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A New European Parity-Democracy Sex Equality Model and why it won't Fly in the United States†

This Article argues that over the past years, in Europe, some instruments and policies dealing with gender equality both at the national and supra-national level reflect a move from a narrow antidiscrimination frame to a broader model that tackles the underparticipation and disempowerment of women in public and private life as a deficiency of democracy and a problem of citizenship. By analyzing specific parity measures that have been adopted recently in some European Member States, such as electoral and corporate board gender quotas in publically held companies, the Article posits that a new understanding between parity democracy, sex equality and antidiscrimination law is evolving and explains why a combination of legal, historical, cultural, ideological and political factors make it unlikely that a similar development will take place in the United States.

Gender inequalities in the United States and Europe are persisting. Only 59% of women in the United States are in the labor force. Women in the United States continue to earn less money than men for equal work, shoulder more childcare and household responsibilities and are more likely to live in poverty. Women are said to hold only 15% of chair seats in Fortune 500 companies, chairing only 2% of the boards. The figures of women in public office are particularly striking, with women representing only 16.80% in Congress and 17% in the Senate after the November 2010 elections.[1] In spite of this, gender quotas in politics or in business are not a popular concept.

In Europe as well women continue to hold an unequal position in the employment domain. According to the European Union's (EU) lat-

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1. Database "Women in national parliaments," *available at* http://www.ipu.org/wmn-e/classif.htm (last visited Sept. 21, 2011).

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est Report on Progress on Equality between Women and Men,[2] as of 2009, the employment rate of women was only 62.5%. In Europe, 31.4% of the women and 8.1% of the men worked part-time. Significantly, the countries where nearly 75% of women were working (Denmark, the Netherlands and Sweden) had among the highest part-time rates. Whereas the labor market participation of mothers was 11.5 points lower than that of women without children, the rate for fathers was 8.5 points higher than that for men without children. Women across the European Union still earned 17.5% less on average than men. Several explanations, besides discrimination, are now commonly provided. They include persisting gender stereotypes, segregation in the employment market, and the unbalanced sharing of care responsibilities with men. It is increasingly argued that changes are unlikely unless women become more empowered both in the public and private sphere, meaning in politics and in businesses. As of 2010 the average number of female members of national parliaments (single/lower houses) was still 24% and among senior ministers of national governments, the share of women amounted to only 27%. Moreover, only 3% of the largest publicly quoted companies had a woman chairing the highest decision-making body.

Nevertheless, as opposed to the United States, over the last two decades the unequal distribution of roles, tasks and power between women and men has become a key issue in European democracies resulting in new approaches, including different types of gender quotas, to advance gender equality and to reconceptualize citizenship rights. This Article argues that Europe is slowly departing from a narrowly conceived equal rights/opportunities (i.e., formal/substantive) sex equality framework in order to gradually embrace what I identify as a parity democracy equality model.[3] As we shall see, this model expands the target from the recognition of equal rights and opportunities (mostly in the employment domain) to enabling both men and women to participate equally in *all* domains of citizenship. Crucially, it reclaims and re-evaluates the domain of social reproduction as a domain of citizenship, and also brings to the fore the interrelationship between sex-differentiated degrees of participation in each of the relevant manifestations of citizenship, i.e., care and social reproduction, politics and the market.

2. EUROPEAN COMMISSION, REPORT ON PROGRESS ON EQUALITY BETWEEN WOMEN AND MEN IN 2010. THE GENDER BALANCE IN BUSINESS LEADERSHIP (2011) [hereinafter EUROPEAN COMMISSION].

3. On the insufficiency of both formal and substantive equality to account for gender quotas seeking to overcome women's political underrepresentation and the need to understand them as rather embodying a specific democratic conception fighting the legacy of the separate spheres tradition, see Blanca Rodríguez Ruíz & Ruth Rubio-Marín, *Constitutional Justification of Parity Democracy*, 60 ALABAMA L. REV. 1167 (2009).

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The Article starts with some reflections on the theoretical underpinnings of the proposed *parity democracy sex equality model* (I). It then shows that this is at least the direction in which equality between men and women has been heading in Europe by describing the framing of sex equality in (mostly non-binding) instruments and policies of the EU and the European Council, which seek to empower women by including them in traditionally male domains of power (both public and private) (II). It also examines specific parity measures that have been statutorily enacted in some European Member States including gender quotas to ensure the balanced participation of women in political bodies and on corporate boards (III). The Article explains how best to understand the connection between parity democracy, sex equality, and antidiscrimination law (IV). It finally introduces some hypotheses about the possibilities and difficulties to transplant a parity democracy sex equality model to the United States (V) before proffering a final thought (VI).

I. Parity Democracy: A Proposed Conception of Sex Equality

The sex equality parity democracy model takes us back to the origins of the state and representative democracy and to the ideology of the social contract and of the sexual contract on which it rests.[4] It is this social-sexual contract that enshrined the separate spheres tradition in industrial societies, by drawing the modern boundary between the public and the private domain as respectively masculine and feminine (both symbolically and functionally) while at the same time inheriting pre-industrial patriarchy and its system of subordination of women to men in the family domain. Thus, the gendered identification of the public and private areas was a structural feature of the modern state that disqualified women as active citizens, denying them the possibility to inhabit the so-defined public sphere.[5]

Central to the construction of the separate spheres and of the definition of citizenship around the male public sphere was the preeminence given to the notion of independence as a synonym of freedom in the new liberal regimes. Modernity enshrined the liberal view of the subject of rights as an autonomous being, master of his own life project. Whereas being a property owner was initially seen as the key signifier of independence (something which for years justified limiting the franchise to men of certain social positions), with the rise of industrial capitalism economic independence came to encompass the ideal of earning a family wage, so that property ownership, wage labor and self-employment all came to be recognized as forms of

4. *See* Carole Pateman, The Sexual Contract (1988).

5. *See* Nancy Fraser & Linda Gordon, *Civil Citizenship Against Social Citizenship, in* The Condition of Citizenship 88 (Bart van Steenbergen ed., 1994).

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economic independence.[6] As a result, both participation in politics and in the market through employment were acknowledged as respectable domains of citizenship.

This understanding of freedom pathologized dependency and those who, by definition, were branded as "dependent."[7] Indeed, dependency or interdependency was not seen as a defining aspect of the person, but as an external enemy against which man, naturally free, must defend himself.[8] But since independence was from the start merely a myth, the state could only assume the individual to be independent by removing the manifestations of individual dependency as much as possible. And this was possible only to the extent that the individual, the paradigmatic citizen, was conceived as first, propertied- male and then, employed or self-employed-male. Women instead were assigned the task of social reproduction, a task that lacked equal political and social significance. In naturally taking on the responsibility of care it was expected that women would enable men's physical, social, and cultural survival, silently allowing the ideal of men as independent citizens and actors in the public sphere to work in practice.[9] Men thus achieved an appearance of independence by shifting toward women the weight of their own dependency.[10] This is how women, by being "just women," enabled men to become citizens.

As managers of their own and other people's (i.e., men's) dependency, women were in turn constructed as dependent, as political minors and hence as unfit for active citizenship, the family becoming then a falsely 'depoliticized' sphere of male authority and female labor. As a result, women's citizenship could only be constructed as indirect, a result of their relationship with men, and as passive, depending on men and/or the State for maintenance and protection. Therefore, the extension of male suffrage regardless of property reconciled the concept of employment and citizenship and rendered both dignified spheres of citizenship participation. By contrast, the extension of female suffrage and the granting of equal employment rights to women were insufficient to guarantee their equal citizenship status, because they did not fundamentally alter the underlying sexual contract. In fact, women acquired social and political rights *before* they achieved equal private law rights, especially vis-a-vis their

6. *See* Nancy Fraser & Linda Gordon, *A Genealogy of "Dependency": Tracing a Keyword of the US Welfare State, in* JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION 128 (1997).

7. *Id.* at 126.

8. *See* Jean Jacques Rousseau, *Discourse on the Origin and Foundations of Inequality Among Mankind* (1755), *reprinted in* THE SOCIAL CONTRACT AND THE FIRST AND SECOND DISCOURSES 69 (Susan Dawn & Gita May eds., 2002).

9. Rodríguez Ruíz & Rubio-Marín, *supra* note 3, at 1177.

10. *Id.*, at 109.

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spouses and in the family domain.[11] But even when formal equality of rights between the sexes was finally recognized in a comprehensive manner, the domain of human reproduction and care remained conceptualized as "private" and culturally enshrined as "female," and the implications of this for women's ability to participate in the domain called public were simply denied.

This is the situation that a parity democracy sex equality model seeks to address and rectify. Although in its common usage, the notion of parity democracy has been usually linked to the project of empowering women by adopting mechanisms (such as gender quotas) to overcome women's traditional underrepresentation in democratically elected institutions or publicly appointed bodies, the model defended here has a broader and deeper aspiration. Its core objective is to unsettle the separate spheres tradition, understood as the tradition that separates the public from the private domain; defines them respectively as primarily male and female domains; recognizes only the public sphere as a domain of citizenship and power; devalues the social relevance of the activities and forms of participation that take place in the so-called private sphere while at the same time depoliticizing the forms of male power and hierarchy that find expression within it.

Unsettling the social construction of gender requires introducing human inter-dependency as a central feature of human life and redefining the type of human autonomy that the liberal ideal tries to protect.[12] The autonomy paradigm, the paradigmatic citizen, can no longer be the dependence-free individual, but rather the person who takes responsibility for his or her own dependence, as well as for those who depend upon him or her, as natural limitations but also as source of meaning of any life project. The paradigm of autonomy thus becomes, not independence, but interdependence, and (inter)dependency and care become constituent components of citizenship.[13] This makes the fundamental goal of parity democracy be about disestablishing a gendered notion of citizenship, a notion which thus far has passed as simply universal by banning social reproduction from the "public universe" and by imagining a "public" universe inhabited by perfectly independent citizens.

11. THE CONQUEST OF FEMALE SUFFRAGE IN EUROPE (Blanca Rodríguez-Ruiz & Ruth Rubio-Marín eds., forthcoming 2012).

12. Blanca Rodríguez-Ruiz & Ruth Rubio-Marín, *The Gender of Representation: On Democracy, Equality and Parity*, 6 ICON 287 (2008).

13. *See* Joan Tronto, *Care as the Work of Citizens. A Modest Proposal*, *in* WOMEN AND CITIZENSHIP 131, 140 *et seq.* (Marilyn Friedman ed., 2003).

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II. Europe's New Sex Equality Model: From Equal Rights and Opportunities to Equal Empowerment and Balanced Participation

In 1965, the main concern underlying the only primary norm dealing with sex equality in the Treaty of Rome of the European Economic Community (EEC), namely Article 119 establishing the principle of "equal pay for equal work," was the reduction of unfair competition between Member States. It was the European Court of Justice which in a ruling of April 1976 explicitly recognized the principle of sex equality in its double economic/social objective to be "a founding principle of the EEC," opening the way to spillovers beyond the workplace.[14] From then on, we observe an evolution of the treatment of equality between men and women from a limited, social, and mostly employment related issue (still at the core of the EU's concerns), to a broader question of justice.[15] This evolution has been reflected in the expansion of the legal framework of the EU's gender equality model enshrined in its primary norms, an evolution in which the Treaty of Amsterdam epitomized a moment of constitutional change. The Treaty of Amsterdam added new gender equality provisions. Equality between men and women was incorporated in the Treaty as a fundamental community value to be promoted (Article 2). Inspired by the Beijing Women's Conference, the Treaty also incorporated the idea of gender mainstreaming (Article 3), setting thus the basis for policies in pursuit of gender equality, preventing the confinement to an equal opportunity ghetto and promoting integration across all fields of policy-making. The Treaty also enshrined the Council's EU competence to undertake pro-active measures to combat discrimination based on sex as well as racial or ethnic origin, religion or belief, disability, age, or sexual orientation (Article 13). The principle of equal pay was re-crafted as a principle of equal pay for work of equal value and a new paragraph was added to the new Article 141, allowing Member States to adopt positive discrimination measures. Reaffirmed under the Lisbon Treaty, the European Union still operates under this legal framework whose profile is now reproduced in the European Charter of Fundamental Rights.[16]

The extent to which such legal framework and policies have allowed women to make progress has been questioned. The model's continued reliance on a formal understanding of equality which makes affirmative action measures an exception that the Court of

14. Defrenne v. Société Anonyme Belge de Navigation Aérienne, 1976, C-43/75 [ECR 455].

15. *See* Agnès Hubert, *From Equal Pay to Parity Democracy: the Rocky Ride of Women's Policy in the European Union*, *in* Has Liberalism Failed Women? Assuring Equal Representation in Europe and the United States 143, 148 (Jytte Klausen & Charles S. Maier eds., 2001).

16. *See* arts. 20, 21, 23.1 and 23.2, respectively.

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Justice defined narrowly, and the inherent limitations of an antidiscrimination equality model to address structural inequalities, have both been criticized. At best, it has been claimed, the model has accelerated the process whereby some women have entered the male domain of employment, and even so, in a segregated market where the most precarious forms of employment (unwanted part-time, underpaid, with poor employment conditions) are overwhelmingly feminized. Gender equality has broadened to incorporate news concepts and new issues but true transformation in terms of gender equality has remained rather modest.[17]

Still, when taking a look at the areas of policy concern and at the rhetoric endorsed at the EU and the Council of Europe level, we can clearly detect an expansion and deepening in the understanding of the meaning of sex equality since at least the mid 1980s. This was precisely the time when affirmative action, including quotas and binding commitments to counteract indirect discrimination in the labor market, were being questioned. It was a time when a "need was felt to shift the debate from the quantitative claim underlying quotas and affirmative action to a qualitative necessity related to the nature of democracy."[18]

Regarding the European Union, we can observe that whereas initially European policies were limited to non-discrimination and equal opportunities in the employment domain, gradually there has been an expansion of what equality between men and women means. The main gist seems to be that gender equality is a democratic necessity, encompassing women's empowerment both in the public and private domain as well as addressing the question of reconciliation of work and family life and, as a natural corollary, albeit more tentatively, that of the unfair distribution of family responsibilities. A similar concern with ensuring the balanced participation between women and men in political and public decision-making had become a priority in the European human rights context thanks to the actions undertaken by Council of Europe in the field of gender equality, and under the main responsibility of the Steering Committee for Equality between Women and Men. But whereas in the context of the Council of Europe, women's empowerment could be more squarely justified as a matter of human rights and democracy, given the EU's limited sphere of competences, its initiatives in this domain have typically been instrumentally linked to broader socio-economic objectives. In general, what we see is a wide display of arguments recalling that gender equality is a fundamental right as well as a vital objective to ensure the EU's growth, employment and social cohesion goals and at

17. *See* Maria Stratigaki, *The Cooptation of Gender Concepts in EU Policies: The Case of "Reconciliation of Work and Family,"* 11 SOCIAL POLITICS 30 (2004).

18. Hubert, *supra* note 15, at 144.

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the same time a necessary instrument for the strengthening of European democracies.[19]

A brief look at the history of the initiatives and instruments of both the Council of Europe and the European Union shows that, whatever their ultimate justification, such initiatives and instruments have all clearly and progressively reinforced each other and gradually come to reflect the parity democracy equality model. The First European Ministerial Conference on Equality between Women and Men held in Strasbourg in 1986 was devoted to *Equality between women and men in political life-Policy and strategies to achieve equality in decision-making*. It was followed in 1988 by a *Declaration on equality between women and men*, adopted by the Committee of Ministers stating that gender equality was an integral part of human rights and a prerequisite for genuine democracy.

Soon after, the concern with the participation of women in decision-making was reflected for the first time in the Third European Commission's Pluriannual Action Program (1991-1995), under a new chapter on the "status of women in society."[20] The actions taken to implement the Program marked the beginning of a process now recognized to have been decisive in most Member States, spawning an intensive follow-up process across Europe and culminating in a Recommendation by the Council in 1996.[21] This Recommendation invited the Member States to adopt a comprehensive, integrated strategy to redress the under-representation of women in decision-making bodies, including, where necessary, through the introduction of legislative and/or regulatory measures and incentives.

At the level of the Council of Europe, the concept of parity democracy was also becoming central. The *Declaration on Equality between women and men as a fundamental criterion of democracy*, adopted during the 4th European Ministerial Conference on Equality between Women and Men in Istanbul in 1997, became a key reference in that context. In fact, the Declaration stated that equality between men and women required a "dynamic challenge to the established power structures and to stereotyped sex roles so as to achieve structural change" and a "new social order." Part of this change required "greater participation by men in the sphere of private life and in caring responsibilities" and a "more equal sharing of responsibilities for decision-making in political and professional life with women"—measures that would arguably "improve the quality of life for all."

19. *See, e.g.*, The Women's Charter adopted by the Commission in Mar. 2010 to commemorate the 15th anniversary of the Beijing Platform for Action (COM (2010) 78 final, Communication from the Commission (Brussels, 5.3.2010)).

20. *See* the "Third Medium-Term Community Action Program for Equal Opportunities for Women and Men" (1991-1995).

21. *Council Recommendation on the balanced participation of women and men in decision-making* 96/694/EC.

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In the new century, the goal of balanced participation has remained high on the European agenda. It has continued to be an objective pressed by the European Parliament[22] and has remained a priority area in the Commission's Action Programmes on Equality between Men and Women, including the one most recently adopted for the 2010-2015 period.[23] At the Council of Europe level it has been the focus of several additional resolutions and recommendations.[24] A 2009 Declaration by the Committee of Ministers (*Making gender equality a reality)* best captures the new equality model when it refers to gender equality as a fundamental criterion of democracy specifying that, far from merely implying equal rights, it also requires "equal visibility, empowerment, responsibility and participation of both women and men in all spheres of public and private life." It urged Member States to address power imbalances and to take measures to guarantee "the equal sharing of responsibilities between women and men and to reconcile their private, family and professional lives." A major feature of the most recent policy documents has been an increasing emphasis on the gender balance in business leadership.[25]

III. Constitutional Battles around Parity Democracy Measures: Women's Quotas for Political Office and Corporate Boards

Whereas the previous section shows the profile of a new model of equality between men and women linked to a vision of parity democracy being advanced by European supra-national entities mainly through soft-law instruments and systems of incentives, the compatibility of this model with constitutional principles is tested when Member States pass legislation making parity democracy measures mandatory. Only then does it becomes clear that the parity democracy sex equality model has the potential to challenge deep-seeded and constitutionally enshrined principles, rights and structures of

22. *See* European Parliament resolution on the Commission report on the implementation of Council Recommendation 96/694 of Dec. 2, 1996 on the balanced participation of women and men in the decision-making process (COM(2000) 120, C5-0210/2000, 2000/2117(COS)).

23. European Commission, Strategy for Equality Between Women and Men (2010 – 2015) (2011).

24. Worth mentioning are two recommendations of the Committee of Ministers: Recommendation Rec (2003) 3 on *The Balanced Participation of Women and Men in Political and Public Decision-Making* that defines balanced participation as a minimum of 40% of both sexes in all decision-making bodies in political or public life and Recommendation Rec (2007) on *Gender Equality Standards and Mechanisms.*

25. Indeed, the last Report on the Progress on Equality between Women and Men adopted by the European Commission in 2010 (*supra* note 2) has chosen this as its main focus of attention and justifies the business case for the inclusion of women on considerations of justice as well as considerations about the overall social utility, in terms of micro- and macro-economic objectives.

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government, including those that ensure non-discrimination on the grounds of sex, those that safeguard non-interference domains in the family, political parties and business, and those that shape the channels of democratic self-government.

A. *Gender Quotas and Political Office*

Over the last two decades, the idea of relying on some form of quota to ensure women's access to political office has been accepted in several European countries. In France, Belgium, Slovenia, Spain and Portugal, the law imposes some form of gender quota in electing representatives for political office.[26] In many other countries, such as Norway, Sweden, Germany, Poland and the United Kingdom, some of the political parties have adopted gender quotas for electoral candidates voluntarily. It is of course the use of legislatively imposed quotas challenging notions of formal equality, the autonomy of political parties and dominant conceptions of representative democracy that has been most controversial. Not surprisingly, in several European countries including France, Italy and Spain, gender quota legislation has been constitutionally challenged and, in some instances, these challenges have triggered constitutional amendments.[27]

An eloquent example of the idea that mandatory gender quotas are incompatible with both formal equality and representative democracy, is the 1982 decision of the French *Conseil Constitutionnel* striking down an act that obliged electoral ballots in municipal elections to have at least 25% of candidates of each gender.[28] Faithful to the universalist notion of citizenship prevalent in France, the *Conseil* held that the principles of equality before the law, of national sovereignty, and the indivisibility of the electoral body, recognized in the French Constitution (Article 3) and in the Declaration of the Rights of Man and the Citizen of 1789 (Article 6), all preclude any person or group from claiming the exclusive exercise of national sovereignty. That they confer upon every citizen an equal right to vote and to stand for elections, without any qualifications or exceptions, other than those that may stem from such conditions as age or incapacity.[29]

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26. *See* European Parliament Directorate-General for Internal Policies, Policy Department C, Electoral Gender Quota Systems and Their Implementation in Europe 11 (2008).

27. *See* Blanca Rodríguez-Ruiz & Ruth Rubio-Marín, *On Parity, Interdependence, and Women's Democracy, in* FEMINIST CONSTITUTIONALISM (Beverly Baines ed., 2011).

28. *See* CC decision no. 82-146DC, Nov. 18, 1982, J.O. 3475. For a thorough discussion of the French debate, see Rodríguez-Ruiz & Rubio-Marín, *supra* note 12, at 287–93.

29. Based on this 1982 decision, in 1999 the *Conseil Constitutionnel* also invalidated the law regulating elections to the Corsican Assembly, which would have introduced strict parity on electoral ballots. *See* CC decision no. 98-408 DC [J.O.], Jan. 20, 1999, at 1028.

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The Italian Constitutional Court reached a similar conclusion in 1995[30] in the context of a constitutional challenge brought against two laws, regulating local, provincial and, to some extent, national elections, and stipulating gender quotas in electoral ballots.[31] Although Article 3.2 of the Italian Constitution sanctions substantive equality,[32] the Court basically argued that it was not enough to support the adoption of affirmative action measures in the political field.

Like in France, the way to electoral gender quotas in Italy and gender parity had to be opened through constitutional amendments, i.e., by inserting provisions to move from a formal towards a substantive understanding of equality in the political domain.[33] Such reform was not necessary in Spain. In January of 2008 the Constitutional Court held that the general principle of substantive equality, as enshrined in the Spanish Constitution, was sufficient to limit the autonomy of political parties; the Court thus upheld legislation making it compulsory for electoral ballots to include not less than 40% of candidates of each sex. The Court rejected the arguments put forward by the plaintiffs, according to which such legislation contradicted the formal equality principle in relation to the right to participate in public affairs, political parties' right to self-organization, free speech and ideological freedom, as well as the principle of the unitary sovereignty of the Spanish nation.[34]

In sum, we see that electoral gender quotas and parity are inadmissible under a formal understanding of the equality principle, while they may well be, and indeed often are, justified under a substantive equality model as a sort of affirmative action measure, at least until women can be said truly to enjoy equal opportunities to access representative positions. Still, in Italy, a general substantive equality provision was not considered a sufficient constitutional foundation to sustain electoral quotas, requiring constitutional amendment, while in Spain the Court held exactly the opposite. In my view, this is due to the fact that even the substantive equality

30. Corte cost., decision no. 422/1995. For a discussion of the Italian debate, see Rodríguez-Ruiz & Rubio-Marín, *supra* note 12, at 294 *et seq.*

31. These are Law No. 81/1993 and Law No. 277/1993.

32. Article 3.2, states that "it is the duty of the republic to remove all economic and social obstacles that, by limiting the freedom and equality of citizens, prevent full individual development and the participation of all workers in the political, economic, and social organization of the country."

33. In France, a constitutional law added a fourth paragraph to Article 3 of the French Constitution, whereby "the law shall favour equality among women and men to have access to electoral mandates and hold elective office." *See* Law No. 99-569 of July 8, 1999 [J.O.], July 9, 1999, at 10175. As for Italy, Constitutional Law No. 2/2001; Constitutional Law No. 3/2001 and Constitutional Law No. 1/2003 all introduced reforms sanctioning the need to promote parity of access to elective office between men and women.

34. *See* STC 12/2008, Jan. 29, 2008 upholding law *Ley orgánica para la igualdad efectiva entre mujeres y hombres* (B.O.E. 2007, 71) (on the Effective Equality of Women and Men).

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logic seeking women's equal opportunities in the political domain is insufficient to give a proper account of the aim of sex-balanced composition of politically representative bodies. Instead, it is the nature of democratic legitimacy that is being restated. Under a substantive equality logic, measures that enhance opportunities might be easier to justify than those that guarantee certain results. Similarly, temporary measures can be much better accounted for than parity measures that are open ended in time. Although the goal of enhancing opportunities may justify quotas that ensure a minimum representation threshold for women (25% to 30%), it is not clear why parity measures (i.e., quotas that apply to both sexes, and not only to women, and that set the threshold at 50% or something close to it, like those approved in both France and Spain) would pass a proportionality test. Finally, embracing an affirmative action/substantive equality/equal opportunities logic to support gender quotas in elected offices is also at odds with the unitary representation model and the notion of electoral formal equality that it represents.

In order to fully understand what has happened in countries where either gender parity or some form of gender quota has been established, one has to move beyond the rights discourse and address questions concerning the contours of our representative democracy, shedding light on the implications of a shift towards parity democracy. The traditional representation model, i.e., the model of unitary general representation that came hand in hand with the liberal state inaugurated with the French Revolution, is antithetical to both parity and any conceivable form of quotas that would defy the notion of a unitary electoral body, as well as with the prevalence of formal equality in the electoral field that is intrinsic to it. Also, gender quotas and/or parity defy the traditional, liberal model of unitary general representation, as they question the notion of both abstract citizens and abstract representatives, i.e., the basis on which individuals are considered equally well represented by any elected body of representatives, regardless of the personal features of the representatives. In particular, gender quotas and/or parity bring out that elected bodies constituted mostly by male representatives can no longer be legitimate because they help perpetuate the separate spheres tradition reinforcing its instrumental role in socially defining the sexes and the subordination of women.

B. Women on Corporate Boards

Many European countries, such as Finland, Sweden, Poland, the Netherlands and Denmark, are approaching the problem of women's underrepresentation on corporate boards of publicly held companies through soft measures including corporate governance codes and charters that companies can sign voluntarily. Increasingly, however,

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gender quotas set by legislation are being considered. In 2003, Norway became the first country in the world to pass a law requiring all publically held companies to achieve gender balance (i.e., at least 40% of each sex) on corporate boards,[35] a measure it extended in 2006 to publicly limited companies. In Spain in 2007, a law introducing gender parity for electoral office also enshrined the goal of gender parity on corporate boards as a goal to be achieved by 2015. In Iceland, legislation adopted in 2010 applicable to publicly owned and publicly limited companies with more than fifty employees aims to ensure that each sex will make up at least 40% of boards by 2013. Even more recently, in 2011 similar quota legislation for state and publicly held companies has also been approved in France, Belgium and Italy.[36]

In the European discourse one finds the business case for diversity defending gender quotas by making reference to the optimization of talents as well as the exploitation of distinctive feminine qualities that would entail the reduction of risk taking, the increase of responsibility, and a less ego driven managerial style. What is distinctively European is that the argument that diversity is good for business is often conflated with the argument that it is also good for democracy.[37] In my view, this reflects the conceptualization of gender quotas on corporate boards as instruments of parity democracy, or, stated differently, the intention to disestablish sites of economic and social (public) power traditionally inhabited by men only.

The constitutional debates that corporate board quotas caused in France illustrate this. In 2011, a new law was passed, requiring the balanced representation of women and men on corporate boards of directors of all public companies and giving businesses six years to ensure that 40% of boardroom positions are taken by women.[38] Prior to this, in 2006, a law requiring corporate gender quotas[39] had been struck down by the Conseil Constitutionnel on the grounds that the law violated Article 6 of the Declaration of the Rights of Man.[40] A constitutional amendment followed in 2008 requiring the law to pro-

35. Since early 2000, also Denmark, Finland and Iceland set gender quotas for state-owned companies.

36. *See* EUROPEAN COMMISSION, *supra* note 2.

37. *See* Julie Suk, *Gender Parity and State Legitimacy: From Public Office to Corporate Boards*, CARDOZO L. REV. (forthcoming).

38. *Loi no. 2011-10 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle* (1), JORF du 27 janvier 2011. Within three years French firms must ensure that a figure of 20% is reached. The legislation will apply to companies in France that are listed, have more than 500 employees or have revenues over 50 million euros.

39. *Projet de loi relative à l'égalité entre les femmes et les hommes*, Texte no. 545, 23 février 2006, art. 22.

40. Article 6 of the Declaration of the Rights of Man and the Citizen of 1789 reads (my translation):

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mote equal access by men and women to professional and social responsibility.[41] Eventually, this enabled the 2011 law to pass constitutional muster. The wording and location of the amendment (in Article 1 of the Constitution, i.e., among the grand principles of the French Republic) indicate that these changes amount to more than mere deviations from the longstanding principle of formal equality. Instead, they imply the constitutionalization of parity democracy as the modern form of French democracy under which men and women are to share the domains of power and the social responsibility that the exercise of power entails. Arguably, one can read the reference to social responsibility in the French Constitution as including responsibility for social reproduction (spelled out primarily in the managing of care and human interdependency) both on its own ground and as a necessary corollary to ensuring women the possibility to participate in other domains. This would result from understanding gender quotas as following from a constitutional commitment to parity democracy. For our purposes it is important to underline that, on the basis of substantive equality, the case for mandatory gender quotas in corporate boards is more difficult to justify than that of mandatory political quotas, for although most liberal democratic constitutions contain a right to vote and run for office, they certainly do not contain a right to be involved in the management of corporations.[42]

IV. Parity Democracy, Equality and Antidiscrimination Law: Towards Parity Citizenship

As we can see from the constitutional litigation just described, to the extent that both political and corporate gender quotas entail classifications on the grounds of sex, they have been perceived as deviations from the norm of formal equal treatment. Such deviations are most commonly justified on the basis of another conception of equality namely, one that furthers a substantive or distributive goal, such as those of equality of results or, at minimum, equality of oppor-

> The law is the expression of general will. All citizens have the right to contribute to its making, either personally or through their representatives. As all citizens are equal before the law, they are likewise all equally eligible for any public office, position or employment, according to their abilities and with no distinction other than their virtues and talents.

See Conseil Constitutionnel, Décision no. 2006-533 DC du 16 mars 2006, *Loi relative à l'égalité salariale entre les femmes et les hommes*.

41. *Loi constitutionnelle no 2008/724 du 23 juillet 2008 de modernisation des institutions de la Veme République*, JORF du 24 juillet 2008.

42. Also, mandatory corporate gender quotas can be seen as limiting property rights and economic freedoms that many constitutions explicitly guarantee. In those constitutions where the content of property is constitutionally recognized as limited by a social function (e.g., art. 33 Spanish Constitution) this social function limitation may be interpreted as giving constitutional coverage to mandatory corporate gender quotas. Alternatively, a constitutional amendment might be the better way to enshrine the parity model.

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tunity. In fact, as I have suggested, it is not clear that a commitment to substantive equality notions is *per se* sufficient to capture the essence of parity. Its aim is better conceptualized as one of degendering citizenship by affirming what we could call a *parity citizenship* model. This, I posit, is because even substantive equality notions must rely on some understanding of what are essential forms of human fulfillment, including modalities of participation in the collective. Such forms of participation are embedded in the understanding of citizenship that is explicitly or implicitly upheld.[43]

Let us explore this in more detail. In most European constitutions as well as in European law, including European human rights law, a substantive account of equality between the sexes is becoming the paradigm. Increasingly, provisions that require equal treatment and prohibit discrimination on the grounds of sex are indeed supplemented by provisions or doctrinal interpretations allowing public powers to take measures that classify on the basis of sex, when these measures are proportional to the aim of redressing structural inequalities by redistributing different forms of advantages.[44] Moreover, some provisions or interpretations go further and do not just allow, but indeed compel, public powers to take measures to achieve such results.[45]

The coexistence of the equal treatment rule and the substantive equality mandates is never quite pacific because *prima facie* they are characterized by radically different logics. Thus, whereas formal equality is best characterized as a procedural rule shaped like a Kantian categorical imperative ("treat equally or do not differentiate or classify on the grounds of sex"), the substantive equality mandate follows a consequential logic and asserts a substantive outcome, i.e., that of ensuring that there be no disadvantages attached to a person's sex or that the existing ones be removed.[46] This tension, which is well exemplified by the ECJ's case law on sex-based affirmative action, is resolved by a balancing exercise, which in Europe takes the form of a proportionality test. But the difficulty of identifying, individualizing and apportioning responsibilities for structural and diffuse systems of privileges and disadvantages makes the task inevitably complex.

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43. On fundamental rights as being secured in a certain area only when the relevant capabilities to function in that area are also secured, see Martha Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273 (1997).

44. *See* arts. 157.1 and 157.4 of TFEU; art. 3 of the Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Gender Recast Directive) and art. 23.2 of the Charter of Fundamental Rights of the European Union.

45. *See, e.g.*, art. 8 of the TFEU, art. 1 of the French Constitution, and art. 3.2 of the German Fundamental Law, specific to sex equality.

46. *See* Hugh Collins, *Discrimination, Equality and Social Inclusion*, 66 MOD. L. REV. 16, 18 (2003).

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Leaving aside the difficult coexistence of formal and substantive equality notions, we find that even a substantive reading of the equality mandate is to some extent elusive: even if spelled out as mandating the aim of "equal opportunities" or "real or de facto equality" it does not in itself provide an answer to the question of equal opportunity "with respect to what?" Without an answer, the emancipatory potential of the equality principle remains inevitably vague. Now, sometimes sex equality or non-discrimination clauses in treaties and constitutions do explicitly refer to the equal enjoyment of rights, and since the same legal instruments contain a list of rights this list constitutes an *a priori* demarcation of the relevant sphere of substantive equality.[47] More often though, this limited equal rights conception is supplemented by free-standing clauses prohibiting sex-based discrimination without specifying the domain in which it should apply.[48]

Even when the equality or non-discrimination provisions make explicit reference to a domain circumscribed by otherwise constitutionally sanctioned rights and freedoms, constraints and/or uncertainties regarding the actual reach of substantive equality provisions remain. First, we may find that there is a gender bias in the list of rights and freedoms that have been constitutionally enshrined and that some of the domains of human capabilities that may arguably be of utmost relevance for human well being have been left out. Think for instance of the total absence or generally precarious framing of reproductive rights in constitutional or human rights documents. Second, we are typically confronted with a certain procedural asymmetry that makes the equal or non-discriminatory treatment mandate an enforceable right and the disparate treatment to ensure substantive equality only a constitutionally valid prerogative or, at best, a generic mandate addressed to state powers. Third, the substantive equality rule does not *per se* define the sources of inequality that can be legitimately targeted nor, more importantly, does it say how far the state can intervene in an attempt to redress inequalities, especially when interventions come at the expense of limiting (especially political and economic) liberties that are also constitutionally enshrined.

Some of these uncertainties surrounding the reach and transformative potential of both the formal and substantive constitutional equality doctrines can be exemplified by taking a look at the dominant models of antidiscrimination legislation. It has for instance been rightly noticed that there is a clear emphasis in antidiscrimination law on employment participation or on the possibility to earn a living

47. See, for instance, art. 14 of the European Convention on Human Rights.

48. Art. 3.3 of the German Fundamental Law provides that "no person shall be favored or disfavored because of sex."

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through the provision of services for others.[49] The explanation, according to Hugh Collins, lies not only in the distributive effects of employment, since the egalitarian goal could also be achieved through taxation and welfare. Rather the problem is primarily the social exclusion or marginalization that derives from employment discrimination in a capitalist and market-based society. In such societies, lack of employment must be understood as entailing an exclusion from non-material goods; this includes the opportunity to participate in the mechanisms offered by society through which "people may establish meaning for their lives, the connections of community and a sense of self-respect" given that in such societies "work provides for most people the principal mechanisms for constructing meaning, community and status."[50] What this means then, is that rights also constitute prerogatives for socially recognized forms of participation and interaction.

In spite of the prioritization in current antidiscrimination law of employment and provision of services, we could arguably expand the list of non-material goods that the enjoyment of rights and freedoms enables, to embrace more comprehensive notions of human capabilities including participation in education, politics, cultural activities, as well as participation in social reproduction and the care of others. Access to these participatory domains requires not only the recognition of rights as prerogatives, but first and foremost, that there are no insurmountable barriers in the social organization of these activities so that each person is free to choose between a range of possible goals in relation to them.[51]

The problem is, of course, that even if direct discrimination is eliminated, both formal and informal institutional arrangements tend to maintain existing distributive patterns.[52] As a result, it is often the combination of formal institutional rules and informal social norms that results in the exclusion of some citizens from some domains of participation. In order to address this type of distributive patterns, sex antidiscrimination laws in Europe have been broadened to encompass the formal institutional rules which in combination with informal social norms have a discriminatory effect.[53] Yet, they have done so while remaining within certain narrow domains of participation, such as employment and services, privileging thereby the "*homo oeconomicus*."

Moreover, while disparate or impact based antidiscrimination laws have come to challenge the validity of the institutional rules

49. Collins, *supra* note 46, at 29.
50. *Id.*
51. *Id* at 24.
52. *Id.* at 30.
53. *See* the concept of indirect discrimination under art. 1.b) of the Gender Recast Directive.

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(e.g., employment conditions), they have left untouched and unquestioned informal social norms (e.g., those requiring women do most of the family work or take most of the part-time employment). There is then a paradoxical reliance of the law on indirect discrimination on the persistence of patterns of structural disadvantage that it may be attempting to redress.[54] The risk of course, is that by accommodating women's "specific situations" (for instance, by adopting measures that allow women to reconcile family and work life), we may end up reinforcing gender roles.[55] Yet, simply ignoring the obstacles that women, especially in charge of young children, encounter in the labor market does not do much to promote their equality either.

What this suggests is that in the end, a durable solution may only lie in identifying what we could call, using Nancy Fraser's classic distinction, "transformative" as opposed to "affirmative" remedies. In our context, this would mean remedies that have the effect of disestablishing rather than entrenching gender roles.[56] The core of our concerns should be first, that many more women than men are structurally excluded from elements that have traditionally been considered both essential components of human welfare and socially recognized forms of contribution, such as participation in employment and politics. And second, that many more women than men end up spending a significant part of their lives and energies in activities, such as the care and nurturing of others, that are neither necessarily conceptualized as central to the fulfillment of human welfare nor recognized as meaningful forms of social contribution. The egalitarian project cannot be one that attempts to correct only the former while ignoring the relevance of the latter.[57] Instead, the solution requires an unconventional reading of the proper relationship and balance between family and private life on the one hand and work life on the other through a reassessment of the meaning of participation in each domain for both men and women.

54. Collins, *supra* note 46.

55. For instance, there is a growing concern that the newly formulated aim of maximizing job opportunities for women through flexible jobs and working conditions and family-friendly policy promoted in the European Union under a work/family life conciliation concept will risk giving up the model of full equality of opportunities and full integration in the primary labor market, and translate into the clustering of women in a secondary flexible (homework/telework) and part-time labor market. *See* Stratigaki, *supra* note 17.

56. *See* Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a "Postsocialist" Age*, *in* JUSTICE INTERRUPTUS, *supra* note 6, at 23-26.

57. This broader transformative goal is what Williams proposes in her recent work which she calls *reconstructive* as opposed to *assimilationist* feminism, criticizing the insufficiencies of a project which sees equality as equality to fit into society as currently structured. *See* JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER (2010).

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Here we are confronted with a familiar "bootstrapping problem of institutional design and innovation."[58] A new regime must be established by the means and within the constraints of the old. Therefore, problem–solving through legislation and institutional innovation becomes possible only after a major part of the problem has been solved. In other words, the "degendering of politics" or, more broadly speaking of citizenship, must be performed by the means available within the institutions and routines of gendered politics.[59] This is exactly what parity democracy measures would have to redress seeking to guarantee equal citizenship, understood as parity citizenship, by disentangling the spheres of participation from gender normativity; dismantling the hierarchy between the sexes; and expanding the domains of citizenship to include all the relevant spheres of social contribution and human fulfillment including that of social reproduction. A traditional model of substantive equality that professes equal opportunities but replicates the separate and hierarchically ordered spheres with its biased conception of human well being and its biased assessment of forms of social contribution, cannot achieve this goal.

All of this invites reflections about the relationship between antidiscrimination law and parity democracy measures. This relationship is best spelled out if both are seen as instruments of equality law, i.e., as a field of law placed at the service of producing and reproducing the basic conditions of legitimacy in any given democracy. The ultimate aspiration of equality law should be to ensure equal citizenship. This would require the law to respond to the specificities of the different violations of the ideal of equal citizenship shaping the exclusion of different groups over history. In this view of citizenship the emphasis would not only be placed on rights holding but also on the possibility of participation and functioning and on the acknowledgement of the value of different forms of participation as a source of meaning and status, and hence human welfare. Under this understanding of equality law, the specific connection between parity democracy and sex antidiscrimination law would be that parity democracy and the conception of citizenship that it advances would provide an answer to the question of the content of substantive equality applied to sex equality law and to be served by sex antidiscrimination law.

For antidiscrimination doctrine in general and sex antidiscrimination law in particular, this would have several implications. For one thing, sex antidiscrimination law should expand to reflect the set of rights and domains of participation that have in the past been restricted or limited on the basis of sex. An antidiscrimination doc-

58. *See* Claus Offe, *The Politics of Parity: Can Legal Intervention Neutralize the Gender Divide*, *in* HAS LIBERALISM FAILED WOMEN, *supra* note 15, at 40-41.
59. *Id.*

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trine focusing only on employment would no longer be enough. Women's traditional exclusion from the domain of politics and men's traditional exclusion from the domain of care should be equally tackled. Yet, the ever expanding force of antidiscrimination law should not attempt to replace other channels of expression of equality law, such as parity equality and socio-economic redistributive measures, especially given antidiscrimination law's defensive nature and its ability to detect but not redress structural inequities and hence propose transformative remedies. This would mean that antidiscrimination litigation would probably be seen as performing a systemic function going beyond the resolution of individual claims of justice and acting as a trigger for structural reforms that may be better addressed by the legislator. Similarly, a symmetrical approach to antidiscrimination law would probably be inadequate. Instead, ideally, the domains in which antidiscrimination law applies, but also the groups that it protects and how such protection operates, would better serve the ideal of equal citizenship if antidiscrimination legislation was particularly attuned to the historical circumstances dictating the ways in which different groups have in the past encountered obstacles to their enjoyment of equal citizenship.

V. Exporting Parity Citizenship to the United States: An Unlikely Venture?

Gender inequalities in the United States are the same as, or worse than, in Europe. To be sure, in its external action the United States has joined the UN and other countries in equating women's political participation with a strong democracy.[60] But then why has parity democracy not become a popular enterprise in the United States even among those most strongly committed to women's equality? More importantly, why is the underrepresentation of women in such domains not even perceived as a democratic deficit? In the remaining pages I am not going to discuss the more or less technical details that would make gender quotas to ensure a balanced representation of both sexes in all domains of public and private power difficult to implement, were they ever to be proposed.[61] Instead, I will tentatively explore the set of social, legal, historical and cultural fac-

60. *See* Nancy Millar, *Envisioning a US Government that Isn't 84% Male: What the United States Can Learn from Sweden, Rwanda, Burundi and Other Nations*, 62 U. Miami L. Rev. 129, 132 (2007-2008) and Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. Davis L. Rev. 1119, 1123 (2005-2006).

61. For instance, regarding electoral quotas, it seems clear that certain characteristics of the American electoral system would make the use of gender quotas more difficult including a majority based as opposed to a proportional representation system; the uninominal nature of electoral districts; and a decentralized and weaker party system that makes individual candidates, much more than political parties, true protagonists of the electoral race.

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tors that in my view make the project of parity citizenship unlikely to be seriously considered in the United States to start with. These factors can perhaps be best fleshed out by anticipating the most common reactions that the idea of mandatory political or corporate gender quotas would raise.

A. *Sexual Contract versus Racial Contract*

One of the most striking differences between Europe and the United States seems to lie in the impossibility to discuss quotas for women in the United States without simultaneously addressing the political underrepresentation or disempowerment of blacks and other minorities. The European parity democracy model seems to rest on the assumption that the sexual contract is foundational to the modern state and needs to be disestablished, and that this distinguishes the political exclusion of women from that of other groups whose political exclusion is, so to say, not as foundational.

This of course is more difficult to defend in a country where slavery and the inferior political status of blacks for representation purposes was, if not explicitly written into the Constitution, then at least acknowledged in its Apportionment Clause and the Fugitive Slave Clause of the Constitution. This had to be overcome by the Thirteenth, Fourteenth and Fifteenth Amendments, which directly shaped the Voting Rights Act and triggered redistricting with attention to the representation of racial minorities. Whereas women too, were excluded, their lack of representation was always an unspoken assumption rather than an explicit textual constitutional provision. Only when their explicit inclusion through the passage of the Nineteenth Amendment took place many years later, did the previous exclusion leave a documentary trail.[62]

Precisely because women's *political* exclusion was simply assumed, and did not even require an explicit sanctioning, one may argue that it has a distinct and even more pervasive history.[63] Looking at the sexual contract only through the lenses of the racial contract may thus obscure the specificities as well as commonalities

62. In contrast, racial discrimination has left less of a constitutional trace in Europe where most constitutions mention race only as one of the grounds of prohibited discrimination along with others and where Europe's paradigmatic forms of racism, colonialism and anti-Semitism were territorially externalized and/or seen as part of the past.

63. *See* Reva B. Siegel, *She the People: the Nineteenth Amendment, Sex Equality, Federalism and the Family*, 115 HARV. L. REV. 1 (2002) (explaining how Americans who adopted the Reconstruction Amendments believed it was unnecessary to enfranchise women under the federal Constitution because women were represented in the state through male heads of household and that enfranchising women would harm the marriage relationship, and how the Nineteenth Amendment granting female suffrage challenged the family as a site of male governance in favor of women's full citizenship).

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of both and make it difficult to come up with an adequate interpretation of sex equality doctrine that places the emphasis on women's specific obstacles to equal citizenship linked to the prevalence of the separate spheres tradition.[64] Yet such specificities regarding access to equal citizenship may have a bearing on the types of remedies that are designed for each.[65] Rather marginal voices have thus far defended the adoption of a Voting Rights Act for Women to institute quotas and other support mechanisms.[66] For the most part, the sex equality and political representation debates have not mixed in the United States.[67] Doctrinally, a synthetic interpretation of the Fourteenth and Nineteenth Amendments, like the one advocated by Reva Siegel, would allow to bring to the fore that the main purpose of sex equality doctrine must be to overcome the relegation of women to the family at the expense of the recognition of the full citizenship stature.[68] This interpretation could ground the power of Congress to enforce measures to overcome women's political underrepresentation under Section Five of the Fourteenth Amendment.

Realistically, however, it seems unlikely that one could press for a gender parity democracy model in the United States without integrating some conception of racial parity democracy. This makes the project more daunting and less viable both theoretically and politically because the forces of racism and patriarchy would presumably join in opposing it.

B. Women versus the Family

Another fascinating point of contrast that may explain why the parity democracy model would find more resistance in the United States than it does in Europe is the way conservative forces in the United States, often mobilized by Christian religious fundamentalism, have historically succeeded in presenting every instance of affirmation of women's rights and fight for equality as a threat to the family. This applies to women's campaign for suffrage; for the Equal Rights Amendment; for reproductive rights; and for the ratification of

64. *Id.* at 12.

65. Rosenblum, *supra* note 60, at 1132.

66. *See* Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 59 (1999). But *see* Rosenblum, *supra* note 60, at 1170, arguing in favor of more fluid remedies to avoid the essentializing consequences of quotas. Similarly, Jane Mansbridge, *The Descriptive Political Representation of Gender: An Anti-Essentialist Argument*, *in* HAS LIBERALISM FAILED WOMEN, *supra* note 15, at 19-39.

67. Thus the two principal sources for sex discrimination law, the Fourteenth Amendment and the Civil Rights Act of 1964 do not address electoral exclusion. Remedies for political underrepresentation have 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. *See* Rosenblum, *supra* note 60, at 1127-29.

68. Siegel, *supra* note 63.

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CEDAW.[69] It is therefore most likely that the parity democracy model would first be constructed as a fundamental threat to the family, and, to the extent that it stems from a nation-wide project, also to federalism notions locating the family within the sphere of state jurisdiction; it would then be resisted on the exact same grounds as all other women's rights initiatives. In other words, it would probably be perceived as social engineering forcing women out of and men into the house, thereby challenging a presumed natural order of things. Constitutionally, both gender neutral readings of the Equal Protection Clause and privacy notions derived from the Fourteenth Amendment would probably be alleged to claim non-interference with the family.

The irony is of course that the parity equality model purports to enhance the political and social recognition of the activities that so far mostly women perform in the so called private (family) domain. This is why resistance articulated precisely in the name of family values shows that what is truly at stake is the defense of an alleged natural order of things (i.e., preserving the sexual contract) and not the defense of care, human reproduction and interdependency.[70]

In Europe, the parity measures have been defended as good for all (politics and corporations will be better off if the resources of both sexes are included, and society will be better off if both men and women can better reconcile family and work) or as a matter of justice to women whose equal rights and participation must define what democracy is fundamentally about. Thus, to the extent that the family has come into the discussion it is to claim the need for men's larger involvement in it or the likeliness that women's empowerment will translate into more family friendly policies.

C. *Individualism, Autonomy, Meritocracy and the Unencumbered Market Forces*

Underlying the U.S. rejection of strict and mandatory gender quotas is of course the critical understanding that quotas on the basis of sex violate formal equality and a gender neutral reading of the Equal Protection Clause. This reflects an anticlassification reading of such provision that has gained strength over the competing an-

69. Siegel, *supra* note 63; Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); for an example of conservative arguments against a U.S. ratification of CEDAW, see the paper sponsored by The Heritage Foundation: Grace Smith Melton, *CEDAW: How U.N. Interference Threatens Rights of American Women*, BACKGROUNDER, no. 2227 (Jan. 9, 2009).

70. In this the analogy again with conservative forces proclaiming family values to defend pro-life positions but failing to give mothers (including single mothers) the public assistance they need is striking.

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tisubordination interpretation.[71] To be sure, as discussed, strict quotas are not uncontroversial in Europe either because despite the prevalent substantive equality model and the application of indirect discrimination as a constitutional doctrine, the formal equality principle still exists forcing a proportionality analysis. Such analysis is more likely to succeed with regard to measures that are less invasive than strict quotas and closer to the ideal of ensuring equal opportunities but not equal results. As we saw, both France, with a formal equality constitutional tradition, and Italy, espousing a substantive equality logic, in the end required constitutional amendments before mandatory political quotas as well as corporate quotas could be enacted.[72]

The greater resistance towards the enactment of legislative measures to ensure women's access to positions of power in both the political and the economic domains is also related to the stronger U.S. individualist tradition and its faith in both autonomy and meritocracy as expressed through the free functioning of the market and of social forces, including capital and political parties, that constitutional provisions such as First Amendment associational rights of political parties help to protect.[73] In Europe, the social or welfare state tradition with its post-World War II constitutional embedding has less difficulty advancing the notion that political and economic imbalances of powers may require positive corrections by the State to protect the more vulnerable. Also in harmony with this social state tradition is the conceptualization of positions of power in political office and corporate governance not only as highly paid and recognized positions for which individuals must freely compete, but also as positions of social responsibility that might justify interference of otherwise constitutionally protected spheres of autonomy (such as freedom of enterprise or the autonomy of political parties) for the sake of ensuring a more egalitarian system and a more perfect democracy.[74] If the social state has traditionally allowed such

71. For the antisubordination approach, *see* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108, 157 (1976) and LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1514-21 (2d ed. 1988). Describing both traditions, see Jack Balkin & Reva Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003).

72. This of course raises a separate question, which is the easiness or difficulty of constitutional amendments. In view of past experience showing the rarity of constitutional amendments in the United States, especially compared to European countries, it seems that a constitutional reform to enshrine parity democracy in the United States would most probably fail.

73. Several American scholars have argued that political parties' First Amendment rights would constitute the largest constitutional obstacles to gender electoral quotas. Rosenblum, *supra* note 60, at 1170 n.251 (citing relevant legal precedent) and Lisa Schnall, *Comment, Party Parity: A Defense of the Democratic Party Equal Division Rule*, 13 AM. U.J. GENDER SOC. POL'Y AND L. 381, 391-92 (2005); Millar, *supra* note 60, at 154-55.

74. Suk, *supra* note 37.

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interventions to address redistributive imbalances related to class hierarchies, then arguably a parity democracy model can do the same to disestablish sexual hierarchies.

D. Anti-essentialism and Anti-stereotyping

One of the most interesting contrasts between Europe and the United States is the degree of controversy that gender quotas would stir up in the United States even among those who are otherwise considered the most committed to women's equality.[75] Although some feminists in Europe have also questioned quotas, raising the concern about tokenism and paternalism, what seems to be most distinctively American is the deep concern with essentialism. In Europe, quotas have been defended both by those who believe that women can add a distinctive way of ruling (more collaborative, less competitive or ego driven) and those who sustain that this is ultimately irrelevant because the point is simply treating women as equal citizens. In contrast, in the United States, quotas would most likely be seen as rigid and essentializing, and the affirmation of the difference that women can make is likely to be controversial enough to prevent feminists of different strands from joining forces to support the initiative.

The reasons that account for this utmost concern with essentializing women are probably several. For one thing, the U.S. sex antidiscrimination doctrine has been mostly concerned with fighting gender stereotypes in general, and those that confine the women to the home, perpetuate the breadwinner role, and limit women's ability to act as full citizens in particular.[76] This has prevented this doctrine from allowing the law to accommodate women's differences, even if they can be statistically proven (like women doing more housework than men) and even if they can be interpreted not as inherent differences (i.e., expressive of women's essential and distinctive nature) but rather as differences that result from masculine norms such as

75. On the impasse of American feminism generated by the egalitarian and difference strands of feminism, see Nancy Fraser, *Multiculturalism, Antiessentialism, and Radical Democracy: A Genealogy of the Current Impasse in Feminist Theory*, *in* JUSTICE INTERRUPTUS, *supra* note 6, at 175-77.

76. On the anti-stereotyping paradigm of U.S. antidiscrimination law, see Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1774 (2008); Mary Anne Case, *The Very Stereotype the Law Condemns: Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1472 (2000); MARTHA A. FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTY CENTURY TRAGEDIES 37 (1995) and RESHAPING THE WORK-FAMILY DEBATE, *supra* note 57, at 75. In contrast, the European sex antidiscrimination model has thus far prioritized addressing women's real obstacles by accommodating their sex-specificity, both social and biological, at the risk of perpetuating effects in terms of gender roles that this option may entail. *See* Julie Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COL. L. REV. 1, 16 (2010).

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those enshrining the separate spheres ideology.[77] Given that reactionary movements resisting women's rights have relied precisely on the defense of the family, it is not surprising that there has been resistance towards defending women's rights and equality on the grounds of "family-related" specificities of women, whether natural or constructed. Also, in a state that can only be minimally relied upon to limit the powers of employers, granting women-specific rights that reflect their roles in care and reproduction is inevitably a double-edge sword.

VI. Final Thoughts

In the end, we find the very assertion that women and women's presence can make a difference—an assertion without which quotas to ensure the balanced participation of women in positions of power can hardly be defended—to be much more controversial in the United States than in Europe. This is the case because it is inevitably taken as a claim about women's essential differences rather than about the enduring effects of the separate spheres ideology which the proclamation of formal equality has not been able to unsettle. And what the need for women's presence has come to reflect, at least in Europe, is the very fact that in more and more European societies a male-only government or male-only corporate world is increasingly perceived as a democratic deficit. While we are still a far cry from actually overcoming that deficit both in Europe and in the United States, this paper intends to suggest that, in some respects, Europe has moved in the right direction. Viewed from a European perspective, the path towards a parity democracy sex equality model in the United States seems to be filled with ideological and constitutional hurdles that seem much harder, albeit probably not impossible, to take.

Yet parity citizenship cannot stop at gender quotas to empower women. Instead it requires quite a bit of social engineering and public spending if the care of others that women have thus far been providing "for free, in the private," is to gain in visibility, social respectability, and, at least in aspiration, equally shared by men. None of this seems likely unless economic production, consumption and the market are at least partly deprived from the unchallenged aura they have enjoyed in advanced market capitalist societies over the last decades. It remains to be seen whether a large-scale economic recession is what is needed to start embracing a more comprehensive vision of the human being and human welfare, challenging the hegemonic role of the "*homo oeconomicus*" as the

77. *See* Williams, *supra* note 57, at 114.

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paradigmatic citizen. Nothing less than challenging that role is needed for parity citizenship to become the new universal standard of citizenship.

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