increase in representation. Parity, nonetheless, markedly increased representation for women, especially in list elections. Overall, far more women serve as representatives now than before Parity. As women become more involved in the political process, more candidates will be available and competitive for national office. This political change may require time to fulfill Parity's goal of equal representation.

Although statistical explanations have persuasive bases to explain the passage of Parity and its failure to achieve its goals, Parity succeeded in substantially increasing representation in the regional elections. Parity increased the potential for women's political participation and established a basis for women's advancement in government and civil society. However, Parity has wrought a more fundamental change in political psychology, perhaps leading to wider acceptance for women in politics. Responding to these insufficient excuses for failing to meet Parity's requirements, *Elle* magazine warned cynical politicians to take note: "paying instead of applying the law will not always pay off."¹⁵⁴ That *Elle*, a fashion magazine, evinced such concern for Parity's enforcement demonstrates that Parity has reached far deeper into the consciousness of the French, transforming the nation into one that expects women to have equal opportunities to win elections. Parity's

¹⁵² *Id.* at 22. That said, parties did not treat men and women differently in terms of the average funding provided to the candidates. *Id.* at 23.

¹⁵³ *Id.* at 25.

¹⁵⁴ Fitoussi, *supra* note 140.

existence suggests a surprising level of comfort with the notion that women deserve equal opportunities to stand for election.

Arguments that women will improve French democracy may appear risky, because the potential failure of women to deliver change may weaken support for women's representation. Polls reflected that such arguments drew on popular perceptions, showing that the French wanted a "feminization" of politics because they believed women would bring new and unique skills to the political arena.¹⁵⁵ This transformation reveals key elements of French legal culture, from theories of democracy to gender, from universalism to difference. Compared to the United States, French legal culture maintains a more nuanced vision and practice of the intersection of gender and democracy. In contrast to the inclusion of gender within France's universalism, this same universalism prevents even minor consideration of racial, ethnic, or religious identity in any state function.

B. *French Constitutional Universalism: Representing Women,
Ignoring Minorities*

Underlying France's approach to democracy is a concept of pure universalism, a radical Eighteenth Century Enlightenment response to monarchy: each citizen is completely equal before the law. Any differentiation by the state between one citizen and another based on group identity would violate this primary rule of French constitutionalism. The rigor with which France holds to this universalism initially froze guarantees for women's representation in 1982.¹⁵⁶ Advocates re-framed their proposal, some by using the feminist discourse of difference to reflect a gendered universalism, constructing Parity as the voice of a universal composed of two sexes. In contrast, the French state refuses to take account of other groups, refusing to compile statistics on racial, ethnic, and religious minorities, under the auspices of Universalism.¹⁵⁷

¹⁵⁵ SINEAU, *supra* note 103, at 246.

¹⁵⁶ Thompson, *supra* note 92. The *Conseil* based its decision on Article 3 of the 1958 Constitution and Article 6 of the 1789 Declaration. *Id.*

¹⁵⁷ See Martin Arnold, *Liberté, égalité et fraternité, but Only for Some*, FIN. TIMES (London), Nov. 7, 2005, at 2.

1. Universalism Defines the French Republic

French democracy relies on a notion of universal rights, born in the French Revolution out of the Enlightenment philosophy. The "Universal Declaration of the Rights of Man and the Citizen," first heard as a speech given early in the Revolution,¹⁵⁸ would become the basis for future democratic efforts. Not only would this Declaration become the preamble of the Constitution of the Fifth Republic, the governing system of France since 1958,¹⁵⁹ but it would also serve as the basis for the Universal Declaration of Human Rights in the United Nations Charter.¹⁶⁰

Under universalist doctrine, all should be treated equally, without regard to membership in any particular group. All citizens benefit from this equal level of treatment. In the Revolution, "[t]he priority was the abolition of the feudal rights, to the suppression of the orders, bodies, and corporations. . . . And this permitted the belief that France put into place the concept of universality."¹⁶¹ A key element of the Declaration's radical egalitarianism is the institution of a meritocracy for public service.¹⁶² This concept of universalism relates to French notions of the republic: the elimination of cultural difference is "the best defense against intercommunity tensions, violence, political and cultural fragmentation and the destruction of democracy."¹⁶³

One crucial element of this universalism is the principle of *laïcité*. Under *laïcité*, France's nonreligious authorities exercise political and

¹⁵⁸ Sieyès, *Reconnaissance et exposition raisonnée des Droits de l'Homme et du Citoyen*, (July 20-21), 1789, referenced in GASPARD ET AL., *supra* note 79, at 51.

¹⁵⁹ DAVID THOMSON, *DEMOCRACY IN FRANCE SINCE 1870*, at 285-86 (1964).

¹⁶⁰ Human Rights Comm'n, *Celebrating the Universal Declaration of Human Rights*, <http://www.hrc.co.nz/index.php?p=451&format=text#2> (last visited Jan. 27, 2006) ("In 1789 the French Revolution produced the Declaration of the Rights of Man and the Citizen. Article II declares that 'The aim of all political association is the conservation of the natural and inalienable rights of man. These rights are: liberty, property, security and resistance to oppression' It was the humanitarian premise in this Declaration that was to inspire and inform the development of the ideology surrounding the UDHR and modern ideas of human rights.")

¹⁶¹ GASPARD, *supra* note 79, at 20-40.

¹⁶² Thompson, *supra* note 92, at 210. In 1789, Article 6 of the Declaration set forth the concept of equality and the foundation of a pure meritocracy in France. Eligibility for civil service employment became based on a person's virtues and talents. The *Conseil d'Etat* formally invoked this principle in the 1954 *Barel* decision. *Id.* at 211.

¹⁶³ ALLWOOD & WADIA, *supra* note 91, at 215-22. "Parity, it is claimed, would distinguish between categories of citizens, and this is contrary to the principle of universalism, according to which all citizens are equal and, in political terms, the same. Parity would thus destroy one of the very bases of democracy." *Id.*

administrative power.¹⁶⁴ This separation has consistently dominated French church-state relations since the overthrow of the Ancien Regime. At that time, the Revolution adopted a strict anti-clerical stance,¹⁶⁵ even going so far as to expropriate and sell church property.¹⁶⁶ It is this same principle that serves to require that the law be agnostic as to racial or ethnic identity, although there is some debate regarding whether this agnosticism derives from the more fundamental question of universalism.¹⁶⁷ Indeed, as one political theorist said, “democracy knows neither black, nor white, neither big, nor small, neither intelligent, nor stupid, neither rich, nor poor, neither men, nor women.”¹⁶⁸

2. *Laïcité* and the Deliberate Invisibility of Race

France’s universalism arises most prominently with regard to racial, ethnic, and religious identity through the principle of *laïcité*, which translates loosely at best, as secularism. France has the most diverse immigration population in Europe, especially since France is “ready to grant political asylum to all opponents of oppression, injustice, and totalitarianism.”¹⁶⁹ France’s religious diversity comes from the long-standing Protestant and Jewish minorities, but France first became a *de*

¹⁶⁴ *Laïcité* has no direct translation. The closest word is secularity. Michel Troper, *French Secularism, or Laïcité*, 21 CARDOZO L. REV. 1267, 1267 (2000). Although there is no one official definition for the term, President Jacques Chirac discussed the concept during a speech made in December 2003. During his speech he stated that “[l]aïcité guarantees freedom of conscience. It protects the freedom not to believe or not believe. It assures everyone of the possibility to express and practice their faith peaceably, freely, though without threatening others with one’s own convictions or beliefs.” See T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 428 (2004); see also President Jacques Chirac, *Discours Chirac Loi Laïcité* (Dec. 17, 2003), <http://www.fil-info-france.com/actualites-monde/discours-chirac-loi-laicite.htm> [hereinafter *Discours Chirac Loi Laïcité*] (French text of speech). This concept reinforces the French legal system where “[t]he state, in effect, does not content itself with defining the legal conditions of citizenship, which are otherwise socially constituted: it also has the right and the duty to create and reinforce social cohesion and, thus, to contribute to the forging of citizenship.” Troper, *supra*, at 1268.

¹⁶⁵ Thompson, *supra* note 92.

¹⁶⁶ John McManners, *The Revolution and Its Antecedents (1774-94)*, in FRANCE: GOVERNMENT AND SOCIETY, *supra* note 92, at 177.

¹⁶⁷ See Martin Arnold, *supra* note 157 (“It is not secularism that stops them asking about ethnicity, it is their claim that everyone is equal under the republic, but that is obviously not true. French society is xenophobic; it only recognizes things that resemble it.”)

¹⁶⁸ GRANRUT, *supra* note 95, at 31.

¹⁶⁹ Guy De Lusignan, *Global Migration and European Integration*, 2 IND. J. GLOBAL LEGAL STUD. 179, 183 (1994).

facto multicultural society during the 1950s and 1960s with the mass labor migration from the North African countries of Algeria, Morocco and Tunisia.¹⁷⁰ France pursued a policy of integration with limited success. This migration has led to an increase in the number of Muslims living in France, making Islam France's second religion after Catholicism since 1989.¹⁷¹ Most of France is Roman Catholic (83%-88%) with a growing Muslim population currently estimated to be 5%-10% of the French population.¹⁷² French Muslims' North African origins render it difficult to distinguish religious discrimination from racial and ethnic discrimination.

Yet, these numbers are estimates, precisely because in pursuit of *laïcité*, France passed law Number 78-17 of January 6, 1978, restricting the official record keeping of racial and ethnic data.¹⁷³ France enacted this law due to past abuses in collecting ethnic data by government officials.¹⁷⁴ France decided to make race invisible — to not accept the collection of data about race and religion. Yet this deliberate invisibility makes targeted programs to counter socio-economic exclusion impossible.

Laïcité underlies France's rejection of affirmative action. Affirmative action, or positive action as it is known in Europe, allows for the "preferential treatment of certain groups to make up for historical wrongs or traditional discrimination against them."¹⁷⁵ France "purports an identity-neutral vision of equality, and does not employ overt measures of positive or affirmative action in favor of ethnic, racial or religious groups."¹⁷⁶ The concept of a meritocracy relies on making opportunities available to all, regardless of group,¹⁷⁷ although it remains

¹⁷⁰ JONATHAN LAURENCE, THE BROOKINGS INST., THE NEW FRENCH MINORITY POLITICS (2003).

¹⁷¹ Gunn, *supra* note 164, at 456 (2004); see also Max Beloff, *The Fourth Republic (1945-55)*, in FRANCE: GOVERNMENT AND SOCIETY, *supra* note 92, at 272.

¹⁷² CIA, THE WORLD FACT BOOK, FRANCE, available at <http://www.cia.gov/cia/publications/factbook/geos/fr.html#People> (last visited Jan. 27, 2006).

¹⁷³ LAURENCE, *supra* note 170; see also Law No. 78-17 of Jan. 6, 1978, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan 24, 1978, p. 227, available at <http://www.legifrance.gouv.fr/texteconsolide/PPEAU.htm>.

¹⁷⁴ LAURENCE, *supra* note 170.

¹⁷⁵ *Id.* at 332.

¹⁷⁶ Daniela Caruso, *Limits of the Classic Method: Positive Action in the European Union After the New Equality Directives*, 44 HARV. INT'L L.J. 331, 366 (2003).

¹⁷⁷ Thompson, *supra* note 92, at 210. As a result of this equality principle, several advancements have been made for women and religious minorities in public employment. Equality in admission is one aspect of equality in public service. The *Conseil* upheld the

open to question whether this applies to non-citizens.¹⁷⁸ Despite this, diverse voices such as conservative politician Nicolas Sarkozy and advocates from the North African community have come out in favor of positive action to integrate Muslims into French society.¹⁷⁹ Although Sarkozy's proposal was greeted with indifference or rejection by most of the political spectrum,¹⁸⁰ it may draw new attention after the French riots of 2005 and the previous passage of the "Headscarf Law," which bans the wearing of ostentatious religious symbols in public schools.¹⁸¹

3. Passage of the Headscarf Law

Quite the opposite of Parity for women, and consistent with France's heretofore rejection of "positive action," the Headscarf Law attempts to erase ethnic and religious differences, rather than recognize them. This law is an effort to merge the constitutional principle of *laïcité* with a contemporary French society.¹⁸²

In 2004, the French National Assembly passed "legislation that would ban the wearing of an Islamic headscarf, or any other conspicuous religious symbol, within French public schools."¹⁸³ Small symbols of religion would still be permitted, but larger symbols, such as the Islamic headscarf and large crosses, would no longer be permissible in public schools because they set children apart from each other.¹⁸⁴ The Conseil d'Etat reinforced this belief by stating that "wearing the religious garb in

structure of one in five posts in the higher civil service to go to applicants not drawn from the ENA (national civil service college) because the different admissions procedure coincided with different kinds of talents. *Id.*

¹⁷⁸ The Fifth Republic of France has had much debate on whether to grant equality the status of a constitutional provision. The French conception of equality is both limited and formal: formal equality requires the equal application of a rule, but not an equality of outcomes. Although some differences such as those between citizens and foreigners may exist, the state may not differentiate between individuals as regarding human rights. *Id.* at 211.

¹⁷⁹ For a discussion of Sarkozy's proposals see Elaine Sciolino, *French Official Looks in His Mirror and Sees Future President*, N.Y. TIMES, Nov. 22, 2003, at A3.

¹⁸⁰ Michael Wells, *International Norms in Constitutional Law*, 32 GA. J. INT'L & COMP. L. 429, 435 (2004).

¹⁸¹ See Law No. 2004-228 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190, available at <http://www.legifrance.gouv.fr/WAspad/RechercheExperteJorf.jsp> (retrieve text by law number); Caruso, *supra* note 176, at 370.

¹⁸² REGIS DEBRAY, *CE QUE NOUS VOILE LE VOILE: LA REPUBLIQUE ET LE SACRE* (2004).

¹⁸³ Bello, *supra* note 2, at 581. The law was passed on February 10, 2004. *Id.*

¹⁸⁴ Commentary to Law No. 2004-228 of March 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], March 17, 2004, p. 5190.

a school is not in itself incompatible with the principle of *laïcité*, but must not constitute an act of pressure provocation, proselytism, or propaganda' that impinges on the freedom of the other students or impedes the school's educational mission."¹⁸⁵ This ruling limited the application of the law and resulting punishment to those girls who were not promoting their religion or "troubling public order."

Deeply rooted in France's history is the strong belief that the educational system is one of the main places to apply the concept of *laïcité* and ensure that the young population of France is educated about it.¹⁸⁶ In fact, during France's colonial period, early in the twentieth century, Algerian children were taught in public schools of "our ancestors the Gauls." It is in the public school system, a key democratic acquisition of the French Revolution, that children become citizens. *Laïcité*, it is held, protects the youth of the country from the harmful influences of divisiveness,¹⁸⁷ permitting them to be themselves.¹⁸⁸ Although arguments were made that this law violates individual religious freedom, the National Assembly determined that banning large religious symbols in public schools fostered the educational purpose of the school by promoting equality instead of religious division. The law only bans large religious symbols from schools, but persons can still feel free to wear religious symbols in the metro systems, cybercafés, supermarkets, movie theaters, and all other public places.¹⁸⁹ Furthermore, students may still express their views through writings and free speech while at school, so long as others are not harmed by the language used.¹⁹⁰

Many criticisms of the law have arisen, particularly from a religious liberty perspective similar to freedom of religion arguments in the

¹⁸⁵ Bello, *supra* note 2, at 611 (quoting Conseil d'Etat, Assemblée générale (Section de l'intérieur), § 1, Nov. 27, 1989, available at http://www.conseil-etat.fr/ce/rapport/index_r_a_cg03_01.shtml).

¹⁸⁶ *Discours Chirac Loi Laïcité*, *supra* note 164; see also Elisa T. Beller, *The Headscarf Affair: The Conseil D'etat on the Role of Religion and Culture in French Society*, 39 TEX. INT'L L. J. 581, 593 (2004).

¹⁸⁷ *Discours Chirac Loi Laïcité*, *supra* note 164.

¹⁸⁸ Commentary to Law No. 2004-228 of March 15, 2004, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], March 17, 2004, p. 5190, available at <http://www.legifrance.gouv.fr/WAspad/RechercheExperteJorf.jsp> (retrieve text by law number); Legifrance, Dossiers Législatifs, http://www.legifrance.gouv.fr/html/actualite/actualite_legislative/liensbaselegifrance/MENX0400001L.htm (last visited Nov. 29, 2005).

¹⁸⁹ DEBRAY, *supra* note 182, at 21.

¹⁹⁰ *Id.* at 22.

United States. In addition, critics argue that the law encourages gender inequality — because only girls wear the Islamic headscarf, this law affects them to a greater degree than it does their male counterparts.¹⁹¹ In fact, a number of girls have been expelled from school for wearing an Islamic headscarf, and are not allowed to return until they agree to remove the headscarf during school hours.¹⁹² French government officials counter this allegation, claiming that the banning of large religious symbols, especially the Islamic headscarf, can help develop women's rights, since most Islamic women are forced by their families, particularly the men in their families, to wear the headscarf.¹⁹³ Regardless of whether the Headscarf Law victimizes or protects women, it certainly restricts public expression of religious identity.¹⁹⁴

Laïcité, and its place within universalism, never arose as an issue within the debate over Parity. Yet Parity has deeply impacted the understanding of the meaning of French universalism, transforming it into a gendered universalism.

C. Parity and Universalism: The Feminist Difference Debate

Parity originally aroused critiques that it violated France's universalist doctrine. In response, feminists had to convince the French that Parity would not violate this Universalism. They argued in favor of an

¹⁹¹ See also Jane Kramer, *Taking the Veil: How France's Public Schools Became the Battleground in a Culture War*, NEW YORKER, Nov. 22, 2004, at 58, 68 ("There has been a good deal of discussion about the veil law among women who consider themselves to be strong French feminists."). See generally Beller, *supra* note 186, at 612 ("[R]eligious apparel could also be banned from a school if it impeded the school's perceived ability to impart French culture or the idea of gender equality to the wearer of the scarf herself. Under the 2004 headscarf legislation, the prohibition of 'ostentatious' religious symbols provides a new space for challenges to the general rule.").

¹⁹² Gunn, *supra* note 164, at 454-55; see also Kramer, *supra* note 191, at 71; Bello *supra* note 2, at 619 ("[T]he students' refusal to remove their scarves constituted an interference with the normal functioning of their education, a disruptive violation of the school's order. The girls' expulsion was upheld.").

¹⁹³ Gunn, *supra* note 164, at 469-70 ("It is, of course, possible that many Muslim girls in France are, as the Commission suggests, coerced into wearing headscarves. We can also imagine the very real possibility that some are threatened with bodily harm if they do not conform to family or community wishes."); see also Kramer, *supra* note 191, at 71 (quoting Ghislaine Hudson, who sat on the Stasi Commission ("Muslim girls should be given the choice to free young women. And the law was aimed at protecting the minds of those girls'. In some ways it protects more. For girls, the burden of choosing not to veil is gone, too, and with it the fear of punishment at home.")).

¹⁹⁴ Indeed, when viewing the Headscarf Law from an American perspective, a First Amendment claim comes to mind.

understanding of “the duality of the human instead of the difference of the sexes.”¹⁹⁵ This effort succeeded in transforming French constitutional culture. The persuasiveness of the advocates’ arguments about the nature and benefit of women politicians representing women and the dissemination of the issue to mass culture, points to the sea of change in French political thought regarding the issue of sexual difference. Feminists succeeded in linking women’s right to representation to the functioning of French democracy itself.

Parity engendered a deep and lively debate among the practitioners of French legal culture. French feminist assertions of women’s difference from men provided a point of departure for attempting democratic innovation, presuming women’s difference and molding the electoral system around that difference.

Deeper inspection of debate over Parity among diverse advocates, intellectuals, and politicians, reveals several elements of French legal culture. First, it is a legal culture immersed in a concern both for gender equality and a consciousness of democratic innovation. Second, in the context of that culture, the debate over Parity has involved the tension, establishment, and interaction between the universalist basis for French democracy and feminist theories of difference.

1. Universalism’s Rejection of Quotas

The debate over Parity reveals tension and shifting opposition between the French tradition of universalism and the growing acceptance of theories of women’s difference asserted by French feminist theory.

Parity, many critics alleged, violated the fundamental principle of universalism. An earlier attempt to institute a 25% floor for women’s representation was rejected by the Constitutional Council in 1982.¹⁹⁶ France’s highest court in such matters declared such quotas invalid. The Constitutional Council normally reviews legislation only when requested to do so by the legislature. Here, the Constitutional Council seized on the opportunity of this quota law, without a request for its intervention, to invalidate the bill.¹⁹⁷ Although as a Civil Law country,¹⁹⁸

¹⁹⁵ Scott, *supra* note 23, at 42.

¹⁹⁶ Gisèle Halimi authored the proposed quota. Françoise Gaspard, a leading proponent of Parity, has argued that the Socialist Party, then in power, purposely allowed the bill to advance, anticipating its rejection by the Constitutional Council.

¹⁹⁷ GASPARD ET AL., *supra* note 79, at 140.

precedent is not law in France, the nature of the rejection by the Constitutional Council prompted advocates to seek versions of the quota law that would survive consideration by the Constitutional Council.

The Constitutional Council's substantive rejection of the quota law centered on the violation of the principle of equality in Article 6 of the Declaration of the Rights of Man and the Citizen.¹⁹⁹ This is because equality does not require that "different people be treated differently," it is just a concept "used essentially to designate prohibited grounds for differentiating between citizens with regard to the provisions of the law."²⁰⁰ The Council referred to Article 3 of the Constitution and Article 6 of the Declaration of the Rights of Man and the Citizen.²⁰¹ The former provision prevents a section of the people from exercising the democratic rights that belong to all. The latter provision states: "all citizens are equally eligible for all public functions, posts, and appointments, according to their ability and with no distinction other than their qualities and their talents."²⁰² Viewed from a certain angle, Parity in a sense discriminated among people for public posts, violating the universalism of the Declaration. As one commentator stated, referring to Parity, "[t]his sort of social corporatism would break the unity of universal suffrage."²⁰³ The 1982 Constitutional Court ruling defeated quotas in the short term, but the flourishing of feminist theory in France

¹⁹⁸ ALLWOOD & WADIA, *supra* note 91, at 207.

¹⁹⁹ *Id.* In 1982, the Constitutional Council ruled unconstitutional a proposed amendment requiring that no more than 75% of candidates on any list be of the same sex. The basis for this decision was Article 6 of the Declaration of the Rights of Man and the Citizen and Article 3 of the Constitution. Article 6 states that all citizens are equally qualified for positions based on their ability and talent. The Council thus held that "all citizens have an equal right to stand for election, and that it is unconstitutional to divide voters or candidates into categories." *Id.*

²⁰⁰ JOHN BELL, FRENCH CONSTITUTIONAL LAW 201 (1992).

²⁰¹ DECLARATION OF THE RIGHTS OF MAN AND CITIZEN art. VI (Fr. 1789) [hereinafter DECLARATION OF THE RIGHTS OF MAN]. The Declaration of the Rights of Man and the Citizen was adopted on August 26, 1789 by the French National Assembly. An English translation is reproduced by the Avalon Project at Yale Law School. See <http://www.yale.edu/lawweb/avalon/rightsof.htm> (last visited Oct. 12, 2005).

²⁰² *Id.*

²⁰³ GEORGE VEDEL, POLITIQUE DES SEXES (2001), *cited in* GRANRUT, *supra* note 95, at 31; *see also* Thompson, *supra* note 92, at 210. Voting is another area where equality is crucial and often debated. One early case dealt with questions about the size and composition of constituencies that still concern people today. This section describes the *Conseil's* approach to equality on electoral boundaries and the process of prohibiting irrelevant discrimination, while at the same time respecting relevant differences. The main objective is to create a rational relationship between voting procedures and the right to vote. *Id.*

fed reconsideration of the relationship between gender and universalism.

2. Feminist Theories: Women's Difference

Feminists have long debated theories of difference. Since the 1970s, French feminist theory, led by Hélène Cixous, Julia Kristeva, and Luce Irigaray, has delved into issues of women's difference from men.²⁰⁴ Of the three, Irigaray developed the most explicitly political examination of women's position in society. In that sense, although no particular philosopher or political theorist has dominated the debate on Parity in France, Irigaray's philosophy most closely approaches the theories espoused by the Parity movement. Early on, her philosophy emphasized the fundamental difference between women and men. One of her most well known works, *This Sex Which Is Not One*,²⁰⁵ explored the social meaning of women's biological difference from men. As men are unitary, women are multiple, Irigaray argued, even down to their genitalia.²⁰⁶ Women's multiplicity puts them in the social position of focusing on relational behavior. Irigaray explored how women's language expressed this relationship-centered existence, in which women constantly relate to others, consistently referring to their interlocutors.

With regard to women's political role in society, Irigaray has argued that women, as metaphysically distinct from men, have the right to citizenship which reflects their own existence.²⁰⁷ A certain number of French feminists disagreed with this "difference" theory, espousing instead the theory that women have the right to "equal" treatment.²⁰⁸ Other Parity advocates agreed with this position and advocated for Parity based on this assertion. Humanity is made up of women and men, advocates argued, and should be represented by a government reflecting this difference:²⁰⁹

²⁰⁴ Note that other strands of feminist theory, including equality feminism, are similar to many United States feminist theories including: difference feminism, universalist difference feminism, and critical feminism. ALLWOOD & WADIA, *supra* note 91, at 118-20. This piece focuses on universalist difference feminism and critical feminism.

²⁰⁵ LUCE IRIGARAY, *THIS SEX WHICH IS NOT ONE* (Catherine Porter trans., Cornell University Press 1985) (1977).

²⁰⁶ *Id.* at 23.

²⁰⁷ See Luce Irigaray, *L'Identite Feminine: Biologie ou Conditionnement Social?*, in GISELE HALIMI, *FEMMES: MOITIE DE LA TERRE MOITIE DU POUVOIR* 101 (1994).

²⁰⁸ ALLWOOD & WADIA, *supra* note 91, at 218-19.

²⁰⁹ *Id.*

Together, women and men combine to define and perpetuate the species. Together, they should combine in equal numbers to organize communal life. . . not in the name of the difference of one sex in relation to the other, but in the name of their dual participation in the human race.²¹⁰

Difference feminists' support for Parity presaged broader political aspirations. As Luce Irigaray argued:

[t]his right to a civil majority should be universal — on the condition of remembering that the universal is two, feminine and masculine This right to a civil majority requires a reworking of the codes of civility, of citizenship, the Civil Code, the Penal Code, the Charter of the Rights of Man; it requires the rethinking of the borders between natural law and civil law.²¹¹

Parity, such advocates argued, would reform the political system to reflect the fundamental difference between women and men.

3. Difference Though Universalism

This vision of women as fundamentally different from men, and as deserving separate representation based on that difference, seems to undermine the universalism that sits at the center of French democratic theory. However, Parity advocates began to emphasize that humanity was dual, instead of focusing on sex differences.²¹² Françoise Gaspard led a discussion that established women's differences by redefining the universal itself.²¹³

Central to this theory was the critique of the universal as fundamentally male. As one Parity advocate argued: "the universalism of the rights of man, sexless, becomes very quickly the moment to valorize the rights of the virile man, while pretending that it's about all of humanity."²¹⁴ Another stated: "It is paradoxical, but interesting to argue, that it was universalism that best maintained the sexualization of power, and that Parity attempts, by contrast, to desexualize power by

²¹⁰ GASPARD ET AL., *supra* note 79, at 2, cited in ALLWOOD & WADIA, *supra* note 91, at 219.

²¹¹ Irigaray, *supra* note 207, at 107-08.

²¹² Scott, *supra* note 23, at 42.

²¹³ Interview with Françoise Gaspard, *supra* note 102.

²¹⁴ Elizabeth Sledziewski, *Rapport sur les ideaux democratiques et les droits des femmes*, in JANINE MOSSUZ-LAVAU, *FEMMES/HOMMES POUR LA PARITE* 67 (1998). Note that Sledziewski generally supported an exclusively difference-based theory for Parity, unlike Gaspard.

extending it to both sexes. Parity would thus be the true universalism."²¹⁵ The universal individual was man and woman."²¹⁶ These Parity advocates argued that a universalism that ignores gender difference is a false universalism. Gaspard characterized the Parity movement as "not a declaration of war by one sex against another. It is, on the contrary, a gesture toward the establishment of a true dialogue between [male] citizens and [female] citizens."²¹⁷ Gaspard's vision of Parity reflects incorporating gender into the universalist constitutionalism of France without adhering to the radical essentialism of feminists such as Irigaray.

The practical establishment of Parity as an element of French universalism arose as feminists shifted from a quota requirement of one-fifth or one-quarter of candidates to the fifty percent Parity proposal. In so doing, their efforts reflected respect of the universalism underlying French constitutional theory. Parity, unlike quotas, was not to establish some minority representation, but rather to give representation to women. As Joan Scott has argued, the Parity effort succeeded not only in achieving the codification of its goals, but also redefined both French universalism and the feminist debate over essentialism.²¹⁸ In feminist theory terms, Parity de-essentialized essentialism by re-conceptualizing representation in terms of society's composition of men and women, instead of centering on the uniquely feminine identity in each woman. Although Parity seems to convey an essentialist structure of gender, culture and law, its advocates' vision of a dual universal may move toward de-essentializing essentialism in the context of political representation as well.

Critics of this redefined universalism alleged that it was nothing more than communitarianism, American style. French constitutional theory centers on the civic creed of universalism in contrast to the communitarianism prevalent in the United States, where society finds itself broken up into groups based on ethnicity, race, or sexual orientation.²¹⁹ As discussed above, increased attention to identity

²¹⁵ Françoise Collin, *Projets Feministes* 103, cited in Scott, *supra* note 23, at 42.

²¹⁶ *Id.*

²¹⁷ GASPARD ET AL., *supra* note 79, at 181. Gaspard expressed some concern about the consequences of difference theory: "One can criticize the Parity law of installing, in the name of equality, a differentialist system of a nature that would turn against women." *Id.* at 153.

²¹⁸ Scott, *supra* note 23, at 43.

²¹⁹ *Id.*

discourse challenges French efforts to depoliticize differences based on “republican resistance to communitarianism.”²²⁰ Feminists countered that women are not a group, but rather women cut across all interest groups and would not be a unified element in the legislature.²²¹ In the end, advocates succeeded with this argument — that women are half of

the universal, and do not constitute a group that would conflict with French universalist traditions.

4. French Women Without a Race?

Despite the lofty goals of French universalism and Parity, minority women’s identities are erased by this system that recognizes gender but ignores race. Minority women, as a consequence, may only find their political voice as culturally neutral (read “French”) women,²²² with their racial and ethnic identity rendered invisible. Without statistics on minorities, it is impossible to estimate the number of minority women who may benefit from Parity.

Intersectionality, the inseparability of multiple oppressed identities, bears a very different face in France from that in the United States, which focuses on race, ethnicity, and religion. Immigrant communities from North Africa and French West Africa carry cultural identities that distinguish them from many French people. Yet women from these backgrounds must face discrimination specific to their subject position, which cannot be analyzed merely from a North African perspective or from a woman’s perspective. In France, as in the United States, because the intersectional experience goes well beyond the sum of racism/ethnocentrism and sexism, ignoring intersectionality cannot sufficiently address the particular manner in which minority women are subordinated.²²³ The deliberate invisibility of race in French officialdom

²²⁰ ALLWOOD & WADIA, *supra* note 91, at 221; *see also*, Mansbridge, *supra* note 21, at 32 (“[T]he Parity movement . . . also counters the argument from French universalism with its cherished difference from the group-oriented politics of the United States and other countries.”); Joan W. Scott, ‘La Querelle des Femmes’ in the Late Twentieth Century, 226 *NEW LEFT REV.* 3, 3-19 (1997).

²²¹ Scott, *supra* note 23, at 43.

²²² In a sense, the French state’s actions recall bell hooks’s statement in *Ain’t I A Woman?*, in which she denounced the white women’s movement for universalizing white notions of woman, thereby erasing the existence of black women. *See generally* HOOKS, *supra* note 73.

²²³ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 *U. CHI.*

adds complexity to intersectionality issues in France. United States studies of intersectionality, while critical of the enforcement of anti-discrimination doctrine, at least rely on official recognition and some enforcement of anti-racist discrimination laws. In France, minority women literally count as women, but cannot count as minorities; they certainly do not count as minority women.

Governed by the universalist rule of *laïcité*, minority communities face socio-economic exclusion that, unlike women's representation, cannot be addressed through state action. The resolution of the Parity debate, provision or some electoral guarantees for women, stands in marked contrast with the rights of racial and ethnic minorities.

D. Summary: A Gendered Universalism

Parity and *laïcité* reflect a fundamentally French perspective on the relationship between gender, race and democracy. As Joan Scott has argued, Parity's construction as a response to a dual universalism reflects the French conception that Parity is not a quota. France's shift from a strict universalism to a "Parity democracy" in a short few years clearly illuminates how France's legal culture links democracy with gender, and universalism with difference. France's historical connection to the ideal of universalism has led to disparate results with regard to women's rights and minority rights. While Parity succeeded in establishing women's right to representation, strict interpretations of *laïcité* have left racial, ethnic and religious minorities not only uncounted but also subject to restrictions of self-expression. This contrast within universalism leaves intersectional women aside. France's attempt to

LEGAL F. 139, 140. Crenshaw describes the bind black women face by liberation movements:

Black women are regarded either as too much like women or blacks and the compounded nature of their experience is absorbed into the collective experiences of either group or as too different, in which case black women's blackness or femaleness sometimes has placed their needs and perspectives at the margin of the feminist and black liberationist agendas. While it could be argued that this failure represents an absence of political will to include black women, I believe that it reflects an uncritical and disturbing acceptance of dominant ways of thinking about discrimination.

Id. at 150. Though I quote extensively from this brilliant piece of legal scholarship, a closer familiarity with Crenshaw's argument would certainly enrich the reader's understanding of my argument. See also Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay "Victories,"* 4 L. & SEXUALITY 83, 87 (1994).

resolve the relationship between democracy and identity (whether gender, racial, ethnic or religious) proves an interesting contrast with the United States. The United States' undeniable under-representation of women and its long history of racial and ethnic subordination highlight the need for further inquiry.

III. DISPARITY: WOMEN'S LACK OF REPRESENTATION IN THE UNITED STATES

Parity embodies a radically different understanding of the relationship between democracy and group rights. Parity poses a host of challenging questions for non-French legal thinkers. Other scholars have raised and examined questions of how government constructs impact gender representation. What blindspots of the United States legal system may be revealed by examining Parity in a comparative framework?²²⁴ First, it becomes clear that the United States shares France's respect for the Law's neutrality with regard to group rights. As addressed in Part I, liberals reject quotas as violating the neutrality of the Law, while critical thinkers oppose quotas as fostering essentialist constructions of identity.

Parity allows us to re-think the relationship between a neutral state and group rights. Can some provisions for women's representation be constructed to reflect the United States' profound antipathy toward quotas? This section will build on Parity with the concept of fluidity to answer both liberal and critical arguments against quotas.²²⁵ Fluidity already defines much United States jurisprudence on remedies for group inequality. Given this fluidity, some remedy for electoral gender inequality would fit within the context of United States neutrality. Reconsidering descriptive representation in the context of Parity and fluidity raises the prospect that quotas, particularly fluid quotas, may not foster essentialism or violate neutrality. Parity reflects a different, but not entirely foreign, iteration of a democratic response to inequality.

A. *French Universalism and United States Neutrality*

Although the democracies of the United States and France share temporal and philosophical origins, many French commentators draw sharp distinctions between France's strict adherence to universalism and the opposing "communitarian" style of the United States. Under this

²²⁴ See generally ROLAND BARTHES, *EMPIRE OF SIGNS* (1982).

²²⁵ See generally Mansbridge, *supra* note 21.

French view, the law of the United States reflects the jumble of groups that constitute the nation, respecting racial and language differences.²²⁶

To the contrary, the United States, as well as France, observes the neutrality of the law. Although not labeled as universalism, and not treated as such by the wider public as a civic religion the way universalism is in France, United States constitutional jurisprudence reflects a very similar value of neutrality.²²⁷ The general principle of neutrality requires that “the government may not play favorites; it must be impartial.”²²⁸ A product of the Enlightenment, the liberal state radically departed from earlier social structures that distinguished among people based on their birth. Universally-applied rights attempted to extinguish the *Ancien Régime’s* inequalities.

Centuries later, across the Atlantic, official classlessness continues as the centerpiece of United States democracy. As Justice O’Connor stated in her dissent in *Metro Broadcasting*, “[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.”²²⁹ Treating individuals differently based on group identity, in that case — race — violates “the Nation’s widely shared commitment to evaluating individuals upon their individual merit.”²³⁰ This emphasis on the individual neatly matches in some ways the emphasis on the citizen in French constitutional thought.²³¹ Finally, as quotas arouse nearly universal repudiation in the United States, we must recall that Parity advocates argued that the law was not a quota, envisioning a republic composed of *citoyens* and *citoyennes*.²³² Thus, despite French commentary to the contrary, French universalism finds a close match in United States

²²⁶ *Id.* at 32.

²²⁷ *But see* Martin Wolf, *When Multiculturalism Is a Nonsense*, FIN. TIMES (London), Aug. 31, 2005, at 11 (contrasting against British response to multiculturalism: “[t]he American and French response to the challenge of creating the needed identities (and so identification with the polity) has been to create a civic creed”).

²²⁸ Sunstein, *supra* note 22, at 1.

²²⁹ *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (quoting *Az. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1083 (1983)) (citations omitted).

²³⁰ *Id.* at 603.

²³¹ *See* DECLARATION OF THE RIGHTS OF MAN, *supra* note 201.

²³² OLYMPE DE GOUGES, DECLARATION DES DROITS DE LA FEMME ET DE LA CITOYENNE (1791).

neutrality.²³³

As French universalism faced feminist criticism, United States neutrality has been criticized by some as a false justification for the distribution of advantages under our constitutional doctrine.²³⁴ Cass Sunstein questions the presumption that neutrality is fair because it draws on old biases and stereotypes.²³⁵ The notion of “equality,” Sunstein asserts, cannot be detached from references to old values and distributions because the concept is dependent upon how the government normally ensures equality, rather than on how it should ensure equality.²³⁶ The baseline of neutrality, in a constitutional context, must be adjusted through a substantive debate that is not reliant upon what is considered “natural.”²³⁷ Finally, Sunstein criticizes the gendered nature of neutrality much in the way that French feminists criticized universalism — as legal rules reflecting male norms that subjugate women.²³⁸

French universalism and United States neutrality share similarities in their underlying philosophy as well as in their relationship to responses to group inequality. To suggest a theoretical framework for resolving this dilemma, Jane Mansbridge’s theory of fluidity provides a strong basis for conceptualizing remedies that straddle the relationship between democracy and identity.

B. Fluidity and the Anti-Essentialist Examination of Quotas

Jane Mansbridge’s work on anti-essentialist arguments for quotas provides useful thinking on how to incorporate lessons from Parity. Mansbridge advocates for the adoption of more ‘fluid’ remedies for

²³³ The author thanks Sheila Foster for sharing many of these parallels.

²³⁴ Sunstein, *supra* note 22, at 1-2.

²³⁵ *Id.* at 2-3.

²³⁶ *Id.* at 5-8.

²³⁷ *Id.* at 12-13.

²³⁸ *Id.* at 3. Legal practices have relied on social norms to justify inequality in the workplace where women are discriminated against in job placement and advancement because of the traditional notion of women being the caretakers and men being the breadwinners. *Id.* at 16. Male physical capacities often serve as the baseline to determine women’s treatment, instead of changing the baseline to view women in their own context. *Id.* at 3. The issue of abortion, as Sunstein argues it, concerns freedom from discrimination rather than a woman’s right to privacy. *Id.* at 49. The norm is to view the situation from what society considers a woman’s natural role, but this is a stereotype. Neutrality, Sunstein points out, moves biological sex differences into the legal sphere of constitutional rights. *Id.* at 49-52.

group inequality. "Permanent quotas are both static and highly essentializing — they imply, for example, that any 'woman' can stand for all "women," any "black" for all "blacks." They do not respond well to constituents' many-sided and cross-cutting interests." Fluid, experimental remedies, grounded in historical rationales, do not foster essentialist notions of identity.²³⁹

Mansbridge charts a spectrum of remedies for political underrepresentation from least fluid to more fluid. Less fluid remedies include those in constitutions instead of legislation or political party rules. Guaranteed seats are less fluid than guaranteed candidacies, which permit voters to choose.²⁴⁰ Such a quota, if legislated, is more easily revised than one in a constitution.²⁴¹ Party-level quotas are still more fluid, as political parties are not official arms of the government.²⁴² Mansbridge places majority-minority districts, the principal remedy in the VRA, in this middle area, as they encourage, but do not mandate, the election of members of certain groups through districting.²⁴³ Most fluid are "enabling devices," policies that encourage members of subordinated groups to seek office.

Examples of "enabling devices" are schools and funding for potential candidates, caps and public funding of nomination campaign expenses,

²³⁹ Mansbridge, *supra* note 21, at 30.

²⁴⁰ Note that the Parity law does not quite fit into this category as it requires political parties to nominate women, not that voters elect women, making Parity a substantially more fluid remedy. For quotas in India, see Jason Morgan-Foster, *From Hutchins Hall to Hyderabad and Beyond: A Comparative Look at Affirmative Action in Three Jurisdictions*, 9 WASH. & LEE RACE & ETHNIC ANC. L.J. 73, 87-92 (2003).

²⁴¹ This would include legislated quotas for seats in legislatures, such as India's bill to institute a quota for seats in the Indian Parliament. India also has a law that requires a third of all village leaders be women. This law has been the subject of a detailed statistical study by Esther Duflo of M.I.T. Esther Duflo & Raghavendra Chattopadhyay, *Women as Policy Makers: Evidence from a Randomized Policy Experiment in India*, 72 ECONOMETRICA 1409 (2004), available at http://econ-www.mit.edu/faculty/download_pdf.php?id=437. This would also include legislative quotas for nominations by political parties, such as Brazil's *Lei das Cotas*.

²⁴² These quotas are widespread, having been adopted by many progressive parties in Europe in the 1990s.

²⁴³ The Voting Rights Act requires, in some instances, majority-minority districting. See Voting Rights Act, 42 U.S.C. § 1973 (1965); Darren Rosenblum, *Geographically Sexual: Advancing Lesbian and Gay Interests through Proportional Representation*, 31 HARV. C.R.-C.L. L. REV. 119, 140-45 (1996); see also *Thornburg v. Gingles*, 478 U.S. 30, 45-51 (1986). She also, erroneously I believe, places proportional representation and cumulative voting systems here. Although proportional representation may provide more minority representation, such systems do a better job of including diverse opinions, not just identity-based minorities. Certain proportional systems provide greater minority representation.

and formalized party committees to find and encourage candidates from disadvantaged groups. Another element, more relevant in developing countries than in countries with established social welfare systems, is daycare for public officials. Such “enabling devices,” subject to context-related revisions, bring fluidity to remedies for group inequality, and for electoral gender inequality in particular.²⁴⁴

Parity lacks fluidity as a permanent part of the French Constitution, but recovers some fluidity in requiring candidacies rather than seats.²⁴⁵ Indeed, as discussed above, Parity permits voters to exhibit a preference for male candidates.²⁴⁶ In this sense, Parity provides equality of opportunity rather than equality of outcome. Although United States observers may view Parity as less fluid, as Joan Scott argues, Parity was not designed to accommodate a group, but to recognize the Republic’s

duality.²⁴⁷ Regardless, Parity does lack the fluidity necessary to avoid the essentializing consequences of quotas.

C. *Beyond the Bugaboo of Quotas: Fluidity in United States Remedies for Group Inequality*

Quotas, as established in Part I, are an anathema in the United States. According to the Supreme Court in *Grutter*, a “quota” means “a program in which a certain fixed number or proportion of opportunities are reserved exclusively for certain minority groups.”²⁴⁸ Quotas rigidly “impose a fixed number or percentage which must be attained, or which cannot be exceeded.”²⁴⁹ Quotas, as Justice Powell stated in *Bakke*, “insulate the individual from comparison with all other candidates for the available seats.”²⁵⁰ A quota such as Parity potentially violates several

²⁴⁴ Mansbridge, *supra* note 21, at 31. .

²⁴⁵ For example, India’s bill provides for a requirement of a certain number of seats. Sumita Ray, *The Women’s Reservation Bill of India: A Political Movement Toward Equality for Women*, 13 TEMP. INT’L & COMP. L.J. 53, 54 (1999).

²⁴⁶ Frechette et al., *supra* note 102, at 5-6.

²⁴⁷ It is worth noting, however, that Mansbridge dismisses the pro-Parity arguments of French feminists that democracy should be half female because the universal is “essentially binary.” Mansbridge, *supra* note 21, at 33.

²⁴⁸ *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (1989) (plurality opinion), *quoted in Grutter v. Bollinger*, 539 U.S. 306, 335 (2003).

²⁴⁹ *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 495 (1986) (O’Connor, J., concurring in part and dissenting in part), *quoted in Grutter*, 539 U.S. at 335.

²⁵⁰ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (Powell, J.), *quoted in, Grutter*, 539 U.S. at 335.

constitutional protections, not least of which is the First Amendment right of political parties.²⁵¹

As defined in United States jurisprudence, only those “least fluid” remedies merit a label of “quota.” Parity, which reserves candidacies for women, would qualify as a quota under United States jurisprudence. On the other hand, majority-minority districts or “enabling devices” may not properly merit the label quota. As addressed in Part I, the label “quota” itself provokes a visceral reaction, sinking any chance of adoption. Defining quota as including any remedy for group inequality, fluidity provides the most potential for considering Parity in the United States context.²⁵² Parity, as a remedy for inequality, raises the question of

²⁵¹ Were the U.S. to institute a law that would impose gender requirements on candidates nominated by political parties, such a law might face a successful challenge as an unconstitutional intrusion into the political parties’ First Amendment rights. See, e.g., *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575-76 (2000). In that case, the Supreme Court struck down the California law as an unconstitutional intrusion into the political parties’ right to associate and stated that “[s]tate interests promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy not sufficiently compelling to justify intrusion into political parties’ associational rights In no area is the political association’s right to exclude more important than in the process of selecting its nominee.” *Id.* at 584; *Tashjan v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986) (striking down Connecticut statute, section 9-431, which required voters in any political party primary to be registered members of that party, because statute “impermissibly interfered with political party’s First Amendment right to define its associational boundaries.”). In *Tashjan*, the Court held that the Constitution conferred limited powers on states to regulate the inner workings of political parties and that “[A] State or a court, may not constitutionally substitute its own judgment for that of the Party. The Party’s determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution.” *Id.* (citation omitted); see also *Democratic Party of U.S. v. Wisc ex rel. La Follette*, 450 U.S. 107, 124 (1981) (holding that “[a] political party’s choice among various ways of determining makeup of a state’s delegation to party’s national convention is protected by the constitution. . . the courts may not interfere on the ground that they view a particular expression of First Amendment freedoms as unwise or irrational”); *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973) (holding that freedom to associate with political party of one’s choice “is an integral part of this basic constitutional freedom”); Lisa Schnall, Comment, *Party Parity: A Defense of the Democratic Party Equal Division Rule*, 13 AM. U.J. GENDER SOC. POL’Y & L. 381, 391-92 (2005) (arguing that so long as courts continue to grant political parties expansive associational rights, Equal Division rules, rules that guarantee women half of available slots in institutions, particularly political, cannot be implemented by State or Federal governments).

²⁵² This determination as to which groups merit some quota depends on a normative evaluation of the justifications for differential treatment. Many others have treaded on this debate. Mansbridge herself argues that quota remedies may be appropriate in historical contexts of 1) a history of communicative distrust; and, 2) uncrystallized interests. Mansbridge, *supra* note 21, at 19. Communicative distrust points to the reality that communication between groups “varies from group to group and from era to era . . .

how the United States balances the law's neutrality with group inequality remedies.

Presenting these various remedies for underrepresentation (and indeed a similar spectrum could be presented for antidiscrimination remedies) exposes the limitations of blind opposition to quotas and other group inequality remedies. Fluidity also provides an analytic structure for assessing which groups merit consideration for differential treatment while maintaining an anti-essentialist awareness. In contrast, other scholars who have advocated quotas rely on reified subordinate identities.²⁵³ Starting from anti-essentialist theory, fluidity already constitutes one of the strongest currents in United States jurisprudence on remedies for group inequality.

1. United States Jurisprudence Increasingly Reflects Fluidity

Fluidity, it may be argued, already characterizes Supreme Court jurisprudence on affirmative action and districting. In both areas, over the course of decades, the Court has established a perspective on the relationship between the neutrality of the state and racial identity. This

particularly if one group is historically dominant and the other historically subordinate." *Id.* at 21. In the context of such group relations, members of subordinate groups may trust other members of that group more than members of the "dominant" group. Mansbridge asserts that such communicative distrust exists between whites and blacks in the United States, and to a lesser extent between men and women. *Id.* at 22. "Uncrystallized interests," according to Mansbridge, exist where "citizen interests on particular issues . . . have not been on the political agenda long, candidates have not taken public positions on them, and political parties are not organized around them." *Id.*

²⁵³ Alex Johnson, for example, advocates the use of quotas in higher education admissions on the subordination of minorities. Johnson advocates the use of quotas because "not much has changed with respect to the condition of minorities in our society and their position vis-à-vis whites," and that "the manipulation of the concept of 'merit' in our society" has led to a consistent subjugation of blacks. Johnson Jr., *supra* note 66, at 1043-46. Johnson recognizes that the presumption that quotas violate the neutrality of the state has been used to defeat affirmative action programs. Johnson has argued that "all affirmative action programs, irrespective of whether quotas were or were not used, were initially mischaracterized as quota programs designed to usurp white males' rights and jobs. Thus, notwithstanding the evidence to the contrary, the effects of affirmative action programs were distorted to raise the specter that significant white jobs and opportunities would be lost unless 'quota-type or based affirmative action programs' were reigned in." *Id.* at 1059. For Johnson, the use of mandatory quotas would help rectify this situation by making minority representation in educational institutions proportional to representation in society as a whole, for qualified individuals. *See id.* at 1044. Johnson's more traditional pro-quota argument would benefit from Mansbridge's fluidity point, that the potential ill effects of quotas may be mitigated through the fluidity in remedies advocated by Mansbridge.

jurisprudence has clearly indicated support for policies that emphasize a multiplicity of factors over hard numbers and “wooden” racial identity. Focusing on remedies for racial inequality in the gender context requires the acknowledgment that issues of race and gender arouse distinct debates and concerns. However, the advanced level of debate over affirmative action in the United States makes it the logical point of departure for an examination of the relationship between the neutrality of the state and remedies for group inequality.

Although fluidity draws on critical theory, it answers liberal concerns that quotas violate the neutrality of the liberal state. Fluid remedies may achieve the goals set out by Bruce Ackerman and others regarding the institution of measures improving equality in society.²⁵⁴ Ackerman’s objection to affirmative action as focusing on inequality points towards the need to pursue goals with consistent methods. Explicitly fluid remedies may remedy group inequality in specific circumstances with clear goals, and lack the negative effects that lead Ackerman and others to reject differential treatment.

The following subpart will summarize this widely-discussed area of the law to demonstrate the ample parallels between current jurisprudence and Mansbridge’s fluidity argument. It is interesting that fluidity, an anti-essentialist argument arising from critical theory, can be described as defining recent United States jurisprudence on balancing neutrality and remedies for group inequality.

2. Fluidity in Race-Conscious Districting

Districting cases since the early 1990s have attempted to define what constitutionally acceptable race-consciousness looks like. In *Shaw v. Reno*,²⁵⁵ the Supreme Court initiated a line of cases in which it began to limit, some say drastically, the level of race-consciousness a state may employ in drawing districts.²⁵⁶ In *Shaw*, the Court held that a black-majority North Carolina district violated the constitutional rights of the district’s voters, who were forced to be part of a voting district plainly designed to be a black majority district. Justice O’Connor characterized the dilemma as one in which blacks had to suffer the “stigma” of being part of a district designed by race-conscious legislators to provide

²⁵⁴ See, e.g., ACKERMAN & ALSTOTT, *supra* note 58.

²⁵⁵ *Shaw v. Reno*, 509 U.S. 630 (1993).

²⁵⁶ See Lani Guinier, (*E*)*racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109, 109-10 (1994) [hereinafter Guinier, (*E*)*racing Democracy*].

representation for them.²⁵⁷ *Miller* and other subsequent cases extended the line of Supreme Court inquiry around whether race is the predominant factor in district-line drawing.²⁵⁸

More recently, in *Georgia v. Ashcroft*,²⁵⁹ the Court substantially weakened section 5 of the VRA by upholding Georgia's refusal to alter its redistricting plan as ordered by the District Court. The decision broadened a State's right to preclude a plan even if it reduced minority voters' ability to elect their preferred representatives, as long as it preserved their "opportunity to participate in the political process."²⁶⁰ This reasoning provoked the criticism that the Court separated minorities' section 5 protection from their opportunity to win elections. Given Georgia's history of racial discrimination, the result may "depress a minority group's voting strength."²⁶¹ Without "the invaluable bargaining chip" of section 5, minority voters' effective exercise of the franchise will be weakened.²⁶² If section 5 remains an essential remedy for black underrepresentation, it bears a mark of fluidity in that its status is not permanent — it is up for reauthorization in 2007.²⁶³ Between *Shaw* and *Georgia v. Ashcroft*, the movement on the Court clearly has been toward increasingly strict adherence to, in the Court's own language, "colorblindness" over "race-consciousness."

Despite this movement toward "neutrality," race-consciousness is still necessary and constitutional. As Peter Rubin has argued, that some level of race-conscious districting may be required to prevent vote dilution:²⁶⁴ "A properly tailored examination of the use of race in the drawing of

²⁵⁷ *Shaw*, 509 U.S. at 689 (Souter, J., dissenting) (providing an interestingly suggestive critique of the notion of "stigma"). *Shaw* also emphasized the bizarre geographic shape of the voting district as a factor in the Court's conclusion that the construction of the district violated the Equal Protection Clause. See Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 483-84 (1993).

²⁵⁸ Darren Rosenblum, *Overcoming "Stigmas": Lesbian and Gay Districts and Black Electoral Empowerment*, 39 HOW. L.J. 149, 151, 159 (1995).

²⁵⁹ *Georgia v. Ashcroft*, 539 U.S. 461, 537 (2004).

²⁶⁰ *Id.*

²⁶¹ Pamela Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 31 (2004).

²⁶² *Id.* at 35. But see Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1731 (arguing that Section 5 may have succeeded in its purpose and that its re-authorization in 2007 may not be necessary).

²⁶³ Issacharoff, *supra* note 262, at 1731.

²⁶⁴ Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1, 32 (2000).

electoral districts — an examination that could appropriately be denominated “strict” — would begin by identifying which of the possible risks and harms associated with the government’s use of race are present in the context of race-conscious districting, and, more specifically, which of these risks and harms are present in the particular districting plan at issue.”²⁶⁵ Instances of permissible race-consciousness include those where race is a factor, but not the predominant factor. Critics have argued that this race-consciousness balance merely waters down the VRA’s standards and permits discrimination anew.

A charitable interpretation of this awareness and avoidance of race in districting may be said to reflect some attempt at balancing the neutrality of the state with concerns for group inequality. Critics of the Court’s introduction of colorblindness into the discourse after *Shaw* appropriately argue that it weakens the already balanced test used for district line drawing. Recoiling from “wooden” classifications, the Court’s hardening of neutrality nonetheless reflects some level of fluidity. As with districting, United States jurisprudence elevates fluidity in remedies in the affirmative action context.

D. Fluidity in Affirmative Action

Districting that balances the neutrality of the state with remedies for racial inequality does reflect some fluidity, but the more impassioned discussion arises in affirmative action. This most central terrain in the debate over remedies for inequality lies in expanding access to education in a knowledge-based economy such as that of the United States. As many have argued, university education is the “guardian at the gate of our democratic ideals,”²⁶⁶ ensuring the maintenance of our “opportunarian ideals.”²⁶⁷ Fluidity colors the direction of recent affirmative action cases. On June 23, 2003, the Supreme Court of the United States decided two parallel cases, *Grutter v. Bollinger* and *Gratz v. Bollinger*, involving race-conscious admission processes at the University of Michigan Law School and at the University of Michigan.²⁶⁸

To summarize these cases, in *Gratz*, the Office of Undergraduate

²⁶⁵ *Id.* at 123.

²⁶⁶ Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 113 (2003) [hereinafter Guinier, *Admissions Rituals*].

²⁶⁷ E. DIGBY BALTZELL, *THE PROTESTANT ESTABLISHMENT: ARISTOCRACY AND CASTE IN AMERICA* 351 (1964), *quoted in* Guinier, *Admissions Rituals*, *supra* note 266, at 113.

²⁶⁸ See *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Admissions assigned a value to each of several factors, including performance measures as well as elements of the applicant's identity.²⁶⁹ Under the earlier version of their policy, virtually all qualified African-American, Hispanic, and Native American applicants were granted admission because they were considered to be "underrepresented minorities" by the university.²⁷⁰ Over the course of the late 1990s, the formula changed, always accommodating some recognition of racial diversity.²⁷¹ After being denied admission in 1995 and 1997, petitioners brought suit, claiming violations of the Civil Rights Act and the Equal Protection Clause.²⁷² In its analysis, the Supreme Court applied strict scrutiny to examine whether the policy used "narrowly tailored means that further compelling governmental interests."²⁷³ In *Gratz*, the Court rejected the undergraduate admissions policy as failing to consider each

²⁶⁹ Points were assigned to each factor, totaled, and added to the applicant's Grade Point Average ("GPA") to yield a "GPA 2" score. When marked on a grid containing GPA 2 scores on the vertical axis and SAT/ACT scores on the horizontal axis, applicants would fall into certain regions of a grid. These regions would dictate one or more steps to be taken. See *Gratz*, 539 U.S. at 254. For example, placement on the grid would indicate which applicants should be admitted or rejected. In addition, the grid indicated when decisions should be delayed for further information or postponed for further consideration. See *id.*

²⁷⁰ See *id.* at 253-54. During the period relevant to the litigation, the University changed its admissions guidelines several times. However, the significant factors are outlined. See *id.* at 253.

²⁷¹ In 1995, applicants with identical GPA 2 and SAT/ACT scores "were subject to different admissions outcomes based on their racial or ethnic status." *Id.* In 1997, additional factors such as "underrepresented minority status, socioeconomic disadvantage, or attendance at a high school with a predominantly underrepresented minority population" were considered. This policy resulted in Caucasian in-state applicants falling in one region on the grid having their applications postponed for a final decision while a minority applicant falling within the same cell being admitted. See *id.* In 1998, the admissions policy was again changed, this time in favor of a "selection index." Applicants could score a maximum of 150 points, based on a combination of the factors enumerated above. In addition, applicants could be awarded an additional 20 points if they were members of underrepresented ethnic or minority groups. See *id.* Students scoring between 100 and 150 would be granted admissions, between 95 and 99 were either admitted or postponed, between 90 and 94 postponed or admitted, 75 and 89 delayed or postponed, and 74 or below were delayed or rejected admissions. See *id.*

²⁷² The suit was based on Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 200d, and the Equal Protection Clause of the Fourteenth Amendment. See *Gratz*, 539 U.S. at 257. Under that clause of the Fourteenth Amendment, "no State shall . . . deny to any person within its jurisdiction the equal protection of laws." Title VI provides that "no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

²⁷³ *Id.* (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). Strict scrutiny is always applied in cases where race is a factor.

applicant on an individual basis.²⁷⁴

In *Grutter*, the Court upheld the Law School's race-conscious admissions process because it required the review of a broad range of applicant materials and incorporated flexibility in assessing applicants' talents, experiences, and potential to contribute to classmates' learning.²⁷⁵ According to written policy, Law School admission was not granted unless applicants were expected "to do well enough to graduate with no serious academic problems."²⁷⁶ The Law School policy did not provide for an automatic admission or rejection based on calculations, but rather took account of a variety of "'soft' variables,"²⁷⁷ one of which was the goal of achieving "diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts."²⁷⁸

These two cases, following *Bakke*, reflect a substantial level of fluidity, advocating admissions programs that advance diversity through "individualized non-mechanical review."²⁷⁹ Justice O'Connor's view in *Grutter* is that an admissions program "must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."²⁸⁰ This contextualized analysis avoids numerical scores with automatic admissions results.

Despite the implicit recognition that admissions policies must necessarily pay "some attention to numbers" the Court has rejected numerical goals as quotas,²⁸¹ because of the lack of flexibility in such

²⁷⁴ See *id.* at 271. This precedent was outlined by Justice Powell in his opinion in *Bakke* where race and ethnic background considerations were permissible as "plus" factors in the admissions process. In accordance with *Bakke*, admissions systems should be flexible enough to consider all relevant elements of diversity. Each applicant should be considered as an individual capable of contributing "to the unique setting of higher education." *Id.*

²⁷⁵ See *Grutter v. Bollinger*, 539 U.S. 306, 315 (2003).

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* The term "diversity," as used by the Law School, was not limited to racial and ethnic characteristics. See *id.* Race and ethnicity were, nevertheless, considered "plus" factors. Instead, the school focused on characteristics that would contribute to classes composed of students capable of continuing the tradition of Michigan graduates. See *id.* at 316.

²⁷⁹ *Id.* at 334. For a persuasive argument on the flexibility requirement in affirmative action post-*Grutter*, see Leslie Yalof Garfield, *Back to Bakke: Defining the Strict Scrutiny Test for Affirmative Action Policies Aimed at Achieving Diversity in the Classroom*, 83 NEB. L. REV. 631 (2005).

²⁸⁰ *Grutter*, 539 U.S. at 336.

²⁸¹ *Id.* (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 323 (1978)).

targets.²⁸² Justice Souter, in his dissent in *Gratz*, defined a quota as something that “‘insulate[s]’ all nonminority candidates from competition from certain seats.”²⁸³ Instead of quotas, in light of the rulings in *Grutter* and *Gratz*, scholars and advocacy groups have endorsed greater experimentation in diversity programs to evaluate applicants holistically and “periodically review whether race-neutral alternatives exist.”²⁸⁴

Fluidity finds substantial support in affirmative action theory. Prior to *Grutter* and *Gratz*, Akhil Amar and Neal Katyal argued that more recent considerations of affirmative action suggest fluid remedies. “Race-based classifications impose wooden notions of what it means to be diverse; racial considerations, by contrast, permit and indeed require evaluation of a whole person.”²⁸⁵ Amar and Katyal contrast current, fluid standards with quotas, which “create the impression that minority students are admitted because of the seats wholly set aside for them and only them, and they imply that race is altogether different from other diversity factors in the ‘normal’ and ‘pure’ admissions process.”²⁸⁶ Amar and Katyal argue that successful affirmative action programs depend on moving beyond “wooden” categories toward fluid remedies.²⁸⁷

Post-*Grutter* scholars have followed this emphasis. As Lani Guinier argues: “admissions decisions are a process, not . . . a fixed point on a

²⁸² *Id.*

²⁸³ *Gratz v. Bollinger*, 539 U.S. 244, 293 (2003) (quoting *Bakke*, 438 U.S. at 317).

²⁸⁴ Guinier argues that after *Grutter* and *Gratz*, “the leadership in higher education needs to be bold.” Guinier, *Admissions Rituals*, *supra* note 266, at 222; Mexican American Legal Defense and Educational Fund (MALDEF) et al., *Bend It, Don’t End It: Affirmative Action and the Texas Ten Percent Plan After Grutter and Gratz*, 8 HARV. LATINO L. REV. 33 (2005). As MALDEF argues, the Supreme Court ruling in *Grutter* overrules a Texas state court decision holding that the desire to obtain a diverse student body was not a compelling reason justifying minority school admissions using affirmative action. The Texas plan guaranteed placement in any Texas public university for students graduating high school in the top ten percent or higher. The ten percent plan has contributed to racial, socio-economic, and geographical diversity at Texas schools. The ten percent rule, however, according to MALDEF, should not be used alone; it should be combined with other affirmative action programs. The authors point out that minority admissions at Texas A & M, particularly black admissions, dropped from over 18% before the ten percent plan was implemented to just over 12% after implementation, despite the increasing number of minority graduation. Similar figures are present at other institutions across the state. *See id.* at 35.

²⁸⁵ Akhil Reed Amar & Neal Kumar Katyal, *Bakke’s Fate*, 43 UCLA L. REV. 1745, 1772 (1996).

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 1776.

scale . . . using numbers as a source of accountability rather than certainty.”²⁸⁸ Anti-subordination remains the goal of affirmative action.²⁸⁹ O’Connor’s insistence that affirmative action remedies for inequality be limited to a term of twenty-five years reflects the goal of keeping remedies fluid so that affirmative action programs do not reify the same subordinated identities they intend to subvert.²⁹⁰

The fluidity of United States remedies for group inequality directly applies to the questions raised by Parity regarding electoral gender inequality.

E. *Women, the Underrepresented Gender*

The United States will not adopt Parity because of the reasons in Part I, above, that make it such a foreign concept. In addition, as discussed above, Parity’s provisions lack the fluidity that typifies United States remedies for group inequality. Parity does, however, suggest new ways for United States scholars to consider the balancing of neutrality and group inequality remedies. It also suggests that United States commentators consider the possibility that: 1) women may be underrepresented in the United States political system and that 2) this inequality merits a remedy.

As stated in Part I, this Article does not seek to present a complete argument that electoral gender inequality should be remedied. Rather, it argues that an appropriately fluid remedy for electoral gender inequality would belong within the tradition of group inequality remedies that coexist with neutrality principles. If it can be said that some of the remedies Mansbridge labels “quotas” do not violate the neutrality of the liberal state, as a normative question, should some remedy for electoral gender inequality be adopted? In addition, extending current voting rights structures, as some have argued²⁹¹ would fail to remedy a problem that concerns gender and not race, which has been the focus of voting rights remedies. Fluidity mandates that remedies for underrepresentation center on the nature of the problem: gender

²⁸⁸ Guinier, *Admissions Rituals*, *supra* note 266, at 223.

²⁸⁹ Victor C. Romero, *Are Filipinas Asians or Latinas?: Reclaiming the Anti-Subordination Objective of Equal Protection after Grutter and Gratz*, 7 U. PA. J. CONST. L. 765 (2005).

²⁹⁰ *Grutter v. Bollinger*, 539 U.S. 306, 311 (2003) (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

²⁹¹ Becker, *supra* note 8, at 258-59.

inequality.

1. Fluidity, Gender and Women's Representation

Fluidity, as an anti-essentialist strategy, requires further investigation into the use of the category of women. The most common feminist definition of sex and gender distinguishes these terms as follows: "'sex' refers to the anatomical and physiological distinctions between men and women; 'gender,' by contrast, is used to refer to the cultural overlay on those anatomical and physiological distinctions."²⁹² Contemporary feminists use the term "gender" more widely because the broader dimensions of identity in society matter more than anatomical distinctions. Analyzing the lessons of Parity in the context of women's underrepresentation in the United States, it must be noted that Parity, and indeed much of the discussion of political inequality centers on "women" (implicitly referencing sex) instead of gender. Parity and many other remedies for electoral gender inequality rely on the gender binarism of women and men in the determination of representation.

Anti-essentialists and transgender activists criticize the categories men and women as presuming cultural constructs to be natural realities. These categories actually contain a myriad of genders, formed genetically, biologically and culturally,²⁹³ with biological traits which include "chromosomal variables, genital and gonadal variations, reproductive capacities, [and] endocrinological proportions."²⁹⁴ In addition, the existence of transgendered people makes it clear that the gender binarism of women and men does not accurately describe humanity in toto.

Not only does Parity fail to acknowledge this complexity, but the principal arguments in its favor center on the duality "*sexuée*" of the polity. As a consequence, a political party could violate Parity with too

²⁹² *Grutter*, 539 U.S. at 311.

²⁹³ See Darren Rosenblum, *supra* note 74, at 505-06; Fausto-Sterling, *supra* note 1, at 20-21.

²⁹⁴ STOLTENBERG, *supra* note 1, at 28. Scientists generally agree that there are seven gender traits that constitute one: 1) Chromosomes; 2) Gonads; 3) Hormones; 4) Internal reproductive organs; 5) External genitalia; 6) Secondary sexual characteristics; and 7) Self identity. Smith, *supra* note 1, at 972. Fifteen years later, the New York Supreme Court of New York County used the exact formulation cited above in *Maffei v. Kolaeton Industries, Inc.*, 626 N.Y.S.2d 391 (Sup. Ct. 1995) (holding that pre-operative transgendered female was protected by New York City's sex discrimination statute as member of class of males). These seven variables classify the distinct elements of gender identity. See Fausto-Sterling, *supra* note 1, at 21 (promoting notion of multiple gender factors).

many women candidates — Parity mandates absolute equality. Designed to empower women, this structure itself imposes essentialist notions of identity.

Remedies for group inequality should avoid essentializing the purported beneficiaries by maintaining fluidity. Rather than engage a notion that men and women should be absolutely equal in political power, remedies should focus on the gendered nature of electoral power, as well as the attendant political and cultural exclusion of women from electoral power. Women's political status has been "historically subordinate."²⁹⁵ As such, remedies should be adopted to balance the power disparity focusing on women. Remedies for the gendered nature of political power raise the issue of descriptive representation.

2. Parallel Dichotomies: Revisiting Descriptive Representation

Descriptive representation merits further examination given Parity's reformulation of the universal. Joan Scott's analysis of Parity points to the feminist redefinition of French universalism.²⁹⁶ One can argue that Parity made essentialism less essentialist, by focusing on society's composition of men and women, instead of characteristics unique to each sex.

Descriptive representation, as discussed in Part I, emphasizes the 'mirror' nature of representation — that a legislature must mirror the population in terms of certain characteristics. Descriptive representation, however, is not accurate at the individual level because, drawing on anti-essentialism, ideological differences exist within the categories of women and men. It cannot be said that only a woman can represent another woman, or even "women" as a class.²⁹⁷ Given that descriptive representation depends on essentialism, is there a parallel connection between interest representation and anti-essentialism? The dichotomy between descriptive and interest representation parallels a dichotomy between essentialism and anti-essentialism. These two dichotomies connect.

Taking essentialism and anti-essentialism to their logical ends with regard to representation proves worthwhile. Essentialist arguments imply "that any woman may represent women generally, regardless of

²⁹⁵ Mark Stein, *Constitutional Protection of Private Power*, 23 QLR L. REV. 47, 58 (2004).

²⁹⁶ Scott, *supra* note 23, at 43.

²⁹⁷ Mansbridge, *supra* note 21, at 29-30.

social differences.²⁹⁸ For a radical essentialist, only a descriptive representative could represent a particular group.²⁹⁹ Thus, essentialism's logical end leads us to an understanding that women cannot represent men and men cannot represent women, an extreme gender binarism indeed.³⁰⁰

Anti-essentialist theory's logical end seems equally extreme. Anti-essentialists divorce beliefs from identity, so any particular woman cannot be presumed to represent any other woman, or women as a whole.³⁰¹ Guaranteed candidacies or seats would achieve no greater likelihood of representing women.³⁰² A radical anti-essentialist would assert that a Senate of one hundred men could represent women, and that one split between fifty women and fifty men would not necessarily differ from the former, all-male, Senate.³⁰³ If identity truly has no connection to ideas, no need for a remedy to inequality exists.

As extreme as the logical end of essentialism is, that representation must reflect identity, arguing that identity is utterly irrelevant in representation is equally extreme. The cultural, rather than biological, construction of identity fosters wide differences within identity. Phenotype does not determine individual politics, but some relation must be present at the broader population level.³⁰⁴ Although far from serving as perfectly reliable markers of ideas, identity has some utility. In cases of severe underrepresentation, numbers may play a role in remedying electoral gender inequality.

A strict and exclusive attention to numbers does raise the threats posed by essentialism. In this endeavor, we may draw on critiques of the theory of black electoral success. Attention to numbers of black representatives did not necessarily advance black interests.³⁰⁵ Where descriptive representation connects to tokenism, as in the race context in the United States, quotas may lock an entire society, the subjugated

²⁹⁸ *Id.* at 30.

²⁹⁹ *Id.* at 29-30.

³⁰⁰ *Id.* at 30.

³⁰¹ *Id.* at 29-30.

³⁰² *Id.* Becker, for example, seems to advocate that women be guaranteed seats to represent women, without addressing the complexities of identity.

³⁰³ *Id.*

³⁰⁴ Judith Butler has argued that agency, rather than depend on some preexistent identity, arises from the site of political struggle. Judith Butler, *Contingent Foundations, in FEMINIST CONTENTIONS: A PHILOSOPHICAL EXCHANGE*, *supra* note 72, at 46.

³⁰⁵ See, e.g., Guinier, *Tokenism*, *supra* note 26, at 1083-88.

group included, into a presumptively fixed identity.³⁰⁶ Without a doubt, remedies for electoral gender inequality that incorporate fluidity may avoid the essentializing effects that have beset black representation.³⁰⁷

The logical limits of essentialist and anti-essentialist theories, combined with the limited empirical data available, lead to the question: can anti-essentialism support descriptive representation? If any one woman cannot be assumed to represent another, can we infer that a half-female legislature will do any better? Further work, both theoretical and empirical, needs to be performed to establish a potential connection between anti-essentialism and descriptive representation. Helpful data would come from studies such as the one performed in India that demonstrates that women in public office do share some policy preferences with women in their communities.³⁰⁸ This suggests that, while an individual woman cannot be assumed to represent women unequivocally, at a broader level, women in positions of power may better reflect women's preferences.

Increasing women's representation may decrease electoral gender inequality. Although numbers cannot be the only marker of improvement, they may be an indicator of change. Quotas, used in sufficiently fluid contexts with the appropriate bases, need not reinforce essentialist identities. Some descriptive representation may be an appropriate response to electoral gender inequality without essentializing women's role in society.³⁰⁹ Some descriptive

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 1101-53. Although Guinier does not directly argue for a concept labeled "fluidity," her advocacy of proportional representation exemplifies the need to depart from traditional concepts of identity in group inequality remedies.

³⁰⁸ Esther Duflo and Raghavendra Chattopadhyay performed a study of the effects of India's Reservation Law, which requires that a third of randomly chosen Village Council head positions must be reserved for women. Duflo polled residents in different regions in India, asking men and women what policy preferences they had. To simplify Duflo's results, women preferred water access and men preferred roads. According to the study, the policy differential between women and men could not be attributed to the inexperience of the women or their disadvantaged social status. More significantly, the decision-maker's gender correlated with policy choices. Thus, where in a village, women preferred policies facilitating water access, women leading Village Councils had a significantly higher likelihood of following this preference than men did. See Duflo & Raghavendra Chattopadhyay, *supra* note 241, at 1409-40.

³⁰⁹ Mansbridge argues that such remedies would be required where substantial communicative distrust exists between groups. Communicative distrust may exist between men and women, but not to the extent that it mandates more radical remedies. Mansbridge argues that where communicative distrust exists in combination with uncrystallized interests, descriptive representation may be the best alternative for

representation, in a fluid form, may remedy electoral gender inequality without violating the United States' neutrality.

3. Beyond Antidiscrimination Toward Representation:
Constitutional Bases for Remediating Political Inequality

As discussed in Part I, women's political representation is an orphan, without support from either voting rights jurisprudence or gender discrimination law. After the Civil Rights Act and more expansive interpretations of the Fourteenth Amendment, equal protection doctrine moved toward a fuller inclusion of gender discrimination in the 1970s. Looking at gender discrimination law as a source reveals an analogy between race and gender discrimination, particularly in Justice Brennan's opinion in *Frontiero*. The analogy relies on the two categories' relation to "an immutable characteristic determined solely by accident of birth." Sex, like race, "frequently bears no relation to ability to perform or contribute to society."³¹⁰ *Frontiero's* dependence on this analogy reflected the perception that constitutional history failed to provide adequate support for a broad proscription of gender discrimination. As Reva Siegal asserts, linking gender to race discrimination theory ignores the "ways that race and gender status regulation intersect and differ."³¹¹

Sex discrimination doctrine is derivative of race-based claims.³¹² A firmer basis for sex discrimination doctrine would be a "synthetic" interpretation of the Fourteenth Amendment and the Nineteenth Amendment, one that would bring together the language of the two amendments.³¹³ Both draw on separate but related histories of oppression and exclusion from democratic processes,³¹⁴ and both share the remedy of bringing previously excluded groups into the citizenry. The historical basis for this interpretation first draws on the efforts of suffragists to include the franchise for women in the Fourteenth Amendment, then in the Fifteenth Amendment, and then in a proposed Sixteenth Amendment.³¹⁵ The many historical links between the

representing subordinate groups' interests. Mansbridge, *supra* note 21, at 19.

³¹⁰ Siegel, *supra* note 29, at 961.

³¹¹ *Id.* at 960.

³¹² *Id.* at 949.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* at 970-71. Suffragists simultaneously argued in court and to Congress that the Fourteenth Amendment permitted women to vote. It was only after their loss in *Minor v. Happersett*, 88 U.S. 162 (1874), that women began to seek a separate amendment.

Fourteenth and the Nineteenth Amendments point toward the value of a synthetic reading.

This synthetic interpretation fosters a strong foundation for gender discrimination doctrine by grounding it in the language of two separate amendments. By centering the doctrine in one amendment directed at gender, such a “synthetic” interpretation avoids the erasure of race and gender distinctions. Pursuant to a synthetic reading, “the Constitution would protect women against regulation that perpetuates traditional understandings of family that are inconsistent with equal citizenship in a democratic polity.”³¹⁶

Remedies for electoral gender inequality broaden the purpose to Siegel’s synthetic reading of the Fourteenth and Nineteenth Amendments. Despite the extension of the Nineteenth Amendment from the franchise to the right to hold political office, it has not yet served to remedy women’s political representation. Equal citizenship should incorporate the most fundamental element of membership in a polity: political representation. An electoral focus would be the most direct, and even obvious, heir to the history and language of the Nineteenth Amendment.

In addition, the Nineteenth Amendment’s language parallels that of the Fifteenth Amendment. In so doing, the drafters reflect, at least implicitly, the recognition that they were rectifying the historical mistake of omitting women from the Fifteenth Amendment.³¹⁷ Akhil Amar has argued that a panoply of political rights attach to the meaning of the Fifteenth Amendment. He further argues that the parallel language of the Nineteenth Amendment carries those rights over to women’s

³¹⁶ Siegel, *supra* note 29, at 948.

³¹⁷ Akhil Reed Amar, *Architexture*, 77 *IND. L.J.* 671, 689-90 (2002). Amar states:

To prevent this, section 2 of the Fourteenth Amendment devised a new apportionment formula which put the word ‘male’ into the Constitution for the first time. In essence, a state that disenfranchised any of its adult male citizens would have its congressional apportionment and electoral college allotment proportionately reduced. But no state would pay any price, in Congress or in the electoral college, for disfranchising adult women citizens! Then came the Fifteenth Amendment, giving black men the vote but doing nothing for women. Only with the adoption of the Nineteenth Amendment in 1920 did ‘We, the People,’ vest women with full and equal voting rights. These later amendments, all the more prominent because they have not simply been hidden in the Old Wing, draw attention to an obvious (in retrospect) defect of the early electoral college: The Founding fathers’ system didn’t do much for the Founding mothers.

Id.

suffrage.³¹⁸

Since the United States encouraged the institution of a quota for women's representation in Iraq, it seems the current administration recognizes quotas as both possible and desirable. To the extent that the United States already has provisions that violate the neutrality of the state, the provisions center on remedying specific, historically established discrimination. Mary Becker has advocated the adoption of a Voting Rights Act for Women to institute quotas and other support mechanisms.³¹⁹ Some of her proposals,³²⁰ such as requiring one female and one male senator from each state, mimic the most essentializing elements of Parity, ignoring crucial lessons from black electoral struggles. Although admirably ambitious, Becker's proposal reflects little of the fluidity that characterizes United States jurisprudence. In addition, the key provisions of the VRA, as discussed in Part I, simply cannot be applied to women — women's exclusion from the ballot box ended with the Nineteenth Amendment, and districting cannot aid electoral gender inequality because women are not geographically segregated, and cannot be said to vote as a bloc.

However, more subtle and fluid remedies may improve electoral gender inequality. Any of the remedies that require adoption at the political party level, or at the level of encouraging participation,³²¹ may be considered fluid. The United States may wish to build on voluntary

³¹⁸ Akhil Reed Amar, *The Fifteenth Amendment and "Political Rights,"* 17 CARDOZO L. REV. 2225, 2226 (1996). Amar states:

I would like to suggest that the best interpretation of the Fifteenth Amendment would read it as encompassing a cluster of political rights; the Amendment protects not only the right to vote, but also the right to hold office, the right to be voted for, the right to vote in a legislature, the right to serve on a jury, and even the right to serve in the military.

Id.

³¹⁹ Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 59.

³²⁰ In *Patriarchy and Inequality*, Mary Becker contends that the problem is with feminism itself. *Id.* It is empty at the core and offers no values inconsistent with traditional male patriarchal values, which are comprised of "a social structure that is male-centered, male-identified, male-dominated, and which valorizes qualities narrowly defined as masculine." *Id.* at 22. Inequality for women cannot be adequately addressed by striving to attain a "bigger piece of the pie." *Id.* at 25, 51-59.

³²¹ Note that, unlike France, the United States does not have one school that trains the political elite, so changing admission quotas will not necessarily achieve much, even though many United States politicians are lawyers.

efforts by political parties to encourage more women candidates.³²² Such provisions must draw on fluid notions of gender rather than fixed ideas of “womanhood” to avoid the pitfalls of essentialism. Parity demonstrates that remedies for gender inequality in political representation can fit into a neutral state if they incorporate greater fluidity. This fluidity has already found its way into United States jurisprudence. Constitutional arguments, drawing on the Nineteenth Amendment and its connections to the Fourteenth and Fifteenth Amendments, may provide a substantial basis for the adoption of such provisions.³²³ Fluid provisions to remedy the gendered nature of political power may not be as distant from current United States law as they appear at first blush.

CONCLUSION

How should democracies, at a global level, relate notions of identity with electoral equality and fairness? Reducing electoral gender inequality requires a detour through the thicket of descriptive representation.³²⁴ In the United States, quotas are widely condemned, and gender and racial discrimination law operate in orthogonal dimensions. By contrast, France’s Parity system is so compelling precisely because of its ambitious goals and mechanisms.

Parity asserts that quotas do not necessarily — or unacceptably — violate the neutrality of the state. But Parity does rely upon essentialist ideas about the intersection of gender and electoral representation. A way to move beyond this impasse is provided by the anti-essentialist framework, with its fluidity of remedies for various permutations of group inequality. The incorporation of anti-essentialist fluidity would answer most of the liberal and conservative objections to quotas.

Law plays a crucial role in constructing and maintaining subordination among identity or interest groups. It is these same structures that effectively close our eyes to other legal systems’ methods

³²² Schnell, *supra* note 251, at 385-86 (discussing party rules encouraging women’s participation in United States political parties).

³²³ Amar, *supra* note 318, at 2226; Siegel, *supra* note 29, at 947-1046.

³²⁴ Regardless of whether the answers involve some form of training or funding for candidates of under-represented groups or the more radical solution of guaranteeing candidacies, the deepening of democracy depends on exploration and experimentation. As the United States pursues the spread of democracy abroad, its own democratic structures continue to ossify. The very different pursuit of improving democracy is at the core of Parity’s ambitions.

for accounting for and treating difference. Therefore instructive to recall French literary critic Roland Barthes' "semiotic travelogue" of his visit to Japan.³²⁵ In exploring Japanese culture he observed that he learned more about *his own* culture than that of his ostensible subject, Japan. Given the "disarray"³²⁶ of comparative legal scholarship, his insight is worth remembering. A comparative approach exposes blind spots in the United States' legal culture, and the positive, concrete effects of such scholarship could transform the approach of the United States to universalism, difference, neutrality and equality.³²⁷ The democracy of the United States could be all the better for it.

³²⁵ BARTHES, *supra* note 224.

³²⁶ See generally Catherine A. Rogers, *Gulliver's Troubled Travels, or the Conundrum of Comparative Law*, 67 GEO. WASH. L. REV. 149 (1998).

³²⁷ Justice Kennedy's opinion in *Lawrence v. Texas* points to the value of a comparative perspective. *Lawrence v. Texas*, 539 U.S. 558, 573, 576 (2003).