

# DISCRIMINATION AS CORRUPTION: RETHINKING QUOTAS IN DEMOCRACIES

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This Article offers a theory of discrimination as corruption, beginning with the widely accepted proposition that racial quotas are obviously discrimination. Racial quotas are thought to constitute discrimination because they fail to respect the dignity of individuals as individuals. This is the reasoning advanced by the U.S. Supreme Court when it rejects quotas while allowing race-conscious affirmative action that is individualized. At the same time, antidiscrimination law, particularly when it draws the line between quotas and affirmative action, seems driven by the fear that quotas will corrupt the democratic process. Quotas are constitutionally offensive because they purportedly cause social divisions and racial resentment, not merely because they fail to recognize persons as individuals. The constitutional repudiation of racial quotas is based on the belief that quotas have a corrosive and delegitimizing effect on democratic institutions. Thus, two questions emerge: (1) Do quotas *really* corrupt democracy?; and (2) How, if at all, should antidiscrimination law respond to similarly corrupt practices? This Article uses transnational comparisons to explore these questions, which are at the heart of a corruption conception of discrimination.

Gender and race quotas are thriving in several jurisdictions around the world, in constitutional democracies that also guarantee equal protection and prohibit discrimination. In the jurisdictions that have embraced them, quotas are publicly defended as mechanisms to legitimize the major social institutions in a democracy. Male overrepresentation in positions of power signals an illegitimate democracy. Racialization of disadvantage also threatens the legitimacy of a republic. In short, democracy is corrupted by inequality, not quotas. Quotas are believed to dismantle, rather than reify, the past gender and race categories that the modern state must overcome. Gender quotas in Europe and racial quotas in Brazil can illuminate the fundamental concerns of U.S. antidiscrimination law, particularly its rejection of quotas. Various foreign examples suggest that quotas do not always or necessarily have the corrosive effects on democracy assumed by American equal protection law. Legal and political actors outside the United States envision quotas as promoting social cohesion and diminishing the salience of race and gender identity politics in the long run.

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Under the discrimination-as-corruption framework, the individualized affirmative action schemes upheld by the U.S. Supreme may be more problematic than outright quotas. From the standpoint of democratic legitimacy, quotas offer efficacy, representativeness, and transparency, whereas individualized affirmative action obfuscates its purposes and then falls short of meeting them. Finally, a corruption framework would lead antidiscrimination law to shift its scrutiny away from quotas and towards conduct that perpetuates incumbent racial advantages.

Part I locates the idea of discrimination as corruption in current American affirmative action doctrine. From *Bakke* to *Fisher*, the U.S. Supreme Court has rejected quotas but permitted individualized race-conscious affirmative action on the grounds that policies that make race too salient (like quotas) lead to social division, and racial resentment. In reading this line of cases, Part I argues that quotas are thought to discriminate because they cause a politics of identity that can be described as corrupt. Parts II and III show how the recent emergence and framing of quotas outside the United States can challenge the causal link between quotas and democratic corruption. Part II examines the law and political discourse of gender quotas in Europe, focusing on the constitutional struggles in France that raised and overcame concerns about gender quotas' divisiveness. Part III turns to racial quotas in Brazil, particularly the reasoning of the Brazil's Supremo Tribunal Federal (STF, or the highest constitutional court) upholding quotas in April 2012. The STF's approach to quotas is particularly worthy of American attention since it answers the U.S. Supreme Court's concerns about the divisiveness of quotas. Part IV shows how both the French discourse of gender quotas and the Brazilian discourse of race quotas conceptualize quotas as strategies for legitimizing the democratic institutions in which they are used. Complex and nuanced understandings of race and gender sustained the assertion that quotas would help challenge rather than reinforce the traditional race and gender categories. Part V returns to the U.S. with a foreign lens. It articulates the parallels between the democratic legitimacy defense of quotas abroad and the diversity rationale for affirmative action in the United States. It then compares individualized affirmative action in the United States with quotas abroad, and explains why quotas might be preferable to individualized affirmative action if democratic legitimacy is embraced as the normative framework. Quotas can be more efficient and transparent than individualized affirmative action in achieving the social inclusion required by democracy. The greater efficiency and transparency of quotas might temper the racial resentment directed at individualized race-conscious affirmative action. Part VI explores the implications, beyond quotas, of embracing a corruption framework for antidiscrimination law.

## I. Quotas as Corruption

The “q-word”<sup>1</sup> is a conversation stopper in the United States because quotas are widely presumed to be morally offensive. The immorality of racial quotas was given scholarly articulation by Alexander Bickel, a major twentieth-century constitutional theorist at the Yale Law School. In *The Morality of Consent*, Bickel wrote:

[A] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can as easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name but in its effect; a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant.<sup>2</sup>

This passage and surrounding ones have made their way into many Supreme Court opinions on affirmative action. The basic idea is that the ideal of equality cannot tolerate the relevance of race, and therefore, a racial quota directly contradicts the ideal it is aimed at achieving. In *Bakke*, the Court invalidated a medical school admissions quota that reserved a specified number of seats for individuals from disadvantaged minority groups. In justifying the rejection of the quota, Justice Powell’s plurality opinion invoked Bickel to argue that equal protection should not distinguish between benign and invidious racial quotas:

Professor Bickel noted the self-contradiction of that view: “The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution.” A. Bickel, *The Morality of Consent* 133 (1975).<sup>3</sup>

The admissions program had prescribed a minimum numerical threshold – 16 out of 100 – for minority students.<sup>4</sup> It did not prescribe a maximum. Indeed, in addition to the 16 Blacks, Chicanos, and Asians admitted under the special admissions program, the University had admitted additional Blacks, Chicano, and Asians through their general admissions program, leading to a total of 24-31 out of 100 minority students

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<sup>1</sup> See, e.g. Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Does Not Induce Hiring Quotas*, 74 *Tex. L. Rev.* 1487 (1996). Referring to quotas as the “q-word” reinforces the taboo nature of quotas.

<sup>2</sup> See Alexander Bickel, *The Morality of Consent* 133 (1974).

<sup>3</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 295 (1978).

<sup>4</sup> *Id.* at 275-76.

each year.<sup>5</sup> The 16 percent minimum for minority students did in effect operate as a maximum cap on white students. Setting aside 16 spots for minorities necessarily means that no more than 84 white students can be admitted. That was the problem with the program.<sup>6</sup>

Another feature of the “quota” that rendered it unconstitutional was its rigidity: the numerical goal was mandatory. The specified number of seats was not merely an aspiration, which can become flexible if countervailing considerations – such as an extraordinary number of amazing white applicants or a significant dearth of qualified minority applicants – come into play.<sup>7</sup> A “quota” requires the numerical targets to be met no matter what. The target-quota is constitutionally impermissible because, in lacking flexibility, it precludes the decisionmaker from treating each applicant as an individual. This occurs because a minority goal necessarily limits the number of positions available for whites. According to this framework, whites’ individual rights are violated when they are excluded from consideration for the 16 spots that have been allocated to minorities, even if they are considered for the 84 remaining spots.

Since *Bakke*, the Supreme Court’s affirmative action cases, in both the Equal Protection and Title VII contexts, have developed this distinction between illegal quotas and permissible affirmative action. Under Title VII, *United Steelworkers v. Weber* upheld an employer affirmative action program that reserved 50 percent of the openings in a training program for black craft workers. The court distinguished this program from illegal quotas, by pointing to the following features that saved it: (1) the affirmative action program did not unnecessarily trammel the interests of white employees, because it allowed whites to compete for the remaining 50 percent of the slots; and (2) more importantly, the plan was “a temporary measure,” which was “not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.”<sup>8</sup> In other words, a quota would likely violate Title VII if it *maintained* racial balance permanently and indefinitely, treating racial balance *as a goal or ends in itself*, whereas valid affirmative action programs only use racial balancing techniques *as a means* to achieve racial equality, with a time limit on such techniques.

It is not clear that the Supreme Court would uphold the affirmative action program at issue in the *Steelworkers* case today, in light of its 2009 decision in *Ricci v. DeStefano*.<sup>9</sup> In *Ricci*, the Court held that an employer’s race-conscious actions to avoid a racially disparate impact in promotions violated Title VII. Nonetheless, one principle from *Steelworkers* that has been repeatedly reaffirmed by the court is the proposition that it is illegitimate to maintain racial balance indefinitely. In *Ricci*, the Court held that the New Haven Fire Department had violated Title VII when it decided

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<sup>5</sup> *Id.* at 275-76.

<sup>6</sup> *Id.* at 319 (“[The Davis special admissions program] tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class.”)

<sup>7</sup> *Id.* at 317-18 (suggesting that an admissions program that viewed race as a “plus” factor and consideration of individual circumstances could pass constitutional muster).

<sup>8</sup> *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979).

<sup>9</sup> *Ricci v. DeStefano* 557 U.S. 557 (2009).

not to promote anyone on the basis of test scores on which racial minorities had performed poorly. A central flaw in the Fire Department's actions is that it appeared to be acting with the intent of pursuing its "preferred racial balance."<sup>10</sup> The New Haven Fire Department had argued that, since it had simply been motivated by a good-faith fear of disparate impact liability, its actions were not discriminatory. But the Supreme Court disagreed. Finding that there was no strong basis in evidence for fearing disparate impact liability, the employer had violated the statute by attempting to avoid racially disparate outcomes under such circumstances. The Court cautioned against the adoption of a *de facto* quota system, in which a "focus on statistics ... could put undue pressure on employers to adopt inappropriate prophylactic measures."<sup>11</sup> It is assumed in *Ricci* that, since quotas are suspect under Title VII's disparate treatment prohibition, any approach to disparate impact liability that incentivizes employers to adopt quotas ("inappropriate prophylactic measures") would also be suspect.

In public education cases raising Equal Protection challenges to race-conscious affirmative action programs, the Supreme Court has explicitly and repeatedly stated that racial balance is not a legitimate state purpose. In *Grutter v. Bollinger*, the Supreme Court upheld the University of Michigan's affirmative action program, recognizing diversity as the compelling state interest that justified the program.<sup>12</sup> In *Grutter*, the Court clearly stated that what saved the law school admissions scheme was that it did not pursue racial balance "for its own sake."<sup>13</sup>

In *Parents Involved v. Seattle Independent School District*, the Court invalidated a school district's consideration of race in assigning children to schools within a district. The plurality viewed the practice as a pursuit of racial balance for its own sake.<sup>14</sup> Justice Roberts relied on *Grutter* to reiterate that any program that was "simply an effort to achieve racial balance" would be "patently unconstitutional." The Court noted, "In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate." Racial balance "pure and simple," or "for its own sake," is unambiguously unconstitutional. It's not even a legitimate governmental purpose<sup>15</sup> – let alone a "compelling" one.

Last Term, in *Fisher v. Texas*, the Supreme Court reaffirmed its rejection of quotas. In fact, none of the parties or amici in support of affirmative action attempted to embrace quotas. In the decision below, the Fifth Circuit's conclusion that the program was constitutionally valid depended on the extent to which it "considers race in a holistic and individualized manner, and not as part of a quota or fixed-point system."<sup>16</sup> The Supreme Court remanded the case, holding that the Fifth Circuit had not applied the proper strict scrutiny analysis. Seven Justices joined the opinion

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<sup>10</sup> *Ricci*, 129 S.Ct. at 2675.

<sup>11</sup> *Id.*

<sup>12</sup> *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

<sup>13</sup> *Id.* at 330 (citing *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)).

<sup>14</sup> *Parents Involved v. Seattle Indep. Schl. Dist.*, 551 U.S. 701, 723 (2007).

<sup>15</sup> *Id.* See also *Grutter*, 539 U.S. at 330.

<sup>16</sup> *Fisher v. Texas*, 631 F.3d 213, 233 (5<sup>th</sup> Cir. 2011).

reaffirming the rejection of quotas. “To be narrowly tailored, a race-conscious admissions program cannot use a quota system,’ *Grutter*, 539 U.S. at 334, but instead must ‘remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application,’ *id.*, at 337.”<sup>17</sup> In this most recent iteration addressing the relationship of affirmative action to the nondiscrimination guarantee of Equal Protection, the Supreme Court says that what’s wrong with quotas is that they fail to evaluate individuals as individuals.

Although U.S. law’s moral denunciation of quotas has largely occurred in cases reviewing race-conscious affirmative action programs, the Supreme Court has assumed that gender quotas would be similarly troubling. The Court upheld a gender-conscious affirmative action program in *Johnson v. Transportation Agency*, but in so doing, adopted the same moral vocabulary against quotas as it does in race cases. The plan was valid because the goals for hiring women “should not be construed as ‘quotas’ that must be met,” and “the Plan sets aside no positions for women.”<sup>18</sup> The Court was satisfied that the “broader goal” of equal opportunity was “divorced . . . from specific numbers or percentages”<sup>19</sup> and there was “ample assurance that the Agency does not seek to use its Plan to maintain a permanent racial and sexual balance.”<sup>20</sup> The resoundingly clear implication is that the goal of maintaining sexual balance permanently, defined by a specific percentage, would be legally suspect.

What’s wrong with maintaining racial or gender balance permanently? I take the Court’s use of the phrase “racial balance for its own sake” as referring to the maintenance of racial balance as a permanent feature of the institution in question. The justifications by various Justices for rejecting quotas provide some accounts of why “racial balance for its own sake” is so unattractive to them. In *J.A. Croson v. City of Richmond*, Justice Scalia cited the *Bickel* passages referenced above, and was troubled that white individuals were denied opportunities based on race.<sup>21</sup> Thus, according to this account, maintaining racial balance permanently is wrong because members of some races will lose out in the numbers game, because of their race (which should be irrelevant) rather than because of some other reason that is deemed to be relevant. Similarly, in *Parents Involved*, Justice Roberts suggests that school districts that maintain racial balance “for its own sake” violate the rights of those students who are excluded from their first-choice schools, which they would attend in the absence of racial balancing.<sup>22</sup>

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<sup>17</sup> See *Fisher v. Texas*, No. 11-345, Slip Opinion at 7 (U.S. S. Ct. 2013)

<sup>18</sup> *Johnson v. Transportation Agency*, 480 U.S. 616, 638 (1987) (citing the agency’s affirmative action Plan).

<sup>19</sup> *Id.* at 639.

<sup>20</sup> *Id.* at 640.

<sup>21</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 527 (1989) (Scalia, J., concurring).

<sup>22</sup> See *Parents Involved*, 551 U.S. at 719 (finding that plaintiffs had standing because being denied first-choice school placement due to racial considerations injured them).

The concerns about the individual rights of the white students who are denied a spot in the schools of their choice tend to converge with a slightly different argument against racial balance that seems to be carrying the evolving doctrine, holding sway at the center of the Court: Quotas cause social division. This claim echoes Bickel's assertion that a quota is a "divider of society." Many scholars have suggested that the avoidance of social division provides a consistent account of the current doctrine in race equality cases, wherein the Court sometimes allows race-conscious actions and sometimes prohibits them.<sup>23</sup> Race-conscious action is impermissible if it fuels too much social division, and can be sustained when it is necessary to counter racial isolation. Because policies like affirmative action are regarded as an undeserved preference for blacks, the resulting racial resentment by whites leads to social balkanization, which renders it constitutionally suspect. The member of the current Court most closely identified with this perspective is Justice Kennedy.

Justice Kennedy did not join the entirety of Justice Roberts' opinion in *Parents Involved*. Writing separately, Justice Kennedy voted to strike down the Seattle and Louisville school district plans, but left room for race-conscious school assignment plans if they were designed narrowly to achieve the legitimate goal of avoiding "racial isolation." Justice Kennedy wrote:

The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.

Yet, Justice Kennedy rejected the plan at issue, based on the conviction that overuse of racial classification leads to undesirable racial dynamics:

Why may the authorities not recognize the problem in a candid fashion and solve it altogether through resort to direct assignments based on student racial classifications? So, the argument proceeds, if race is the problem, then perhaps race is the solution.

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The argument ignores the dangers presented by individual classifications, dangers that are not as pressing when the same ends

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<sup>23</sup> See Reva Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 *Yale L. J.* 1278, 1300 (2011); Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 *Duke L.J.* 781, 787 (2006); Robert C. Post, *The Supreme Court, 2002 Term--Foreword: Fashioning the Legal Constitution: Culture, Courts, and the Law*, 117 *Harv. L. Rev.* 4, 74 (2003); Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 *Ohio St. L.J.* 669, 691 (1998).

are achieved by more indirect means. . . . To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. . . . Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process. On the other hand race-conscious measures that do not rely on differential treatment based on individual classifications present these problems to a lesser degree.<sup>24</sup>

Quotas are the paradigmatic example of a program that makes race too salient. When racial identification is too strong, according to Kennedy a “new divisiveness” emerges. When he suggests that race becomes a “bargaining chip in the political process,” he is perhaps alluding to a political dynamic by which individuals use their racial identities strategically to obtain otherwise undeserved goods and advantages in the political marketplace.<sup>25</sup> This dynamic is “corrosive;” the suggestion is that it goes against the way the political process is supposed to work. But when race-conscious measures are softer, “more indirect,” Justice Kennedy believes that this dynamic of divisiveness (and the accompanying “bargaining chip” problem) is reduced. According to Justice Kennedy, being too transparent about trying to achieve racial balance is unconstitutional because it produces social division and “bargaining chip” politics. When people identify too strongly by race, politics gets played through identity rousps. This corrupts the democratic political process.

The characterization of a racial quota as a form of political corruption is more explicit in *J.A. Croson v. Richmond*. The Supreme Court struck down a policy adopted by a municipal government to award at least 30 per cent of construction subcontracting to minority business enterprises. The Court was critical not only of the exclusion of whites from the 30 percent set-aside,<sup>26</sup> but the political context in which the quota was adopted. The lower court had determined that “there as more of a political than a remedial basis for the racial preference.”<sup>27</sup> The population of Richmond was 50 percent black, and less than one percent of the construction contracts had been awarded to minority businesses. Throughout the opinion, the Court expresses doubt as to whether the low percentage of contracts with minority businesses can be explained by racism.

Furthermore, the Court characterizes the Richmond quota as an instance of self-dealing by blacks. In Richmond, African Americans had obtained a political majority in the city government. The Court stated:

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<sup>24</sup> *Parents Involved in Community Schools v. Seattle Indep. Schl Dist. No. 1*, 551 U.S. 701, 796-97 (2007).

<sup>25</sup> For a critique of this strategic deployment of race, particularly in allegations of racism, see Richard Thompson Ford, *The Race Card* (2008).

<sup>26</sup> See *Richmond v. J.A. Croson*, 488 U.S. 469, 493 (1989).

<sup>27</sup> *Id.*

In this case, blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.<sup>28</sup>

The Court then cited John Hart Ely's account of reverse discrimination: "[A] law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature."<sup>29</sup> On Ely's understanding, the mere fact of preferential treatment for blacks does not render it reverse discrimination. Rather, preferential treatment for blacks becomes a form of discrimination if and only if a group that is in power is using the preference to reinforce that power.<sup>30</sup> If a white majority placed burdens on itself to achieve racial justice, the Croson Court suggested that these could amount to "benign" racial classifications that might cut against heightened scrutiny. But the Court seems to think, in this case, that a black majority is merely helping itself. Furthermore, the Court also declined, in Croson, to recognize the remediation of societal discrimination as a justification for the racial classification that had been adopted. Its reasoning was that "our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate a 'piece of the action' for its members."<sup>31</sup> Although the Croson Court's description of the Richmond situation as self-dealing by blacks is questionable, the tendency to worry about corruption, rather than mere racial classification, is compelling. It suggests that, if a racial quota were adopted under different political conditions, it would not necessarily be rejected.

The corruption framework is most salient in some of Justice Stevens' opinions. Justice Stevens has voted to uphold affirmative action programs on several occasions, but he has also voted to strike them down on some occasions. He upheld the minority set-aside program in Adarand, but voted to strike down the program in Croson and also in Fullilove v. Klutznick. In his dissenting opinion in Fullilove, cited by the Court in Croson, Justice Stevens explicitly articulated his concerns about the effects of a quota on the political process. He depicted the quota as a "monopoly privilege" which only benefited "the relatively small number of persons within the racial classification who represent the entrepreneurial subclass—those who have, or can borrow, working capital."<sup>32</sup>

Justice Stevens pointed out:

Our historic aversion to titles of nobility is only one aspect of our commitment to the proposition that the sovereign has a fundamental duty to govern impartially. When government accords different

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<sup>28</sup> Id at 495-96

<sup>29</sup> Id. at 496.

<sup>30</sup> See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 170-72 (1980).

<sup>31</sup> Croson, supra note \_\_ at 511.

<sup>32</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 533 (Stevens J., dissenting).

treatment to different persons, there must be a reason for this difference. Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate.<sup>33</sup>

Justice Stevens was especially troubled that the 10 per cent minority set-aside at issue in *Fullilove* was largely driven by the Congressional Black Caucus, who insisted that, if the federal government was going to provide a \$4 billion public contract business, their constituents were entitled to “a piece of the action.”<sup>34</sup> He feared that these types of contracts could become a form of political patronage. He concluded, “But in the long run any rule that authorized the award of public business on a racial basis would be just as objectionable as one that awarded such business on a purely partisan basis.”<sup>35</sup> Thus, what’s wrong with the quota is not merely that individuals (or businesses) are classified by race, but rather, that it is imagined to operate as inappropriate or undeserved privilege. Whether this description of the minority set-aside program is correct or not, it appears that this conceptualization leaves room for the possibility of quotas that are unproblematic.

If quotas are wrong because they distort the political process and harm the conditions under which people of different races govern themselves for the common good, they would be less problematic if they had different effects on the political process. Justice Kennedy in *Parents Involved*, the *Crosby* majority, and Justice Stevens in *Fullilove* all scrutinize quota-like policies based on the concern that they breed a politics of identity that undermines a long-term vision of how democracy should work. They all imagine a society in which race plays less of a role in politics than it does today.

The construction of quotas as democratic corruption raises two sets of questions: (1) Is it always true that race or gender quotas generate a balkanizing politics of identity that is bad for a democracy’s legitimacy?; and (2) What practices, other than quotas, should anti-discrimination law scrutinize if discrimination were to be redefined through this lens of democratic corruption? The remainder of this Article focuses primarily on the first question, by exploring the recent experience of gender quotas in Europe, especially France, and racial quotas in Brazil, wherein quotas have come to be seen as legitimizing rather than balkanizing the institutions of democracy. The law of quotas in these other jurisdictions shows how the American view of quotas as discrimination is dependent on political, institutional, social and legal factors that are historically contingent and open to disruption. Outside the United States, there has been a transformative evolution of the political, legal, and institutional discourse around quota and social cohesion. This experience suggests that, in different circumstances, quotas might attain more democratic legitimacy

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

than individualized affirmative practiced in the United States. Finally, if quotas are discriminatory because they arise from or encourage the politically corrupt practice of “getting a piece of the action” for one’s own identity group, what other practices might antidiscrimination law scrutinize? Raising this question requires us to take seriously recent claims by sociologists that today’s racial inequalities stem largely from “opportunity hoarding” by whites.

## II. Gender Parity in Europe

### A. Gender Quotas

Since the 1980s, gender quotas have been introduced in many European countries, by political parties or by legislation, to increase the number of women in elected legislatures.<sup>36</sup> Over the last ten years, quotas have also been adopted, by legislation or by self-regulatory bodies, to increase the number of women in corporate leadership positions. In November 2012, the European Commission proposed a European Union directive requiring publicly listed companies in the European Union to reach the objective of 40% representation by the under-represented sex on these companies’ non-executive boards of directors.<sup>37</sup> The EU proposal leaves most aspects of enforcement and implementation to the member states, but it does require every member state to enable unsuccessful candidates to take legal action against companies that fall short of the quotas, and empowers rejected candidates to force the companies to disclose the selection criteria used.<sup>38</sup>

The proposal for an EU directive requiring women to constitute almost half of all corporate boards of directors follows legislation passed in various European countries over the last decade. A few months before the European Parliament’s resolution urging the Commission to adopt legislation imposing a 40% gender quota on corporate boards, France had adopted such a law.<sup>39</sup> The French Parliament adopted the statute in January 2011 after a long constitutional struggle over the compatibility of the French constitution’s equality provisions and various gender quotas – from elected office to corporate boards and other positions of power. The French law, which prohibits the proportion of directors of each sex from being less than 40 percent in publicly traded companies, echoes the provisions of a

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<sup>36</sup> See Drude Dahlerup, *Women, Quotas and Politics* (2006); Mona Lena Krook, *Quotas for Women in Politics: Gender and Candidate Selection Reform Worldwide* (2009).

<sup>37</sup> See European 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*, 2012/0299 (COD), Nov. 14, 2012, art. 4.

<sup>38</sup> See *id.*

<sup>39</sup> Loi no. 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 (1), JORF du 27 janvier 2011 (Fr.).

Norwegian statute adopted in 2003.<sup>40</sup> Spain had adopted a similar statute in 2007, imposing a minimum of 40 percent for candidates of each sex for party lists in legislative elections, as well as on corporate boards of directors for public companies.<sup>41</sup> Belgium, Italy, and the Netherlands adopted laws in June and July 2011 adopting a 30 percent quota for each sex on corporate boards.<sup>42</sup> In Germany, the upper house of Parliament has voted in favor of a proposal to require 40 percent of the supervisory boards of Germany companies to be women by 2023.<sup>43</sup> The German debate will continue in the Bundestag in the coming months. Just within the last year, between the French law, the EU-level proposal, and quota legislation in several countries, it seems clear that quotas have emerged in Europe as a new model for pursuing gender equality.

In France, Italy, and Spain, the electoral and corporate gender quotas stirred up constitutional conflicts that have been resolved over the past three decades.<sup>44</sup> The French Constitutional Council struck down different types of gender quotas in 1982, 1999, and 2006, precipitating new feminist mobilizations, constitutional amendments and legislation to authorize gender quotas. Similarly, in Italy, the first attempt to require candidate gender quotas was struck down by the Italian Constitutional Court in 1995, which catalyzed constitutional amendments to permit quotas in 2001 and 2003. In Spain, the constitutional court upheld the 2007 statute adopting gender parity quotas for elected offices and corporate boards, and thus no constitutional amendment was necessary. The constitutional conflicts in these countries created a vigorous public debate between constitutional courts, social movements, and legislatures about the justification of gender quotas. This led to a transformation in the meaning of quotas and gender equality. Whereas quotas were regarded thirty years ago as a way of empowering women at the expense of men, today they are understood as a pillar of “parity democracy” for the good of all. The conceptual lens is not

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<sup>40</sup> Amendment to the Public Limited Companies Act, Ot.prp. Nr. 97 (2002-2003) (Nor.)

<sup>41</sup> Ley Orgánica 3/2007, de 22 de marzo, para la Igualdad Efectiva de Mujeres y Hombres (Organic Law 3/2007, of 22 March, on the Effective Equality between Women and Men) (Sp.).

<sup>42</sup> Legge 12 Luglio 2011, n. 120 Modifiche al testo unico delle disposizioni in materia di intermediazione finanziaria, di cui al decreto legislativo 24 febbraio 1998, no. 58, concernenti la parità di accesso agli organi di amministrazione e di controllo delle società quotate in mercati regolamentati, Gazzetta Ufficiale [Official Gazette of Italy] N. 174 del 28 Luglio 2011 (It.); Proposition de loi visant à promouvoir une représentation équilibrée des femmes et des hommes dans les conseils d’administration d’entreprises publiques économiques et de sociétés qui on fait publiquement appel à l’épargne, Sénat de Belgique, Document législative no. 5-186-2 (1 février 2011) (Be.) (adopted June 30, 2011).

<sup>43</sup> See Bundesrat, Gesetzesantrag der freien und hansestadt Hamburg, Entwurf eines Gesetzes zur Förderung gleichberechtigter Teilhabe von Frauen und Männern in Führungsgremien (GlTeilhG), Drucksache 330/12, May 29, 2012; see also Gesetzinitiative: Bundesrat stimmt für die Frauenquote, Die Zeit, Sept. 21, 2012.

<sup>44</sup> For an account of the constitutional evolutions, see Blanca Rodriguez Ruiz & Ruth Rubio-Marín, The Gender of Representation: On Democracy, Equality and Parity, 6 Int’l J. Const. L. 287 (2008); see Blanca Rodriguez Ruiz & Ruth Rubio-Marín, Constitutional Justification of Parity Democracy, 60 Alabama L. Rev. 1167 (2009).

discrimination but rather, democracy. The central questions are no longer “Do women need quotas to remedy discrimination? Do quotas discriminate against men?” Rather, the central questions concern the legitimation of power: “Can a democratic state govern its people if half of humanity is not represented? How can the power of institutions over all citizens be legitimized?”

## B. The Constitutional Evolution

The French evolution provides a colorful illustration of this shift. When the Constitutional Council first struck down a proposed law imposing a 25% quota for female candidates on political party lists for municipal elections in 1982, it regarded the quota as divisive. Yet, by 2008, Article 1 of the French Constitution was amended to reflect that “equal access by men and women” to all positions of power and responsibility was now a fundamental constitutional value, clearly authorizing quotas to implement this principle. A close look at the way quotas were reframed over time in France can complicate the American understanding of the nature of quotas.

The 1982 law had prohibited lists of candidates for municipal councils from containing more than 75% of persons of the same sex. The Constitutional Council held that such a rule violated Article 3 of the French Constitution. 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>45</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, which has constitutional status. Article 6 is essentially an equal protection guarantee, and it guarantees merit-based individual consideration, unlike its American counterpart: “All citizens, being equal in the eyes of the law, 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>46</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 into

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<sup>45</sup> Const., art 3 (Fr. 1982), quoted in Conseil constitutionnel, 82-146DC, para. 6.

<sup>46</sup> Declaration of the Rights of Man and of the Citizen, art. 6 (Fr. 1789).

separate categories.”<sup>47</sup> Making distinctions of sex for the candidates for office would constitute such a division and thereby violate these two provisions. The Constitutional Council’s decision, in framing the distinction as a division, has parallels to the U.S. Supreme Court’s conception of racial distinctions as discrimination violating equal protection when they engender social division.

This decision catalyzed a new mobilization by the supporters of gender quotas throughout the 1980s and 1990s, culminating in the statutes passed from 2000-2011 implementing gender quotas in many different institutional contexts. During the 1990s, quotas were renamed “parity.”<sup>48</sup> The concept of a “quota” had negative connotations in French politics because it was associated with American-style affirmative action, the paradigm example of an undesirable division of a democratic republic.<sup>49</sup> This is ironic, given that American affirmative action is judicially defined in contrast to quotas, and it is an example of the transatlantic misunderstandings that raise challenges, and perhaps are most illuminating, for comparative analyses of equality and antidiscrimination law.

Yet, the articulated difference between “quotas” and “parité” in France stands in stark contrast to the articulated difference between “quotas” and “affirmative action” in the United States. In France, “parity” is more demanding, and thus more rigid than quotas, whereas in the United States, “affirmative action” is less rigid and more flexible than quotas. The new French “parity” rules require women to constitute half of all electoral candidates in 2000, and corporate boards in 2011, mirroring the presumed demographic makeup of France: As women constitute half of humanity, they must constitute half the legislature. The most important difference between the quotas adopted in 1999-2000 and those attempted in 1982 was that the new quotas imposed 50-50 balance rather than a minimum threshold of 25%. The earlier statute only required at least 25 percent of the candidates be women, thereby giving parties more flexibility and wiggle room in the gender composition of the slate. The new statutes that emerged from 2000-

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<sup>47</sup> Decision 82-146 DC OF 18 November 1982 Act amending the Electoral Code and the Code of Municipalities and governing the election of municipal councillors and the conditions for entry of French nationals residing outside France in electoral registers

<sup>48</sup> See generally Eléonore Lépinard, *L'égalité introuvable : la parité, les féministes, et la république* (2007); Laure Bereni, French Feminists Renegotiate Republican Universalism, 5 *French Politics* 191 (2007); Joan Wallach Scott, Parité! Sexual Equality and the Crisis of French Universalism (2005); Jocelyne Praud & Sandrine Dauphin, *Parity Democracy: Women's Political Representation and the Fifth Republic* (2010); Katherine A.R. Opello, Gender Quotas, Parity Reform, and Political Parties in France (2005); Mona Lena Krook, Quotas for Women in Politics: Candidate Selection Reform Worldwide ch. 6 (2010); Blanca Ruiz Rodriguez & Ruth Rubio Marín, Constitutional Justification of Parity Democracy, 60 *Ala. L. Rev.* 1171(2009); Luce Irigaray, *Democracy Begins Between Two* (2001).

<sup>49</sup> Françoise Gaspard, Claude Servan-Schreiber, & Anne LeGall, Au pouvoir, citoyennes! Liberté, égalité, parité 130 (1992). See also Catherine Tasca report to the Sénat, no. 1477 (1999); Laure Bereni & Eléonore Lepinard, “Les femmes ne sont pas une catégorie”: Les stratégies de légitimation de la parité en France, 54 *Revue française de science politique* 71 (2004).

2011 implementing parity always required close to a 50-50 ratio,<sup>50</sup> with very little flexibility in the definition of gender balance.

The proposition that gender parity is fundamental to the nature of the democratic republic was the central claim by the *parité* movement in the 1990s. Gender parity was not defended primarily in terms of women's needs for equal opportunities; it was defended by reference to the French republic's need for democratic legitimacy. In 1992, *Au pouvoir citoyennes*, a book written by the movement's leaders to justify gender parity in politics, appeared. Its central claim was that gender parity was a founding principle of democracy, along with liberty and equality.<sup>51</sup> Democracy aspired to be universal, but could not be if women were not represented.<sup>52</sup> Women were not a special interest group, the authors argued; they were half of humanity.<sup>53</sup> Indeed, the 25% quota treated women as a special interest group, because it was an arbitrary politically-determined percentage that did not correspond to women's share of the population.

The same year, fourteen European politicians, including France's former prime minister Edith Cresson, signed the Declaration of Athens at the first European summit on "Women in Power." The Declaration of Athens framed the underrepresentation of women in political decision-making bodies at the local, regional, national, and European level as a "democratic deficit" problem.<sup>54</sup> The central message of the Declaration was that gender inequality was bad for democracy and society as a whole, rather than any suggestion that gender inequality was bad for women. The pursuit of gender balance in the decisionmaking bodies was framed as a "campaign to reinforce European democracy."<sup>55</sup>

In 1996, ten French women politicians from various political parties signed the Manifesto of the Ten for Parity, calling for a constitutional amendment to permit affirmative action measures. In the Manifesto, they argued that "[e]quality is more pressing than ever, not only for women but also for our country, because women's participation in public life today goes hand in hand with our country's national interest like never before."<sup>56</sup> In this Manifesto, the advocates of parity argued that French Jacobinism had produced a "democratic aristocracy pretending to be a republican elite." The exclusion of women was part of a deeper monopoly by a few men over

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<sup>50</sup> For proportional representation elections, the 2000 law required political parties to constitute what is known as a "zipper" list: alternation of male and female candidates, to ensure that half of those elected from each party will be women. For "winner take all" single-member districts, the law required parties to run an equal number of male and female candidates under threat of losing public campaign financing proportionate to the degree of noncompliance, allowing a 2 percent margin of error. See *Loi no. 2000-493 du 6 juin 2000 tendant à favoriser l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives (1)*, J.O. du 7 juin 2000, p. 8560.

<sup>51</sup> See Françoise Gaspard, Claude Servan-Schreiber, & Anne LeGall, *Au pouvoir, citoyennes! Liberté, égalité, parité 9-10* (1992).

<sup>52</sup> *Id.* at 14.

<sup>53</sup> *Id.* at 164-66.

<sup>54</sup> Declaration of Athens, November 3, 1992.

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

<sup>56</sup> *Manifeste des 10 pour la parité*, June 6, 1996.

representative and executive functions. They argued that this approach was outdated in the post-industrial world, which would thrive on more openness, consultation, and debate.<sup>57</sup>

The mobilization of the 1990s culminated in the legislative adoption of gender parity quotas (at least 40%) for a wider range of regional and national legislative elections in 1999. But the Constitutional Council struck it down, referring to its 1982 decision.<sup>58</sup> This led a constitutional amendment, adopted that year. Article 3 of the constitution was amended with the following language: “The law favors the equal access of men and women to electoral power and elected positions.”<sup>59</sup> At the same time, neither the language in Article 3 requiring the suffrage to be universal and equal nor the language guaranteeing equality in Article 6 of the Declaration were repealed or amended.

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 and men candidates. For European and Senatorial elections, the list had to alternate between men and women. For legislative elections utilizing the single-member majoritarian system, the law provided for the reduction of a party’s funding if the difference between the number of men and women candidates exceeded 2 percent of its total number of candidates.<sup>60</sup> The “loi parité,” as it is known, was also challenged before the Constitutional Council. The challengers argued that the 1999 constitutional amendment only authorized statutes to “favor” equal access by men and women but stopped short of permitting laws to impose mandatory quotas.<sup>61</sup> The Constitutional Council rejected this argument, and held that mandatory quotas enforced with sanctions was a valid way for the law to “favor” equal access. The purpose of the amendment was to “empower the legislature to establish any mechanism that would give full effect to the principle of equal access for women and men to electoral mandates and elective offices.”<sup>62</sup> While the challengers took the position that the constitutional amendment prohibited mandatory quotas while permitting affirmative action (similar to the American doctrine), the Constitutional Council rejected that argument and declared mandatory electoral quotas to be constitutionally permitted.

Yet, when the French legislature attempted to legislate a gender parity rule for corporate boards of directors in 2006,<sup>63</sup> the Constitutional Council struck it down, invoking Article 6 of the Declaration of Rights of Man.<sup>64</sup> The Constitutional Council held that the 1999 amendment on “equal access by men and women to elected office” only permitted parity quotas in

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<sup>57</sup> Id.

<sup>58</sup> CC Décision n° 98-407 DC du 14 janvier 1999.

<sup>59</sup> Loi constitutionnelle no. 99-569 du 8 juillet 1999 relative à l’égalité entre les hommes et les femmes, JORF du 9 juillet 1999, page 10175, art. 1 (Fr.).

<sup>60</sup> Loi no. \_\_ du 6 juin 2000. [cite]

<sup>61</sup> See CC Décision no. 2000-429 DC du 30 mai 2000, ¶ 4.

<sup>62</sup> CC Décision no. 2000-429 DC du 30 mai 2000, ¶¶ 7-8 (official English translation available on Conseil constitutionnel’s website).

<sup>63</sup> Assemblée Nationale, Texte adopté no. 545, Projet de loi relatif à l’égalité salariale entre les hommes et les femmes, 23 février 2006.

<sup>64</sup> Conseil constitutionnel, Décision no. 2006-533DC du 16 mars 2006.

elected office, and had not authorized such quotas in any other domain. Implicit in the Constitutional Council's 2006 decision is the assumption that the formal conception of equality attributed to Article 6 had not been fundamentally altered by the 1999 amendment. The legislature reacted with yet another constitutional amendment. In 2008, the French constitution was amended to enable the proposal to impose gender quotas on corporate boards of directors to be adopted in 2011. This time, the amendment was broad in language and scope. The constitutional amendment in 2008 added "positions of social and professional responsibility" to the paragraph added in 1999, and moved the entire provision to article 1 of the constitution. 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.

In including "positions of professional and social responsibility" as domains in which parity measures should be adopted by the legislature consistent with the constitution, French lawmakers noted that this piece of constitutional text belonged in article 1, deliberately placed between the Preamble and the first title of the Constitution, "devoted to the affirmation of certain grand principles of our Republic," such as the description of the Republic as "indivisible, secular, democratic, and social" as well as the guarantee of "equality before the law of all citizens."<sup>65</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>66</sup>

In the legislative debates over the amendment, the question arose as to whether the "principle of parity in social and professional matters" really belonged in the Constitution, "which determines the organization of public power."<sup>67</sup> Yet, its supporters prevailed in the argument that a guarantee of parity in professional and social responsibility should be constitutionalized. According to this logic, the nature of the republic is at stake when women,

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<sup>65</sup> See Loi constitutionnelle no. 2008-724 du 23 juillet 2008 de modernisation des institutions du Ve république, art. 1, J.O., 24 juillet 2008, p. 11890 (Fr.); Senat, Rapport fait au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement d'administration générale (1) sur le projet de loi constitutionnelle, adopté par l'Assemblée Nationale, de modernisation des institutions de la Ve République, No. 387, 11 juin 2008, page 55.

<sup>66</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 Sénat, Séance du 18 juin 2008 (compte rendu intégral des débats), available at <http://www.senat.fr/seances/s200806/s20080618/s20080618007.html>

<sup>67</sup> Remarks of Jérôme Chartier, Séance du 27 mai 2008.

who constitute half of humanity, are not represented in positions of professional and social responsibility.

The constitutional amendments that enabled parity quotas were framed as “equal access,”<sup>68</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>69</sup> Today, the law defines gender equality as gender balance. Whereas a 25 percent women’s quota violated constitutional equality provisions, a quota that requires women to constitute half or almost half of the decisionmaking bodies is consistent with those equality provisions (which have not been repealed), because gender balance has become the mechanism by which power is legitimized and equal access to decisionmaking is measured.

The comparison to the American constitutional understanding of affirmative action and race or gender “balance” is striking. In the United States, the pursuit of demographic “balance” tends to delegitimize any affirmative action program. Both parties in the *Fisher* case embraced this proposition. The legitimacy of any affirmative action program will depend upon the extent to which the individual is given an equal opportunity to compete as an individual. The Supreme Court regards the pursuit of racial balance as an end goal as an injury to individuals’ entitlements to fair competition. By contrast, in France, the pursuit of gender “balance” tends to legitimize the affirmative action program (in this case, simple 40% quotas). French quotas and affirmative action programs were regarded as illegitimate insofar as their goal was promoting individual equality of opportunity as compared to the social goal of balanced representation.

The gender parity quotas in France are part of a larger trend that is occurring in Europe. Although some aspects of the French discourse surrounding “*parité*” are particular to the French context and not representative of the European conversation, the idea that gender parity is a necessary condition of the legitimate democratic state is a European idea.<sup>70</sup> Indeed, the 1992 Athens Declaration was undertaken by women politicians from many different states within Europe, and the term “parity democracy” emerged in 1989 in a seminar organized by the Council of Europe on gender equality.<sup>71</sup> The European Commission’s current project of proposing gender quotas on corporate boards of directors echoes the tendency to view gender balance as a legitimizing feature of democratic institutions.

### III. Racial Quotas in Brazil

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<sup>68</sup> See Loi constitutionnelle no . 99-569, supra note \_\_; Loi constitutionnelle no. 2008-724, supra note \_\_.

<sup>69</sup> Loi no. 2011-103, supra note \_\_.

<sup>70</sup> For an account of the European and international influences on the French feminist parity movement, see Eléonore Lépinard, *L’égalité introuvable*, supra note \_\_, at 29-76.

<sup>71</sup> See Conseil de l’Europe, *Rapport sur les idéaux démocratiques et les droits des femmes, séminaire sur “La démocratie paritaire – quarante ans d’activité du Conseil de l’Europe,”* Strasbourg, 6-7 novembre 1989 (Elisabeth Sledziewski).

While gender quotas have been reconciled with the constitutional guarantees of equality in Europe, the quotas proliferating outside the United States are not limited to gender. In Brazil, the last decade has witnessed experimentation with race, gender, and class quotas in public employment and higher education. These policy innovations are a recent phenomenon in Brazil. In the United States, quotas like the one at issue in *Bakke* were adopted in the 1970s, four decades ago, immediately following legal changes that mandated desegregation. While Brazil did not practice state-mandated segregation, racism and racial discrimination took other forms, resulting in extreme patterns of socioeconomic disadvantage amongst people with dark skin.<sup>72</sup> Thus, racial quotas and affirmative action in Brazil are not viewed as a measure to remedy one particular historical manifestation of racism (such as segregation); they have been justified broadly as combating past and ongoing disadvantages stemming from the many forms of racism.

Historically, Brazil has prided itself on being a “racial democracy”<sup>73</sup> – a country that abolished slavery in 1888 and avoided the state-mandated segregation practiced in the United States and South Africa.<sup>74</sup> In Brazil, the ideology of “racial democracy” posits that Brazil is a mixed-race country that celebrates high rates of miscegenation.<sup>75</sup> Yet, the project of “racial democracy” had white supremacist origins; miscegenation was encouraged in the late 19<sup>th</sup> century as a way of whitening the population to overcome the purported genetic deficiencies of blacks.<sup>76</sup> In the 1980s and 1990s, anti-racist movements inspired by the civil rights movement in the United States proposed reforms such as university quotas to remedy the disadvantages sustained by Afro-Brazilians as a result of racism and discrimination.<sup>77</sup> Quotas began to emerge on the local level: In 1999, Porto Alegre, Brazil’s sixth largest city, established that 5 percent of the work force of all contractees with the city be black.<sup>78</sup> That year, the state of Bahia, in which nonwhites constitute 75 percent of the population, adopted a rule requiring one-third of all models or actors in advertising in state publicity to be black.<sup>79</sup>

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<sup>72</sup> See Tanya Kateri Hernandez, *Racial Subordination in Latin America: The Role of the State, Customary Law, and the New Civil Rights Response* (2012); France Winndance Twine, *Racism in a Racial Democracy* (1998).

<sup>73</sup> The idea that Brazil was a “racial democracy” was given articulation in by social historian Gilberto Freyre. See Gilberto Freyre, *The Masters and the Slaves: A Study in the Development of Brazilian Civilization* (1933; English trans. 1946)). In 1970, Freyre remarked on various American and European visitors’ observations of Brazilian society as being free of the racial discrimination practiced in the United States. See Gilberto Freyre, *Order and Progress* 169-97 (trans. Rod. Horton 1970).

<sup>74</sup> For a comparative study of the different consequences of Brazilian and American slavery for race relations, see Carl Degler, *Neither Black Nor White: Slavery and Race Relations in Brazil and the United States* (1971).

<sup>75</sup> See Mala Htun, *From “Racial Democracy” to Affirmative Action: Changing State Policy on Race in Brazil*, 39 *Latin American Research Review* 60, 61(2004); Edward Telles, *Race in Another America: The Significance of Skin Color in Brazil* 4(2002).

<sup>76</sup> See Thomas Skidmore, *Black Into White: Race and Nationality in Brazilian Thought* 44 (1993).

<sup>77</sup> See Twine *supra* note \_\_, at 1-3.

<sup>78</sup> See Telles, *supra* note \_\_, at 59.

<sup>79</sup> *Id.* at 60.

On the federal level, a Justice Ministry decree adopted quotas for black (20%), female (20%), and disabled employees (5%) in 2001, applicable to management and senior advising positions in firms offering services to the Justice Ministry and those involved in cooperative projects with international organizations.<sup>80</sup> The Ministry of Culture adopted a similar policy in 2002.<sup>81</sup> The racial quotas adopted in Brazil are often accompanied by additional quotas based on other characteristics such as socio-economic status, public secondary school attendance, sex, and disability. During this period, state governments and universities adopted quota programs for public university admissions. The state of Rio de Janeiro adopted a 2003 decree authorizing universities to use quotas for the admission of graduates of public high schools, blacks, and poor people (who might overlap with ethnic minorities).<sup>82</sup>

The University of Brasilia (“UnB”) adopted a “Plan of Measures for Social, Ethnic, and Racial Integration” in the same year with the following quotas for admissions which reserved 20 percent of the places for black students, in all courses offered by the university, for ten years.<sup>83</sup> The University of Brasilia’s admissions website states the objective of the quota as follows:

The system of quotas for blacks exists because the Brazilian University is a place for the education of professionals in which the overwhelming majority is white. To support only one ethnic segment in the construction of thinking about national problems is to offer limited-term solutions.

The policies of affirmative action directed at the black population has as its objective the confrontation of the landscape of racial inequalities, recognized by the State and observed in the University of Brasilia.<sup>84</sup>

In addition to racial quotas, the integration policy included affirmative action based on socio-economic disadvantage. While it does not implement a quota for this category, it allocated scholarships to blacks and natives in situations of need, and gives a preference to black and indigenous students from disadvantaged social backgrounds.<sup>85</sup> Finally, the university explicitly defined black in broad terms, allowing it to include mixed-race persons with yellow or brown skin, and depending entirely on self-

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<sup>80</sup> Mala Htun, From “Racial Democracy” to Affirmative Action: Changing State Policy on Race in Brazil, 39 *Latin American Research Review* 60, 69 (2004)

<sup>81</sup> *Id.*

<sup>82</sup> Lei 4151/03, September 3, 2003 (Rio de Janeiro) (Br.). Note that the state legislature adopted this decree in the face of a constitutional challenge to a 2000 law imposing a 40 percent quota for black and brown students. See Tanya Kateri Hernandez, *Racial Subordination in Latin America: The Role of the State, Customary Law, and the New Civil Rights Response* 154 (2012).

<sup>83</sup> See Relatório, ADPF 186, at 2.

<sup>84</sup> See Sistema de Cotas, Universidade de Brasília, [http://www.unb.br/estude\\_na\\_unb/sistema\\_de\\_cotas](http://www.unb.br/estude_na_unb/sistema_de_cotas).

<sup>85</sup> Relatório at 3.

identification.<sup>86</sup> To be considered under the quota system, the student must obtain a minimum score on the admissions tests.

The Democratas political party brought an *arguição de descumprimento de preceito fundamental* (ADPF) before the Supreme Federal Tribunal,<sup>87</sup> a petition alleging the violation of a fundamental constitutional principle. Since the petition was brought by a political party and not by individual litigants alleging the injury of rejection under the quota system, the focus of the argument was the broader social effects of quotas. The petition did not harp on the individual rights of white individuals who are excluded by the quota. In a statement of preliminary considerations, the petition framed the issue as fundamentally about the desirability of a “racialized state.”<sup>88</sup> It argued that the United States, Rwanda, and South Africa were countries with “institutionalized racism,” and that the measures used in such countries to overcome this past were inappropriate to the construction of a “just, equal and solidaristic society” in Brazil, as required by the 1988 constitution.<sup>89</sup>

The Democratas’ petition advances two main contentions: First, Brazil is post-racial: Drawing on a wide range of sociological and demographic sources, the petition argues that, in Brazil, racial identities pluralistic, socially constructed, and contingent. Second, and following from this premise, the Democratas argued that a racial quota for “blacks” was a departure from this dynamic racial landscape, making Brazil artificially biracial and reinforcing the black-white divide.

After three years of litigation<sup>90</sup> and three days of public hearings with a wide array of expert testimonies, the Supreme Federal Tribunal unanimously upheld UnB’s racial quotas. Its engagement of the arguments with regard to democracy and social cohesion are worth detailing here. It is noteworthy that both the proponents and skeptics of quotas were arguing from the standpoint of democracy and the democratic legitimacy of powerful social and political institutions, rather than interests of individuals burdened or benefited by these quotas.

In an opinion denying the Democratas’ request for preliminary relief, and referring the case for consideration by the full court, Gilmar Mendes, then the President of the Supreme Federal Tribunal, cast doubt on the constitutional claim. The preliminary decision posits that the principles of equality and non-discrimination are primarily about social inclusion in a

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<sup>86</sup> See Sistema de Cotas, Universidade de Brasília, [http://www.unb.br/estude\\_na\\_unb/sistema\\_de\\_cotas](http://www.unb.br/estude_na_unb/sistema_de_cotas).

<sup>87</sup> See Democratas, ADPF 186 2-800, July 20, 2009, visando a declaração de inconstitucionalidade dos seguintes atos do Poder Público, que resultaram na instituição de cotas raciais na Universidade da Brasília (hereinafter Democratas ADPF 186 Petition). For an overview of this type of petition and other forms of judicial review of constitutionality, see Keith Rosenn, *Judicial Review in Brazil: Developments Under the 1988 Constitution*, 7 Sw. J. L. & Trade Am. 291, 306-08 (2000).

<sup>88</sup> Democratas ADPF Petition at 26.

<sup>89</sup> Id. at 26.

<sup>90</sup> For a more detailed account of the various lawsuits challenging the affirmative action programs at other universities, see Tanya Kateri Hernandez, *supra* note \_\_, at 154-56.

democracy.<sup>91</sup> Liberty and equality are the two foundational principles of the Brazilian legal order. These principles are in a “symbiosis” with the democratic state based on rule of law. Invoking the French Revolution, the court interpreted liberty and equality as being connected to the principle of fraternity. The modern notion of fraternity included a commitment to a multicultural and complex society, in which manifestations of racism, segregation, and nationalism represented serious threats to equality and liberty, property understood. Thus, in Brazil, the idea of fraternity expressed “a constitutional normativity in the sense of recognition and protection of minorities.”<sup>92</sup>

The opinion engages Justice Kennedy’s concurring opinion in *Parents Involved*, in which he warns against the new divisions that could be caused by the state’s classification of persons by race.<sup>93</sup> There is an awareness that this fear of social division is leading to the rejection of quotas and significant restrictions of affirmative action in the United States. The *Ricci* case is also cited for the proposition that employers violate Title VII in taking race into account. The American cases, according to Justice Mendes, invite an analysis of the difference between quotas adopted by employers and administrators and quotas adopted by law. In its analysis, Justice Mendes points out that, when a quota is arrived at through democratic deliberation, publicly and transparently, it achieves the democratic legitimacy necessary for the normative regulation of matters that affect the community. Furthermore, it is noted that the Brazilian constitution authorizes legislative interventions to protect fundamental rights and guarantees. Thus, a legislative quota adopted under conditions of democratic transparency can become “affirmative action as a mechanism of social inclusion.” But Justice Mendes acknowledges the complex and difficult question raised by balancing the positive consequences of racial quotas to promote the social inclusion necessary for a true democracy, on the one hand, and the possibility raised by Justice Kennedy that quotas will polarize society into “whites” and “nonwhites” or “black” and “nonblacks,”<sup>94</sup> on the other hand.

In deferring these questions to the full court, Justice Mendes announced that fundamental questions linked to Brazilian national identity were at stake in this case:

Are we a racist society? What is the most efficient way for us to combat prejudice and discrimination in Brazil? Are we giving up on ‘racial democracy’ or can we struggle, by eliminating some prejudice, to turn it into a reality? Do we need to become a “bicolor nation” in order to surpass the “wounds” of slavery? At what point does social exclusion produce prejudice? Is prejudice based on skin

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<sup>91</sup> Supreme Federal Tribunal, ADPF 186, Medida Cautelar, Decisão, July 31, 2009 (Br.) at 6

<sup>92</sup> *Id.* at 7-8

<sup>93</sup> *Id.* at 23-24.

<sup>94</sup> *Id.* at 25.

color linked or not to prejudice based on income? How do we turn the public university into a space that is open to all Brazilians?<sup>95</sup>

In engaging Parents Involved and Ricci to launch this discussion, this early assessment of Brazilian quotas lays out an alternative democratic vision for racial quotas. While the potential of quotas to divide society is fully acknowledged, Justice Mendes also points out the possibility that quotas can combat discrimination. Unlike Justice Kennedy, Justice Mendes does not think it is clear that the costs of quotas in potential polarization outweigh their benefits. Indeed, this balancing, which requires addressing these larger questions about Brazil's racial past and future, is what he invites his colleagues to do in deciding the case before them.

Almost three years later, all eleven members of Brazil's Supreme Federal Tribunal voted to uphold the University of Brasilia's racial quota system.<sup>96</sup> In a thoroughly reasoned opinion, the reporting Justice, Minister Ricardo Lewandowski, viewed equality and democracy as interconnected in Brazil's new constitutional order.<sup>97</sup> The Brazilian constitution's guarantee of equality, at Article 5, provides that "all are equal before the law, without distinctions of any kind."<sup>98</sup> Justice Lewandowski then points out that, since its adoption in 1988, the equality guarantee has always included material equality, not merely a formal principle of equal treatment.<sup>99</sup> Invoking John Rawls, Justice Lewandowski then explains that material equality encompasses distributive justice. Thus, under the Brazilian constitutional model, diverse institutional mechanisms are authorized to correct distortions that result from the application of the purely formal principle of equality.<sup>100</sup>

Furthermore the equality guarantee in Article 5 must be understood in light of other provisions of the Brazilian constitution that shed light on the values protected by the constitution. There are provisions that explicitly impose a duty upon the state to eradicate inequalities. For example, Article 3 provides that the fundamental objectives of the Federal Republic of Brazil are, inter alia, "to eradicate poverty and marginalization and to reduce social and regional inequalities."<sup>101</sup> Courts must thus examine the consequences of a legislation to determine whether it is producing or not producing results contrary to the Constitution.<sup>102</sup> In addition, the Preamble of the 1988 constitution provides that the democratic state, based on the rule of law, must "ensure the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a society

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<sup>95</sup> Id. at 25-26.

<sup>96</sup> ADPF 186 Decisão de Julgamento, April 25, 2012, available at <http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?numero=186&classe=ADPF&origem=AP&recurso=0&tipojulgamento=M>.

<sup>97</sup> Supreme Tribunal Federal, ADPF 186, Voto Questões Preliminares, 26 abril 2012 (Brazil) available at <http://www.stf.jus.br/arquivo/cms/noticianoticiastf/anexo/adpf186rl.pdf>.

<sup>98</sup> Const. art. 5 (Br.).

<sup>99</sup> ADPF 186, Voto Questões Preliminares, supra note \_\_, at 4.

<sup>100</sup> Id. at 7.

<sup>101</sup> Id. at 12 (citing Constitution art. 3 (Br.)).

<sup>102</sup> Id.

that is fraternal, pluralistic and without prejudice, founded on social harmony.”<sup>103</sup> Finally, the Constitution contains provisions explicitly addressing education. Article 205 provides that education “promotes and incentivizes, with the collaboration of society, aiming towards the whole development of the person, his or her preparation for the exercise of citizenship and his or her qualification for work.”<sup>104</sup>

The opinion posits that all objective selection criteria, designed to be impartial and equal, will simply tend to perpetuate inequalities that have been traditionally established. Ruling elites will reproduce themselves and social and political power will remain inaccessible to marginalized groups. The situation by which power is concentrated within a ruling elite that continues to reproduce and perpetuate itself becomes a serious threat to constitutional principles when it affects the distribution of public resources.<sup>105</sup> In the context of public universities, the existing system of competitive exams, with no affirmative action, had produced a student body that was largely white and educated in private high schools. Citing a recent treatise on fundamental rights, Lewandowski highlights three distinct problems emerging from this situation: First, it violates the rights of the members of the least advantaged groups to benefit from the good of public education under conditions of equality with more advantaged persons during their early years of education. Second, a public university that is predominantly white is failing in its mission to constitute an environment susceptible to favor citizenship, human dignity, and a just and free society. Third, a public university that fails to integrate all the social groups will produce consciousness of the exclusions, hierarchies, and inequalities that marked Brazilian society from the beginning of its history. When less than 2 percent of university graduates are black, the state university system is falling short of the constitutional duty of the state to eradicate poverty and marginalization.<sup>106</sup> The decision emphasizes the role of university admissions in a democratic society. In developing this point, Justice Lewandowski relies on U.S. Supreme Court decisions expounding the diversity rationale for affirmative action. There is a long citation to Justice O’Connor’s majority opinion in *Grutter*, including her statement of the importance of ensuring that the path to leadership must remain visibly open to talented individuals of all races and ethnicities.<sup>107</sup>

It is then noted that quotas are prescribed for disadvantaged persons in the Brazilian constitution. Article 37 provides that the law shall reserve percentages of public posts for disabled persons. In construing this provision, precedents of the Brazilian supreme court have noted that the state has a duty to repair and compensate the factors that cause inequality in fact and hinder the achievement of a society that is fraternal, pluralistic, and without prejudice as required by the Preamble.<sup>108</sup> Towards this end, quotas

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<sup>103</sup> Id. at 16 (citing Preamble to the Constitution of 1988 (Br)).

<sup>104</sup> Id. at 16 (citing Constitution art. 205 (Br)).

<sup>105</sup> Id. at 15.

<sup>106</sup> Id. at 17 (citing Vieira, Oscar Vilhena, *Direitos Fundamentais – uma leitura da jurisprudência do STF*).

<sup>107</sup> Id. at 35 (citing *Grutter v. Bollinger*, 539 U.S. 333).

<sup>108</sup> Id. at 40.

have been adopted not only for disabled persons, but also for women.<sup>109</sup> Justice Lewandowski notes that, unlike the United States Supreme Court, the Brazilian supreme court has permitted quotas. Citing the academic writings of Justices Barbosa and Lucia (current colleagues on the Court who also voted to uphold quotas), Lewandowski explains that, under the Brazilian constitution, the state has an activity duty to realize the principle of equality.<sup>110</sup> What is worth noting here, by contrast with the United States, is that quotas are understood to promote fraternity by eradicating disadvantage. This is the opposite effect of that assumed by Justice Kennedy in his *Parents Involved* concurrence.

Other Justices, in following Justice Lewandowski's vote, emphasized the link between racial quotas and the democratic legitimacy of the state. Justice Fux, for instance, pointed out that Article 3 of the Brazilian constitution, which articulates the objectives of the state, requires the construction of a society that is "just and solidaristic."<sup>111</sup> Justice Fux noted that this imposed moral and legal obligations on the state to realize the supreme value of equality as a foundation of the democratic constitutional state. Fux suggested that there was a paradox to living under such constitutional commands if students graduating from public schools faced difficulties in being admitted to public universities, in which the majority of students are graduates of private schools.<sup>112</sup> In light of this gap between reality and the constitutional ideal, Justice Fux found that the principle of proportionality was met by the racial quota because it utilized a benign racial classification for social purposes that were praiseworthy and obviously hostile to segregation.<sup>113</sup> The idea that racial quotas promoted solidarity – the opposite of social division – was echoed by Justice Cezar Peluso.<sup>114</sup>

#### IV. Overcoming Essentialism

Nonetheless, the anxieties expressed in U.S. law about how quotas will reify racial identities and make them too salient in the political process must be addressed. Gender quotas do label individuals as "men" and "women," and race quotas must categorize applicants to universities as "white" and "nonwhite." As a legal matter, the essentializing function of quotas seems to be in tension with constitutional equal protection clauses that envision persons primarily as individual citizens rather than as bearers of gender or racial identities. However, the essentialism that seems endemic

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<sup>109</sup> Id.

<sup>110</sup> Id. at 42-43 (citing Gomes, Joaquim Barbosa, Instrumentos e Métodos de Mitigação da Desigualdade em Direito Constitucional e Internacional and Rocha, Cármen Lúcia, Ação afirmativa: O Conteúdo Democrático do Princípio da Igualdade Jurídica).

<sup>111</sup> Políticas de ação afirmativa e reserva de vagas em universidades públicas -8, supra note \_\_, at 15.

<sup>112</sup> Id.

<sup>113</sup> Id.

<sup>114</sup> Políticas de ação afirmativa e reserva de vagas em universidades públicas -14, supra note \_\_, at 18.

to quotas can be overcome when quotas – and race and gender identity – are publicly understood as disruptions of traditional myths that the twenty-first century democratic state must overcome. In the gender context, gender quotas and gender categories disrupt the social contract myth, which hides an unjust sexual contract. In so doing, it dismantles the sexual contract. In the race context, racial quotas and racial categories disrupt the racial democracy myth, which hides the complex social and historical dynamics of racism. In so doing, racial quotas can dismantle the social processes that amplify racial identification. The anti-essentialist account of quotas challenges the received wisdom in American affirmative action jurisprudence that race- or gender-conscious action necessarily hampers progress towards a society in which these identities are less salient.

A. “Women” as Half of Humanity

In France, the legitimacy of gender parity depended on gender exceptionalism.<sup>115</sup> The critics of parity alleged that gender quotas would then lead to racial and ethnic quotas, raising the specter of increasing and perpetual divisions of the electorate, and of national sovereignty. Wouldn't gender quotas lead to the proliferation of social divisions and categories? According to the advocates of gender parity, gender parity could not form the basis for any other demographic quotas because gender is unlike race or any other demographic category.<sup>116</sup> Women – unlike other disadvantaged or underrepresented groups – constitute half of humanity.<sup>117</sup> Unlike other disadvantaged or underrepresented groups, 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. There weren't blacks and whites two millennia ago, and the whole point of legal interventions prescribing racial equality is to end up in a world without a concept of whites and blacks two millennia from now. This is what Bickel is talking about when he refers to a “race equality that will make race irrelevant.”<sup>118</sup>

On the one hand, the French discourse of gender exceptionalism sounds like biological sex essentialism. Could the idea of “parity democracy” be sustained without attributing a high degree of social significance to the biological differences between men and women? Indeed, the rhetoric supporting parity presents the difference between men and women “natural,”<sup>119</sup> whereas it is assumed that the difference between racial minorities and whites is socially (and legally) constructed. This biological

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<sup>115</sup> What I term gender exceptionalism is an approach to parity that is most closely aligned with Sylviane Agacinski, a parity advocate and author of *Parity of the Sexes*. Agacinski forcefully argued that sexual difference was universal and that men and women were naturally complementary halves of humanity. See Sylviane Agacinski, *Parity of the Sexes* (1999) (trans. Lisa Walsh).

<sup>116</sup> See Joan Scott, *Parité!* *supra* note \_\_, at 62; Blanca Rodriguez Ruiz & Ruth Rubio Marin, *The Gender of Representation: On Democracy, Equality, Parity*, 6 *Int'l J. Const'l L.* 287, 301 (2008).

<sup>117</sup> *Id.*

<sup>118</sup> See Bickel, *supra* note \_\_.

<sup>119</sup> See Agacinski, *supra* note \_\_ at \_\_.

essentialism undergirds the traditional justification for the differentiated sex roles of men and women in the family and in the public political and economic life. Perhaps this understanding has broadened the appeal of gender quotas to broad political constituencies, even those who do not share feminist goals.<sup>120</sup>

At the same time, recognizing the historical and lasting significance of sex differences<sup>121</sup> need not collapse into biological sex essentialism. It is difficult to imagine a genderless future because the differentiation of men's and women's social roles have structured most societies' arrangements for social reproduction. In the modern European nation-state, men have been expected to participate as citizens of the state and market-maximizers in civil society. This leaves no time for the tasks of social reproduction, specifically the raising of the next generation of citizens and market-maximizers.

Thus, the traditional solution to the problem of social reproduction is to assign the tasks to a category of persons – women – who are excluded from political and economic citizenship.<sup>122</sup> If women were fully included in political and economic citizenship, there would be a crisis of social reproduction: Women would be governing and working, so they would not be available for the tasks required to perpetuate the reproduction of humanity.<sup>123</sup> Nobody would be performing the daily tasks necessary to raise the next generation, and social reproduction would slow down significantly. This is why the advent of formal equality between men and women, and formal inclusion of women in political and economic citizenship has not rapidly led to equal numbers of men and women in the positions of political, social, or economic responsibility. The demands of avoiding human extinction have been too powerful, and have made it hard to disrupt the mechanisms by which social reproduction tasks get allocated to women. Despite the formal redefinition of women as citizens and market participants, women only ascend to positions of political, social, and economic responsibility or leadership by becoming persons who spend little or no time on the tasks of social reproduction. For lack of a better term, let's call such people "men." "Men" are either childless or capable of avoiding the tasks of social reproduction, by delegating to spouses, family members, nannies, daycares, or schools.

Parity democracy can disrupt the assumption that democratic citizens are "men." "Men" are all persons (biologically men and women) who are marginal participants in social reproduction.<sup>124</sup> Parity democracy is

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<sup>120</sup> See Mona Lena Krook, *Quotas for Women in Politics*, supra note\_\_.

<sup>121</sup> See Joan Williams, *Unbending Gender* (1999).

<sup>122</sup> Carole Pateman has termed this dynamic the "sexual contract." See Carole Pateman, *The Sexual Contract* (1988). See also Carole Pateman, *The Disorder of Women: Democracy, Feminism, and Political Theory* 33 (1989).

<sup>123</sup> Hegel used this logic to justify women's exclusion from the state and civil society. See G.W.F. Hegel, *Philosophy of Right*, See G.W.F. Hegel, *Elements of the Philosophy of Right*, §§ 158-181; Michael O. Hardimon, *Hegel's Social Philosophy: The Project of Reconciliation* 183-89.

<sup>124</sup> Gaspard et al. argue that two "political" sexes were created out of the two "biological" sexes. "Political" sex refers to the gendered division of labor by which

a social order in which all the positions of professional and social responsibility must be filled by (biologically defined) men and women in equal numbers. Let us imagine how this social order operates.

If all the biological women who are legislators and corporate board directors are “men” – people who are marginal participants in social reproduction – (this is the case today), a crisis in social reproduction will ensue. Biological women in these positions will either not have children or will have to delegate social reproduction to others. The lack of affordable and acceptable childcare options will hobble the ability of the state and the market to function efficiently. This will force a new collective arrangement, different from the old gendered breadwinner-caregiver model, for social reproduction.

If the biological women who constitute legislators and board directors in a parity regime consist of “men” and “women” – which is to say this group includes full (rather than marginal) participants in social reproduction, then the ideal of the citizen who can devote himself full-time to the state and civil society will have to be altered. Requiring parity between biological men and women will either integrate “women” (active participants in social reproduction) into governance and economic life.

In other words, if it remains constant that those who participate in the public sphere must be “men,” at the very least the society will have to find a way to make sure that the next generation of citizens gets raised while the current generation of citizens is busy governing and growing the economy. If the public sphere includes “women” – biological men and women who are spending significant time on child-rearing tasks – the hours and norms of major political, economic, and social institutions will have to change. Either way, parity democracy forces us to move into a world that both (1) looks radically different from the world we inhabit today, and (2) responds better to the present needs of most human beings, who are living uncomfortably in the awkward state of “incomplete revolution”<sup>125</sup> with regard to gender roles. The current state of affairs is an “incomplete revolution” in the following sense: The radical shift from one breadwinner/citizen per family towards two breadwinners/citizens per family has taken place, without any plan for filling the childcare gap created by this revolution. Gender parity quotas can complete the gender revolution, by precipitating the social, economic, and cultural changes necessary to enable biological men and women to occupy different roles than those that emerged in the preindustrial and industrial economies, without endangering the continuation of the human species.

#### B. Reconceptualizing “Race” in Brazil

A deep engagement with the logic and implications of parity democracy in Europe suggests that the justification for gender quotas cannot be neatly enlisted for racial quotas. The crisis of social reproduction is not

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men participate in the public sphere while women inhabit the private sphere of the family, the site of social reproduction. See Gaspard et al., *supra* note \_\_, at 62-71.

<sup>125</sup> See generally Gosta Esping-Anderson, *The Incomplete Revolution: Adapting to Women’s New Roles* (2009).

implicated in a democracy that fails to represent all its racial and ethnic groups in the same way that it is in a democracy that fails to represent women. The parallels between gender quotas and racial quotas should not be overstated. If gender parity can resolve the crisis of social reproduction endemic to post-industrial societies that require two breadwinners to sustain families, the legitimacy gains to the democratic nation are perhaps greater than any conceivable proposed benefits of eliminating racial disparities.

At the same time, in upholding racial quotas, the Brazilian Supreme Court put forth an anti-essentialist account of race. In justifying his vote, Justice Lewandowski confronted the argument that racial quotas would reinforce the concept of race and exacerbate social divisions. Recall that this argument initially appeared in the preliminary injunction ruling, citing Justice Kennedy's prediction that race-conscious state action would create new social divisions. In announcing his vote, Justice Lewandowski recognized the non-existence of the biological and genetic concept of race.<sup>126</sup> Referencing the STF's precedents, Lewandowski insisted that race was a historical-cultural concept, artificially constructed to justify discrimination and domination exercised by some individuals over certain groups that were invidiously claimed to be inferior. This deeply ingrained racism gave rise to a politics by which persons who shared a history of discrimination came to fight for their rights, created the cultural groups associated with race. The valorization of ethnic and cultural identities is the result of racism, and thus takes on a new meaning. For Lewandowski, the valorization of ethnic and cultural groups, even though it was a product of racism, facilitated the integration and social elevation of the previously discriminated. According to this logic, the reinforcement of racial identities, understood as socially constructed rather than biological, can aid integration rather than polarization.<sup>127</sup> Justice Lewandowski relies upon this account to argue that quotas based solely on socioeconomic status are inadequate to achieve social justice. A long history of racial discrimination has socioeconomic effects, but it also has complex symbolic and psychological aspects that people process through the formation of ethnic identities.<sup>128</sup>

Justice Lewandowski's account essentially holds that increasing the salience of race today will facilitate an integrationist project which will diminish the salience of race in the long run. It echoes a theory advanced by Jean-Paul Sartre in 1948, in which he viewed black poets' cultural project of reaffirming black identity as "antiracist racism." In his preface to an anthology of black Francophone authors from French colonies, Sartre argued that black consciousness was nothing but a reaction to the racist oppression by whites. Black consciousness was a necessary psychological resource that empowered blacks to resist this oppression. Thus understood,

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<sup>126</sup> Políticas de ação afirmativa e reserva de vagas em universidades públicas -5, STF Mensal, supra note \_\_, at 14.

<sup>127</sup> Id.

<sup>128</sup> Id.

Sartre believed that a cultural identity growing out of racism against blacks was a necessary tool towards a future society without races.<sup>129</sup>

In *The Racial Contract*, Charles W. Mills draws on Carole Pateman's sexual contract theory in proposing that there is a "racial contract" that is a necessary but repressed component of the modern state. Race is a concept that was created to justify the exclusion of some people from the social contract between free and equal citizens.<sup>130</sup> The social contract theories that became the pillars of the modern constitutional state emerged in Europe during the same period that European capitalism grew through various forms of race-based exploitation in territories outside of Europe, the most significant manifestation being slavery.<sup>131</sup> Mills points out that almost all the major social contract theorists, such as Hobbes, Locke, Rousseau, and Kant, justified the exclusion of savages, natives, and blacks from their proclamations of equal rights, autonomy, and the freedom of all men. The suggestion here is that modern states could not have emerged – building nations and capitalist economies – without maintaining a class of persons, designated by race, who were excluded from equal rights and liberties. If this "racial contract" is not merely incidental to the modern state, but a fundamental pillar of it, there are several implications that must be confronted. First, including everyone in the social contract – particularly those who were formerly marked as unworthy of citizenship – will endanger the modern nation-state as it has traditionally existed. If everyone is a citizen and rights-bearer, nobody will provide unpaid or underpaid labor to build national economies. Thus, to perpetuate the modern capitalist nation-state, states will formally include everyone, by proclaiming the equal protection of the laws and condemning racism, but new mechanisms will enact the exclusions necessary to sustain these economies. Thus, the only way to truly overcome the "racial contract" is to remake the modern state, and to invent models of economic growth that do not depend on laborers with no meaningful rights. How is this going to get done? Everyone must be included in the social contract, but in a way that goes beyond formal equality.

Justice Joaquim Barbosa, the only black member of the Brazilian Supreme Court, suggested, along these lines, that discrimination is a necessary component of relations between human beings. They engage in competition, and thus, human beings distinguish between each other. But when these distinctions intensify, the gaps between persons are enlarged. Barbosa acknowledges that affirmative action can be regarded as yet another manifestation of ongoing group conflict. Those who have historically benefited from discrimination against minority groups will regard affirmative action as an attempt by a conflicting group to gain advantage.<sup>132</sup>

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<sup>129</sup> Sartre, *Orphée noir*, Préface de l'anthologie de la nouvelle poésie nègre et malgache XIV (Senghor ed. 2011) (1948).

<sup>130</sup> See Charles W. Mills, *The Racial Contract* 63 (1997) ("White" people do not preexist but are brought into existence as "whites" by the Racial Contract . . . The white race is invented, and one becomes "white by law.")

<sup>131</sup> *Id.* at 63-73.

<sup>132</sup> *Políticas de ação afirmativa e reserva de vagas em universidades públicas*-13, *supra* note \_\_, at 17.

But Barbosa considers the conditions under which the state can transform the meaning of affirmative action. It can become a public policy concretizing the principle of material equality and neutralizing the perverse effects of various forms of discrimination under certain conditions. Justice Barbosa suggests that an affirmative action program can be imposed and suggested by the State to combat not only flagrant discrimination, but also cultural and structural discrimination that is deeply entrenched. When properly implemented by the state, affirmative action can be the most elegant manifestation of a hard-working state, one which takes initiatives rather than believing in the invisible forces of the market. He framed quotas as a mechanism for achieving harmony and social peace. He emphasized the extent to which the infinite exclusion of a disadvantaged group can detract from these values. Justice Barbosa predicted that ending this social exclusion by way of quotas would strengthen economic development and growth, enrich businesses, and lead to the growth of the country as a whole.<sup>133</sup> Racial quotas would allow this economic growth to occur without reproducing the “racial contract” exploitations that enabled growth in the past.

#### V. Quotas vs. Affirmative Action: What’s Less Divisive?

The judicial discourse around gender and race quotas outside the United States raise serious doubts about the assumption in U.S. equal protection law that racial quotas are inherently divisive and lead to a “corrosive” politics of identity. At the very least, the alternative conceptualization of quotas in other jurisdictions should lead one to demand a more thorough and empirically supported account of how quotas unleash negative consequences for democracy and the legitimacy of the political process in the United States. If any such account were to appear, one might also demand an account of how, precisely, individualized race-conscious affirmative action avoids the negative consequences attributable to quotas.

The notion that affirmative action should be evaluated in terms of the democratic legitimacy of the state institutions is not foreign to U.S. law. Indeed, in the higher education context, the diversity rationale for affirmative action reflects a theory of democracy and the role of the university within a democratic state.<sup>134</sup> In *Grutter*, the Supreme Court provided an account of why diversity in elite legal education constituted a compelling state interest. It identified diversity with the inclusion of a “critical mass” of persons belonging to underrepresented minority groups.<sup>135</sup> A “critical mass” of such students (as compared to a few token members) would be important not because of the expectation that minority students would any particular viewpoints, but rather to dispel such stereotypes. The distinction between “critical mass” and “tokens” is similar to the French distinction between “parity” and “quotas.” In France, a 50-50 quota was

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<sup>133</sup> Políticas de ação afirmativa e reserva de vagas em universidades públicas -13, *supra* note \_\_, at 17.

<sup>134</sup> See generally Lani Guinier, Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals, 117 *Harv. L. Rev.* 113 (2003).

<sup>135</sup> *Grutter*, 539 U.S. at 332.

preferable to the 25 percent quota because the presence of so many women would necessitate the inclusion of a wide range of women – including those who participate in social reproduction. Similarly, a critical mass of minorities is needed to ensure that the full range of diverse backgrounds and perspectives within minority communities is represented in the law school classroom.

The Grutter Court linked diversity to national unity, implicitly responding to the concern that race-conscious diversity promotion was divisive. The Court declared, “Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”<sup>136</sup> Here, the Court characterized race-conscious diversity – traditionally seen as dividing people into groups – as a mechanism that facilitates, and is in fact essential to, the realization of “one Nation, indivisible.”<sup>137</sup> This assertion, too, echoes the shift in the French discourse, by which gender quotas overcame their initial portrayal as threatening the indivisibility of national sovereignty and dividing the electorate. By 2000, the rule of almost 50-50 (or 40-60 in some formulations) became the hallmark of “parity democracy,” with the potential to unite the two halves of humanity rather than drive them apart.<sup>138</sup>

Finally, the Grutter Court made explicit the link between diversity and democratic legitimacy, comparable to the French and Brazilian justifications for quotas. Indeed, the Brazilian quotas decision cited this passage. The Court noted:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. . . . Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.<sup>139</sup>

The Court suggests that the legitimacy of a wide range of state institutions would be called into question if the path to leadership (ie law schools) did not include members of every race and ethnicity. Similarly, quotas have been advanced in other countries on the grounds that the legitimate exercise of power depends on the inclusion of women and blacks in these institutions.

From the standpoint of discrimination as corruption, it can be argued that individualized affirmative action is more problematic than quotas. Individualized affirmative action raises a host of legitimacy problems. First, its lack of rigidity comes with a lack of measurable

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<sup>136</sup> Id.

<sup>137</sup> Id.

<sup>138</sup> Lépinard & Bereni, *Les femmes ne sont pas une catégorie*, supra note \_\_.

<sup>139</sup> Id. at 332-33.

outcomes, and this could well mean that it fails to achieve the social inclusion necessary to legitimize the institutions in question. Second, its lack of transparency can fuel greater social division and racial resentment. Overall, from the democratic legitimacy standpoint, quotas are preferable to affirmative action, not the other way around as suggested by U.S. doctrine and civil rights advocates.

#### A. Measurable Outcomes

The central difference between quotas and affirmative action, as articulated by U.S. courts, is that quotas are mandatory whereas affirmative action is flexible and individualized. Quotas require a certain outcome, in terms of the percentage of women or racial minorities represented. Individualized affirmative action rejects these numerical outcomes as the measure of the program's success; it requires that each individual gets to compete for every spot. While flexible and individualized affirmative action appears to better protect individual rights to meritocratic evaluation, quotas better achieve the integration necessary to democracy if they produce race or gender balance more effectively. It is interesting to note that the features that legitimize affirmative action in France and Brazil would detract from an affirmative action program's legitimacy in the United States. In France and Brazil, the lack of flexibility – a strict numerical percentage that is enforced and based on demographics – legitimizes the program. In the United States, use of numerical percentages and demographics is precisely what sinks an affirmative action program's legality.

Since mandatory legislated quotas have only been in effect in Europe and Brazil over the last 10-15 years, it is still too early to draw conclusions about whether quotas actually work in practice to produce outcomes, and whether they work better than flexible individualized affirmative action. Nonetheless, quotas appear to produce outcomes to the degree that the threatened sanction for failure to reach those outcomes is concrete and serious. Since the French constitutional amendment in 1999 leading to electoral gender parity quotas in 2000, outcomes have been mixed. In Parliament, the percentage of women legislators is close to 25 percent, with 26.9 percent of the deputies in the National Assembly and 22.1 percent of Senators. Gender parity in compliance with the 40 percent quota has been achieved in regional councils, where 48 percent of the council members are women. Thirty-five percent of municipal counselors are women. Within municipal councils, the municipalities with more than 3500 residents have reached gender parity – 48 percent of the council members in those cities are women, whereas only 32.2 percent of the council members are women in municipalities with fewer than 3500 residents. For the first time in 2012, 48.7 percent of the cabinet-level ministers in the government are women.<sup>140</sup>

With the exception of the 2012 cabinet, which was voluntarily composed of a nearly equal number of men and women by the new Socialist President and prime minister, all the other political domains in which women occupy 40 percent or more of the positions are ones in which the law prescribes a concrete means of achieving parity or imposes a serious

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<sup>140</sup> See Observatoire de la parité, Repères statistiques, available at [cite]

sanction. Most members of Parliament are elected in single-member districts by a majority vote. The parity law requires political parties to run an equal number of male and female candidates nationally for these elections, or else lose public funding in an amount proportionate to the gender gap.<sup>141</sup> Under this system, French political parties have opted to lose some funding in order to run the candidates (more men than women) who are likely to win in these single-member majoritarian elections. As a result, the parity rule as it operates in Parliamentary elections is not really a rigid candidate quota that prescribes outcomes, but a flexible financial incentive system for increasing the number of female candidates. Political parties naturally balance these financial incentives against other competing interests, particularly their interest in winning the largest number of Parliamentary seats nationally.

Regional councils, by contrast, are elected in a proportional representation system. Political parties present lists of candidates, and voters vote for a party rather than for particular candidates. Each party obtains a number of seats proportionate to the votes they obtained, enabling that proportion of the candidates on their lists to take office. Under the 2000 law, for Parliamentary, regional, and municipal elections using party lists, the gap in the number of male and female candidates cannot be more than one, and every group of six candidates must include an equal number of men and women.<sup>142</sup> All regional and municipal councils are elected by party lists. For municipalities with more than 3500 people,<sup>143</sup> the party lists must alternate between men and women. This rule guarantees that any party winning more than one seat will produce a roughly equal number of men and women council members. If the Electoral Code rules regarding party lists are not complied with, the law authorizes administrative courts to nullify the election.<sup>144</sup> The threat of invalidating party lists has been sufficient to bring political parties into compliance with the parity rules in PR elections, leading to the achievement of gender parity in these positions. However, the mere threat of losing funding has “priced” gender parity in the national Parliamentary elections, and has been insufficient to produce gender parity in Parliament in over a decade since the parity law was adopted.

In the United States, flexible affirmative action mean that no particular numerical outcome is guaranteed – or even desired. Even when U.S. law permits the pursuit of numerical goals and benchmarks as a remedy in a discrimination suit, these goals are seldom enforced by hard sanctions. The benchmarks and goals that are articulated in recent Title VII class action settlements do not come with strong enforcement mechanisms. Employers are required by the settlements to make “best efforts” to hire and promote a

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<sup>141</sup> See Loi 2000-493 du 6 juin 2000 tendant à favoriser l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives (1), JORF June 7, 2000, p. 8560, Art. 15.

<sup>142</sup> See Loi 2000-493 du 6 juin 2000 tendant à favoriser l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives (1), JORF June 7, 2000, p. 8560 art. 2, codified at C. électoral art. L 264.

<sup>143</sup> See *id.*

<sup>144</sup> See C. électoral art. L 222; L 248.

certain number of women or minorities by a certain date. But the settlements never articulate any sanctions for employers that fail to achieve these outcomes, and what actions are necessary or sufficient to constitute “best efforts.” One settlement, for instance, required the company to make good faith efforts to hire new financial advisers at the rate of 32% women by a certain date, and required it to report the number of women hired to plaintiffs’ class counsel.<sup>145</sup> It also provides for the appointment of a diversity officer within the corporation, who, along with the plaintiffs’ attorney, will monitor the implementation of the settlement. Class members who think that the terms are not being complied with can bring complaints and propose remedies. But no concrete sanction remotely similar to the nullification of elections in France is threatened. This is fairly common in consent decrees in civil rights cases today.

Furthermore, Frank Dobbin’s study of corporate diversity management suggests that covert quotas are extremely rare among corporate employers. On the one hand, reverse discrimination suits and anecdotes seem to perpetuate the notion that hiring decisions are being driven by implicit quotas. Disappointed white male job applicants are sometimes told that they did not get the job because the firm had to hire a woman or a minority. However, Dobbin conducted dozens of surveys and found only two employers who admitted to using quotas. Even government contractors who were subject to affirmative action regulations (including goals for minority hiring) did not use quotas.<sup>146</sup>

Dobbin also cites numerous studies (including very recent ones) suggesting that American employers do not treat goals as quotas. If they did, the numbers of minorities hired and promoted would actually match the goals. But where evidence is available, employers tend to fall short of minority hiring goals, and many continue to prefer white candidates to black ones when qualifications are equal. Experiments involving black and white job applicants with matched resumes suggest that, even when qualifications are matched, whites get job offers over blacks 15 percent of the time, whereas blacks get job offers over whites 5 percent of the time.<sup>147</sup> Devah Pager’s study shows that blacks without criminal records have less success than matched whites with felony convictions.<sup>148</sup> The Bertrand and Mullainathan study also shows that white names are twice as likely as African-American names to be offered interviews when the CVs of the candidates are matched. These outcomes suggest that employers are not treating the diversity imperative as a quota.<sup>149</sup> We would need more data about the overall percentage of white and minority employees to make reliable inferences about whether the employers are covertly using a hiring quota. But this data at least suggests that neither antidiscrimination nor

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<sup>145</sup> Amex Settlement, p. 16.

<sup>146</sup> Frank Dobbin, *Inventing Equal Opportunity* 127-28 (2009)

<sup>147</sup> See *id.* (citing Turner, Fix & Struyck).

<sup>148</sup> Devah Pager, *The Mark of a Criminal Record*, 108 *Am. J. Soc.* 937, 958 (2003).

<sup>149</sup> Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* 12 (MIT Dep’t Econ. Working Paper No. 03-22, 2003), available at <http://ssrn.com/abstract=422902>.

diversity-based affirmative action have truly become the functional equivalent of quotas, at least in the workplace. If they had, Dobbin points out, the proportion of women and minorities hired and promoted would be higher.

This comparison highlights the main difference between quotas in Europe and their alternatives in the United States: efficacy. Quotas with hard sanctions achieve integration that can be measured, whereas affirmative action “goals” may not. Under an antidiscrimination doctrine that renders quotas illegal, measuring the success of an affirmative action program by counting the percentages of women and minorities is also suspect. *Fisher v. Texas* provides a good example of the type of affirmative action program permitted by our Constitution: the “head in the sand” approach. Under the existing legal regime, institutions pursue diversity by considering race minimally when considering individual applicants. They avoid, or pretend to avoid, measuring their achievement of diversity by the number of minorities enrolled relative to the demographic realities of either the population or the pipeline. Affirmative action becomes unmoored from the commitment to achieving diversity in any concretely measurable way. If measuring the success of affirmative action through numerical indicators of diversity is suspect, affirmative action becomes a policy whose justification becomes abstract and forgotten, and diversity becomes an increasingly elusive goal. Yet, it appears, this “head in the sand approach” has become the most likely path to affirmative action’s legality, largely because quotas have to be avoided.

#### B. Transparency

As an alternative to the “head in the sand approach” that accompanies constitutionally permissible individualized holistic affirmative action in the United States, consider the “Law of Social Quotas” adopted in Brazil in August 2012.<sup>150</sup> After the Supreme Federal Tribunal of Brazil held that university racial quotas were constitutionally permitted, the Senate adopted a law (with only one vote against) requiring all federal universities to utilize “social quotas.” The statute requires federal universities to reserve 50 percent of their spots for graduates of public high schools.<sup>151</sup> Of the spots reserved, half must go to students whose family incomes are below 1.5 times the minimum wage.<sup>152</sup> The other half of the reserved spots must go to black, mixed-race, and indigenous graduates of public high schools, reflecting the proportion of these groups in the population of the regions in which the federal university is located, as determined by census data.<sup>153</sup> The statute was signed into law on August 29, 2012, and a decree of October 11, 2012 (the day after *Fisher v. Texas* was argued before the U.S. Supreme Court) imposes specific requirements for universities’ implementation of the law.<sup>154</sup>

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<sup>150</sup> Lei no. 12.711 de 29 de agosto 2012.

<sup>151</sup> See *id.* at art. 1.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at art. 3.

<sup>154</sup> Decreta no. 7.824 de 11 de outubro 2012.

In the initial opinion denying preliminary relief to the petitioners, the Brazilian Supreme Federal Tribunal pointed out that quotas were most likely to be legitimate if they were adopted transparently by legislation.<sup>155</sup> This particular bill had been introduced in 2008, and while it was pending, the Democrats political party petitioned the court to challenge the University of Brasilia's quotas on grounds of unconstitutionality. It is interesting to note that after the Supreme Federal Tribunal's unanimous decision reconciling the UnB quota system with the Brazilian constitution, the Senators belonging to the Democrats party did not all vote against the mandatory quota legislation.<sup>156</sup> This illustrates the extent to which the highest constitutional court of a nation can participate in a national normative discourse about equality and democracy. Since the Supreme Federal Tribunal did not hold that quotas were required by the constitution, the legislators were free to reject the quotas bill for policy reasons. Nonetheless, an overwhelming majority (including almost all the members of the Democrats party who brought the constitutional challenge to quotas) voted to require public universities to adopt quotas.

A significant feature of the new quotas law is that it seeks to make university admissions more transparent. The implementing decree requires federal universities to publicize the number of spots that it is allocating to the social quota scheme at the same time that it publicizes its admissions criteria. Universities are permitted to rely on their own competitive exams (known as vestibulares) or on the national standardized test written by the federal government (Exame nacional de Ensino Media, or ENEM) as the basis for admitting students. The quotas legislation explicitly authorizes the federal universities to rely on ENEM, in departure from the traditional practice of each university relying on its own competitive exam. This authorization emerged after a previous version of the bill was vetoed by President Dilma Rousseff. Under the Senate's initial proposal, the universities could rely on high school GPA to admit the students under the quota scheme.<sup>157</sup> President Rousseff vetoed this in order to encourage the use of ENEM. ENEM is widely thought to produce outcomes that are less correlated with social advantage than the vestibulares. The Minister of Education preferred ENEM to high school grades, largely because it did not want to the new quotas to incentivize grade inflation.<sup>158</sup>

In Brazil, the mandatory quota is being introduced at the same time that the nation is rethinking admissions procedures generally. The quotas

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<sup>155</sup> See Decisao, Medida Cautelar, supra note \_\_.

<sup>156</sup> There are currently 5 Democrats in the Senate, and only one Senator from another party voted against the bill. See <http://www.senado.gov.br/senadores/senadoresPorPartido.asp>. See also Só um senador votou contra o sistema de cotas nas universidades federais, Vio Mundo, Aug. 8, 2012, available at <http://www.viomundo.com.br/politica/so-um-senador-votou-contra-o-sistema-de-cotas-na-universidade.html>.

<sup>157</sup> See Comissão Diretora, Paracer No. 1.005 de 2012, Projeta de lei da Camara no. 180 de 2008.

<sup>158</sup> Dilma vai vetar artigo de lei de cotas nas instituições federais, diz ministro, G1 Globo, Aug. 23, 2012, available at <http://g1.globo.com/educacao/noticia/2012/08/dilma-vai-vetar-artigo-da-lei-de-cotas-nas-instituicoes-federais-diz-ministro.html>.

coincide with the promotion of a national standardized testing scheme. The standardized test is seen as a way of opening up access to the universities. The standardized test is not viewed as a competition in which the best performers “win” spots, but rather, a way of ensuring that everyone who benefits from a public university education meets the minimum qualifications to benefit from a university education. Once this threshold is met, the democratic mission of the university – including the goals of distributive justice and social inclusion – becomes the focus. These goals are as important – or perhaps even more important – than awarding opportunities as prizes for the best exam-takers.

Quotas are not perfect as ways of promoting equality. But their categorical rejection introduces additional legitimacy harms that must be taken into account. One cost of rejecting quotas, and their numerical methods of pursuing and measuring equality, is the decrease in transparency. When quotas are disfavored on the grounds that individuals must be considered as individuals rather than as members of groups, race and gender can be one of many factors considered, but cannot be the decisive factor. It is clear that, under Bakke and Gratz, an institution cannot use different cutoff scores for the admission of black and white students.

If black students and white students with different scores are being admitted, such outcomes have to be explained by “soft” and “individualized” factors like interviews, essays, and a consideration of the student’s individual human characteristics that may not register on admissions tests. In other words, saying no to quotas necessitates the creation of “individualized” selection procedures that necessarily increase the use of “soft” or subjective criteria. A greater reliance on soft criteria makes any selection procedure less transparent than one which depends on test scores and quotas. Under an individualized affirmative action scheme, nobody really knows why they were rejected: Was my test score too low? Was my essay too dull?

The unique anxieties and resentments fueled by a complex individualized selection scheme should be considered. When a rational self-interest maximizing person is rejected under an “individualized” affirmative action scheme, the rejected person receives a mixed, opaque message: “You were rejected due to your individual shortcomings, but some of those shortcomings might have been overcome if you had been a woman or underrepresented minority receiving ‘plus’ factors.” When there are multiple criteria, it is easy to convince oneself that race or gender, rather than individual shortcomings, determined the outcome, since both are plausible explanations. Under such circumstances, racial resentment is an easy coping mechanism for the individual whose self-esteem would be significantly injured if he had to confront one’s individual shortcomings.

At the heart of the belief that quotas (as well as other forms of race-conscious action) cause social division is an implicit story about the dynamics of racial resentment. Our affirmative action doctrine assumes that quotas cause more racial resentment than affirmative action. When a white person who is rejected from an elite institution can see that a black person with a lower test score was admitted under an admissions quota, racial resentment ensues because the white person can see that race, rather than individual merit, was the decisive factor. Because our ideal of equality tells

us that race should not be relevant to who gets what whereas individual merit should be relevant, a sense of injustice emerges.

Doing individualized affirmative action instead of quotas is one attempt to rewrite this story: it attempts to convince everyone that, in fact, it was individual merit – redefined in some amorphous way that incorporates race – rather than race, that was decisive. But this rewriting is not convincing. Individualized affirmative action reaffirms the premise that the institution’s primary purpose is to provide opportunities to individuals based on a conception of merit centered on individual traits. If that is the starting point, it does not matter whether quotas or individualized affirmative action is used. If race appears to be a determining factor, racial resentment will ensue. If anything, the obfuscation of the selection criteria resulting from not using numbers and quotas might ignite more racial resentment, as it becomes a scapegoat for discontented individuals who need to make sense of their rejection.

In Europe and Brazil, the constitutional discourse around quotas has departed from the premise that the relevant institutions are primarily concerned with providing individuals with opportunities. The starting point is the democratic republic, rather than the individual. Within the democratic state, the wide range of public and private institutions, including legislatures, universities, and even corporations, are regarded as exercising social power that must be legitimized.<sup>159</sup> Democratic legitimacy depends upon the participation of all on equal terms. A democracy cannot continue to govern legitimately when its citizens are racially stratified, or when the citizens who tend to social reproduction do not participate. When this is understood, overcoming the underrepresentation of women and historically subordinated racial groups becomes a high-priority goal of the institution. This goal can sometimes surpass other important goals, such as the provision of individual opportunities based on individual factors.

It is important to note that, in the United States, resentment does not always result from institutions’ prioritization of worthwhile goals over traditional indicators of individual merit. Universities routinely give preferences in admissions to legacy candidates, presumably justified by the institution’s goal of maintaining good relations with alumni and potential donors. This means that individuals whose qualifications are stronger than those of legacy admittees are being rejected. Yet, there is no legacy resentment fueling a movement to end legacy admissions akin to the racial resentment fueling the movement to end affirmative action. Presumably, this is because people accept the universities’ institutional justifications for legacy preferences as legitimate, whereas the institutional justifications for race-based affirmative action are not widely embraced. They are not widely embraced because they are wildly confusing: By rejecting quotas and insisting on individualized consideration, our doctrine has urged that individual merit is at the heart of affirmative action. However, if no expectation of individualized consideration were created, and the

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<sup>159</sup> I elaborate the notion of corporations as subject to requirements of state legitimacy in a democracy in Julie C. Suk, *Gender Parity and State Legitimacy: From Public Office to Corporate Boards*, 10 *Int’l J. Const. L.* 449 (2012).

democracy justification for quotas and affirmative action were well-understood, the efficacy and transparency of quotas would perhaps avoid the resentment.

The distinctive facts of *Parents Involved* and *Ricci* illustrate this point. In *Parents Involved*, one of the plaintiffs was the mother of Joshua, a Louisville kindergartener who was assigned to a school that was 10 miles away from his home. The school for which he was geographically zoned (the “resides school”) was less than a mile away from his home, but he was rejected from that school because it was already full.<sup>160</sup> Joshua attempted to enroll in August, and the deadline for enrollment had been in May. Joshua was not challenging that rejection in the litigation. Had he been assigned to the school 10 miles away from home due to his failure to enroll at the zoned school on time, he would not be complaining. After all, school districts have an institutional interest in avoiding overcrowding and enforcing enrollment deadlines, even if means turning away kids who have recently moved to the school zone, live nearby, and are arguably thus more deserving of a spot at that school. Joshua then tried to get into a different school, for which he was not geographically zoned, but was nonetheless a mile away from his home.<sup>161</sup> That school was not full, but rejected Joshua because admitting him would have led to an overrepresentation of whites in that school. This was the rejection that was being challenged in litigation. Why do Americans accept the institutional prerogative in enforcing an enrollment deadline but challenge the institutional prerogative in achieving social inclusion and diversity? Sacrificing the principle of individual merit goes unnoticed until it is done to achieve racial integration. To reverse this dynamic, we need a clearer and more robust public account of the link between racial equality and democracy.

This dimension of the racial resentment might be reduced if quotas rather than individualized affirmative action schemes were used. At the University of Brasilia, the quota policy was transparent. The school made very clear in its admissions website that all admitted students must attain a minimum score, ensuring that those admitted are qualified. In addition, the new quotas legislation in Brazil has several transparency requirements. Under a transparent quota scheme, people who are rejected do not experience the uncertainty and lack of a cognitive closure associated with opaque, complex, and subjective individualized affirmative action schemes. Nor do they confront existential anxieties about whether it was an implicit or covert quota or their individual deficiencies that led to their failure. The social psychology literature suggests that people’s attitudes towards policies like affirmative action are dictated not only by their values and beliefs, but also by a more complicated set of conscious and unconscious personal motivations. These personal motivations include epistemic motivations (desire for closure), existential motivations (self-esteem management), and ideological motivations.<sup>162</sup> Psychologists’ work on whites’ attitudes towards

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<sup>160</sup> See *Parents Involved v. Seattle Indep. Schl. Dist.*, 551 U.S. 701, 717 (2007).

<sup>161</sup> *Id.*

<sup>162</sup> J.T. Jost, J. Glaser, A.W. Kruglanski, & F.J. Sulloway, *Political Conservatism as Motivated Social Cognition*, 129 *Psychological Bulletin*, 339 (2003). See also J. Duckitt, *A Dual-Process Cognitive-Motivational Theory of Ideology and Prejudice*, 33

affirmative action has focused on the ideological motivations associated with social dominance.<sup>163</sup> But my suggestion here is that, when comparing quotas and affirmative action, individualized affirmative action could fuel more resentment than quotas. The opacity of individualized affirmative action – wherein nobody can quite put a finger on how much race mattered to an admissions decision – and the perception that the affirmative action policy is really a quota behind closed doors, might increase the epistemic and existential motivations for resenting the policy. This hypothesis challenges the doctrinal assumption that quotas would fuel *more* resentment and social division than individualized affirmative action.

## VI. Towards A Corruption Conception of Discrimination

Some parallels emerge between the discourse of democracy in France and Brazil underlying quotas and the discourse of diversity justifying affirmative action in the United States. The logic deployed in other jurisdictions suggests that quotas need not produce the “new divisions” that would undermine the possibility of forming one nation, indivisible. In France and Brazil, the constitutional discourse articulates the hope that quotas will transform the function and meaning of gender and race, rather than perpetuate the historically used categories that are now regarded as problematic. Having recognized the potential for such transformation, the experimentation is ongoing.

Should the legitimacy of democratic institutions, rather than individual dignity-based rights to opportunities, become the normative frame for antidiscrimination law? Thinking about the relationship of quotas to antidiscrimination law should lead to a broader reflection on the practices that antidiscrimination law proscribes. In *The Imperative of Integration*, Elizabeth Anderson argues that the ideal of democracy should form the basis for evaluating racial segregation. Democracy involves relations of social equality. Equality is not merely a formal legal status, but a cultural norm.<sup>164</sup> Distributive inequalities can undermine the social relations central to a democracy. For Anderson, when democracy is the starting point for thinking about what’s wrong with segregation or other forms of discrimination, the positions for which people are competing – university spots, jobs, public contracts – are thought to serve the public as a whole, not

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Advances in Experimental Social Psychology, 41 (2001); D. Dunning, A Newer Look: Motivated Social Cognition and the Schematic Representation of Social Concepts 10 Psychological Inquiry 1 (1999).

<sup>163</sup> See, e.g., Hillary Haley & James Sidanius, The Positive and Negative Framing of Affirmative Action: A Group Dominance Perspective, 32 Pers. & Soc. Psychol. Bull. 656 (2006); Stanley R. Bailey, Legacies of Race: Identities, Attitudes, and Politics in Brazil 145-68 (2009); Stanley Feldman & Leonie Huddy, Racial Resentment and White Opposition to Race-Conscious Programs: Principles or Prejudice? 49 Am. J. Pol. Sci. 168 (2005); Lawrence Bobo, Race and Beliefs About Affirmative Action: Assessing the Effects of Interests, Group Threat, Ideology, and Racism, in *Racialized Politics: The Debate About Racism in America* 137 (David O. Sears, Jim Sidanius, & Lawrence Bobo eds. 2000)

<sup>164</sup> Elizabeth Anderson, *The Imperative of Integration* 102 (2009).

the persons who occupy them.<sup>165</sup> The issue is not whether it is unfair to minority individuals when only members of the majority race occupy all the leadership positions, but whether these leaders can legitimately govern the entire polity under such circumstances.

In *The Social Contract*, Rousseau posited that various systems of legislation required the avoidance of extremes of wealth and poverty: “[N]o citizen be so very rich that he can buy another, and none so poor that he is compelled to sell himself: Which assumes, on the part of the great, moderation in goods and influence and, on the part of the lowly, moderation in avarice and covetousness.”<sup>166</sup> In a footnote to this passage, Rousseau asks: “Do you, then, want to give the State stability? Bring the extremes as close together as possible; tolerate neither very rich people nor beggars.”<sup>167</sup> Rousseau suggested that the gaps between rich and poor led to “trafficking in public freedom.”<sup>168</sup>

In *Ricci v. DeStefano*, Justice Alito’s concurring opinion explicitly characterized the employer’s decision that was being held to violate Title VII’s disparate treatment prohibition as a form of political corruption. *Ricci* held that the New Haven Fire Department discriminated when it decided not to use the test scores as the basis for promotion because of the racially disproportionate effect that using those test scores would produce. For Justice Alito, the problem with the decision was not merely that the New Haven Fire Department took the race of the highest test scorers into account, but that it did so in response to political pressure from a black community leader. Evidence in the record indicated that a prominent African-American pastor with “personal ties” to the mayor of New Haven unduly influenced the decision by playing the race card. The African-American pastor is described in the record as someone who threatens race riots and “calls whites racist if they question his actions.”<sup>169</sup> Reviewing the evidence, Alito writes:

Almost as soon as the City disclosed the racial makeup of the list of firefighters who scored the highest on the exam, the City administration was lobbied by an influential community leader to scrap the test results, and the City administration decided on that course of action before making any real assessment of the possibility of a disparate-impact violation. To achieve that end, the City administration concealed its internal decision but worked—as things turned out, successfully—to persuade the CSB that acceptance of the test results would be illegal and would expose the City to disparate-impact liability. But in the event that the CSB was not persuaded, the Mayor, wielding ultimate decisionmaking authority, was prepared to overrule the CSB immediately. Taking this view of the evidence, a reasonable jury could easily find that the City’s real

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<sup>165</sup> *Id.* at 108.

<sup>166</sup> Jean-Jacques Rousseau, *The Social Contract* Book 2, ch. 11, in *The Social Contract and Other Later Political Writings* 78 (Victor Gourevitch ed. & trans. 1997).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Ricci v. DeStefano*, 557 U.S. 557, 598 (Alito, J., concurring).

reason for scrapping the test results was not a concern about violating the disparate-impact provision of Title VII but a simple desire to please a politically important racial constituency.<sup>170</sup>

Thus understood, the legal violation occurred because lobbying, rather than a genuine fear of liability, exerted a decisive and opaque influence on a public policy decision. For Alito, the discrimination occurs when a public employment decision is made to “please a politically important racial constituency.”

Justice Alito does not spell out what, precisely, is wrong with this scenario, but it appears to resemble what’s wrong with nepotism in hiring or bribery in politics: Access to one kind of good (family connections or money) is determining access to an unrelated good (desirable job or votes). Having an advantage in one area is enabling a person to gain an advantage in another sphere of life that ought to be governed by different rules, such as merit or representativeness.<sup>171</sup> At the very least, there are some spheres of life which ought not to be governed by money, family connections, or other inherited advantages. Those spheres are the major institutions of a democratic state, which are supposed to serve the public, and include everyone equally.

Justice Alito’s implicit theory of discrimination as corruption should be taken seriously. It does not suggest that the white firefighters had an entitlement to be promoted on the basis of their test scores, but rather, that all the firefighters were entitled to an employment decision that was not produced by lobbying. In other words, employment decisions are unfair when they are determined by the deployment of power accumulated elsewhere.

Lawrence Lessig’s recent account of corruption illuminates this idea. In *Republic, Lost*, Lessig expands the definition of corruption beyond the traditional understanding. Corruption includes not only the evil criminal acts of vote-buying or bribery, but also a pathology that Lessig calls dependence corruption:

Imagine a young democracy, its legislators passionate and eager to serve their new republic. A neighboring king begins to send the legislators gifts. Wine. Women. Or wealth. Soon the legislators have a life that depends, in part at least, upon those gifts. They couldn’t live as comfortably without them, and they slowly come to recognize this. They bend their work to protect their gifts. They develop a sixth sense about how what they do in their work might threaten, or trouble, the foreign king. They avoid such topics. They work instead to keep the foreign king happy, even if that conflicts with the interests of their own people.<sup>172</sup>

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<sup>170</sup> *Ricci v. DeStefano*, 557 U.S. 557, 604-05 (Alito, J., concurring).

<sup>171</sup> Michael Walzer developed this theory in *Spheres of Justice*. See Michael Walzer, *Spheres of Justice* (1982).

<sup>172</sup> Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress – and a Plan to Stop It* 17 (2012).

The fear was not just that a particular minister might be bribed. It was that many ministers might develop the wrong sensibilities. The fear, in other words, was that a dependency might develop that would draw the institution away from the purpose it was intended to serve: The people. The realm. The commons.<sup>173</sup>

Another example, which Lessig calls an “obvious case,” is a medical school professor who is given many paid speaking opportunities by a pharmaceutical company that produces one of many competing drugs to treat a health condition. There is no implied or express agreement that the professor will recommend the drug company’s treatment over others. But the company knows when she recommends their drug. The professor becomes dependent on the well-paid speaking opportunities, which enables her to buy a new car and a new house. This dependence causes the professor to be less critical of the treatments from this company. If this professor teaches in an institution whose purpose is leadership in alleviating human suffering caused by disease, her dependence on the company has corrupted her by compromising the objectivity of the judgment she uses in attempting to alleviate human suffering.<sup>174</sup>

Dependence corruption, according to Lessig, is ordinary rather than evil:

[W]e need not be saying that the doctor is an evil or bad person. If our doctor has sinned, her sin is ordinary, understandable. And indeed, among doctors in her position, her ‘sin’ is likely not even viewed as a sin. The freedom or latitude to supplement one’s income is an obvious good. To anyone with kids, or a mortgage, it feels like a necessity. We can all, if we’re honest, imagine ourselves in her position precisely. Ordinary and decent people engage all the time in just this sort of compromise.<sup>175</sup>

At the same time, Lessig illustrates, through various public-policy examples such as education and financial regulation, that dependence corruption may cause more harm to our democratic institutions’ ability to serve the public interest and than the evil or criminal forms of corruption.

In France and Brazil, social movements and courts have expressed concern that the institutions of democracy will be unable to serve the public if certain classes of persons continue to be overrepresented in those institutions. When men are overrepresented in French government, and when rich white students who were formed in private schools are overrepresented in Brazilian public universities, the situation is similar to dependence corruption. Under conditions of dependence corruption, political actors are dependent on wealth, a form of accumulated privilege that undermines the forms of judgment appropriate to the institution. Gender and race overrepresentation in desirable positions similarly indicates the operation of accumulated and undeserved privileges within an institution that is supposed to be democratic and legitimate. Sociologists

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<sup>173</sup> Id. at 19.

<sup>174</sup> Id. at 15.

<sup>175</sup> Id. at 16.

have called the deployment of privileges accumulated within a bounded social network “opportunity hoarding.” On Charles Tilly’s account, “opportunity hoarding” operates “when members of a categorically bounded network acquire access to a resource that is valuable, renewable, subject to monopoly, supportive of network activities, and enhanced by the network’s modus operandi.”<sup>176</sup>

In a recent book, sociologist Nancy DiTomaso builds on Tilly’s “opportunity hoarding” model by interpreting the behavior of working-class whites in the employment market. DiTomaso’s interview data reveal that, for many working-class whites, opportunity-hoarding has played a significant role in their work histories of being hired and promoted. Many interviewees reported that they got their first jobs with help from the connections of a family member or friend.<sup>177</sup> Both Tilly and DiTomaso argue that the persistence of racial inequality is the consequence of opportunity-hoarding. DiTomaso’s distinction between opportunity-hoarding and discrimination as defined by current law is illuminating:

Both the laws and the academic literature frame the complaints of African Americans in terms of their exclusion rather than in terms of white inclusion. That is, they focus on discrimination, by which they mean specific and intentional acts of exclusion of blacks by whites. But exclusion is a consequence of opportunity hoarding. Exclusion is neither opportunity hoarding’s main intent nor the primary means by which it operates. Hoarding means gathering to oneself, perhaps with little thought to the negative consequences for others.<sup>178</sup>

Indeed, legal scholars of racial inequality who have engaged the literature on “opportunity hoarding” have defined it as *restricting* access to a good, and focused on the *exclusion* of blacks and/or the denial of goods to blacks.<sup>179</sup>

There is a difference, however, between restricting access to a good through the exclusion of blacks (“I *only* help my white friends, *and nobody else*, get jobs”) and the ordinary forms of opportunity hoarding documented by DiTomaso in her interviews. For the most part, people just seek help from their friends or family members, who in turn seek to help their friends or family members. These networks of opportunity tend to be racially homogeneous. There is a man who got his first job because his brother got him in the door. After he lost his job due to a drug incident, his friends and brother helped him find a series of other jobs.<sup>180</sup> Another man with poor grades in college got his first job in a company where his father was a supervisor, helped by his father’s phone call to a colleague.<sup>181</sup> Another got a

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<sup>176</sup> See, e.g., Charles Tilly, *Durable Inequality* 10 (1997)

<sup>177</sup> See Nancy DiTomaso, *The American Non-Dilemma: Racial Inequality Without Racism* 46-66 (2013).

<sup>178</sup> *Id.* at 56.

<sup>179</sup> See, e.g., Michelle Adams, *Racial Inclusion, Exclusion, and Segregation in Constitutional Law*, 28 *Const. Commentary* 1, 23 (2012); R.A. Lenhardt, *Race Audits*, 62 *Hastings L. J.* 1527, 1546 (2011);

<sup>180</sup> DiTomaso, *The American Non-Dilemma*, *supra* note \_\_, at 47.

<sup>181</sup> *Id.* at 51.

summer job at a bank during college after his father talked with a friend.<sup>182</sup> DiTomaso observes, “In a pretty consistent pattern, the interviewees often obtained jobs with higher pay and better benefits with the help of family or friends, but sometimes found jobs that did not pay enough to support a family through more formal means (ads, direct applications, employment agencies).<sup>183</sup> Opportunity hoarders seek to avoid market competition to find an “inside edge” to obtain a desired position, “often through the help of their family or friends using whatever influence they might have had to pass along good jobs – that is, jobs as good as they had access to – to people they knew.”<sup>184</sup> The aggregate *effect* of opportunity hoarding is exclusion of those who are not in one’s network of family and friends. When networks of family and friends are racially homogeneous, ordinary attempts to help one’s friends and family exacerbate racial inequalities, even though this consequence is not a necessary feature of opportunity hoarding.

What, if anything, is wrong with getting a good job – or getting into an excellent kindergarten – through family connections or a good word put in by a friend? Like the doctor who exemplifies Lessig’s “dependence corruption,” opportunity-hoarders are ordinary. The freedom or latitude to help and be helped by one’s friends and family is an obvious good. For anyone with family members or friends, one might even say that hoarding opportunities for your loved ones is simply what every person aspires to do as a loyal friend or family member. In Lessig’s account of dependence corruption, the ordinariness and lack of evil in individual actors does not preclude the conclusion that the conduct is corrupt and therefore in need of rooting out. What matters the most is the *aggregate effect* of the conduct on the stated goals of the institution. Similarly, a discrimination-as-corruption framework would regard ordinary non-evil practices as discriminatory if they had the effect of significantly undermining the conditions of equality necessary for democratic institutions to govern legitimately in the public interest.

## Conclusion

U.S. affirmative action doctrine, in drawing a constitutional line between quotas and individualized affirmative action, has imagined quotas to be bad because of their divisive effect on democracy. In characterizing the wrong of quotas as discrimination, this body of law has connected antidiscrimination norms to democratic theory. Examples from foreign jurisdictions challenge the American assumption that quotas by their very nature cause social division, resentment, and a corrosive politics of identity. The discourse of gender quotas in Europe and racial quotas in Brazil illustrate how quotas are imagined to have the opposite effect than that feared by American Justices.

Nonetheless, the American cases rejecting racial quotas implicitly urge a valuable new approach to discrimination: Discrimination as corruption. In this normative framework, antidiscrimination law would

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<sup>182</sup> Id.

<sup>183</sup> Id. at 53.

<sup>184</sup> Id.

seek to eradicate practices and policies that undermine the conditions necessary for democratic institutions to govern legitimately and/or to serve the public. Since quotas can have a variety of consequences and meanings within a constitutional democracy, defining discrimination as corruption need not lead to scrutiny for all quotas. Rather, it should lead to scrutiny for a wide range of ordinary and perfectly understandable individual behaviors that cause racial disadvantage, which in turn undermines the institutions of democracy.

Considering that the discrimination as corruption framework would render problematic the ordinary practices of helping one's friends and family, perhaps an enforcement framework designed to target and remedy evil behaviors is inappropriate. Taking discrimination as corruption seriously should lead us to rethink the mechanisms by which law and public policy vindicate equality. Quotas, as practiced in France and Brazil, are designed to quickly integrate legislatures, corporate boards, and universities. These are institutions where social networks are formed, but of course there are others. The discrimination-as-corruption framework, viewing opportunity-hoarding as a central problem for racial equality, should embrace public policy mechanisms that can quickly and effectively integrate social networks. Even if opportunity-hoarding persists, its operation within racially integrated networks will mitigate the aggregate effects on the equality necessary to legitimize democracy.