ARTICLE

The gender of representation: On democracy, equality, and parity*

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The debate regarding the statutory introduction of gender parity in electoral lists has been led, on the one hand, by those who envisage parity as a way to attain substantive equality between the genders. The opposition has been led by those who, on the other hand, reject it as going against the very principle of equality in its formal dimension, as well as against the autonomy of political parties. Based on the experience of France and Italy on this matter, this article discusses both sets of arguments and applies them to the Spanish context. It further defends the need to bypass the theoretical parameters of equality and affirmative action in order to place the defense of electoral parity within the theoretical parameters of the postliberal democratic state. It aims, therefore, at articulating electoral parity as a conceptual requisite of the democratic state.

Introduction

Among the various feminist struggles for gender equality in the West, achieving parity in political representation is, today, a primary goal in many countries. It is the objective that best exemplifies the empowerment of women proposed at the Fourth United Nations World Conference on Women's Rights (Beijing, 1995) as a crosscutting goal of all initiatives aimed at achieving real equality of the genders. A prominent demand, it is also—as we shall see—a polemical one, in both the political and the legal arenas and among courts and scholars.

Politically, there is not always agreement on whether it is strategically wise to introduce measures intended to guarantee, or simply to foster, women's having a matching—or even a minimum—presence alongside men in representative bodies. Legally, it is not always clear whether such measures are

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consistent with the constitutional framework of the legal system for which they are intended. Indeed, measures that aim to balance the presence of women and men in representative political bodies raise doubts as to their consistency with the principles underlying political representation within the state. The dominant model of representation is based on the notions of generality, unity, and equality—a model of representation that, in the words of the Spanish Constitutional Court, "presumes that the will of the representatives is the will of the constituency, by virtue of which the actions of representatives are attributed to voters as a whole, not just to those who voted for them or who form the majority."[1] This supposition requires that the vote of those represented, in effect, be free and equal. Consequently, as a precondition for the enactment of general laws, that is, equal laws, general representation requires the free and equal voting rights of those represented. Politics has thus been deemed the realm of formal equality, a terrain in which there is no room for affirmative action. Here, it is argued, affirmative action would go against the modern notion of political representation as unitary and general. It would undermine, moreover, the right of excluded male candidates to stand for elections. The autonomy of political parties, it is further claimed, would also be jeopardized.

On the other hand, defenders of electoral quotas favoring women candidates in order to achieve a greater or a balanced presence of women in political representation[2] highlight the superficiality of formal equality—what Luigi Ferrajioli has called the "*aporia* into which an acritical notion of the principle of equality can fall."[3] A formal conception of equality, it is claimed, is inadequate when it comes to attaining true gender equality—as is shown in the political sphere by the gap between the number of men and women representatives. It is important, advocates of quotas argue, to remember that humanity is divided *grosso modo* fifty-fifty between women and men. It is, therefore, reasonable that each gender should have equal representation. There is no reason, however, why this should call into question the

[1] Sentencia del Tribunal Constitucional [S.T.C.] Judgement 10/1983, Feb. 25, 1983.

[2] This article will focus mainly on the debate regarding parity; however, strictly speaking, a distinction should be made between measures aimed at achieving parity—understood as an even, balanced, or comparable presence (for example, approximately proportionate to the gender distribution in the population)—and quota measures that seek to guarantee a minimum presence of women in representative bodies (for example, a minimum of 25 or 30 percent). Although some of the arguments in favor of a quota system can be extended to the case for parity, the underlying logic is not necessarily the same.

[3] Luigi Ferrajioli, *Differenza di genere e garanzie di uguaglianza* [*Gender Difference and Equality Guarantees*], *in* Genere e Democrazia: La Cittadinanza delle Donne a cinquant'Anni dal Voto [Gender and Democracy: Women's Citizenship Fifty Years after Suffrage] 93 (Franca Bimbi & Alisa Del Re eds., Rosenberg & Sellier 1997) (authors' translation).

principles of generality and unity in modern political representation. Indeed, equal representation does not imply that women should only vote for women, or men only for men, or that each gender should only represent its own interests. Each elected representative continues to represent the population as a whole. Democracy and equality require, nonetheless, that each gender have a minimum level of representation and, in fact, that they be comparably represented.

Thus run the basic lines of the constitutional argument concerning minimum quotas—or parity—for the genders in political representation. We present them and discuss them in depth, looking at the French, Italian, and Spanish experiences in the first part of this article. The objective of this article, however, goes beyond the analytical description of these case studies and the discussion of arguments put forward in their contexts. In the second part of this article we will defend the constitutionality of measures aimed at achieving gender parity in representation, arguing that these are not merely affirmative action measures and that the debate concerning their validity should be grounded at a point well outside the discussion as to whether a formal or substantive equality model should prevail in politics and, ultimately, outside the debate on rights—specifically, women's right to a larger share of political representation based on a substantive concept of equality; or men's right not to be excluded from electoral ballots, which would infringe their right to stand for elections and violate the formal concept of equality in political representation.

Rather, we claim, the parity debate should be understood as a debate about democracy—namely, a debate about the model of democracy implicit in the pursuit of gender equality in political representation. In this regard, we argue that a model of democracy based on gender parity completes the transition from the liberal state to the democratic state, a transition that began when universal suffrage was established. We argue that, in order for this transition to be fully achieved, the presence of men and women in parliament must be comparable and, if this does not occur spontaneously, it can and must be enforced. Depending on the situation, parity may be imposed by the political parties themselves or, if necessary, by law. Our main contention, then, is that a true democracy must be a parity democracy, and it is legitimate, therefore, to promote that condition, even to impose it by law—not only from the standpoint of a concern with substantive equality as a woman's right but as a structural prerequisite of the democratic state.

1. Balanced representation as a constitutional matter: The French, Italian, and Spanish experiences

In Europe, the debate over parity in political representation—that is, parity democracy—has been fueled by the legislative experiences of some European

countries. These include some in which quotas have been legislated without the need for constitutional reform;[4] others in which such reform opened the path to quotas;[5] and still others in which constitutional jurisprudence has invalidated legislative initiatives to introduce minimum quotas or parity in representation, forcing a constitutional amendment before such measures could be introduced. This happened in France and Italy. In Spain, a law introducing parity democracy is pending constitutional challenge.

1.1. The French experience

In France, the first initiatives aimed at allaying the chronic deficit of women in political representation were debated in the 1970s, prompting the Socialist Party to adopt the first voluntary quotas.[6] It was not until 1982, however, that the leap was made to establish legally mandated quotas with a project to reform the municipal electoral system. The parliament passed a measure that barred electoral ballots from having more than 75 percent of its candidates of the same gender.[7]

[4] In Belgium, a 1994 law established that there should be at least 25 percent female candidates on all electoral lists, with the provision that this percentage would increase with each election, up to 33 percent in 1999, with the ultimate goal fixed at 40 percent between 2010 and 2015. The law provided for incremental application, so that it would be applied in 1994 to local elections; in January 1996 to federal, and in January 1999 to the remaining elections. The rule was applied during the first elections, but the outcome was far from what had been hoped, mainly because it said nothing about the positions that men and women should be assigned on the list, and, therefore, many women were placed at the bottom. Thus, in 2000 and 2002, there were legislative reforms aimed at attaining parity at the different levels of representative positions. *See* Law No. 1994-05-24/37, May 24, 1994, Moniteur belge [Belgian Monitor], July 1, 1994.

[5] In Portugal, the issue was posed from the outset as a matter for constitutional amendment. Thanks to that amendment, enacted in 1997, article 109 of the Portuguese Constitution now establishes that "direct, active participation of men and women in political life is a condition and fundamental instrument for the consolidation of the democratic system, and the law must promote equality in the exercise of civil and political rights and non-discrimination based on gender for access to public positions."

[6] Regarding the French case and the debate around it, see, among many others, Olivia Bui-Xuan, Le droit public français entre universalisme et différentialisme [French Public Law between Universalism and Differentialism] (Université Paris II 2003); La parité dans la vie politique: Rapport de l'Observatoire de la parité entre les hommes et les femmes [Parity in Political Life: Report of the Research Study on Parity between Men and Women] (Gisèle Halimi ed., La documentation française 1999); Francine Demichel, À Parts égales: Contribution aux débats sur la parité [In Equal Parts: Contribution to the Debates on Parity] (Recueil Dalloz Sirey 1996); Sylvanne Agacinski, Politique des sexes [Sexual Politics] (Seuil 1998); Janine Mossuz-Lavau, Femmes/hommes: Pour la parité [Women/Men: In Favor of Parity] (Presses de Sciences Po 1998); Evelyne Pisier, Égalité ou parité? La place des femmes: Les enjeux de l'identité et de l'égalité au regard des sciences sociales [Equality or Parity? The Place of Women: Identity and Equality at Stake in the Social Science Context] (La Découverte 1995).

[7] Loi modifiant le code électoral et le code des communes et relatif à l'élection des conseillers municipaux et aux conditions d'inscription des Français établis hors de France sur les listes électorales [Act Amending the Electoral Code and the Code of Municipalities Concerning the Election of Municipal Councillors and the Conditions for Inclusion in Electoral Registers of French National Residing outside France], Law No. 82-974 of Nov. 19, 1982, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Nov. 20, 1982.

Despite the broad political consensus backing the law, sixty delegates from the opposition challenged it before the Conseil Constitutionnel. The Conseil declared the law unconstitutional based on article 3 of the French Constitution[8] and on article 6 of the Declaration of the Rights of Man and the Citizen of 1789,[9] which is incorporated in the current Constitution, arguing that both sanction the principle of equality in the eyes of the law and forbid the division of the electorate or candidates into categories.[10] Faithful to the universalist notion of citizenship prevalent in France, the Conseil Constitutionnel held that the principles of national sovereignty and the indivisibility of the electoral body precludes any person or group from claiming the exclusive exercise of national sovereignty. Furthermore, it argued, article 6 of the 1789 Declaration states that it is citizenship itself that confers the equal right to vote and to stand for elections, without any qualifications or exceptions, other than those that may stem from such conditions as age or incapacity.

The quota measure having thus failed without much ado among feminists (who were never comfortable with the idea of a 25 percent quota, given that women constitute more than 50 percent of the population), it was some years before the march toward parity recovered its momentum. The idea of parity, put forward initially by the Council of Europe and taken up by the intellectual elite and the feminist movement as an instrument of political pressure, became popular in 1992 after the publication of the book, *Au pouvoir citoyennes—Liberté, égalité, parité*,[11] which advocated strict parity between men and women in the assignment of seats on legislative assemblies at all territorial levels. One

[8] Article 3 reads:

> National sovereignty resides in the people, who exercise it through their representatives and by means of referendum.
> No one sector of the people or single individual shall claim its exercise.
> Suffrage may be direct or indirect in the conditions set forth by the Constitution, and shall always be universal, equal and confidential.
> According to the law, electors are all French nationals of both sexes, who are of age and enjoy full exercise of their civil and political rights.

[9] Article 6 reads:

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

[10] CC decision no. 82-146DC, Nov. 18, 1982, J.O. p. 3475.

[11] Françoise Gaspar, Claude Servan-Schreiber & Anne Le Gall, Au pouvoir, citoyennes: Liberté, égalité, parité [Power for Women Citizens: Freedom, Equality, Parity] (Le Seuil 1992). The book argues that for elections following the proportional system, 50 percent of candidates should be of each gender. For elections organized according to the majority system, it proposes reducing existing districts to half the number by means of a merging system, and turning them into binomial districts for electoral purposes, so that each candidacy could include a man and a woman.

year later, the Organization of Women for Parity would be formed as a civil society advocacy group for bringing together all organizations in support of the cause; at about the same time, the Manifesto of the 577 for Parity Democracy (alluding to the number of seats in the National Assembly and signed by 289 women and 288 men), calling for parity legislation, would appear in *Le Monde*.[12] Finally, in the 1995 presidential campaign, it was clear that the idea had moved from legislative and judicial forums to the political arena: all three leading presidential candidates included in their platforms the promise to adopt measures to put an end to the chronic underrepresentation of women in political bodies. As the culmination of the movement, in 1996 ten former female ministers published their "manifesto of ten in favor of parity" in *L'Express*.[13] As we will see, the basic idea was to reflect the duality of humanity precisely in those forums in which decisions are made that affect humanity as a whole. If the law had played a central role in the age-old exclusion of women from the sphere of democracy, it was claimed, it would now be incumbent upon the law to make amends, as it were, and thus guarantee women's inclusion in a genuine democracy.

Despite massive popular support for the parity cause and its promise to modernize French democracy by feminizing the political elite of the country, the idea of enacting it as an alternative to the quota system, which had been constitutionally invalidated years before, did not flourish. In 1999, the Conseil Constitutionnel once again invalidated a law, in this case, the law regulating elections to the Corsican Assembly, which would have put in place a system of strict parity (an equal number of male and female candidates) on electoral ballots.[14] The Conseil based its decision explicitly on the precedent of 1982, emphasizing that no distinction on the basis of gender in any form was compatible with the principle of equality and, above all, with the indivisibility of the electoral body.

Thus, in the end, it took a constitutional amendment to open the way to parity. In 1999, Constitutional Law No. 99-569 of July 8 amended article 3 of the French Constitution with the introduction of a new paragraph—the fourth—whereby "the law shall favor equality among women and men to have access to electoral mandates and hold elective office." The purpose of the reform was also to amend article 4 of the Constitution so as to provide that political parties "shall contribute to the application of the principle set forth in the last section

[12] Réseau Femmes pour la Parité [Organization of Women for Parity], *Manifeste des 577* [*Manifesto of the 577*], Le Monde, Nov. 10, 1993, *also available at* http://multitudes.samizdat.net/spip.php?article736 (in French).

[13] *Manifeste pour la Parité* [Manifesto for Parity], L'Express, June 6, 1996.

[14] CC decision no. 98-407DC, Jan. 20, 1999, J.O. p. 1028. *See* Eric Millard, *Constituting Women: The French Ways, in* The Gender of Constitutional Jurisprudence 122 (Beverley Baines & Ruth Rubio-Marín eds., Cambridge Univ. Press 2004).

of Article 3 [the principle of equal access of men and women to hold elective office and functions] in accordance with the provisions of the law."[15]

The hurdle of unconstitutionality thus overcome, parity made its debut in the form of the June 6, 2000, Law on Equal Access of Women and Men to Elective Offices and Functions.[16] It required, under penalty of disqualification, that all parties in elections employing lists include 50 percent of candidates of each gender (±1) on their ballots. This included elections to municipal office (in towns of fewer than 3,500 inhabitants), regional office, the Corsican Assembly, the Senate (in those cases where the system of proportional representation applied), and the European Parliament.[17] For legislative elections based on the system of single-member districts, the law stipulated a penalty in public financing proportionate to the degree of noncompliance for any party that failed to include an equal number of candidates of each gender (allowing for a 2 percent margin of error).

Once again, the opposition in Parliament challenged the law in the Conseil Constitutionnel. They argued that the constitutional amendment only invited the Parliament to adopt measures to promote the guarantee of equal access of both men and women. Binding measures, such as those provided for in the law, they claimed, were still invalid to the extent that they unconstitutionally limited the freedom of voters, infringed the principle of indivisibility of the electorate, and jeopardized the right of those men to stand for elections who would have to renounce their electoral aspirations in favor of female candidates. This time, however, the Conseil Constitutionnel rejected the appellants' claims. The constitutional amendment, it stated, introduced nuances into the principle of indivisibility of the electorate inasmuch as it allowed for legislators to adopt measures, whether binding or not, to afford men and women equal access to representative positions.[18]

[15] The text of article 4 would become:

> Political parties and groups shall contribute to the exercise of suffrage.
> They shall be freely constituted and exercise their activity in respect for the principles of national sovereignty and democracy.
> They shall contribute to the application of the principle stated in the last section of Article 3, according to the law.

[16] Law No. 2000-493 of June 6, 2000, J.O. p. 131. The system established by this law has recently been perfected in the amendment involving Law No. 2007-128 of Jan. 31, 2007, J.O., p. 1941, "tendant à promouvoir l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives" (to promote equality between women and men regarding access to electoral positions and functions).

[17] In single-round elections, such as European or regional elections, the law requires male and female candidates to be listed alternatively from the top down. In other elections, which are double round, parity has to be respected on each list of six candidates, regardless of the order in which candidates figure.

[18] CC decision no. 2000-429DC, May 30, 2000, J.O. p. 8564.

1.2. The Italian experience

In Italy, Law No. 81/1993, which regulates local and provincial elections, provided that in elections for the Consiglio Comunale (Town Hall) the political parties had to include a certain minimum number of women on their electoral ballots.[19] It stipulated that neither gender could have a presence of less than 25 percent on lists in municipalities of up to 15,000 inhabitants, and not less than 33 percent in those of more than 15,000. Similarly, Law No. 277/1993 regulating elections to Congress provided that the political parties must present electoral ballots in alternating gender order ("zipper list") for elections to seats subject to the proportional system (that is, for 25 percent of seats).[20]

The question of the constitutionality of these measures was brought before the Constitutional Court.[21] It originated, paradoxically, in charges placed by a male citizen from the town of Molise where, in elections for mayor and town hall, the three electoral ballots included only one woman among a total of 36 candidates in clear violation of Law No. 81/1993. Upon resolution of the case, the Consiglio di Stato took it to the Constitutional Court on grounds of unconstitutionality. Specifically, the consiglio challenged the compliance of article 5.2 of Law No. 81/1993, related to the composition of electoral ballots in towns of fewer than 15,000 inhabitants, as was the case of the town in question, with articles 3 and 51 of the Italian Constitution. Article 51 holds:

> All citizens of both sexes shall be entitled to hold public and elective office in conditions of equality according to the requirements established by law.

Article 3 provides, in the first paragraph:

> All citizens shall have the same social dignity and shall be equal before the law, regardless of sex, race, language, religion, political opinion or personal or social condition.

And in the second:

> It is the obligation of the Republic to suppress any economic or social obstacles that hinder, and therefore limit the freedom and equality of citizens, the full development of individuals and the meaningful participation of all workers in the political, economic and social organization of the country.

[19] Regarding the Italian debate on gender quotas and parity, see Genere e Democracia, *supra* note 3; La parità dei sessi nella rappresentanza politica: In occasione Della visita Della Corte costituzionale alla Facoltà di Giurisprudenza di Ferrara [Parity in Political Representation: On the Occasion of the Visit of the Constitutional Court to Ferrera Law School] (Roberto Bin et al. eds., G. Giappichelli 2003); Donne, politica e processi decisionali [Women, Politics and Decision-Making Processes] (Licia Califano ed., G. Giappichelli 2004).

[20] For a complete, concise version of the Italian case, see Giuditta Brunelli, Donne e politica [Women and Politics] (Il Mulino 2006).

[21] Corte cost., decision no. 422/1995.

Article 51, it was argued, imposes formal electoral equality without exception. It thus refers to article 3, paragraph 1, in the context of elections and sets itself apart from the second paragraph. This reading is consistent with the notion of political freedom enshrined in article 49, which grants all citizens the right to associate freely by means of parties and thus take part in the democratic process of deciding the course of national politics.

The Constitutional Court declared the challenged article of Law 81 unconstitutional. Moreover, it declared unconstitutional any legal regulation of electoral quotas, including provisions in: Law No. 81 regarding municipal elections in towns of more than 15,000 inhabitants; Law No. 277 as it pertains to congressional elections; and laws concerning elections in certain regions with special autonomy (Friuli-Venezia, Trentino–Alto Adige, and Valle d'Aosta) as well as the law on regional elections in regions with ordinary autonomy. The Court, in effect, adopted the arguments of the Consiglio di Stato, asserting that, in electoral matters, gender is irrelevant and cannot be made to condition the exercise of the right to stand for elections, a right recognized for all citizens on equal terms. Under article 51, the Court held, such equality may not be qualified in the sense indicated under article 3, paragraph 2, of the Constitution. This is all the more the case to the extent that electoral quotas are intended not to eliminate obstructions to real equality between the genders but, rather, to impose directly a measure of equality. The Court thus deemed electoral quotas inconsistent with the notion of unitary political representation characteristic of the modern state. Yet the Court encouraged political parties to adopt voluntary measures to promote women on their electoral ballots.

In light of the passiveness of political parties on this issue, the Italian Constitution was amended in order to override the Constitutional Court's objections to the legal promotion of a greater presence of women in representative bodies. Constitutional Law No. 2/2001 provided that, in order to achieve balanced representation of both genders, electoral laws in regions with a special autonomy statute are to promote parity in elections. Furthermore, Constitutional Law No. 3/2001 added the following seventh paragraph to article 117 of the Constitution:

> Regional laws shall suppress any hindrance of full equality between men and women in social, cultural and economic life and shall promote parity of access to elective office between men and women.

Constitutional Law No. 1/2003 completed the task by adding a second sentence to the first paragraph of article 51:

> To such ends, the Republic shall use special measures to promote equal opportunities among men and women.

These amendments changed the constitutional context in which measures promoting women on electoral ballots had to be viewed. Moreover, they managed to bring about a change in the attitude of the Constitutional Court even before Constitutional Law No. 1 went into effect. Indeed, the Court rejected a challenge

presented by the government against Valle d'Aosta Law No. 21/2003, which required that ballots for Regional Council elections include candidates of both genders.[22] Not only had the constitutional framework changed, or was about to change, in relation to the 1995 ruling; the Court's rhetoric had also changed. The law in question, asserted the Court, does not impose unequal treatment of the genders. Rather, its regulations are neutral with respect to gender. The Court also ruled that the right of men to stand for elections when excluded from ballots cannot be considered infringed, as the configuration of electoral ballots resides exclusively with political parties. Furthermore, the Constitutional Court found that the unitary nature of representation was not affected, inasmuch as the law under scrutiny established no relevant legal relationship between voters of either gender and elected candidates of that same gender. The law in question, reasoned the Court, only affects the freedom of political parties when it comes to drafting their ballots, although it stipulates that it does so in accordance with the new wording of the constitutional text.

1.3. The Spanish experience: Toward a constitutional reform?

In Spain, of late, the question has arisen of whether measures pursuing parity democracy are in accordance with the Constitution. Recently, four Spanish autonomous communities[23] have introduced a system of electoral parity.[24] Most pertinent, however, has been the passage in 2007 of Organic Law on Real Equality of Women and Men by the Spanish Parliament.[25] This law confronts the prevailing discrimination against women in Spain and relates it both to the limited number of women in positions of political, social, cultural, and economic power and to the difficulties they face in reconciling professional and family lives.

In order to achieve real equality in political participation, the organic law on Real Equality of Women and Men[26] articulates what it calls the principle of

[22] Decision No. 49/2003.

[23] Spain is divided into seventeen autonomous communities, each with its own legislative and executive power, which relate to the central state as federated states do to a federation, as established in Title VIII of the Spanish Constitution and in the communities respective Statutes of Autonomy (Estatutos de Autonomía).

[24] *See* Law 6/2002, June 21, 2002, which amends Electoral Law 6/1986, Nov. 26, 1986, Autonomous Community of the Balearic Islands; Electoral Law 11/2002, June 27, 2002, which amends Law 5/1986, Dec. 23, 1986, Castilla-La Mancha; Electoral Law 5/2005, Apr. 8, 2005, which amends Law 1/1986, Jan. 2, 1986, Andalusia; and Law 4/2005, Feb. 18, 2005, on Equality of Women and Men, Basque Country. There are constitutional challenges pending with respect to the Basque and the Andalusian laws.

[25] In Spain, organic laws are a special category that can only be adopted, amended, or repealed by an absolute majority of the House of Representatives. The Spanish Constitution requires that some matters, including some fundamental rights, such as political rights, be regulated by Organic Law.

[26] Organic Law 3/2007, March 22, 2007.

a balanced presence and amends Organic Law 5/1985 on the General Electoral System, requiring that all electoral ballots be composed of candidates with 40 percent from each gender, a minimum percentage that must be met with every set of five positions. The system must be applied in all elections, including municipal elections, except in towns with a population of 5,000 or fewer (and fewer than 3,000 as of 2011). This also includes regional elections, that is, elections for the autonomous communities' Legislative Assemblies, although the electoral laws regulating these elections can call for an even greater number of women. In brief, the principle of balanced presence embodies what we could call parity with a margin of flexibility, as it relies on minimum and maximum percentages for each gender, as does the quota system, but endorses percentages that approach 50 percent. There is a constitutional challenge pending with respect to these provisions.

Will a constitutional reform in Spain be necessary, then, as it has been in France and Italy, for the introduction of parity democracy by law to be considered valid? It is our contention that no such reform is required. Indeed, as mentioned earlier, this article advances the claim that parity democracy is fundamental to a proper interpretation of the democratic state and that its implementation by law is, consequently, a requirement of democracy rightly understood. Before developing our central argument, however, we would like to return to the scholarly and legal lines of reasoning on the promotion or legal enforcement of parity democracy developed both in Spain and abroad (mainly in the cases of France and Italy outlined above) with a view to identifying the arguments that may be relevant to the Spanish case.

To begin with: Which model of equality should prevail with respect to political representation? Are affirmative action measures appropriate or is a formal concept of equality called for? We take our lead from article 9.2 of the Spanish Constitution. This article deals with measures that pursue substantive equality among persons conceived as members of specific social groups, that is to say, it is concerned with affirmative action measures that favor socially disadvantaged groups beyond the provisions of formal equality granted under article 14 of the Spanish Constitution.[27] Article 9.2 has no equivalent in the French Constitution. It is, however, comparable to article 3.2 of the Italian Constitution, with one important difference. The Italian provision refers to the obligation of public authorities to remove *economic and social* obstacles that hinder the full political participation of individuals, whereas article 9.2 of the Spanish Constitution does not specify the nature of the obstacles that must be removed. Article 9.2 thus applies to all types of obstacles that hinder women's access to elective offices—whether faced in the system, in political parties, or individually.

[27] *See* S.T.C. 28/1992, Mar. 9, 1992; *see also* S.T.C. 128/1987, July 16, 1987; and S.T.C. 109/1993, Mar. 25, 1993.

In the Spanish Constitution, the principle of equality has two complementary dimensions, one formal and the other substantive. These two dimensions are mutually beneficial, conferring meaning and relevance on each other and extending to politics. There is, however, the question still raised in certain circles regarding which model for promoting substantive equality may be applied in the area of politics. The issue, here, is the extent to which it is possible to promote by law a greater presence of women in representative bodies and to do so, not by measures aimed at leveling the playing field—ensuring equal opportunities—but, rather, by measures that explicitly equalize the presence of both genders in representative bodies. Only the former, it is argued in some sectors, can be considered affirmative action measures.[28] This would include indirect measures such as financial aid from public authorities to political parties, provided in proportion to the percentage of women on their ballots. On the other hand, measures that set minimum gender quotas on party ballots do not fall within affirmative action because, rather than intervening at the outset to enable women to have the same access to representative office as men do, these measures directly impose an outcome. This is the case, specifically, when voters are not given the option of choosing among candidates on election ballots (open ballots) but, instead, are presented with closed ballots where party lists are voted as blocks. Creating equal opportunities for both genders to have the same access to representative positions in politics via mandatory quotas on closed electoral ballots—so goes the argument—is tantamount to directly imposing a fixed presence of both genders in election results. Equal opportunity is thus transformed into equal results.

This line of reasoning was, as we have seen, one of the arguments put forward by the Italian Constitutional Court in declaring unconstitutional the law that, prior to the constitutional amendment, had set minimum gender quotas on certain electoral ballots.[29] We maintain, however, that reserving such quotas on ballots does not, in fact, guarantee a balanced presence in representative offices. If there is a leveling of opportunity and outcome, this occurs in the context of closed ballots and is due not to quotas but, rather, to the closed nature of the ballots. It is the latter that transforms opportunity into reality; closed ballots limit the electorate's control over the transition from opportunity to result in the same way that they limit the electorate's ability to shape their vote in any other way. It is not reasonable to attribute to electoral quotas any effects that are not directly derived from them. This is not to diminish the worthiness of affirmative action measures in pursuing parity as the ultimate outcome, for the fact remains that "if the discussion of substantive equality is to be taken

[28] *See, e.g.*, Louis Favoreu, *Principio de Igualdad y Representación Política de las Mujeres, Paridad y Constitución* [*The Principle of Equality and Women's Political Representation*], 17(50) Revista Española de Derecho Constitucional 13, 23–24 (May–Aug. 1997). (advancing this line of reasoning, in the French context, as an argument against the parity system).

[29] Corte cost., decision no. 422/1995.

seriously, it is impossible to fully rule out that some variants of equality… may be based on measures in some way geared toward … the outcome."[30]

In light of the foregoing, we should consider the issue of whether mandatory electoral quotas constitute a violation of the right of candidates to stand for elections who are not included on party ballots because of these quotas, thus violating article 23 of the Spanish Constitution. If this is the case, such quotas could not even be imposed by the parties on their own. In fact, this was precisely the issue that arose in the United Kingdom when, in the parliamentary primaries of 1993 and 1996, the Labour Party presented ballots composed exclusively of women for certain of its electoral colleges. In traditionally Labour-leaning colleges, this assured that the seat would be filled by a woman. One candidate, Peter Jepson, whose candidacy the party had rejected for this reason, filed suit against the party. The Industrial Court of Leeds ruled in favor of the plaintiff on the grounds that the policy of presenting ballots composed exclusively of women violated the Sex Discrimination Act of 1975.[31] To make this type of ballot possible, it would require the passage of the Sex Discrimination Election Candidates Act of 2002,[32] which allows for the adoption of temporary affirmative action measures until 2015.

In a legal context closer to the Spanish one, we saw that the Italian Constitutional Court discarded the notion that mandatory electoral quotas affect candidates' rights to stand for elections when excluded based on such quotas. It ruled that aspiring candidates cannot have a "hypothetical right of inclusion on the ballot," this issue lying within the jurisdiction of freedom of political parties. "There is no 'contest'-based method for the selection of candidates that would allow someone who is not included on a ballot to pose a legal challenge asserting unfair priority given to someone included on the ballot."[33] This assessment, as we have seen, was shared by the French Conseil Constitutionnel; it, too, rejected the assertion that the parity law infringed article 3 of the French Constitution by unduly restricting the right to stand for elections.[34] Such reasoning is perfectly applicable to the Spanish constitutional framework.[35]

[30] Antonio D'Aloia, *Le 'quote' elecctorali in favore delle donne* [*Electoral 'Quotas' in Favor of Women*], *in* La parità dei sessi nella rappresentanza politica, *supra* note 19, at 51, 60 (authors' translation).

[31] Jepson & Dyas-Elliot v. Labour Party, [1996] I.R.L.R. 116 (IT).

[32] This law regulates elections for Parliament, European elections, elections of the Scottish Parliament, elections for the National Assembly for Wales, and some local elections.

[33] Corte cost., case no. 49/2003 (authors' translation).

[34] CC decision no. 82-146DC.

[35] *See* Alfonso Ruiz Miguel, *Paridad electoral y cuotas femeninas* [*Electoral Parity and Female Quotas*], 1 Aequalitas 44, 51 (1999); and Octavio Salazar Benítez, *Las cuotas femeninas en cuanto exigencia de la igualdad en el acceso a los cargos públicos representativos* [*Female Quotas as a Demand for the Right to Equal Access to Representative Positions*], 48–49 Revista de Derecho Político 421 (2000).

The above arguments raise the question of whether enforcing minimum electoral quotas for both genders contradicts article 6 of the Spanish Constitution, which ensures the free and democratic functioning of political parties.[36] Indeed—and notwithstanding the U.K. case—reservations on the issue of mandatory quotas do not carry over to actual political parties when it comes to the voluntary adoption of minimum quotas for women on their lists. In Scandinavian countries, for example, the equal presence of men and women on election ballots is today an undisputed reality. In Germany as well, all political parties foster the presence of women on ballots through quotas, from the Green Party's zipper lists to the one-third quota imposed by the Christian Democratic Union (CDU), the 50 percent quota of the Democratic Socialist Party (DSP), or 40 percent in the case of the Socialist Party (SP). Likewise, in Spain, both the Izquierda Unida (United Left) and the Partido Socialista Obrero Español (Socialist Party) share a tradition of including mandatory minimum measures for both genders in their party statutes. Specifically, at the thirty-first Socialist Party convention of 1988, the party imposed a minimum quota of 25 percent for each gender at all levels and then raised it to 40 percent in 1997; neither of these measures has given rise to constitutional legitimacy concerns.

In addition, the Italian Constitutional Court made it clear that measures deemed "unconstitutional when imposed by law can nevertheless be looked upon favorably when freely adopted by political parties, associations or groups participating in elections, subject to the applicable provisions of their respective statutes or regulations on presenting candidacies."[37] The issue at hand, therefore, is the constitutionality of minimum gender quotas when these are imposed by law on party ballots because of the constitutional provision ensuring the free and democratic functioning of political parties.[38]

2. Party autonomy, quotas, and democratic representation

This brings us to the true Gordian knot of the debate about minimum quotas, about the legality of their imposition by law, and, ultimately, about the proper place of parity democracy within the democratic state. Indeed, if one looks closely, the doubts raised by the constitutional mandate regarding the free and

[36] This is how it is interpreted, for example, by Paloma Biglino Campos, who believes mandatory quotas would damage the party's right to self-organization. *See* Paloma Biglino Campos, *Las mujeres en los partidos políticos: representación, igualdad y cuotas internas* [*Women in Political Parties, Representation, Equality and Party Quotas*], *in* Mujer y Constitución en España [Women and the Constitution in Spain] 416–417 (Centro de Estudios Políticos y Constitucionales 2000).

[37] Corte cost., case no. 422/1995.

[38] See this examined in the Spanish context in Fernando Rey Martínez, *Cuotas electorales reservadas a mujeres y Constitución* [*Electoral Quotas for Women and the Constitution*], 1 Aequalitas 52, 56 (1999).

democratic functioning of political parties can itself lead to an *aporia*. Any assertion that political parties should function "freely and democratically" requires a definition of the free functioning of political parties within the context of a democratic state. At heart is a question about the very concept of democracy. What do we understand it to mean in the context of the modern state? What do we understand by "democratic state," and how can public authorities be faithful to this vision?

These questions lead us, in turn, to wonder which model can and should be in force in the democratic state. Indeed, the application of the principle of formal equality in the political/electoral sphere is related to the free and equal nature of voting in the democratic state, which is inherent to representation understood as universal and unitary—a model of representation characteristic of the state since its beginnings. The deeper question, then, is whether imposing minimum gender quotas on electoral ballots does indeed depart from this model of representation. Or, put another way: To what extent is imposing such quotas consistent with democracy and with the concept of representation inherent therein?

This is the type of debate that has characterized the discussion concerning quotas and parity in France. As we have seen, the Conseil's rejection of the constitutionality of the quota law in 1982 was based precisely on the notion that such a system departed from equality and universality of voting and from traditional French principles of national sovereignty and the indivisibility of the electoral body according to French tradition.[39] In the French case, the idea of parity came about and gained strength specifically relative to the quota system as a formula for making the tradition of French universalism compatible with the political inclusion of women, as one half of humanity. Equality was sought in preference over the quota and, with it, the equal participation of all in the representation of all. Parity, argue its advocates, is not a means for representing women collectively as a group with specific interests to be exclusively propounded; nor, as held by its detractors, does it turn its back on French universalism by opting for a communitarian approach to representation. It is more about finishing the work begun by the French Revolution and

[39] Similar arguments have been put forward by sectors opposed to electoral parity. In the words of one of the strongest opponents of France's parity law, Robert Badinter (former minister of justice and former president of the Conseil Constitutionnel), "We are all citizens and nothing more than citizens. Thus is the foundational principle of our Republic. Our Republic has never been a mosaic of communities or a juxtaposition of diverse components. It has never recognized anything but individuals, human beings, and citizens with no discrimination of any kind" (based on authors' translation of the quotation taken from Philippe Bataille & Françoise Gaspard, Comment les femmes changent la politique et pourquoi les homes résistent [How Women are Changing Politics and Why Men are Resisting] 8 (La Découverte 1999). In fact, as we have seen, this was also a central line of argument for those who unsuccessfully challenged the law, hoping that, even after the text of the Constitution was reformed, the Conseil would realize that prescriptive measures like those contained in the challenged law were contrary to the principle of indivisibility of the electoral body.

preventing an abstract universalism (which, until now, has always de facto been a masculine universalism) from denying—as it did for a century and a half—women's right to vote and to stand for elections. It is about preventing the continued relegation of women—as is currently the case—to the statistical status of (always merely) being politically represented rather than being regarded as representatives.

In addition, parity's advocates argue that, unlike the quota system, gender parity does not necessarily open Pandora's box for the French nation to break into a multiplicity of groups defined by race, religion, age, or sexual orientation, each one claiming separate representation. Gender, the argument maintains, is not merely another factor of differentiation; it is, by nature, cross-cutting in that it is immutable, noncontingent, or, as claimed, the *prima divisio* (the universal difference) because it is the only difference that cannot be disassociated from the notion of personhood.[40] Women are not a group or a minority—they are half of the population. The citizen is not an abstract, universal entity but, by nature, a gendered being. Parity is thus nothing more than the political expression of the fact that humanity is composed of two gendered halves and, therefore, its representative bodies must be analogously composed to be democratically legitimate.

Thus, the distinction between parity and quotas and the discussion as to which is compatible with the French universalist tradition is at the forefront of the French debate. As stated, this article sets out to defend the constitutionality of legislation that makes parity democracy mandatory. Nonetheless, in following along with the French debate but taking it further, let us emphasize that enforcing minimum electoral quotas for women does not cast doubt on the universal and unitary nature of political representation of the state. Indeed, defenders of such quotas do not usually claim that women should vote only for women or receive votes only from women or that they only represent women's interests. It is emphasized, first and foremost, that, with or without quotas, elected representatives, male and female, should represent all citizens, male and female. Introducing women into state representative bodies, then, is a way of enriching and extending the legitimacy of the democratic system without challenging the model of universal and unitary political representation on which the state rests.[41]

[40] *See* Demichel, *supra* note 6, at 97; and Agacinski, *supra* note 6, at 159. For Spain, see Eva Martínez Sampere, *La legitimidad de la democracia paritaria* [*The Legitimacy of Parity Democracy*], 107 Revista de Estudios Políticos 133 (2000).

[41] *See* Fernando Aguiar, *A favor de las cuotas femeninas* [*In Favor of Female Quotas*], 116 Claves de la Razón Práctica 30 (2001); Ruiz Miguel, *supra* note 35, at 239; and Licia Califano, *Riforme costituzionali e 'quote' per le donne* [*Constitutional Reforms and Quotas for Women*], *in* La parità dei sessi nella reppresentanza politica, *supra* note 19, at 172; and Licia Calfano, *Azioni positive e rappresentanza politica dopo le riforme costituzionali* [*Positive Action and Political Representation after Constitutional Reforms*], *in* Donne, politica e processi decisionali, *supra* note 19, at 48.

Accordingly, the key issue is not that all women necessarily share, by virtue of being women, a single group of interests or that gender plays a greater role than ideological or other differences in determining the political positions of individuals (women, after all, also operate on partisan logic). What is essential is that, due to both women's biology and, above all, their social experience, there are good reasons to think that some interests are gendered. That is, there are interests that may not affect or interest all women equally, but do affect and interest women as a group more than they do men.[42] We could cite as examples, here, interests related to specific issues, such as those associated with reproductive biology, raising children, and caring for dependents and relatives in need, as well as those related to marginalization, discrimination, and oppression (such as unequal pay and domestic or sexual violence).[43]

To the extent it is possible to identify a list of substantive questions likely to motivate the vote of the female electorate or to motivate both men and women who are concerned about justice for both genders, it could be argued that the debate should focus on ideas and party platform (within the traditional system of representation as a means of choice among representatives) rather than on the presence of groups (based on a model of representation that aspires to

[42] This responds to those who have questioned, from the standpoint of political theory, the extent to which electoral quotas can be justified based only on the argument that they allow the interests of women to be included in the context of political representation. Indeed, as elected women do not necessarily represent women, and given the fact that women voters do not elect those who represent them according to their gender but, rather, based on a system of political parties and in elections organized according to geographical districts, it has been questioned whether elected women can take on the role of representing the "interests of women." This is particularly the case when there is no consensus on what such interests may be, since women are not a homogeneous category. Regarding the possibilities and limits of gender quotas related to including interests, see, for example, Anne Phillips, The Politics of Presence: The Political Representation of Gender, Ethnicity and Race 57–85 (Oxford Univ. Press 1995); Cynthia Cockburn, *Strategies for Gender Democracy: Strengthening the Representation of Trade Union Women in the European Social Dialogue*, 3 Eur. J. Wom. Stud. 1 (1996); and Anna G. Jonasdottir, *On the Concept of Interest: Women's Interests and the Limitations of Interest Theory, in* The Political Interest of Gender (Kathleen Jones & Anna G. Jonasdottir eds., Sage 1988).

[43] *See* Phillips, *supra* note 42, at 68–69; Fiona Mackay, Love and Politics: Women Politicians and the Ethics of Care 83 (Continuum 2001); Jonasdottir, *supra* note 42, at 42; and Hege Skjeie, The Feminization of Power; Norway's Political Experiment (Institute for Social Research, Oslo 1988). *See, e.g.,* Mujeres en política [Women in Politics] (Edurne Uriarte & Arantxa Elizondo eds., Ariel 1997). On tackling the concept of "women's interests," Cockburn and Jonasdottir propose an interesting distinction between the formal dimension (summarized in terms of agency) and the substantive dimension (regarding the content of the interest). In order for an interest to be attributed to women as a whole, it is not necessary, in terms of content, for all women to defend the same position regarding a given matter (abortion is a paradigmatic example). Rather, what is crucial is that, because the decision on the matter may have a disparate impact on women, it may reasonably be argued that women have a special interest in ensuring that this decision not be taken without the opinion and participation of women. *See* Cockburn, *supra* note 42; and Jonasdottir, *supra* note 42.

guarantee the reproduction of social diversity in the representative body).[44] Nevertheless, we contend that, without a minimum presence of women in representative bodies, it is unlikely—despite continued talk of representation and advancement of the common good as the good of all those represented—that sufficient attention will be accorded to issues that affect women disparately. This is due as much to epistemological limitations as to the limits of human empathy and altruism. From this perspective, the rationale for a minimum presence of women would not be to replace the underlying logic of the system of representation. Rather, the goal would be to improve the conditions of deliberation within the mechanics of that system, thus assuring a baseline connection between representatives and their constituencies and guaranteeing the centrality in the political agenda of issues that affect one half of the population more than they do the other. By the same token, a minimum presence of women would serve, symbolically, to rescue women from their historic invisibility and ensure a space for women of distinct and differing ideologies to identify and deliberate on fundamental items on that agenda without renouncing their internal differences.[45]

There are, therefore, justifications for the statutory imposition of a minimum presence of women in representative bodies. However, our intention is to withdraw from the debate on electoral quotas and, instead, to defend gender parity in representation as a separate option with its own internal reasoning, arguing that the logic of parity transcends that of the quota system. Furthermore, in contrast to the logic of minimum quotas, the logic of parity cannot be translated into a rationale for minimum representation for other socially marginalized groups. Both debates are clearly connected, in that both are related to the current crisis of representation—a crisis that encompasses both representation and representativeness. We must not forget that, in the democratic context, representation is an indirect form of self-government. Indeed, "to be governed by the decisions (legislative and, through them, executive) made by our own representatives is a form, albeit indirect, of governing

[44] Anne Phillips contrasts two different representation models—the politics of ideas and the politics of presence. The former, the standard model in representative democracies, places emphasis on systems of shared beliefs and on the ideas and values formed, discussed, and expressed through political parties. This model is based on the possibility of one social group representing the interests of the other, because what is essential is ideological affinity rather than shared experience. The latter arises from growing frustration in the face of the persistent self-referentiality of the political class; its thesis is that ideas cannot be entirely dissociated from experience and identity, and there is thus a need for representative political bodies to reflect more accurately the plurality of the society they represent. *See generally* Phillips, *supra* note 42.

[45] *See also* Joni Lovenduski & Pippa Norris, Gender and Party Politics (Sage 1993). For this very reason, we believe that from the standpoint of including interests, the minimum-presence quota system, which ultimately attempts to guarantee a critical mass, is much more justifiable than the parity system, which would rather seem to indicate the impossibility of one gender representing the interests of the other, advocating thus a system of mirror representation.

ourselves worthy to be considered an authentic historical milestone."[46] And, to paraphrase Hegel, as an indirect form of self-government, representation only makes sense as long as the representative shares in the interest of his/her constituency, that is, if that interest is, in fact, his or her own.[47] The crisis of representativeness, then, refers to the ever more elusive nature of representatives as actors in the indirect self-governance of the people; to the self-referential nature of politics; and to its lack of connection to social and cultural reality. Indirect self-governance of the people through their representatives is increasingly becoming a legal fiction.

The basic issue is to be found in how far the model of modern representation adopted by the liberal state—the model based on unitary and universal political representation—continues to be functional, following the consolidation of the democratic state and, with it, the opening of the system of political representation to a truly heterogeneous society. The transition from a liberal to a democratic state implies transcending the fictional "will of the nation" and replacing the concept of national sovereignty with that of popular sovereignty. It also implies that recognizing the equal legal rights of individuals means not negating their differences but, instead, guaranteeing "the equal right of all to assert and protect their own identity."[48] The predominant question is whether the concept of representation held by the liberal state must now be adjusted in order to be compatible with the democratic state. In fact, the failure to make such adjustments may well account for the current rift between representative bodies and the social reality that should be represented therein.[49]

This article does not aim to undertake the enormous task of developing a model of representation adapted specifically to the democratic state. Let us merely assert that political representation in the democratic state should be conceived of in terms that allow for the expression not only of what unites us as citizens in general,[50] along liberal lines of logic, but also of what separates us

[46] Angel Garrorena Morales, Representación política y Constitución democrática [Political Representation and Democratic Constitution] 50 (Cuadernos Cívitas 1991).

[47] Georg Wilhelm Freidrich Hegel, Elements of the Philosophy of Right 282 (New ed., Cambridge Univ. Press 1995) (1822).

[48] Ferrajioli, *supra* note 3, at 95.

[49] In the words of Angel Garrorena Morales:

> When the bourgeoisie … originally formulated representation, it encompassed certain signs or data (we could say, certain trends or inertia), which have remained fixed fast to the concept ever since, and later on … have not helped the subsequent unfolding of this category to take place in the best way … they have not helped representation to really be filled with representation.

See Garrorena Morales, *supra* note 46, at 41.

[50] Jean-Jacques Rousseau, *The Social Contract*, *in* The Social Contract and the First and Second Discourses 149 (Yale Univ. Press 2002) (1762).

as individuals.[51] The scope of this article is different but no less fundamental. We defend the idea that parity democracy is inherent to the democratic state and that, without it, the state would continue to function within the typically liberal notion of presumed equality, which fails to embrace the extension of sovereignty and the transition to true equality entailed in the democratic state. In other words, parity democracy has its own logic.

3. Parity democracy and the democratic state

The parity democracy we propose is grounded on a preconstitutional issue that affects the legitimacy of the democratic system—an issue of democratic legitimacy that came about with the transition from liberal democracy to the democratic state, and that determines whether this transition can be considered complete. Our argument poses parity democracy as a problem of democratic legitimacy that is different from, and arises prior to, the democratic state's taking on a social dimension. It is an argument that transcends the matter of the constitutionality of affirmative action measures in favor of marginalized social groups, as well as the legitimacy of measures to ensure the presence of these groups in representative state bodies through a quota system. The need for parity democracy came about earlier, hand in hand with the inauguration of the democratic state.

The universal suffrage that was envisaged in the transition to the democratic state was intended to embrace the entire population of men and women within the concept of "state." Nevertheless, even though women became eligible to vote and to be elected to public office, the democratic state has remained a masculine state because it did not question the prevailing social contract as a foundational myth of the state nor raise doubts about the pact between the sexes on which the social contract is based.[52] Rather, that transition confirmed and perpetuated the contractual myth of the origin of the state and the ideological concepts upon which it rests, including liberty and equality as attributes ascribed to men—an assumption that rendered women inherently unequal, sealing their dependent status.

Enlightenment theorists' conceptualization of men as independent beings was accompanied by a parallel conceptualization of women as dependent on and subjugated to men. A particularly eloquent testament to this can be found in the writings of the classic theoretician of democracy Jean-Jacques Rousseau, in which the enlightened author lays out the symbolic gender models on which the state

[51] Indeed, the generality, universality, and impartiality of laws actually depend not on the neutrality of the legislator but on the breadth with which the legislative debate can voice the biases in play. The more biases that are brought up and pitted against each other in the debate, the more impartial the legislative outcome will be. On this idea, see Jürgen Habermas, Faktizität und Geltung [Between Facts and Norms] 212 (Suhrkamp 1994); Klaus Günther, *Legal Adjudication and Democracy: Some Remarks on Dworkin and Habermas*, 3 Eur. J. Phil. 49 (1995).

[52] Carole Pateman, The Sexual Contract (Stanford Univ. Press 1988).

has continued to thrive—models that, it has been argued, "constitute a core, not a peripheral theme in his political works."[53] Rousseau observes how men are naturally free, whereas women, on the other hand, "are made to please (men) and to be subjugated" by them.[54] He bases this essential natural difference between the genders on their different physical strengths. Nature has made one sex stronger, one weaker. And since for Rousseau, the natural consequently leads to the moral, "one *must be* active and strong, the other passive and weak."[55]

What is interesting is that the perception that physical strength is exclusive to men leads Rousseau to assert that only men are free or, rather, that only men have the inclination to be so. Liberty, observes Rousseau, contradicts women's nature, which is to submit to and obey men. This prompts his assumption that justice and reason are also the exclusive territory of men.[56] By the same token, he finds, only men are capable of reason, of searching for abstract truths, principles, and axioms. Women, on the other hand, lack theoretical intelligence; what they do have, as compensation, is the capacity for observation.[57] "Women's reason is of a practical sort which leads them to quite capably find the means to arrive at a known end, but does not lead them to find such an end."[58] All of this is dressed up in a series of virtues that compensate for women's natural limitations in terms of reason, and which are associated with chastity, modesty, sweetness, wit, and beauty.

The conclusion to be drawn from the above is that the public arena is the exclusive territory of men.[59] Women, on the other hand, were born to remain

[53] Ana Rubio Castro, Feminismo y ciudadanía [Feminism and Citizenship] 74 (Instituto Andaluz de la Mujer 1997).

[54] Jean-Jacques Rousseau, Emile 412 (Basic Books 1979) (1762).

[55] *Id.* (emphasis added). Interestingly, for Rousseau, natural differences among men, including differences in their physical strength, are minimal and never dictate further differences among them: "Inequality is barely perceptible in the natural state, and … its influence thereon nearly null," a situation that should be applied to the heart of civil society. *See* Jean-Jacques Rousseau, *Discourse on the Origin and Foundations of Inequality among Mankind*, *in* The Social Contract and the First and Second Discourses, *supra* note 50, at 69. Thus Rousseau concludes that "moral inequality, merely authorized by positive law, goes against natural law if it does not keep proportion with physical inequality." *Id.* at 316.

[56] Rousseau, *supra* note 50.

[57] *Id.*

[58] *Id.*

[59] Although our analysis has centered on the work of Rousseau, Kymlicka reminds us how liberal theory's traditional division between state and society, by virtue of the patriarchal culture it has inherited, ends up becoming a division between the male public realm (state and society), and the female domestic realm (mainly the family). Women fare as badly or worse in the Aristotelian republican tradition that inspires Rousseau, a tradition that sees not society but, rather, the realm of politics, as the environment par excellence for human freedom, sanctioning the distinction between the genders in the same way and condemning women to contribute to the sphere of dependence, necessity, and daily routine within the family. *See* Will Kymlicka, Contemporary Political Philosophy 390–392 (2d ed., Oxford Univ. Press 2002).

far away from the public sphere and to put their virtues at the service of the private, which one understood to mean the domestic realm. The boundaries drawn by modernity between public and private terrain, that is, between masculine and feminine, are well known, and it is not our intention to harp on this matter. We do, however, wish to highlight two points: first, arguments that hold men to be political subjects within the modern state and that, at the same time, disqualify women are not simply circumstantial. Nor is the disqualification of women a mere oversight,[60] or a temporary deficiency in the articulation of the state—a deficiency that, as with the exclusion of non–property owners, could eventually be put right with the transition to democratic statehood. It cannot be regarded as such without casting doubt on the very contractual basis of the state.[61] This is so because the logic underlying the social contract reflects the liberal view of the human subject as an autonomous being in defining his own life project, a view that is likewise upheld by the myth of the independence of the individual, which is to say, the assumption that the individual is free in the sense that he can go about the business of life independently of others on whom he does not depend and who do not depend upon him.[62] Thomas Hobbes eloquently offers this view of the individual: "Let us consider men … as if but even now sprung out of the earth and suddenly, like mushrooms, come to full maturity, without all kind of engagement to each other."[63] There is no room here for individual dependence or for understanding how to reconcile personal autonomy with the responsibility of dependency. Dependency is seen, not as a fundamental aspect of the person, but as an external enemy against which man, naturally free, must defend himself.[64] Thus conceived, independence becomes an essential attribute of the individual in the modern interpretation thereof, an attribute that the liberal state poses as a prerequisite for access to active citizenship, and that the democratic state presumes in theory and aspires to in practice.

[60] See, in a similar vein, Celia Amorós, Tiempo de feminismo: Sobre feminismo, proyecto ilustrado y postmodernidad [Feminist Times: On Feminism, The Enlightened Project and Postmodernity] 155–156 (Cátedra 2000).

[61] The words of Rousseau in *Politics and the Arts* are eloquent in this sense: "Even if it could be denied that a special sentiment of chasteness is natural in women … it is in society's interest that women should acquire these qualities." Penny Weiss & Anne Harper, *Rousseau and the Political Defence of the Sex-Roled Family, in* Feminist Interpretations of Jean-Jacques Rousseau 43, 44 (Lynda Lange ed., Penn. State Univ. Press 2002).

[62] *See* Ana Rubio Castro, *La representación política de las mujeres: Del voto a la democracia paritaria* [*Women's Political Representation: From the Vote to Parity Democracy*], *in* 10 Años de Historia 1995–2005 [10 Years of History 1995-2005] 45–76 (Editorial Asociación Seminario Mujer Latinomericana-Mujer Andaluza 2005).

[63] Thomas Hobbes, *Philosophical Rudiments Concerning Government and Society, in* The English Works of Thomas Hobbes 109 (William Molesworth ed., Wissenschafliche Buchgesellschaft 1966), *cited in* Sheila Benhabib, *The Generalised and the Concrete Other, in* Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics 148, 156 (Polity Press 1992).

[64] Rousseau, *supra* note 50.

The problem is that, since independence is a myth, the state can only assume the individual to be independent if it goes to the trouble of removing all manifestations of individual dependency. It became necessary to "design an 'I' that needs nothing from anyone, … an 'I' that is beholden to no one nor is anyone beholden to him."[65] Such a construct was possible to the extent that the individual was conceived of as male, and women were assigned the tasks associated with man's dependency. Thus, what was postulated as women's dependency on men—a dependency that disqualified them for the public realm—consisted deep down of their taking on the tasks arising from human dependency, both their own and that of others. These tasks were necessary for the survival of individuals—men and women alike—physically, socially, and culturally. This is the basis of the sexual pact inherent in the social contract. This is the pact of fraternity—fraternity expressed as a value in the revolutionary triad, a necessary value for the enactment of the other two: the liberty and equality—of men.[66] In other words, in the social contract men achieved the appearance of being free and equal, and thus independent, thanks to having shifted onto women, in a pact of fraternity, the weight of their own dependency.

The independence of men that the social contract celebrates and purports to perpetuate is the result, then, of the shift of their own dependency onto women, a structured shift that is precisely based on this social and sexual contract. In this double contract, women do not figure as subjects but, rather, as outsiders who enable it. Women enable the existence of the public sphere, politics, and society without participating in it, in fact, precisely to the extent that they do *not* participate in it. Their incorporation as citizens of the state is produced in this scenario through the family, where women give life to the illusion of the independence of men, operating as "the invisible support of the 'I', a support that acts on amorous sentiment."[67] In this way, liberal thinking ended up grounded on a concept of personal autonomy that is also a definition of the genders. Men are the free and independent beings that, as such, can carry out life projects autonomously or cultivate political virtues in the public realm; women are the administrators of man's dependency.

The acknowledgment of women's right to suffrage created a wrinkle in the model just described. To grant women the status of citizens meant to also recognize their capacity to act in the public realm as rational beings, as modern subjects, thus breaking with the division of roles imposed by the liberal state.

[65] Rubio Castro, *supra* note 53, at 82.

[66] Pateman, *supra* note 52, at 109.

[67] Rubio Castro, *supra* note 53, at 87. On the role of love, understood as romantic love, as an element that shapes the state, see Elena Pulcini, Amour-Passion e Amore Coniugale: Rousseau e l´Origine de un conflitto moderno [Passion-Love and Conjugal Love: Rousseau and the Origin of a Modern Conflict] (Marsilio Editori 1990); Anna Jónasdóttir, El poder del amor: ¿Le importa el sexo a la democracia? [The Power of Love: Does Sex Matter to Democracy?] (Cátedra 1993); Niklas Luhmann, Liebe als Passion: Zur Codierung von Intimität [Love As Passion: The Codification of Intimacy] (Suhrkamp 1994).

Hence the significance of suffrage, both theoretical and symbolic. And hence why, although women's suffrage did not distort the practical, everyday functioning of the sexual contract, its concession would in most cases come after universal men's suffrage and after a long-fought social and political struggle.

Despite all of this—and this is the second point we wish to emphasize—neither the transition to the democratic state nor the concession of women's right to vote and to stand for elections has altered the premises of the sexual contract. To begin with, the effects of conceding to women political rights were mitigated by the cultural and economic reinforcement of the premises of the sexual contract in the post–World War II years. These were the years of the triumph of the nuclear family as the ideal family model, both in the economic domain and in the social imagination. These were the years that created the myth of the bourgeois figure of the housewife, entrusted with caring for the home, her husband, and children and spending the family salary to the benefit of all—a salary that was earned exclusively by her husband.[68] This model of the family diminished the potential of women's suffrage to transform the contractual basis of the state. It reinforced the public realm as the territory of men, as it did the private sphere as the domain of women, thus solidifying the foundations for the democratic state as rooted in the premises of the liberal social and sexual contract. This meant an endemic majority participation of men in public affairs, employment, and politics throughout a public arena built on the foundations of the ideal of male independence. There is no room, then, for human interdependency as a natural, necessary, and daily feature of people's lives. Rather, human dependency becomes a pathology, something that must be removed and disregarded in order for people to be able to function in the public sphere according to the ideal of independence. In the democratic state, therefore, citizens continue to be conceptualized as independent individuals, individuals who interact with one another as free agents, as it were, while removing all manifestations of their everyday dependencies.[69]

As long as it continues to be controlled by men, the public realm will continue to serve this masculine ideal of independence. As long as the state continues to rest on the fiction of independence, participation in public life is possible only for those who are in a position to shift their own everyday dependencies onto the shoulders of others. Furthermore, it is well known that women's shift to the public sphere of independence has not been accompanied by a parallel shift of men to the private one, where human dependency is handled. Such a

[68] For a critique of this family model, see Nancy Fraser, *After the Family Wage, in* Justice Interruptus: Critical Reflections on the Post-Socialist Condition 41 (Routledge 1996).

[69] In this regard, we share the position of Joan Tronto, who explains how caregiving has been left aside in moral and political thinking due to the contradiction, both theoretical and practical, between the predominant discourse of autonomy and equality, on the one hand, and the reality of human vulnerability and interdependence, on the other. *See* Joan Tronto, Moral Boundaries (Routledge 1993).

shift is hard to imagine without a prior cultural reassessment of domestic work. This is why women's independence still depends upon the extent to which they can displace their dependency on to other economically marginalized groups.

4. Human interdependency and political representation

The foregoing is the situation parity democracy proposes to rectify. By including an equal number of men and women in the public realm of representation, parity democracy provides the basis for the state to cease being the exclusive venue of individuals perceived as independent, and it allows for dependence—symbolized and managed mainly by women—to enter the public realm. The sexual contract had relegated human dependence to the private sphere, considered the natural terrain of women; moreover, the democratic state continues to see it as an obstacle to the ideal independence of autonomous people. With parity democracy, such dependence may move into the public realm as an equally important facet of ordinary life. Once human dependence ceases to be perceived as an obstacle to participation in public affairs, political representation can be achieved not only with regard to the masculine ideal of individuals but also in terms of those aspects that the sexual contract traditionally ascribed to women. The state could then go on to represent all individuals in all their complexity; human autonomy, as aspired to under the liberal ideal, would be thus redefined. The paradigm would no longer be the dependence-free adult but, rather, the adult who takes responsibility for his or her own dependence as well as for those who depend upon him or her as natural limitations on any life project.

Parity democracy is, then, in line with the dismantling of the sexual contract and the implementation of a truly democratic state. A parliament composed of a similar number of men and women encompasses independence and the management of dependence in equal measure, thus achieving the advancement of an ideal of human autonomy that assumes the interdependence of individuals instead of denying it. That said, assuming that the goal is to break the sexual contract, and to do so by incorporating interdependence into the political realm as a defining element thereof, we can ask ourselves: Why is it necessary to impose parity democracy to reach that goal? Why is it not enough to have a parliament composed, essentially, of men inclined to pass laws providing both for people unable to function autonomously and for their caretakers?

We believe the answer is twofold. First, there is the symbolic and cultural aspect. The very existence of a parliament composed of an equal number of men and women radiates the message to all citizens that politics is no longer reserved for independent men nor even for a select group of women who have managed to adapt to the male parameters of independence. It is, instead, a setting where both genders must come together to debate the common good. In this sense, parity democracy has the specific potential to expand the horizons

of what women and girls imagine to be possible for themselves. And given that women's exclusion from politics is structurally linked to the very definition of masculinity and femininity (respectively, in terms of independence and the management of dependence), parity democracy works as an instrument of cultural transformation that dismantles the pillars of the social contract standing on those definitions.

The other aspect is functional. We believe it unlikely that a parliament composed mainly of men can give the management of dependence its due place in the public realm—as a fundamental, defining element of that realm and not as a social pathology that must be treated. Since politics has forever been dominated by men who operate on rules conjured up from the myth of independence (think, for instance, about the requirement of total availability in terms of work schedule and geographic mobility), and since this myth has only been sustainable due to the existence of women who handle men's dependency from the shadows, we are now faced with a political world custom-made to fit its own false paradigm. It is not surprising, therefore, that the political class is an avid consumer of care provided by others, while it undervalues the "female" work of managing dependence.[70] This being so, there is no good reason to think that the political class (consisting primarily of men) would have any interest in questioning a system that privileges them and, at this point, is simply accepted by most people as the natural way of things.

Here it could be argued that matters are already changing, and that parity is not necessary to bring about change. There are already women in politics, and there is no reason to believe that their presence will not grow over time. Along with those growing numbers, it may be expected that the management of dependence will take on an increasingly central role in public affairs. We contend, however, that the dismantling of the sexual contract requires parity and, therefore, that it can be imposed by law if it does not occur spontaneously. What the uneven presence of women in politics shows is not that the public sphere, as currently conceived, has internalized human interdependence as a defining element in the same way it has internalized the cult of independence. What the presence of some women in politics proves is that there are women who are capable of playing by the rules created by men in the same way men do. And they are capable of doing it by virtue of bearing a much greater cost than men do (the so-called double shift); or by approximating the ideal of the "unburdened" male required by the rules of politics (which implies, for women, not marrying, or divorcing quickly, and not having children, or having fewer than desired); or because the privileges of class allow them to significantly

[70] Tronto coins the notion of "privileged irresponsibility" to refer to the advantage enjoyed by groups in power as a result of other people taking care of them and the people that depend on them, and the notion of "care demanding" to refer to the double process of depending to a great extent on the care of others and, at the same time, devaluating or trivializing the importance of this care. *See* Tronto, *supra* note 69.

shift those dependencies onto the shoulders of other women.[71] Indeed, what is most common for women involved in politics is a combination of all these factors. Although there are women to be found in politics, fitting domestic responsibilities into the demands of a life in politics continues to be the greatest obstacle to women who want to have such a career.[72]

In this sense, using a quota system to impose a minimum number of women seems inadequate, simply because it is not enough to dismantle the social contract. It is true that such a minimum broadens the bases of deliberation for the inclusion of interests. It is reasonable to assume that for as long as the average female politician continues to be more responsible for managing dependence than the average male politician, she will be better able, by virtue of her own life experience and that of others close to her, to relate to the demands of caring for dependents. But quotas are inadequate nonetheless in both the functional and symbolic sense when it comes to the ultimate goal of disestablishing the sexual contract. To begin with, quotas can have negative effects. There is the resentfulness of men, who see quotas as an undue privilege, and the resistance of women, who are or aspire to be in politics and do not wish this achievement to be viewed as the result of a quota rather than merit alone.[73] There is the additional risk that "quota women" will feel that this status imposes on them a duty to defend the interests of all women. Quotas also create the risk that the traditional, gender-based division of tasks will be reproduced within representative bodies, a division that would ultimately consign women to the ministries, commissions, and committees most involved in dependence issues at the societal level (social affairs, environment, health, education), while reserving the supposedly hardcore issues of politics (economy, national and foreign affairs)

[71] In this regard, it comes as no surprise that the greatest difference between male and female members of the Spanish Parliament is not their experience, education level, or job profile but, rather, their marital status: there are many more single or divorced women than single or divorced men. *See* Celia Valiente, Luis Ramiro, & Laura Morales, *Mujeres en el parlamento: un análisis de las desigualdades de género en el Congreso de los Diputados* [*Women in Parliament: An Analysis of Gender Inequalities in the House of Representatives*], 121 Revista de Estudios Políticos 192–193 (2003).

[72] Sociological studies on women's underrepresentation in politics make a distinction between supply-related factors (referring to the fact that few women seem to opt for politics) and demand-related factors (by which male-imposed structures, rules, and practices in politics are alienating for women and tend to exclude them). The fact that both types of factors are clearly connected to assigning the management of dependency predominantly to women is easily understood when the underlying causes of the lack of supply are analyzed. Among those cited as motivation factors (linked mainly to the development of women in a patriarchal society that sets femininity and agency against each other and defines femininity in terms of domestic duties) are household duties, time constraints (not only in terms of lack of time but also lack of predictability or flexibility of scheduling), and lack of self-confidence related to lack of resources (such as political experience, contact network, social status, and technical and social skills). *See* Mackay, *supra* note 43, at 57–61. Thus, it has been argued that without a more equitable sharing of household chores, it will be very difficult to achieve equally effective rights for women to take part in public affairs. *See generally* Susan M. Okin, Justice, Gender and the Family 4 (Basic Books 1984).

[73] *See* Mackay, *supra* note 43, at 72–73.

for men.[74] Ultimately, under the quota system independence continues to be assumed as the norm, while concessions are made to the representation of the management of dependence as an exception.

Instead, parity impacts both genders equally, putting them and the respective notions of independence and the management of dependency each represents on an equal footing in public affairs, with the result that neither dependency nor caretaking nor the female gender is stigmatized. Furthermore, the quota system does not create a base for the types of women who go into politics to become increasingly representative of the female gender in functional terms. Rather, aspiring to a minimum number probably will cause a kind of natural selection among women, favoring those who function most like men and are thus less representative of the underrepresented gender.[75] Therefore, while quotas may change the players on the political field, they will not likely make any change in the rules of the game.[76] Parity, on the other hand, can redefine those rules by granting equal relevance to both independence and the management of dependency.

In light of all the above, if we are right and if democracy properly conceived must transcend the premises of the sexual contract, then parity—the equal presence of both genders in politics—is a democratic must. Only by including women and men on equal terms in the public realm is it possible to transform politics from a terrain governed by the myth of human independence and to make room for the notion of interdependence. This will redefine the relative importance and social value placed upon independence, on the one hand, and the management of dependency, on the other. Only then will we be able to reassess gender roles and move beyond the sexual contract.[77]

5. Final observations

We have argued that parity democracy is necessary for the transition to and realization of a truly democratic state since it will allow the state to strip away the

[74] On how female members of Parliament have focused on health, education, and family-related issues, at least until well into the 1980s, see Vicky Randall, Women and Politics (2d ed., Macmillan 1987). In Spain, too, a noticeable difference has been found between the percentages of representatives of both genders who belong to parliamentary commissions related to social policies. *See* Valiente et al., *supra* note 71, at 193–194.

[75] *See* Mackay, *supra* note 43, at 72–73.

[76] Similarly, on equal work opportunities for women, Cynthia Cockburn has referred to the existence of a short and a long agenda. The short agenda aims to attain equal opportunity by assimilating women into the status quo, whereas the long one seeks to transform the system (society, jobs, politics) to reflect the functional difference between genders. *See* Cynthia Cockburn, *Equal Opportunities: The Short and Long Agenda*, 20 Indust. Rel. J. 218 (1989).

[77] In this regard, it has been pointed out that parity allows for not only caregiving women but also caregiving men, that is, for inclusion of masculine types that have also traditionally been excluded from the political sphere and, in this sense, extends the range of culturally acceptable masculinities. *See* Mackay, *supra* note 43, at 209.

false paradigm of independence that currently guides participation in politics. Parity democracy would clear the way for those who, by virtue of the sociosexual contract, exemplify and embody the managing of dependency, enabling them to take their place on equal terms alongside those who typify independence. The realm of public representation would then truly belong to all, both male and female, which, as has been said, "[would entail] a transformation of the initial concept on which representation is based and, in turn, of sovereignty."[78] And not so much because the population is composed of men and women, but because one represents independence while the other represents the managing of dependency. Parity, then, is about bringing into politics the reality that everyone's independence depends upon the proper management of our nature as dependent beings upon whom, in turn, others depend. The only vision of independence that can be a truly faithful representation of ourselves as human beings is one that incorporates our dependencies as well. Parity democracy aims to integrate the human dimensions of independence and dependence in the public realm. This will free us from the structuring of society based on the liberal disassociation between the ideal of independence/public realm, on the one hand, and dependency/private realm, on the other, and from the respective gender roles associated with each. It is about making room for both ends of this false dichotomy in state representative institutions and about finally building an all-embracing state with the equal inclusion of all individuals in all their dimensions.

Given that women's exclusion from politics has been key to the cultural definition of the genders, the project of building this all-embracing state must begin in the political arena through parity democracy. The dismantling of the sexual contract must begin at its foundations, in the definition of what is public. However, this project cannot rest at just that; it must extend to all centers of power within society—not only in politics but at the economic, social, and cultural levels as well. It must also penetrate family walls. In this sense, it is worth celebrating that the Spanish Law on Real Equality of Women and Men, in addition to instating electoral parity, has put into place measures that promote equal participation by women and men in corporate decision making, as well as other measures to facilitate both the reconciliation of work, personal, and family lives and the joint responsibility for domestic tasks and family caretaking. All of this is relevant to the ultimate implications of electoral parity. Advocating parity is part of the larger goal of disassembling culturally entrenched gender roles, a dismantling that must occur in both the public and private realms, most notably in domestic life. Electoral parity puts men and women in the position of being the driving force behind this broader purpose, without which true equality between men and women will prove unattainable.

[78] Encarna Bodelón González, *La soberanía popular y el sujeto femenino: Los límites del concepto de soberanía desde una crítica feminista* [*Public Sovereignty and the Female Subject: The Limits of the Concept of Sovereignty from a Critical Feminist Perspective*], *in* Soberanía: Un principio que se derrumba [Sovereignty: A Crumbling Principle] 141 (Roberto Bergally & Eligio Resta eds., Paidós 1996).

There has been much discussion as to whether women's ethics are different from men's; whether women's ethics are affected by their experience as caregivers and administrators of human relations; and whether these factors would naturally lead women to a type of politics different from men's.[79] If this were true, flooding representative bodies with women would create new operating rules that would make politics more compatible with caring for dependents. Questions such as the following would move to the forefront: Who takes care of the children and parents of members of parliament? What about travel, illness? What time do daycare facilities close? When are school vacations? It would also guarantee the inclusion of human-dependence–related issues as core interests on the political agenda, rescuing them from their current political and cultural devaluation. Beyond all this, if care theorists are right, what would change would be the very way we do politics. It has been said, for example, that from a highly competitive, aggressive, hierarchical model full of formalisms, we could advance toward one that is more deliberative, empathetic, and cooperative. This new model would be defined more by the search for compromise and mutual responses to shared needs than by the prevalence of particular interests. It would be more about cooperation among individuals who are aware of their interdependence, and less about competition among individuals who see themselves as independent.[80] All of this would make the realm of politics slightly more habitable for many women and for some men, too.

It is impossible to know what the world would be like if women had contributed equally to governing it for centuries. What does seem reasonable to assume is that the world of politics made in the image and semblance of women would be different from the one made, thus far, in the image of men; policies and ways of operating based on an awareness of human interdependence would have their rightful place in a world that, until now, has operated on the notion of independence. It is, therefore, reasonable to expect that women's equal participation alongside men in the world of politics would challenge the parameters of what has been considered standard in this traditionally male world.

Postscript: *While this article was in proofs, the Spanish Constitutional Court issued a decision (STC 12/2008, January 29 2008), holding that parity provisions do not violate the Spanish Constitution.*

[79] Thus, care theorists have supported the idea that women, due to their traditional caregiving roles, operate according to different rules, values, and virtues than men do. For example, it has been said that women tend to reason more in terms of conflicting responsibilities than in terms of rights, contextualize more than men when solving problems, and are more concerned about taking on responsibilities and sustaining relationships than about formality and affirmation of abstract rules. *See* Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (Harvard Univ. Press 1982).

[80] *See, e.g.*, Mackay, *supra* note 43, at 89–90, 108, as well as other sources cited therein.