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## GENDER QUOTAS AFTER THE END OF MEN

JULIE C. SUK\*

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### I. NORMATIVE IMPLICATIONS OF THE END OF MEN

Hanna Rosin observes in her book, *The End of Men*, that the postindustrial economy favors women and disfavors men.<sup>1</sup> As a result, we are seeing important changes in society that signal the end of male dominance and female subordination. In both the United States and Europe, women are beginning to outnumber men in colleges and professional schools.<sup>2</sup> The global future is one in which women may be employed at higher rates than men, earning more than men, and exercising more power than men. Marriage, a traditional source of women's subordination, is in decline, and women who enter into it are occupying the more privileged position of breadwinner rather than the economically subordinate role of homemaker and caregiver.<sup>3</sup>

The tale of gender role reversal is fraught with normative ambivalence. On the one hand, the rise of women that accompanies the end of men appears to be a feminist utopia. Women now have access to good jobs, good incomes, and positions of power that were once blocked by sexism and male dominance. The end of men is the end of male dominance, the very goal of gender justice. On the other hand, the new gender gap, in which men are disadvantaged relative to women, poses a new moral problem, a dystopia requiring social – if not legal – intervention. *The End of Men* thus invites a confrontation of feminism's normative aspirations. Is it possible to end male dominance and female subordination without engendering female dominance and male subordination? If the end of men does not amount to the oppression of men, is there anything

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\* Professor of Law, Benjamin N. Cardozo School of Law and Visiting Professor, Harvard Law School. Many thanks to Gunnar Strömmer for guidance on the evolution of Swedish equality law.

<sup>1</sup> HANNA ROSIN, *THE END OF MEN: AND THE RISE OF WOMEN* 117 (2012).

<sup>2</sup> *See id.* at 149; *infra* note 96 and accompanying text.

<sup>3</sup> ROSIN, *supra* note 1, at 79-112.

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unjust or normatively undesirable about allowing women to surpass men in income, employment, and power?

In many jurisdictions around the world, women's past and current disadvantage is regarded as an injustice that must be corrected by various measures, including antidiscrimination law, affirmative action, and even gender quotas. A large number of countries have implemented electoral gender quotas, and many European countries have recently passed laws requiring corporate boards to implement gender quotas for their boards of directors.<sup>4</sup> Under these quotas, no gender is permitted to exceed sixty percent of the desired positions.<sup>5</sup> In the end-of-men future, men will benefit and women will lose out under such quotas. Will gender justice require, or even permit, gender quotas after the end of men? This Essay engages this question by contrasting the constitutionalization in recent years of gender quotas in France with the concurrent drive to end university gender quotas in Sweden. I assume that Rosin is correct in predicting the end of men, while understanding that the descriptive thesis is itself highly contested.<sup>6</sup> Whether the end of men is coming or not, imagining such a universe is nevertheless useful for teasing out the fundamental commitments of gender justice, which will guide the law of gender equality going forward.

## II. THE RISE OF GENDER QUOTAS

In November 2012 the European Commission proposed a directive imposing gender quotas on the boards of directors of large publicly traded companies in Europe.<sup>7</sup> The proposed directive provides:

Member States shall ensure that listed companies in whose boards members of the under-represented sex hold less than 40 per cent of the non-executive director positions make the appointments to those positions on the basis of a comparative analysis of the qualifications of each candidate, by applying pre-established, clear, neutrally formulated and

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<sup>4</sup> See *infra* Part II.

<sup>5</sup> See *infra* Part II.

<sup>6</sup> Indeed, many of the contributions to this symposium raise substantial questions about whether we are in fact approaching the end-of-men future. See, e.g., June Carbone & Naomi Cahn, *The End of Men or the Rebirth of Class?*, 93 B.U. L. REV. 871, 893 (2013) (arguing that the rise in inequality in the United States does not signal the end of men because "an agenda that truly reflected the rise of women would accordingly start with a more equal and just society"); Michael Selmi & Sonia Weil, *Can All Women Be Pharmacists?: A Critique of Hanna Rosin's The End of Men*, 93 B.U. L. REV. 851, 867 (2013) (explaining that Hanna Rosin's argument is "based on misinterpretation of data and used to explain or justify women's state of economic well-being").

<sup>7</sup> See *Commission Proposal for a Directive of the European Parliament and of the Council on Improving the Gender Balance Among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures*, at 7-8, COM (2012) 614 final (Nov. 14, 2012).

unambiguous criteria, in order to attain the said percentage at the latest by 1 January 2020 or at the latest by 1 January 2018 in case of listed companies which are public undertakings.<sup>8</sup>

Gender quotas have been widely used in European nations as well as other parts of the world to increase the number of women in various domains of power, especially legislatures.<sup>9</sup> In 2011 several European countries adopted gender quotas for corporate boards,<sup>10</sup> following the example of Norway, which took similar action in 2003.<sup>11</sup> The new gender quotas are not designed merely to require that the number of women meet a minimum threshold; they are gender-parity rules framed in gender-neutral terms such that one sex can never become overrepresented.<sup>12</sup> The most common formulation, like the one in the

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<sup>8</sup> *Id.* art. 4(1), at 24.

<sup>9</sup> See Drude Dahlerup, *Introduction to WOMEN, QUOTAS, AND POLITICS* 3 (Drude Dahlerup ed., 2006). See generally MONA LENA KROOK, *QUOTAS FOR WOMEN IN POLITICS: GENDER AND CANDIDATE SELECTION REFORM WORLDWIDE* (2009).

<sup>10</sup> See Loi modifiant la loi du 21 mars 1991 portant réforme de certaines entreprises publiques économiques, le Code des sociétés et la loi du 19 avril 2002 relative à la rationalisation du fonctionnement et la gestion de la Loterie Nationale afin de garantir la présence des femmes dans le conseil d'administration des entreprises publiques autonomes, des sociétés cotées et de la Loterie Nationale [Law to Ensure Women's Representation on the Boards of Autonomous Public Undertakings, Publicly Traded Companies, and the National Lottery] of July 28, 2011, MONITEUR BELGE [M.B.] [OFFICIAL GAZETTE OF BELGIUM], Sept. 28, 2011, 59,600; Loi 2011-103 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 [Law 2011-103 of January 27, 2011 on Equal Representation of Women and Men on Corporate Boards and on Equality in the Workplace] arts. 1, 2, 4, 6, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 28, 2011, p. 1680; Legge 12 luglio 2011, n. 120, in G.U. July 28, 2011, n. 174 (It.); Wet van 6 juni 2011 tot wijziging van boek 2 van het Burgerlijk Wetboek in verband met de aanpassing van regels over bestuur en toezicht in naamloze en besloten vennootschappen [Act of June 6, 2011 Amending Corporate Management and Oversight Rules in Public and Private Companies], Stb. 2011, nr. 275, p. 4 (codified at BW art. 2:166) (Neth.). For a general account of reforms in EU member states, see European Comm'n, Directorate-Gen. for Justice, *Women in Economic Decision-Making in the EU: Progress Report*, at 13 (2012), available at [http://ec.europa.eu/justice/newsroom/gender-equality/opinion/files/120528/women\\_on\\_board\\_progress\\_report\\_en.pdf](http://ec.europa.eu/justice/newsroom/gender-equality/opinion/files/120528/women_on_board_progress_report_en.pdf).

<sup>11</sup> Lov 19. desember 2003 nr. 120 om endringer i lov 13. juni 1997 nr. 44 om aksjeselskaper, lov 13. juni 1997 nr. 45 om allmennaksjeselskaper og i enkelte andre lover (likestilling i styrer i statsaksjeselskaper, statsforetak, allmennaksjeselskaper mv.) [Act No. 120 of December 19, 2003 Amending Act No. 44 of June 13, 1997 Relating to Limited Liability Companies, Act No. 45 of June 13, 1997 Relating to Public Limited Companies, and Certain Other Acts], NORSK LOVTIDEND [OFFICIAL GAZETTE OF NORWAY], Part I, No. 17-2003, Jan. 13, 2004, p. 2678.

<sup>12</sup> See, e.g., Law 2011-103 of January 27, 2011, art. 2 (Fr.) (specifying minimum quotas for both sexes on corporate boards); Act No. 44 of June 13, 1997 Relating to Limited Liability Companies § 20-6(4) (last amended July 1, 2012) (Nor.), available at <http://www.l>

European Commission proposal, is a rule prohibiting one sex from exceeding sixty percent of the positions to which the quota applies. In many of the European countries that have adopted gender quotas, gender balance – fifty-fifty equilibrium between men and women – is considered a worthwhile normative goal, a desirable and permanent feature of all just and equal institutions.

The corporate-board gender quotas that have emerged in the last few years are perhaps the logical extension of a more established global trend of gender quotas in electoral laws.<sup>13</sup> Around forty countries in Europe, Latin America, Africa, and Asia have introduced gender quotas for candidates for elected office.<sup>14</sup> In fifty other countries political parties have been using gender quotas, although they are not required to do so by law,<sup>15</sup> in order to ensure that women are represented in government. Quotas have been more successful in producing gender-balanced leadership in some contexts than in others.<sup>16</sup> Success depends upon the electoral systems into which gender quotas are introduced, and the sanctions threatened or imposed for non-compliance with gender-balance requirements.

In the various contexts in which gender quotas have been introduced, multiple justifications have emerged. Initially, supporters of gender quotas framed them as measures to counteract the disadvantages faced by women in certain fields. Representatives recommended quotas at the World Conference of the International Women's Year in 1975.<sup>17</sup> The United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

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ovdata.no/all/hl-19970613-044.html (providing that each sex shall compose at least forty percent of corporate boards larger than nine members).

<sup>13</sup> See Julie C. Suk, *Gender Parity and State Legitimacy: From Public Office to Corporate Boards*, 10 INT'L J. CONST. L. 449, 454 (2012).

<sup>14</sup> Dahlerup, *supra* note 9, at 3.

<sup>15</sup> *Id.*

<sup>16</sup> In France, for instance, despite the electoral gender quotas applicable to political parties since 2000, *see infra* note 50 and accompanying text, the French Parliament remained 26.9% women as of July 2012, *Women in National Parliaments*, INTER-PARLIAMENTARY UNION, <http://www.ipu.org/wmn-e/classif.htm> (last updated Feb. 1, 2013). This falls far short of the fifty-fifty gender balance to which the law aspires. By contrast, in Norway the corporate-board gender quotas led to a rapid increase in the number of women on the boards of the companies to which the law applied. According to Norway's official statistics, as of January 2012 women constituted 40.9% of the boards of public limited companies, whereas men made up 59.1%. *Board Representatives, by Gender, Age Groups, Level of Education, Size Groups and Economic Activity. 1st of January 2012*, STAT. NOR. (Jan. 1, 2012), [http://www.ssb.no/a/english/kortnavn/styre\\_en/tab-2012-06-06-01-en.html](http://www.ssb.no/a/english/kortnavn/styre_en/tab-2012-06-06-01-en.html).

<sup>17</sup> World Conference of the International Women's Year, Mexico City, Mex., June 19–July 2, 1975, *Report of the World Conference of the International Women's Year*, at 156, U.N. Doc. E/CONF.66/34; *see also* ÉLÉONORE LÉPINARD, L'ÉGALITÉ INTROUVABLE : LA PARITÉ, LES FÉMINISTES ET LA RÉPUBLIQUE [UNOBTAINABLE EQUALITY: PARITY, FEMINISTS, AND THE REPUBLIC] 30-34 (2007).

urges state parties to “take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.”<sup>18</sup> In addition, article 4 of CEDAW explicitly states that “temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention.”<sup>19</sup> By 1995 the Platform for Action that emerged from the United Nations World Conference on Women in Beijing encouraged “specific targets and implementing measures” to remove barriers that directly or indirectly discriminate against the participation of women.<sup>20</sup>

The jurisprudence of the Court of Justice of the European Union (ECJ) also strengthened the antisubordination rationale for gender quotas. In the 1990s some private and public entities within the European Union had employment policies that could be described as gender quotas.<sup>21</sup> Male litigants challenged these policies by alleging that gender quotas violated the Equal Treatment Directive of 1976.<sup>22</sup> In *Kalanke v. Bremen* the ECJ invalidated an employment policy that gave preference to female candidates for jobs in which women were underrepresented (defined as under fifty percent) when choosing between equally qualified candidates.<sup>23</sup> The ECJ referred to this policy as a “quota system.”<sup>24</sup> While acknowledging that the directive permitted different treatment of men and women through “measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities,”<sup>25</sup> the ECJ held that this exception must be construed narrowly, such that giving automatic priority to female candidates under these circumstances violated the equal treatment requirement.<sup>26</sup>

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<sup>18</sup> United Nations Convention on the Elimination of All Forms of Discrimination Against Women art. 2(e), *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

<sup>19</sup> *Id.* art. 4. For an account of the international legal origins of the French gender quota proposals, see LÉPINARD, *supra* note 17, at 29-53.

<sup>20</sup> United Nations Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, *Beijing Declaration and Platform for Action*, ¶ 190(a), U.N. Doc. A/CONF.177/20/Rev.1, Annex II (Oct. 17, 1995).

<sup>21</sup> *See, e.g., infra* note 23 and accompanying text.

<sup>22</sup> *See* Council Directive 76/207/EEC, art. 1, 1976 O.J. (L 39) 40, 40. This directive implemented the principle of equal treatment between men and women in employment. *Id.* Since then, the directive has been amended and consolidated with other directives addressing equal pay and occupational social-security schemes. *See* Directive 2006/54/EC, of the European Parliament and of the Council, 2006 O.J. (L 204) 23 (popularly known as the Equal Treatment Directive of 2006).

<sup>23</sup> Case C-450/93, *Kalanke v. Bremen*, 1995 E.C.R. I-3069, ¶¶ 3, 24 (quoting Landesgleichstellungsgesetz [Law on Equal Treatment for Men and Women in the Public Service] § 4, Nov. 20, 1990, BREMISCHES GESETZBLATT 433 (Bremen) (Ger.)).

<sup>24</sup> *Id.* ¶ 9.

<sup>25</sup> *Id.* ¶ 17 (citing Council Directive 76/207/EEC, *supra* note 22, art. 2(4)).

<sup>26</sup> *Id.* ¶¶ 21, 22.

After *Kalanke*, however, the ECJ upheld a similar policy in 1997 in *Marschall v. Nordrhein-Westfalen*.<sup>27</sup> The rule gave priority to women in promotions for any sector in which there were fewer women than men in the particular higher-grade post, provided the male and female candidates had equal qualifications.<sup>28</sup> The ECJ distinguished this case from *Kalanke* because the policy at issue in *Marschall* explicitly stated that women were not to be given priority if there were “reasons specific to an individual [male] candidate [that] tilt[ed] the balance in his favour.”<sup>29</sup> In elaborating its decision, the court pointed out that national measures that “give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on equal footing with men” came within the positive action provision of the directive.<sup>30</sup>

In 2000 the ECJ upheld a German regional government’s “women’s advancement plan,” which had set binding targets for women’s appointments and promotions to increase the proportion of women in sectors in which women were underrepresented.<sup>31</sup> In so doing the court noted that qualified female candidates were less likely to be promoted “particularly because of prejudices and stereotypes concerning the role and capacities of women in working life, so that the mere fact that a male candidate and a female candidate are equally qualified does not mean they have the same chances.”<sup>32</sup> It held that the Equal Treatment Directive of 1976, particularly the positive action provision, “does not preclude a national rule which, in so far as its objective is to eliminate underrepresentation of women in trained occupations in which women are underrepresented and for which the State does not have a monopoly of training, allocates at least half the training places to women.”<sup>33</sup> Quotas are a departure from the fundamental norm of equal treatment, and they are justified only if they remove barriers to women’s opportunities. The exception in the Equal Treatment Directive of 1976 was framed in gender-

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<sup>27</sup> Case C-409/95, *Marschall v. Nordrhein-Westfalen*, 1997 E.C.R. I-6383, ¶¶ 3, 33, 35.

<sup>28</sup> *Id.* ¶ 3.

<sup>29</sup> *Id.* (quoting *Beamtengesetz für das Land Nordrhein-Westfalen* [Law on Civil Servants of the Land of North Rhine-Westphalia] § 25(5), May 1, 1981, GESETZ- UND VERORDNUNGSBLATT FÜR DAS LAND NORDRHEIN-WESTFALEN [GVNW] 234, as amended by *Siebtes Gesetz zur Änderung dienstrechtlicher Vorschriften* [Seventh Law Amending Certain Rules Relating to the Civil Service], Feb. 5, 1995, GVNW 102 (North Rhine-Westphalia) (Ger.)) (internal quotation marks omitted).

<sup>30</sup> *Id.* ¶ 27.

<sup>31</sup> Case C-158/97, *In re Badeck*, 2000 E.C.R. I-1902, ¶¶ 7-9, 38, 44, 55 (citing *Hessisches Gesetz über die Gleichberechtigung von Frauen und Männern und zum Abbau von Diskriminierungen von Frauen in der öffentlichen Verwaltung* [Law of the Land of Hesse on Equal Rights for Women and Men and the Removal of Discrimination Against Women in the Public Administration], Dec. 21, 1993, GESETZ- UND VERORDNUNGSBLATT FÜR DAS LAND HESSEN I [GVBl. I] 729 (Hesse) (Ger.)).

<sup>32</sup> *Id.* ¶ 21.

<sup>33</sup> *Id.* ¶ 55.

specific terms, by which positive action to remove women's disadvantage is justified while positive action to remove men's disadvantage remains an open question.<sup>34</sup> Furthermore, the ECJ made clear in another case decided in 2000 that the directive's positive action provision did not permit a preference for female candidates – whether achieved through a quota or a soft affirmative action scheme – whose qualifications were significantly and objectively inferior to those of a male candidate.<sup>35</sup>

Thus, the ECJ's jurisprudence has reinforced the notion that gender quotas can only be narrowly justified by the goal of eradicating women's disadvantage. Particularly when women's underrepresentation in certain positions is explained by prejudice, stereotype, or other practices associated with women's traditional exclusion from working life, quotas tend to be upheld. Quotas are a mechanism for combating and undoing the history and present complex structures of women's subordination. On this account of quotas, quotas are presumably no longer necessary nor legitimate once women's underrepresentation is overcome. This logic has different consequences for men's underrepresentation. If men become underrepresented, their disadvantage is understood to result from the legitimate evolution of the post-industrial economy, rather than from unjust subordination. Therefore, the positive action exceptions to equal treatment in the ECJ's caselaw only appear to tolerate measures to eliminate women's underrepresentation but not men's underrepresentation.

### III. GENDER BALANCE AS A PERMANENT GOAL: PARITY DEMOCRACY IN FRANCE

Throughout the 1990s, however, a new discourse emerged in continental Europe: gender parity – the representation of men and women in roughly equal numbers – was understood to be a requirement of all legitimate institutions exercising power in a democracy because each sex represented half of humanity. Thus conceived, gender balance is not merely a means of eradicating women's past disadvantage or current societal discrimination, but a permanent feature of good governance. Accordingly, legitimate legislatures and corporate boards must remain gender balanced, even after women's subordination has been alleviated.

The alternative discourse emerged in France, in part because the French Constitutional Council had rejected a gender quota that had been proposed to diminish women's disadvantage in politics. In 1982 a proposed law would have required women to constitute twenty-five percent of the candidates for

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<sup>34</sup> Nonetheless, the Employment Equality Framework Directive of 2000 has a gender-neutral provision that permits “maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds.” Council Directive 2000/78/EC, art. 7, 2000 O.J. (L 303) 16, 20 (establishing a general framework for equal treatment in employment and occupation).

<sup>35</sup> See Case C-407/98, *Abrahamsson v. Fogelqvist*, 2000 E.C.R. I-5562, ¶¶ 55-56, 62.

certain municipal elections.<sup>36</sup> The Constitutional Council held that such a rule violated article 3 of the French Constitution.<sup>37</sup> At the time, article 3 provided:

National sovereignty shall belong to the people, who shall exercise it through their representatives and by means of referendum.

No section of the people nor any individual may arrogate to itself, or to himself, the exercise thereof.

Suffrage may be direct or indirect as provided by the Constitution. It shall always be universal, equal and secret.

All French citizens of either sex who have reached their majority and are in possession of their civil and political rights may vote as provided by statute.<sup>38</sup>

This constitutional provision envisions national sovereignty as indivisible. Thus, dividing the electorate into sections or factions impedes the exercise of sovereignty.

The Constitutional Council also invoked article 6 of the French Declaration of the Rights of Man and of the Citizen, which has constitutional status.<sup>39</sup> Article 6 is essentially an equal protection guarantee, and it guarantees merit-based individual consideration, unlike its American counterpart<sup>40</sup>: “All citizens, being equal in [the law’s] eyes, shall be equally eligible to all high offices, public positions and employments, according to their ability, and without other distinction than that of their virtues and talents.”<sup>41</sup> The Constitutional Council held that a “combined reading” of these two provisions necessitated the invalidation of the gender quota, because “these constitutional principles preclude any division of persons entitled to vote or stand for election

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<sup>36</sup> Projet de loi no. 253 adopté définitivement par l’Assemblée nationale le 21 octobre 1982 modifiant le code électoral et le code des communes et relatif à l’élection des conseillers municipaux et aux conditions d’inscription des Français établis hors de France sur les listes électorales [Proposed Law No. 253 Adopted by the National Assembly on Oct. 21, 1982 on Municipal Elections Reform] art. 4, *in* Compte rendu intégral, séance du 21 octobre 1982 [Proceedings, Session of October 21, 1982], JOURNAL OFFICIEL DE L’ASSEMBLÉE NATIONALE (COMPTES RENDUS) [J.O.A.N. (C.R.)] [OFFICIAL GAZETTE OF THE FRENCH NATIONAL ASSEMBLY], Oct. 22, 1982, p. 6126, *available at* <http://archives.assemblee-nationale.fr/7/cri/1982-1983-ordinaire1/031.pdf>. The proposed law would have added a new provision, article L260 *bis*, to the *Code électoral*, requiring that one sex does not exceed more than seventy-five percent of the candidates on electoral lists for municipal elections. *Id.*

<sup>37</sup> Conseil constitutionnel [CC] [Constitutional Court] decision No. 82-146DC art. 2, Nov. 18, 1982, Rec. 66 (Fr.), *translation available at* [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/a82146dc.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a82146dc.pdf).

<sup>38</sup> *Id.* ¶ 6 (quoting 1958 CONST. art. 3 (Fr.)).

<sup>39</sup> *Id.*

<sup>40</sup> *Cf.* U.S. CONST. amend. XIV, § 1.

<sup>41</sup> CC decision No. 82-146DC ¶ 6 (quoting DÉCLARATION DES DROITS DE L’HOMME ET DU CITOYEN [DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN] art. 6 (Fr. 1789)).



into separate categories.<sup>42</sup> Drawing distinctions based on sex for candidates for office would constitute such a division and thereby violate these two provisions.

In response the French advocates of gender quotas adopted a new strategy and a new discourse. The foundational text of the feminist parity movement, *Au pouvoir citoyennes ! Liberté, égalité, parité*, propounds that parity, unlike quotas, seeks to vindicate the universality of the entire republic, rather than to remedy the disadvantage of one part of the population.<sup>43</sup> Parity, unlike quotas, reaffirms the unity, rather than division, of the republic by requiring that the two complementary halves of humanity (male and female) be represented.<sup>44</sup> By contrast, quotas – understood as a low minimum threshold (for example, fifteen to twenty-five percent) – serve primarily to give women opportunities to compete for desired positions of power and to defend their special interests.<sup>45</sup> The twenty-five percent quota treats women as a minority group with interests that may be at odds with the rest of the republic; hence it is divisive. On the other hand, “parity democracy” – understood as fifty-fifty male-female representation in all organizations exercising power in a democratic society – is not primarily aimed at enhancing women’s opportunities as individuals or even as a group. Its primary purpose is to legitimize the larger institution’s exercise of political, economic, and social power.<sup>46</sup> The larger institution, the democratic republic, must represent the people, and all people are male or female. The new model embraces gender balance as a collective democratic goal rather than as a means of achieving equal opportunity for a minority group.<sup>47</sup> It also envisions the fifty-fifty gender equilibrium as a permanent feature of any just governing body of the state.<sup>48</sup> Democratic governance cannot claim to be universal or legitimate if half of humanity is not represented.

In France the parity-democracy ideal has become constitutionalized in recent years. In 1999 article 3 of the Constitution was amended with the following language: “Statutes shall promote equal access by women and men to elective offices and positions.”<sup>49</sup> In 2000 a new statute required party lists for municipal, regional, European, and senatorial elections – those governed by the proportional representation system – to include an equal number of women

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<sup>42</sup> CC decision No. 82-146DC ¶ 7.

<sup>43</sup> FRANÇOISE GASPARD ET AL., *AU POUVOIR, CITOYENNES ! LIBERTÉ, ÉGALITÉ, PARITÉ* [RISE UP, FEMALE CITIZENS!: LIBERTY, EQUALITY, PARITY] 165-67 (1992).

<sup>44</sup> *Id.* at 166.

<sup>45</sup> *Id.* at 133.

<sup>46</sup> *Id.* at 172-76.

<sup>47</sup> See LÉPINARD, *supra* note 17, at 158-85.

<sup>48</sup> See GASPARD ET AL., *supra* note 43, at 172-73.

<sup>49</sup> Loi constitutionnelle 99-569 du 8 juillet 1999 relative à l’égalité entre les femmes et les hommes [Constitutional Law 99-569 of July 8, 1999 Concerning Equality Between Women and Men] art. 1, J.O., July 9, 1999, p. 10175 (Fr.) (author’s translation).

and men candidates.<sup>50</sup> When the French legislature attempted to enact a gender-parity rule for corporate boards of directors in 2006,<sup>51</sup> the Constitutional Council struck it down, invoking article 6 of the Declaration of the Rights of Man and of the Citizen.<sup>52</sup> The Constitutional Council held that the 1999 amendment on “equal access by men and women to elective offices and positions” only spoke to parity quotas in political office and had not authorized such quotas in any other domain.<sup>53</sup> The legislature reacted with yet another constitutional amendment. In 2008 the French Constitution was amended to be consistent with the legislative proposal to impose gender quotas on corporate boards of directors.<sup>54</sup> This time the amendment was broad in language and scope. It added “positions of social and professional responsibility” to the paragraph added in 1999, and moved the entire provision to article 1 of the constitution.<sup>55</sup> Article 1 now reads as follows:

France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organized on a decentralized basis.

Statutes shall favor equal access by women and men to elective offices and posts as well as to positions of professional and social responsibility.<sup>56</sup>

The amendment encourages, if not requires, the state to promote gender parity as fundamental constitutional law, by placing it in a constitutional article that establishes the principles legitimating the republic itself.<sup>57</sup> Once the

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<sup>50</sup> Loi 2000-493 du 6 juin 2000 tendant à favoriser l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives [Law 2000-493 of June 6, 2000 on Equal Access by Women and Men to Elective Offices and Positions], J.O., June 7, 2000, p. 8560.

<sup>51</sup> Projet de loi no. 545 adopté définitivement par l'Assemblée nationale le 23 février 2006 relatif à l'égalité salariale entre les hommes et les femmes [Proposed Law No. 545 Adopted by the National Assembly on February 23, 2006 Concerning Equal Compensation for Men and Women] arts. 21-25, available at [http://www.assemblee-nationale.fr/12/pdf/ta/t\\_a0545.pdf](http://www.assemblee-nationale.fr/12/pdf/ta/t_a0545.pdf).

<sup>52</sup> CC decision No. 2006-533DC ¶¶ 4, 19, Mar. 16, 2006, J.O., Mar. 24, 2006, p. 4446 (striking down, among others, articles 21 through 26 of Proposed Law No. 545).

<sup>53</sup> *Id.* ¶ 14.

<sup>54</sup> Loi constitutionnelle 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République [Constitutional Law 2008-724 of July 23, 2008 for the Modernization of the Institutions of the Fifth Republic] art. 1, J.O., July 24, 2008, p. 11890 (Fr.).

<sup>55</sup> *Id.*

<sup>56</sup> 1958 CONST. art. 1 (Fr.), translation available at <http://www.assemblee-nationale.fr/english/8ab.asp>.

<sup>57</sup> Some politicians expressed concern that the gender equality provision did not belong in article 1, because article 1 is a description of the nature of the republic itself. See *Compte rendu intégral, séance du 18 juin 2008* [Proceedings, Session of June 18, 2008], JOURNAL

constitution was amended, the legislature was able to adopt, in 2011, a statute very similar to the one that had been struck down in 2006, requiring corporate boards of publicly traded companies to achieve gender balance such that no gender can occupy more than sixty percent of the directorships.<sup>58</sup>

The constitutional amendments that enabled parity quotas were framed as “equal access,”<sup>59</sup> but the 2011 statute imposing a parity quota on corporate boards of directors is styled as a law requiring “*balanced representation of men and women.*”<sup>60</sup> In short, the law now defines gender equality as gender balance. Whereas a twenty-five percent women’s quota to alleviate women’s disadvantage violated constitutional equality provisions, a quota that requires women to constitute half or almost half of decisionmaking bodies is consistent with those equality provisions because gender balance has become the mechanism by which power is legitimized and equal access to decisionmaking is measured.

One difficulty for French advocates of gender parity was the question of whether gender quotas would lead to the adoption of race or ethnic quotas. Feminist advocates of gender parity insisted that gender was unlike race because sex was a universal, natural, and enduring feature of humanity.<sup>61</sup> Women have always constituted (roughly) half of humanity and always will. There were men and women two millennia ago, and there will be men and women two millennia from now. It is hard to tell the same story for race. This rhetoric sounds like biological sex essentialism. The difference between men and women is understood to be “natural,”<sup>62</sup> not contingent or political, whereas the difference between blacks and whites is understood to be socially and legally constructed.

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OFFICIEL DU SENAT (COMPTES RENDUS) [J.O.S. (C.R.)] [OFFICIAL GAZETTE OF THE FRENCH SENATE], June 19, 1982, pp. 2910, 2941 (statement of Sen. Robert Badinter asserting that article 1 of the constitution defines the very nature of the republic), *available at* <http://www.senat.fr/seances/s200806/s20080618/s20080618.pdf>.

<sup>58</sup> Loi 2011-103 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 [Law 2011-103 of January 27, 2011 on Equal Representation of Women and Men on Corporate Boards and on Equality in the Workplace] arts. 1, 2, 4, 6, J.O., Jan. 28, 2011, p. 1680 (Fr.).

<sup>59</sup> Constitutional Law 2008-724 of July 23, 2008, art. 1 (Fr.) (author’s translation); Loi constitutionnelle 99-569 relative à l’égalité entre les femmes et les hommes [Constitutional Law 99-569 of July 8, 1999 Concerning Equality Between Women and Men] art. 1, J.O., July 9, 1999, p. 10175 (Fr.) (author’s translation).

<sup>60</sup> Law 2011-103 of January 27, 2011 (emphasis added) (author’s translation).

<sup>61</sup> See SYLVIANE AGACINSKI, *PARITY OF THE SEXES* 14 (1999).

<sup>62</sup> Laure Bereni & Éléonore Lépinard, « *Les femmes ne sont pas une catégorie* » *Les stratégies de légitimation de la parité en France* [“*Women Are Not a Category*”: *The Strategies of Parity Legitimization in France*], 54 *REVUE FRANÇAISE DE SCIENCE POLITIQUE* 71, 84 (2004) (author’s translation).

Parity democracy treats gender balance as a permanent goal of legitimate institutions, rather than as a remedy for discrimination against women that will expire once this discrimination has been eradicated. Under a parity-democracy paradigm, the legislature's legitimacy is compromised any time one gender becomes demographically underrepresented. Since humanity is understood to be half female and half male, the underrepresentation of men poses the same illegitimacy problems as the underrepresentation of women. If the utopian vision of gender relations is two different halves complementing one another, men's disadvantage and underrepresentation is a dystopia that must be corrected for the same reasons that women's underrepresentation and disadvantage must be corrected.

#### IV. THE END OF MEN AND THE END OF QUOTAS: THE CASE OF SWEDISH UNIVERSITIES

Recent developments in Sweden pose a challenge to parity democracy. Roughly twenty years ago, gender quotas were challenged before the ECJ by men who would have ascended to positions of power but for those quotas.<sup>63</sup> But Sweden provides a glimpse of the end-of-men future: over the last ten years, women in Sweden have brought litigation challenging gender quotas arguing that they are being denied positions they deserve because the quotas are protecting the opportunities of less-qualified men.

The Swedish prohibition of sex discrimination emanates from various sources of antidiscrimination law. Chapter 1, section 5 of the Discrimination Act prohibits education providers from discriminating against students on any of the grounds protected by the statute – sex, gender identity or expression, ethnicity, religion, disability, sexual orientation, and age.<sup>64</sup> Nonetheless, chapter 2, section 6 explicitly authorizes affirmative action by providing that the prohibition of discrimination in section 5 does not prevent “measures that contribute to efforts to promote equality between women and men in admissions to education.”<sup>65</sup> The act imposes duties on employers and education providers to take “active measures” to achieve the purposes of the statute.<sup>66</sup> It explicitly requires education providers to elaborate a yearly plan that includes measures to “promote equal rights and opportunities for the children, pupils or students participating in or applying for the activities, regardless of sex, ethnicity, religion, or other belief, disability or sexual orientation.”<sup>67</sup>

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<sup>63</sup> See *supra* notes 21-35 and accompanying text.

<sup>64</sup> 1 ch. 5 § DISKRIMINERINGSLAG [DISCRIMINATION ACT ch. 1, § 5] (Svensk författningssamling [SFS] 2008:567), last amended by SFS 2012:913 (Swed.), translation available at <http://www.regeringen.se/content/1/c6/11/59/03/b463d1e1.pdf>. All citations and quotations of Swedish statutes in this Essay reference the available English translations.

<sup>65</sup> *Id.* § 6.

<sup>66</sup> *Id.* ch. 3.

<sup>67</sup> *Id.* § 14.

The current education provisions of the Discrimination Act are understood to encompass the provisions of an earlier statute known as the Equal Treatment of Students at Universities Act.<sup>68</sup> Section 7 of that statute prohibited unfavorable treatment on the basis of “sex, ethnic belonging, religion or other religious faith, sexual orientation, or disability.”<sup>69</sup> It also included the “active-measures” provisions of the Discrimination Act, wherein section 3 required universities to undertake “goal-oriented work to actively promote the equal rights of students irrespective of their sex, ethnic belonging, religion or other religious faith, sexual orientation or disability.”<sup>70</sup> Further, it required universities to adopt an annual plan toward achieving these goals.<sup>71</sup> The statute made an exception, however, for different treatment based on the prohibited grounds when “the treatment is justified[,] taking into account a special interest that is manifestly more important than the interest of preventing discrimination at the university.”<sup>72</sup> In addition, the Higher Education Act provides that “[e]quality between women and men shall always be observed and promoted in the activities of higher education institutions.”<sup>73</sup> Finally, the Higher Education Ordinance reiterates the gender-equality provision of the Higher Education Act.<sup>74</sup> It also states that “[p]rovisions on the equal treatment of students and applicants to higher education institutions, irrespective of gender, ethnic belonging, religion or other belief, sexual orientation or disability, are given in the Equal Treatment of Students at Universities Act.”<sup>75</sup>

Within this legal landscape, some Swedish universities implemented gender quotas in their admissions procedures, requiring gender balance in the admitted class. As of 2010 twenty-nine out of thirty-five Swedish universities were using some form of gender quota.<sup>76</sup> These gender quotas were intended in part

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<sup>68</sup> LAG OM LIKABEHANDLING AV STUDENTER I HÖGSKOLAN [EQUAL TREATMENT OF STUDENTS AT UNIVERSITIES ACT] (SFS 2001:1286), *last amended* by SFS 2006:308, *superseded* by SFS 2008:567 (Swed.), *translation available at* [http://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20Equal\\_Treatment\\_of\\_Students\\_at\\_Universities\\_Act.pdf](http://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20Equal_Treatment_of_Students_at_Universities_Act.pdf).

<sup>69</sup> *Id.* § 7.

<sup>70</sup> *Id.* § 3.

<sup>71</sup> *Id.* § 5.

<sup>72</sup> *Id.* § 7.

<sup>73</sup> 1 ch. 5 § HÖGSKOLELAG [HIGHER EDUCATION ACT ch. 1, § 5] (SFS 1992:1434), *last amended* by SFS 2012:910 (Swed.), *translation available at* [http://www.lunduniversity.lu.se/upload/staff/higher\\_education\\_act.pdf](http://www.lunduniversity.lu.se/upload/staff/higher_education_act.pdf).

<sup>74</sup> 1 ch. 8 § HÖGSKOLERFÖRING [HIGHER EDUCATION ORDINANCE ch. 1, § 8] (SFS 1993:100), *last amended* by SFS 2013:32 (Swed.), *translation available at* [http://www.lunduniversity.lu.se/upload/staff/higher\\_education\\_ord.pdf](http://www.lunduniversity.lu.se/upload/staff/higher_education_ord.pdf).

<sup>75</sup> *Id.* § 9.

<sup>76</sup> *Sweden Ends Use of Preferential Treatment in Connection with University Entries*, EUR. CENTER FOR WOMEN & TECH. (Aug. 25, 2010, 11:48 AM), [http://www.ecwt.eu/digitalcity/projects/eudir/eudir\\_boxedNews.jsp?dom=BAAFHDFD&prt=BAAEZMPO&firt=AAA](http://www.ecwt.eu/digitalcity/projects/eudir/eudir_boxedNews.jsp?dom=BAAFHDFD&prt=BAAEZMPO&firt=AAA)

to undermine gender segmentation in the subjects studied by men and women.<sup>77</sup> Women are underrepresented, for instance, in the science disciplines.<sup>78</sup> Despite women's greater likelihood of obtaining a college degree, women are underrepresented in research and academic careers.<sup>79</sup> Quotas to achieve gender balance have generally been regarded as a measure to eradicate women's disadvantage, as manifested in the underrepresentation of women in subjects that lead to more prestigious careers.

But in practice, gender parity quotas in some university departments disadvantaged women in the admissions process. In recent years litigation brought by the Swedish Centrum för rättvisa (Center for Justice), a public interest organization, has successfully challenged gender quotas on behalf of female plaintiffs who were denied university admission.<sup>80</sup> The veterinary school at the Swedish University of Agricultural Sciences had been using a gender quota in admissions.<sup>81</sup> In Sweden, pursuant to the Higher Education Ordinance, admissions are based strictly on high school grades or test scores.<sup>82</sup> Thus, under the admissions scheme at the veterinary school, the school's attempt to achieve gender balance led to a situation in which admitted female candidates had higher scores than the admitted male candidates.<sup>83</sup> The Centrum för rättvisa represented female students who had been denied admission to the program in a lawsuit alleging that this admissions scheme constituted direct discrimination in violation of section 7 of the Equal Treatment of Students at Universities Act.<sup>84</sup> The Svea Court of Appeals agreed, declining to regard this program as coming within the statutory exception for different treatment justified by special interests more important than preventing discrimination.<sup>85</sup> The Centrum för rättvisa concurrently challenged a similar gender quota for

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AVDLJ&men=BAAEZMPQ&smen=BAAEZMPQ&finn=BAAEZMQX.

<sup>77</sup> Cf. *Sweden Set to Scrap University Gender Quotas*, LOCAL (Jan. 12, 2010, 8:31 AM), <http://www.thelocal.se/24330/20100112/#.URVCp7vLh5E> (describing how Swedish affirmative action gave priority to whichever gender happened to be underrepresented in a given program).

<sup>78</sup> AGNETA HANSSON & ANN MARGARETH MÖLLER, RTD-PP-L4-2007-1, META-ANALYSIS OF GENDER AND SCIENCE RESEARCH: COUNTRY REPORT SWEDEN 3 (2009), available at [http://www.genderandscience.org/doc/CReport\\_Sweden.pdf](http://www.genderandscience.org/doc/CReport_Sweden.pdf).

<sup>79</sup> *Id.*

<sup>80</sup> *Sweden Ends Use of Preferential Treatment in Connection with University Entries*, *supra* note 76.

<sup>81</sup> *Sweden Set to Scrap University Gender Quotas*, *supra* note 77.

<sup>82</sup> 7 ch. 12 § HÖGSKOLERFÖRING [HIGHER EDUCATION ORDINANCE ch. 7, § 12] (SFS 1993:100), last amended by SFS 2013:32 (Swed.), translation available at [http://www.lunduniversity.lu.se/upload/staff/higher\\_education\\_ord.pdf](http://www.lunduniversity.lu.se/upload/staff/higher_education_ord.pdf).

<sup>83</sup> *Sweden Ends Use of Preferential Treatment in Connection with University Entries*, *supra* note 76.

<sup>84</sup> See Rättsfall från hovrätterna [RH] [Svea Court of Appeals] 2009-12-21 p. 389 T3552-09, at 390 (Swed.).

<sup>85</sup> *Id.* at 405-06.

admissions to the University of Lund's psychology department on behalf of female plaintiffs who had been denied admission.<sup>86</sup> Shortly after the Svea Court of Appeals' decision in the veterinary case, the University of Lund settled the psychology admissions case.<sup>87</sup>

Although the Swedish Supreme Court has never ruled on the legality of gender quotas, it held in 2006 that an ethnic quota for admission to the Uppsala Law Faculty violated the same provision of the Equal Treatment of Students at Universities Act.<sup>88</sup> The Uppsala Law Faculty had been setting aside ten percent of its spots for students born to two non-Swedish parents.<sup>89</sup> The Swedish Supreme Court held that this was a form of discrimination on the basis of ethnicity that could not be sustained as a valid exception to the equal treatment provision in section 7 of the Equal Treatment of Students at Universities Act.<sup>90</sup> Indeed, this ruling encouraged Centrum för rättvisa to begin litigating the challenges to gender quotas as well.<sup>91</sup>

In the wake of litigation challenging race and gender quotas in Swedish Universities, the Swedish government took action in 2010 to prohibit quotas in university admissions as a general matter.<sup>92</sup> The new regulation repealed the language in the Higher Education Ordinance that had permitted exceptions to the requirement of equal treatment for different treatment that could be specially justified for manifestly important reasons.<sup>93</sup> Accordingly, it is now understood that universities can no longer use quotas or other forms of gender-conscious action to achieve gender balance. In justifying the new regulation, the Swedish Minister of Higher Education and Research, Tobias Krantz,

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<sup>86</sup> Ansökan om stämning enligt lag (2002:599) om grupprättegång [Class Action Complaint 2002:599], [Malmö District Court] 2009-10-14 T9339-09 (Swed.), available at <http://centrumforrattvisa.se/wp-content/uploads/files/Dom%20-%20Malm%C3%B6%20tingsr%C3%A4tt%2020100304.pdf>.

<sup>87</sup> Förlikningsavtal [Settlement Agreement], [Malmö District Court] 2010-02-24 T9339-09 (Swed.), available at <http://centrumforrattvisa.se/wp-content/uploads/files/Dom%20-%20Malm%C3%B6%20tingsr%C3%A4tt%2020100304.pdf>; see also *Female Students Awarded Discrimination Damages*, LOCAL (Feb. 22, 2010, 1:31 PM), <http://www.thelocal.se/25136/20100222/#.UVDWExyk958>.

<sup>88</sup> Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2006-12-21 p. 683 T400-06 (Swed.), available at [http://hogstادمstolen.se/Domstolar/hogstادمstolen/Avgoranden/2006/2006-12-21\\_T\\_400-06\\_Dom.pdf](http://hogstادمstolen.se/Domstolar/hogstادمstolen/Avgoranden/2006/2006-12-21_T_400-06_Dom.pdf).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* For a discussion of the case, see CHRISTOPHER MCCRUDDEN & SACHA PRECHAL, THE CONCEPTS OF EQUALITY AND NON-DISCRIMINATION IN EUROPE: A PRACTICAL APPROACH 40 (2009), available at [ec.europa.eu/social/BlobServlet?docId=4553&langId=en](http://ec.europa.eu/social/BlobServlet?docId=4553&langId=en).

<sup>91</sup> See *Sweden Ends Use of Preferential Treatment in Connection with University Entries*, *supra* note 76.

<sup>92</sup> *Id.*

<sup>93</sup> FÖRORDNING OM ÄNDRING I HÖGSKOLEFÖRORDNINGEN [REGULATION AMENDING THE HIGHER EDUCATION ORDINANCE] (SFS 2010:700) (amending HIGHER EDUCATION ORDINANCE, ch. 7, § 12) (Swed.).

pointed out that the quota system “has hit the talented female students especially hard.”<sup>94</sup>

As of 2007 Swedish women outnumber men in seven of nine fields of study, while men outnumber women only in the technical field.<sup>95</sup> In the absence of quotas in Swedish university admissions, this trend is expected to continue. This is consistent with the overall situation in Europe. A European Commission report indicates that women between the ages of twenty and twenty-four are outperforming men in educational results in all the member states,<sup>96</sup> and women now make up fifty-nine percent of university graduates in Europe.<sup>97</sup> Women are more heavily represented than men in most subjects, including competitive and prestigious subjects like medicine and law.<sup>98</sup> More women than men are now studying some science subjects as well, such as biology and veterinary sciences.<sup>99</sup> Nonetheless, men remain overrepresented in physical sciences and engineering.<sup>100</sup>

In Sweden university gender quotas came to an end because they were no longer needed to counteract women’s disadvantage in that particular context. Indeed, the government’s stated justification for repealing the provisions of law that left room for such quotas was that the policies were hurting talented women.<sup>101</sup> The Swedish Ministry of Justice has opposed EU legislation requiring gender parity on corporate boards.<sup>102</sup> In Sweden the vision of gender justice that is being pursued does not require gender balance as a permanent feature of legitimate institutions. A society in which women are

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<sup>94</sup> *Sweden Ends Use of Preferential Treatment in Connection with University Entries*, *supra* note 76.

<sup>95</sup> HÖGSKOLEVERKET [SWEDISH NAT’L AGENCY FOR HIGHER EDUC.], *KVINNOR OCH MÄN I HÖGSKOLAN* [WOMEN AND MEN IN HIGHER EDUCATION] 8, 32 (2008), *available at* <http://www.hsv.se/download/18.6923699711a25cb275a8000278/0820R.pdf>. Men and women are equally represented in the arts. *Id.*

<sup>96</sup> European Comm’n, Directorate-Gen. for Emp’t, Soc. Affairs & Equal Opportunities, *Report on Equality Between Women and Men 2009*, at 22 (2009), *available at* <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=86&furtherPubs=yes> (charting the educational attainment level of women and men aged twenty to twenty-four in European Union member states as of 2007).

<sup>97</sup> *Id.* at 16.

<sup>98</sup> *Id.*

<sup>99</sup> *See* European Comm’n, Directorate-Gen. for Emp’t, Soc. Affairs & Equal Opportunities, *Opinion on The Future of Gender Equality Policy After 2010 and on the Priorities for a Possible Future Framework for Equality Between Women and Men*, at 14 (2010), *available at* [http://ec.europa.eu/justice/gender-equality/files/opinions\\_advisory\\_committee/2010\\_01\\_opinion\\_future\\_gender\\_equality\\_policy\\_after\\_2010\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/opinions_advisory_committee/2010_01_opinion_future_gender_equality_policy_after_2010_en.pdf).

<sup>100</sup> *Id.*

<sup>101</sup> *See Sweden Set to Scrap University Gender Quotas*, *supra* note 77.

<sup>102</sup> Magnus G. Graner, State Sec’y, Swedish Ministry of Justice, *Gender Imbalance in Corporate Boards in the EU – Public Consultation* (May 28, 2012), *available at* [http://ec.europa.eu/justice/newsroom/gender-equality/opinion/files/120528/pa/297\\_en.pdf](http://ec.europa.eu/justice/newsroom/gender-equality/opinion/files/120528/pa/297_en.pdf).



overrepresented in prestigious university programs that lead to prestigious jobs and positions of power is not necessarily an unjust one.

According to the Swedish vision of equality that is now taking shape in the university context, an overrepresentation of women would only be problematic if it could be traced to the subordination of men or women. For instance, women are overrepresented in some professions, such as nursing and early childhood education, largely because these are professions closely connected to women's traditional subordinate role as caregivers. Gunnar Strömmer, the Centrum för rättvisa lawyer who represented the female plaintiffs in the Swedish university suits, has questioned whether gender balance should always be a goal in itself.<sup>103</sup> Nonetheless, he has acknowledged that "[f]or some study programmes, such as early childhood education and psychology, it might be important to educate both women and men. But why is it problematic that more women than men want to be veterinarians?"<sup>104</sup>

#### V. CONCLUSION: TOWARD A FEMINISM OF FEAR

The recent trajectories of gender quotas in France and Sweden suggest a tension between the parity-democracy and antisubordination rationales for gender quotas. In the domains where women remain disadvantaged or underrepresented, this tension remains masked, as the two rationales converge to support positive measures to eradicate women's disadvantage. But in the domains where women are beginning to outperform men, should gender balance be manufactured? This question has direct relevance to the United States. Rosin notes that many American college admissions officers are avoiding "crossing the dreaded 60 percent threshold" by "explain[ing] away the boys' deficits."<sup>105</sup> This is an informal gender quota designed to slow down, or prevent, the end of men. Are American equality norms quietly moving from antisubordination to parity democracy?

The American version of parity democracy may amount to a feminism of fear, to borrow Judith Shklar's defense of liberalism.<sup>106</sup> For Shklar, the most compelling justification for liberal principles such as limited government is not the moral aspiration to individual freedom but the avoidance of cruelty and physical suffering.<sup>107</sup> The "liberalism of fear" does not "offer a *summum bonum* toward which all political agents should strive," but rather undertakes to ward off a "*summum malum*, which all of us know and would avoid if only we could."<sup>108</sup> Similarly, a feminism of fear would conceptualize gender balance not as the *summum bonum* embraced by the French ideology of *parité*,

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<sup>103</sup> Marte Ericsson Ryste, *Sweden Ends the Use of Preferential Treatment*, GENDER BALANCE RES. – NOR. (Aug. 13, 2010), <http://eng.kifinfo.no/nyhet/vis.html?tid=72920>.

<sup>104</sup> *Id.*

<sup>105</sup> ROSIN, *supra* note 1, at 159.

<sup>106</sup> JUDITH SHKLAR, *POLITICAL THOUGHT AND POLITICAL THINKERS 3* (1998).

<sup>107</sup> *See id.* at 5-12.

<sup>108</sup> *Id.* at 10-11.

but rather as a safeguard against the *summum malum* of sex-based subordination. Even if male disadvantage in the post-industrial economy is not explained by women's unjust subordination of men, gender balance can protect against the possibility of women exploiting their existing advantages to create greater, undeserved disparities that endure beyond the post-industrial age. Today's feminists may disagree about the precise historical moment at which men exploited their advantage in pre-industrial economies to produce the gender injustice against which modern feminists have struggled. Maintaining gender balance indefinitely, even in the absence of apparent sex-based subordination, provides a practical if imprecise way of achieving equality without precisely defining the line between disadvantage and subordination.