Gender parity and state legitimacy: From public office to corporate boards

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In most countries around the world, women make up a small minority of corporate boards of directors, which remain predominantly male. In the last decade, many European countries have adopted laws that impose mandatory quotas on corporate boards of directors to achieve gender balance in corporate leadership. In the United States, by contrast, corporate board diversity is largely a matter left to corporations’ voluntary initiatives, not law, and the “business case for diversity” dominates the debate. This article traces the evolution of the corporate board gender balance laws in Norway and France. Although it is often said that the presence of women in corporate leadership is “good for business” in Europe, I argue that the new private-sector gender quotas are best understood as mechanisms to improve the democratic legitimacy of the state. In France, the proposal to impose gender quotas on corporate boards emerged shortly after the law imposing similar quotas on candidates for elected office. However, the French constitution had to be amended before each law was ultimately adopted. The unique constitutional genesis of the corporate gender quotas laws in France illustrates the connection between the “business case for diversity” and foundational concerns about the legitimacy of democratic policy-making. This connection is more apparent in European countries than it could be in the United States, due largely to the corporatist frameworks of governance in the former. The comparison suggests that corporatist traditions may open up opportunities for the pursuit of gender equality which are absent from the American arena.

In most countries around the world, women make up a small minority of corporate boards of directors, which remain predominantly male. Is this a problem that the law should attempt to fix, whether through incentives or mandatory quotas? In the

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last few years, several European countries, most notably Norway and France, have answered this question in the affirmative through laws requiring gender quotas on corporate boards of directors. In the United States, corporate board diversity is largely a matter left to corporations’ voluntary initiatives, not law. In the American legal and political landscape, quotas are not seriously considered, as they have raised constitutional questions and caused political balkanization in the context of race. In Europe, the legally mandated corporate gender quotas have followed earlier legislation in these countries to achieve gender balance in public offices. What is the justification for corporate gender quotas in the countries that have adopted them? And is there a relationship between the quotas for public office, on the one hand, and private business leadership, on the other?

Both proponents and detractors of corporate board quotas focus on the business case for diversity, the notion that more female leadership will increase profits and firm value. This essay argues, however, that the new corporate gender quotas in Europe are best understood as initiatives to strengthen the democratic state’s legitimacy. This idea is seldom explicitly developed, and democracy talk is often run together with the claim that diversity is good for business. In France, separate constitutional amendments have been necessary before the adoption of gender parity rules, first in the political context and then in the corporate context. Drawing on the French experience, this essay shows how gender balance on corporate boards helps legitimize state policies adopted under corporatist paradigms of democratic governance.

1. Corporate gender quotas: An emerging European trend

In 2003, Norway became the first country in the world to pass a law requiring all public companies to achieve gender balance on corporate boards. The law amended the Public Limited Companies Act to provide that each sex must make up at least forty percent of the representatives on company boards. Companies that fail to comply are given four weeks to remedy the situation, after which a court is authorized to dissolve the company if it remains in violation.

1 Although Regents of University of California v. Bakke upheld the constitutionality of affirmative action programs narrowly tailored to promote diversity, it struck down the particular program challenged in that litigation because it operated as a racial quota. See 438 U.S. 265, 318-20. In Grutter v. Bollinger, the Court reaffirmed the understanding that racial quotas would be unconstitutional. See Grutter v. Bollinger, 539 U.S. 306, 309 (2003).

2 In the United States, the word “quota” is often deployed to oppose civil rights legislation. For instance, President George H.W. Bush vetoed the Civil Rights Act of 1990 on the grounds that it would impose quotas on employers. See 136 Cong. Rec. 31,827, 31,828 (1990). Congressional opponents of the 1991 Civil Rights Act, which eventually passed, also fought about whether the bill was a “quota bill.” See H.R. Rep. No. 102-40, pt. 2 at 58-63. In addition, when voting rights scholar Lani Guinier was nominated to head the Civil Rights Division of the U.S. Justice Department in 1995, an op-ed in the Wall Street Journal described her as a “quota queen,” and President Clinton withdrew her nomination. See Anthony Lewis, The Case of Lani Guinier, N.Y. REVIEW OF BOOKS, Aug. 13, 1998.

3 Amendment to the Public Limited Companies Act, Ot.prp. No. 97 (2002-2003) (Nor.).

4 See Public Limited Companies Act, § 16-15(1)(2); §16-16 (Nor.).
The Norwegian law has catalyzed similar proposals in many other European countries and in the EU. In Spain, a 2007 law introducing gender parity for electoral office also requires gender parity on corporate boards. In 2011, France, Italy, and Belgium passed legislation requiring gender quotas on corporate boards. In Germany, the question of whether a gender quota should be mandated by law is currently being debated. This past summer, the European Parliament moved for a resolution calling upon the Commission to propose Europe-wide legislation adopting measures, including quotas, to increase female representation on corporate management bodies to 40 percent by the year 2020.

In France, the new law requires the balanced representation of women and men on the corporate boards of directors of all public companies. Although a law requiring gender quotas on corporate boards was initially adopted in 2006, it was struck down by the Conseil constitutionnel, which catalyzed a constitutional amendment in 2008 requiring the law to promote equal access by men and women to professional and social responsibility. The unique evolution of the French law mandating gender balance on corporate boards illuminates the relationship between corporate gender quotas and the gender quotas for elected government office.

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11 Conseil constitutionnel [CC],decision no. 2006-533 DC, Mar. 16, 2006, Loi relative à l’égalité salariale entre les femmes et les hommes, J.O., Mar. 24, 2006, at 4446 (Fr.).
12 Loi constitutionnelle 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République, art. 1, J.O., July 24, 2008, at 11890 (Fr.).
2. The business case for diversity

In the United States, a law requiring quotas in the private sector is hard to imagine. The American debate about including more women and minorities on corporate boards is about voluntary initiatives. From the American perspective, corporate boards should diversify by appointing more women and minorities, for two main reasons: to provide equal opportunities to women and minorities to advance to the highest echelons of the business world, and because a diverse board will improve the company’s bottom line. The latter argument, known as the “business case for diversity,” tends to dominate debates about initiatives to put more women and minorities in leadership positions. Equality of opportunity compels the prohibition of discrimination against women and minorities, but it is usually insufficient to drive more robust pursuits of diversity, such as affirmative action or quotas. Diversity initiatives are usually defended by reference to the benefits of diversity to persons or institutions other than the women or minority individuals who would occupy leadership roles as a result of the initiative, specifically the businesses themselves, and perhaps the national economy. According to this account, businesses will increase profits by getting women’s perspectives on selling more products to women, or at least avoid the losses associated with excessive risk-taking and corruption, by adding a feminine style of management to corporate leadership.

Similarly, in European countries, the business case for diversity is invoked in defense of corporate gender quotas. The Norwegian Director General of the Ministry of Children, Equality, and Social Inclusion has defended the law by observing: “The lessons learned are certainly positive and serve both economic goals as well as democracy and fairness. Research has shown that diversity is good for business’ [sic] bottom line.” The Ministry claims that Norwegian businesses were losing value by failing to make use of all the talent available in Norway. If women make up more than half of university educated persons, but only seven percent of corporate directors, this would suggest that corporate boards are missing out on a significant pool of Norway’s talent. In defending the Norwegian statute, the Norwegian Minister of Trade has claimed that women as a group provide particular, identifiable benefits to corporate boards,


because they tend to display a different set of characteristics from men as a group. They tend to broaden discussions, reduce unnecessary risks that a corporation might take on, and punish excessive risk-taking.15

The focus on the business case for gender parity in corporate leadership is not unique to Norway. Following the financial crisis in 2008, one panel at the World Economic Forum in Davos, Switzerland raised the question: “Would the world be in this financial mess if it had been Lehman Sisters?”16 Some argue that, due to women’s different styles, increasing women’s presence in corporate management leads to better corporate governance, which improves the company’s performance in the long run.17

Over the last several years, there have been various empirical studies to determine whether diversity on corporate boards actually enhances firm value, some inspired specifically by the Norwegian law. The results are mixed. Some studies suggest a positive correlation between increased numbers of women and minorities on the board of directors and corporate performance.18 For example, in 2007, a McKinsey study of the largest European companies found that those with at least three women on executive committees outperformed their sector in average return on equity by about ten percent and produced operating profits that were nearly twice as high.19 But other studies challenge the correlation between board diversity and corporate performance.20 A study by University of Michigan economists specifically examines the effect of the Norwegian gender parity law on the value of Norwegian firms. This study demonstrates that, because the legal imposition of the forty percent gender quota on corporate boards required approximately thirty percent of the members of an average board to change very quickly, Norwegian firms experienced an “exogenous shock” which had a substantially negative impact on the value of these firms.21 Another empirical study by economists shows that the Norwegian quota has led to increased labor costs and reduced short-term profits in the affected firms.22

The business case for diversity tends to be the focus of those who are skeptical of gender quotas,23 not only its supporters. This tends to obscure other important approaches. In Norway, the argument that diversity is good for business is often

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15 See Kate Sweetman, How Women Have Changed Norway’s Boardrooms, HARV. BUS. REV., July 27, 2009.
16 Where would we be if women ran Wall Street?, N.Y. TIMES, Feb. 1, 2010.
17 See Bratte Britnes & Gro Ladegård, Women and Influence in Corporate Boards: The Case of Norway; The Conference Board of Canada, Women on Boards, Not Just the Right Thing… But the “Bright” Thing (2002).
19 See Nicola Clarke, Getting Women into Boardrooms, by Law, N.Y. TIMES, Jan. 27, 2010.
23 See, e.g., Carrie Lukas, Surprise: Forcing Corporate Boards to Have More Women Isn’t Good for Business… or Most Women, NAT’S REV. ONLINE, Feb. 2, 2010.
conflated with the argument that diversity is good for democracy. In its official website explaining the law, the Ministry of Children, Equality, and Social Inclusion claims, on the one hand, that “[r]eaching a balanced participation is a question of democracy,” but all the explanations of why the law is necessary emphasize the benefits to businesses and the economy. In the official discourse, “democracy” and “legitimacy” are often invoked, but the logic advanced to defend the law is that the economy will fare worse if it ignores half the world’s talent, and that diversity will enhance companies’ bottom line. Can the democratic legitimacy argument be developed independently of concerns about companies’ profitability?

3. Political gender quotas and the case for parity democracy

Recent developments in France, culminating in the law imposing gender balance on corporate boards of directors in January 2011, provide a rich example. In France, the first attempt to legislate corporate gender quotas was invalidated by the Conseil constitutionnel in 2006. Despite the fact that the French constitution had been amended in 1999 to permit gender parity in elected office, the court viewed corporate gender quotas as a separate issue from parity in political institutions. Thus, another constitutional amendment was required before corporate gender quotas became constitutionally viable. A 2008 constitutional amendment provides that the law shall promote equal access to “positions of professional and social responsibility” as well as elected office. This history reflects the understanding that the arguments made in defense of gender balance in political institutions are not obviously applicable to the corporate context. After all, a democratic state has a clear duty to represent its citizenry, whereas corporations do not.

Over the last three decades, many European countries have experimented with gender quotas to increase the number of women in elected office. In France, Belgium, Slovenia, Spain, and Portugal, the law imposes some form of gender quota in electing representatives for political office. In many other countries, such as Norway, Sweden, Germany, Poland, and the United Kingdom, some of the political parties have adopted gender quotas for electoral candidates voluntarily.

In France, Italy, and Spain, the constitutional courts have addressed the question of whether the gender quotas in elected office are compatible with each nation’s constitutional guarantee of equality. In France, the parity law was adopted in 2000 only

25 CC, decision no. 2006-533 DC, supra note 11.
26 Loi constitutionnelle 2008-724, supra note 12.
28 Id.
after a constitutional amendment in 1999, which was necessitated by the Constitutional Council’s rejection of a law imposing gender quotas in 1982. The Constitutional Council held that the law violated two provisions of the French constitution guaranteeing equality: Article 3, which requires suffrage to be “universal, equal, and secret,” and Article 6 of the Declaration of Rights of Man, which provides: “All citizens, being equal in the eyes of the law, shall be equally eligible to all high offices, public positions, and employments, according to their ability, and without other distinction than that of their virtues and talents.” Although the advocates of gender quotas saw them as a remedy for women’s inequality in politics, the formal conception of equality enshrined in the French constitution was a barrier to this measure, which the court regarded as a form of discrimination. In 1999, Article 3 of the constitution was amended with the following language: “The law shall promote the equal access of men and women to electoral power and elected positions.”

This constitutional amendment enabled the legislature to revisit the issue of gender quotas. Yet, gender parity was framed very differently in 1999–2000 than it had been in the past. Proponents of gender parity in 1999–2000 no longer framed gender quotas as affirmative-action type measures to equalize women’s opportunities to serve in political positions. Rather, the emphasis was on the legitimacy of the state in a representative democracy. The imagined beneficiary of gender parity was no longer the newly elected female legislator, but the republic itself. The rhetoric that won the day in 1999–2000 was the simple assertion that women constituted half of humanity. If the legislature consisted only of men, it could not claim democratic legitimacy because it would be failing to represent half of humanity.

This argument assumes that men cannot represent women. Joan Scott has critiqued the essentialist premise that sexual duality is a natural, enduring, and impliedly insurmountable feature of humanity. Gender essentialism is what distinguishes women’s claim for equal representation in the state from those made by other politically

30 Loi constitutionnelle 99-569 du 8 juillet 1999 relative à l’égalité entre les hommes et les femmes, art. 1, J.O., at 10175.
31 CC, decision 82-146, Nov. 18, 1982, Loi modifiant le code électoral et le code des communes et relative à l’élection des conseillers municipaux et aux conditions d’inscription des français établi hors de France sur les listes électorales, J.O. Nov. 19, 1982, at 3475.
32 Id.
33 Loi constitutionnelle 99-569 du 8 juillet 1999 relative à l’égalité entre les hommes et les femmes, art. 1,J.O., July 9, 1999, at 10175.
disempowered groups, such as racial minorities. Essentialist or not, the democratic legitimacy argument for gender parity follows a very different logic from the affirmative action or equal opportunity argument. The purpose of parity is not to ensure that women politicians have a chance to succeed in politics, but that women participate in lawmaking—by representing and by being represented—in state institutions that purport to be democratic. The laws promulgated by the state cannot purport to be democratically legitimate if half of its citizens have not participated, regardless of whether the lack of women’s participation can be explained by formal exclusions or women’s choices (such as lack of interest or skill in politics).

It need not be essentialist to posit that men cannot adequately represent women in the contemporary state. Blanca Ruiz-Rodriguez and Ruth Rubio-Marín have developed the theoretical grounding for this argument most fully, by advancing a normative vision of “parity democracy.” “A true democracy must be a parity democracy,” on their view, because gender parity is a “structural prerequisite of the democratic state.” 36 Parity is 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.” 37

Parity democracy assumes not that humanity is naturally organized by sexual difference, but that the modern state has been historically structured by sexual difference. The continued existence of the modern state depends, in fact, upon the splitting of humanity into two genders. Ruiz Rodriguez and Rubio Marin argue that the modern 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.” Drawing on political theorist Carole Pateman’s work, 38 they argue that the disqualification of women as citizens in the past was a central structural feature of the modern state.

The social contract assumes that every individual citizen is independent and autonomous, but this independence is a myth. Male citizens could not pursue individual autonomy without women’s performance of tasks, mostly relegated to the private sphere, which enable men’s physical, social, and cultural survival. 39 As Ruiz Rodriguez and Rubio Marín put it, “[m]en thus achieved an appearance of independence by shifting toward women, in a pact of fraternity, the weight of their

37 Id. at 302.
38 See generally Carole Pateman, The Sexual Contract (1988). Susan Okin also argues, in a reading of Rousseau’s political philosophy, that Rousseau’s conception of the social contract (which strongly influence French understandings of republicanism) also depended upon the unequal division of power within the family. On Okin’s reading of Rousseau, women could participate in Rousseau’s ideal republic “only through their domestic influence on their husbands.” See Susan Moller Okin, Women in Western Political Thought 145 (1979).
39 Hegel was one of the few Western political theorists who saw civil society and the modern state as depending on the gendered division of labor in the family. See G.W.F. Hegel, Elements of the Philosophy of Right, §§ 158–181 (Allen W Wood ed., H.B. Nisbet trans., CUP, 1991) (1820); Michael O. Hardimon, Hegel’s Social Philosophy: The Project of Reconciliation 183–189 (1994).
own dependency.” The social reproduction that historically sustained the nation-state was made possible by women’s relegation to the private sphere and exclusion from citizenship. That is the “sexual contract.”

To dismantle the sexual contract, it is not enough to give women the vote and the opportunity to run for political office. These opportunities do not offer a solution to the problems of dependency and social reproduction. Women’s formal equality of opportunity to run for office has not produced legislatures with gender balance. Equal opportunity has enabled a few token women to succeed, while the gendered division of public and private tasks continues to permeate the modern state and civil society. It is only when women are actually participating in the public sphere in significantly large numbers that the system will be forced to confront and solve the problems of dependency and social reproduction. Unless women are visibly participating in the public institutions of the state, it can be assumed that the sexual contract is still firmly in place. If contemporary democratic states are to recognize that all of their citizens are dependent on others for their physical, social, and cultural survival, it cannot perpetuate the myth of independence in its conception of citizenship or its exercise of political power.

To say that women are “half of humanity” is not a reference to women’s biology. Rather, it is the recognition that autonomous male individuals could not thrive or continue to reproduce themselves without requiring women to perform the tasks needed for social reproduction in the private sphere. Yet, it is by no means clear what the world should look like once the sexual contract has been dismantled. Is it a world in which marriage is made more equal, or one in which it ceases to exist? In the ideal universe, are there equal numbers of male and female breadwinners and equal numbers of male and female homemakers? Or is it a world in which each person, male or female, engages equally in breadwinning and homemaking? What the world should look like when the sexual contract is dismantled will remain contested for a long time. We won’t really know when this project has been completed, but we will know that it has not been completed if women—the losing parties in the sexual contract—have not participated in exercising public power. This does not mean that gender parity is sufficient to dismantle the sexual contract. But it may be necessary.

4. From political to corporate parity?

If the legitimacy of the democratic state is the most plausible justification for laws imposing gender parity in elected public office, it does not obviously apply to laws requiring women to constitute a certain percentage of corporate boards of directors in the private sector. This intuition explains why the French Conseil constitutionnel struck down the 2006 proposal to impose the forty percent gender quota on corporate boards, even though the constitutional amendment of 1999 explicitly permitted gender parity in elected office. The Conseil constitutionnel again invoked article 6 of

the Declaration of Rights of Man in holding the law unconstitutional. It noted that article 3 required the law to promote “equal access by women and men to electoral power and elected positions,” and could only be applied to elected political offices, and not to the leadership of corporate boards.41

The Conseil constitutionnel’s decision reveals the understanding that the 1999 amendment allowing for parity did not fundamentally alter the conception of equality emanating from the guarantees of equality in existing constitutional provisions, such as the general guarantees of equality in article 1 of the Declaration or paragraph 3 of the 1946 Preamble, the first paragraph of article 3 of the Constitution, or article 6 of the Declaration. These provisions continue to prohibit the state from treating men and women unequally, as the Constitutional Council established in 1982. The new language in the last paragraph of article 3 requiring the law to “promote equal access by women to electoral power and elected positions” simply carves out a narrow exception to the general rule of formal sex equality. The court reasoned that, with the exception of public elected office, the constitution did not allow sex to be considered above merit and social utility,42 and this meant that a law could not require a percentage of corporate boards to be composed of one sex or the other.

In France, the rhetoric of democratic legitimacy is central to the initiative to impose gender quotas on corporate boards. A 2008 constitutional amendment enabled the proposal to impose gender quotas on corporate boards of directors to be adopted in 2011. The constitutional amendment in 2008 added language to the paragraph added in 1999, and moved the entire provision to article 1 of the constitution. Article 1 now reads as follows:

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

Statutes shall promote equal access by women and men to elective offices and posts as well as to positions of professional and social responsibility.

The debates in the Senate and the National Assembly confirm that the amendment was intended to overrule the Conseil constitutionnel’s 2006 decision, which refused to extend the logic of the 1999 amendment to enable women’s equal access to all positions of professional and social responsibility. In including “positions of professional and social responsibility” as domains in which parity measures could be adopted by the legislature consistent with the constitution, French lawmakers noted that this piece of constitutional text no longer belonged in article 3, which addressed the exercise of national sovereignty and the suffrage. Rather, it belonged in article 1, deliberately placed between the Preamble and the first title of the Constitution, “devoted to the affirmation of certain grand principles of our Republic,” such as the description of the Republic as “indivisible, secular, democratic, and social,” as well as the guarantee

41 CC, decision 2006-533 DC, supra note 11.
42 Id.
of “equality before the law of all citizens.” The amendment essentially established the duty to promote gender parity as fundamental constitutional law, by placing it in a constitutional article that establishes the principles legitimating the republic itself.

In France, one legislator who opposed the constitutional amendment raised the question of whether the “principle of parity in social and professional matters” really belonged in the Constitution, “which determines the organization of public power.” Yet, its supporters prevailed in the argument that a guarantee of parity in professional and social responsibility should be constitutionalized. According to this logic, the nature of the republic is at stake when women, who constitute half of humanity, are not represented in positions of professional and social responsibility.

5. Corporatist traditions in Norway and France

The state’s legitimacy is tainted when the largest corporations fail to represent half of humanity if these corporations are recognized as exercising state power. In most European countries, the state must consult with “social partners” in public policy areas such as employment regulation and social protection. It is no surprise that Norway was the first country to impose gender quotas on companies, not only because Norway is known for its gender equality, but also because Norway has one of the strongest traditions of corporatism in Europe. For political scientists, corporatism is a “cornerstone of the Scandinavian model” of governance. As Phillipe Schmitter’s classic work defines it:

Corporatism can be defined as a system of interest representation in which the constituent units are organized into a limited number of singular, compulsory, noncompetitive, hierarchically ordered and functionally differentiated categories, recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports.

In corporatist regimes, public policy is made not only through legislation adopted by representatives elected through universal suffrage, but also through negotiations between the state and interest groups, such as industry associations and trade unions.

44 Some politicians expressed concern that the gender equality provision did not belong in Article 1, because Article 1 is a description of the nature of the republic itself. See Sénat, Séance du 18 juin 2008 (compte rendu intégral des débats), available at http://www.senat.fr/seances/s200806/s20080618/s20080618007.html.
47 See Josep M. Colomer, COMPARATIVE EUROPEAN POLITICS 269 (3d ed. 2008).
Thus, while talking in the rhetoric of the business case for diversity, the Ministry of Children, Equality, and Social Inclusion claims that “[r]eaching a balanced participation is a question of democracy.” 49 In Norway, the fact that corporations exercise political power has long been acknowledged. A widely cited article by Norwegian political scientist Stein Rokkan observed in 1966 that the Norwegian state has “two channels of decision-making: the electoral-legislative and the organizational-corporate.” 50 When it comes to economic policy, the crucial decisions are rarely made at the legislative level; they emerge from negotiations between trade union leaders, employers’ associations, farmers’ representatives, and other economically significant groups. As Rokkan observed, “These yearly rounds of negotiations have in fact come to mean more in the lives of rank-and-file citizens than the formal elections.” 51 Corporations and their representatives have long played an institutionally recognized role in setting Norwegian economic policy. This is why the representativeness of corporations affects the legitimacy of the democratic state in Norway. In corporatist states, it is assumed that business leaders play an important role in governance, perhaps as important a role as the legislature. If gender parity is needed to legitimize governance, it must be achieved not only in state institutions, but also in the private sector organizations that are frequently at the negotiating table with the state.

Recent work on Norwegian politics suggests that corporatism is weaker today than it was twenty years ago. 52 Nonetheless, the longstanding existence of formal channels by which corporations are represented in policymaking is sufficient to sustain a political and legal culture in which it is assumed that corporations participate in policymaking. Especially by comparison with the United States’ pluralist model of governance, the power of corporations to influence public policy remains formal and recognized in Norway. This gives rise to the notion that corporations must exercise power in some accountable or legitimate fashion.

The tradition of corporatism in France is more complex. Political scientists do not regard France as a strong corporatist state like Norway. On the one hand, the republican tradition growing out of the French revolution went against the representation of group interests in democratic policymaking. On the other hand, there are important features of French constitutional design and political practice that recognize the role of corporations in French governance. First, the French constitution establishes a consultative assembly, the Conseil économique, social et environnemental (CESE or Economic, Social, and Environmental Council), 53 in which the most representative unions and employer associations are represented. The CESE also includes

49 Ministry of Children, Equality, and Social Inclusion. Representation of both sexes on company boards, available at http://www.regjeringen.no. In answering frequently asked questions about the law, the website focuses on economic bottom-line arguments to explain why balanced participation is a “question of democracy.”


51 Id. at 107.


53 Const arts. 69–71 (Fr.).
professional organizations, agricultural organizations, and other interest groups. The constitution provides that the CESE give its opinion, on reference from the Government, on any proposed legislation or decree. It provides that any plan or program of an economic or social character be submitted to the CESE for an opinion. The CESE does not exercise formal government power; it cannot veto proposed legislation or vote upon it. However, it is a symbolic institution that provides a forum for deliberations between various interest groups and the government. The CESE embodies the French constitutionalization of a corporatist paradigm of governance, a commitment to the organized representation of social and economic interests.54

For policies affecting employment and social security, the French government negotiates directly with the “social partners,” the largest trade unions and employers’ organizations. French employers are well-organized into two large associations, the Association française des entreprises privées (AEPF) and the Mouvement des entreprises de France (MEDEF). MEDEF’s membership includes 700,000 firms. It is consulted by the legislature as well as the executive branch in deliberations leading to the adoption of major reforms in employment and social security policy. In the past, MEDEF was known as the Conseil national du patronnat français (CNPF), and its main membership consisted of the large nationalized companies. As a result, the line between the state and the private sector was not clearly defined.55 The members of MEDEF are corporations of all sizes; they are represented in the organization through their boards of directors. Laurence Parisot, the current president of MEDEF, has been on the board of directors of BNP-Paribas, the largest bank in France, as well as Michelin.56

For the last decade, MEDEF has been a leader in negotiating various reforms to liberalize French employment law. One significant recent example is the emergence of the “rupture conventionnelle,” in 2008,57 a significant reform that weakens the job security protections of French workers. The reform allows employers and employees to agree to the terms by which their relationship is terminated, outside of the traditional procedures for termination for just cause under the Labor Code. MEDEF proposed this for several years to make the French labor market more flexible, as it would facilitate terminations, which in turn would stimulate hiring.58 MEDEF negotiated a national collective agreement between MEDEF and various unions implementing the “rupture conventionnelle,”59 and six months later, the Labor Code was revised to legalize such agreements.

58 See MEDEF, BESOIN D’AIR (White Paper, 2007).
As French corporations are slowly bringing about an evolution in the French approach to employment and social security policy, largely through MEDEF action, they have simultaneously embraced the concept of gender parity on corporate boards. In April 2010, AFEP and MEDEF jointly issued a Corporate Governance Code for Listed Corporations, urging its members to adopt its provisions. It includes the recommendation that corporate boards achieve a percentage of at least twenty percent women within three years, and at least forty percent women within six years. This recommendation is framed as a means of taking “appropriate action to assure the shareholders and market that its duties will be performed with the necessary independence and objectivity.” In short, gender parity is not only necessary for good governance, but also to enhance public trust in corporate governance. It is clear that gender balance is seen as a way of legitimating the corporation. The AFEP/MEDEF recommendation has been emphasized in the Senate reports defending the 2011 corporate gender parity law.

6. The alternative to corporatism: Pluralism in the United States

The absence (or historical failure) of corporatism in the United States may explain why it is so difficult for Americans to see beyond the business case for increasing the number of women on corporate boards. For comparative political scientists, the United States represents the “pluralist” paradigm of the state’s relationship to interest groups such as corporations, to be contrasted with the “corporatist” paradigm. In the United States, corporations exercise political influence through lobbying and other forms of political speech, not through formal, institutionalized negotiations with other organizations and the state. In fact, the Supreme Court has justified the protection of corporations’ First Amendment free speech rights on an anti-corporatist vision of democratic governance. In *Citizens United v. Federal Election Commission*, the Supreme Court suggests that corporate free speech must be protected in order to allow small corporations to counter the speech of large corporations.

Corporate executives and employees counsel Members of Congress and Presidential administrations on many issues, as a matter of routine and often in private. An *amici* brief filed on behalf of Montana and 25 other States notes that lobbying and corporate communications

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60 AFEP & MEDEF, Corporate Governance Code of Listed Corporations, Amended in April 2010, Section 6.3.
with elected officials occur on a regular basis . . . When that phenomenon is coupled with § 441(b), the result is that smaller or nonprofit corporations cannot raise a voice to object when other corporations, including those with vast wealth, are cooperating with the Government.\footnote{See Citizens United v. Federal Election Commission, 130 S.Ct. 876, 907 (2010).}

Underlying this suggestion is the fear of European-style cooperation between the largest corporations and the government. As corporations and other interest groups are seeking to influence policy, the pluralist paradigm of governance holds that the state plays the minor role of referee,\footnote{M. Wiarda, supra note 63, at 5.} and it cannot give the largest corporations (or associations of corporations) any privileged voice, access, or social partnership. The power of corporations is to be curbed by non-interference with the speech of all (including less powerful) corporations, rather than by imposing responsibilities on the most powerful corporate speakers.

In continental Europe and Scandinavia, the traditions of formal collaboration between the state and corporate interests in the making of public policy render it logical to expect corporations to be representative in order to legitimize the actions of the state. But in the United States, where corporatism failed and pluralism prevails, corporate board diversity seems to be wholly irrelevant to the legitimacy of the democratic state. This is why the “business case” for corporate diversity in the United States remains divorced from concerns about state legitimacy and democratic representation.

7. Conclusion

In contrasting the European and American understandings of corporate diversity, my purpose is to open up a comparative dialogue about the way in which our political institutions and legal culture can shape the possibilities for women’s participation in political and economic life. The comparison highlights the implications of the corporatist and pluralist paradigms of policymaking for women’s equal citizenship. Corporatism in Europe engenders a strong consciousness that state and corporate power are intertwined, such that the conditions for legitimizing state power must be imposed on those who wield corporate power. The legally mandated corporate gender quotas in Europe are best understood as legitimizing corporations’ exercise of public power, rather than merely as maximizing profits. The emerging approach to gender equality in the European private sector is shifting the focus away from the individual right to equal opportunity and towards the mechanisms that render democratic policymaking legitimate.

Might this approach provide any useful insights for thinking about diversity in corporate America? The business case for diversity is appealing because it avoids the zero-sum mentality that accompanies equal opportunity claims. The business case for diversity is a story in which everyone wins; women and minorities get opportunities and businesses (and the nation) get richer. In the equal opportunity story, women and
minorities get opportunities at the expense of businesses, men, and non-minorities—after all, equalizing opportunities means redistributing them.

In short, the business case for diversity in the United States is a way of avoiding balkanization. Reva Siegel suggests that “antibalkanization” may well become the new paradigm through which U.S. constitutional law evaluates the permissibility of measures to promote the integration of minorities.67 Might we in the United States be able to forge a link between the integration of minorities and women in corporate leadership positions and the legitimacy of our democratic policymaking processes? Or is the business case for diversity, narrowly construed as profit-maximization, our only route to social cohesion?

The rise of gender quotas in Europe demonstrates the broader range of arguments for promoting women’s equal citizenship, beyond the rights and benefits of women themselves, and beyond profit-maximization. In positing that the state’s democratic legitimacy is undermined by the absence of women in both public and private sector leadership, equal opportunity facilitates democratic solidarity, instead of alienating those whose opportunities appear diminished by the new quotas. In France, the recent processes of constitutional change demonstrate the way in which gender quotas can be framed as “antibalkanization” measures. The quotas are characterized as advancing humanity by ensuring that both halves are represented, rather than as advancing the particular rights or interests of women. This transformation has been facilitated by the recognition of social partnerships between public and private institutions. Perhaps the absence of such recognized partnerships in the United States limits the range of antibalkanization tools in our democracy.