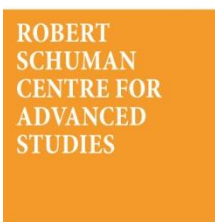




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Equality Regimes Compared:
France's Political and Corporate Quotas

Darren Rosenblum

European University Institute
Robert Schuman Centre for Advanced Studies
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Abstract

This article differentiates parity, the French political quota from the French Corporate Board Quota. Further, the article articulates how an examination of political quotas after the corporate board quota was passed could be beneficial in reexamining and reformatting political quotas. Both share the goal of increasing representation of women. The French political quota preceded the Corporate Board Quota and was relatively unsuccessful, which may have led to the difference in the implementation of the Corporate Board Quota. The paper concludes that the Corporate Board Quotas is both more modest and stronger than the political board quotas. More modest because the focus of the remedy is on the board and not the executive committee, which is a less powerful institution within the corporate governance structure. The Corporate Board Quota is stronger because they mandate seats and not merely candidacies. There are advantages to the focus within the corporate context of different sites of governance and different ways to affect governance which suggest other mechanisms for political equality regimes.

Keywords

Quota, France, Political, Corporate, Board of Directors, Gender, Representation

Introduction*

Sex equality is alluringly simple as a principle. One framing with broad appeal is that of the U.S. Supreme Court in *Mississippi University for Women v. Hogan*: the law should be devoid of “fixed notions concerning the roles and abilities of males and females.” Individuals may espouse such beliefs but transforming the two essential societal power centers-political office and corporate management - proves more daunting.

The notion that women should be fairly represented in politics has gained traction in many countries - over one hundred have political quotas for women. Elected office is both highly symbolic and accommodates a wide range of skills and capabilities that might make for an effective politician. The corporate sector has proven a more difficult component of society to alter because of highly entrenched notions of competence and unstated, informal cultural norms about skill sets. Unintentional and structural discrimination favors men in upper managerial ranks, leaving women outside of the corporate elite. The failure of the corporate sector to deploy effectively the extensive pool of educated women reflects the deep link between masculinity and notions of competence.

This paper examines France’s experience in formulating and implementing legal frameworks to move toward sex equality in both politics and corporate life. France is not the first European country to do this. Norway has that distinction, having attained high levels of women's representation in government and then adopting its corporate board quota (“CBQ”) in 2003. To be sure, France’s experience has been informed by the goals, results and findings of the Norwegian implementation. But France is a dramatically larger nation, a member of the G8 and, like the United Kingdom, the beneficiary of a post-colonial network of mostly developing nations. Furthermore France was the site of one of the two great 18th Century democratic revolutions that so shaped our contemporary understanding of democracy, universalist citizenship and equilibrium between political and capitalist power. Thus, though not Europe’s first attempt, the French quotas efforts are paradigmatically instructive, and the topic of what follows here.

This article highlights the similarities and differences between the French political quota and the French corporate board quota. The examination of the two quotas should prompt inquiries about whether parity might profit from insights into the corporate board quota’s efficacy. Notably, CBQs mandate seats and not candidacies. In both contexts, the goal is to increase women’s representation. The French political quota came before its corporate board quota and was relatively unsuccessful, which may have led to the difference in the implementation of the corporate board quota. The paper seeks to demonstrate that corporate board quotas are both more modest and stronger than the political representation quotas. Corporate board quotas provide the more modest remedy of improving sex diversity on the board and not the executive committee, which is a less powerful institution within the corporate governance structure. This rather dramatic difference in efficacy is not substantively undercut in its significance by its focus solely the Board of Directors, which functions to select the leading executives and to assess and approve the leadership’s strategies. Had the architects of the legal framework sought to impose a quota on the direct operations of a company’s highest managerial ranks, it is likely that opposition to such market interference would have prevailed.

Part One of this Article will describe the progression and implementation of these two quotas. Part Two will both describe the performance differential between the quotas and suggest potential explanations for the broad success of the corporate board quota against the more modest achievements of Parity.

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Part I: Quota Implementation

This part will survey the enactment of parity and the CBQ and will describe the performance of each of these equality remedies.

A. Representation Models

Rosabeth Moss Kanter articulated the notion of critical mass in 1977, and it has since proven quite robust in analyzing minoritarian-majoritarian dynamics in group structures of wide array of types. In order for a minority group to have an impact on group decision making processes, that minority must achieve a certain level of representation in the group.¹ Below 1/3 of the group, and the minority's native point of view and mindset are ineffectual or easily dismissed as tokenism: appearances without an undergirding reality.

Moving above a third to forty percent, which is what the corporate board quota requires, permits greater flexibility in implementation, especially in scenarios where there may be – real or imagined – a talent shortage. Strict parity has essentialist downsides. Its strict binarism posits that there are simply two and only two kinds of candidates, male and female. This is the vision underlying the political parity efforts France undertook in 2000. The ideal legislature in its ideal incarnation would include half men and half women. Gender balance, as I have argued elsewhere, offers flexibility.² It also provides an evenhandedness for sectors that may currently or will eventually exclude men. In those contexts, increasing the presence of men reveals the virtue of critical mass itself. It provides a non-essentialist solution to industries that have labored under culturally essentialist talent scouting models.

B. Political Parity

Both Parity and the CBQ required constitutional amendments. To understand why requires a focus on universalism's centrality in the over two hundred years of French republicanism. Universalism dictates that each citizen is equal in stature and dignity before the state. Similar to critiques of affirmative action in the US context, any remedy to women's historical under-representation in political/civic affairs uses sex as a base of discrimination, as a long string of French constitutional challenges and setbacks makes amply clear.³ The risk, therefore, with any sort of equality remedy within a universalist constitutional framework is that it may justify unequal treatment on certain bases. Thanks to France's capacious amendment process, the constitution could be carefully altered to meet the desired goals. Thus with the amendment passed in 1999, the underpinning of the debate shifted, and policy makers and activists could shift the debate to crafting the mechanics of how to achieve parity or something close to it, and how to phase it in and to measure progress in electoral representation across national, regional and municipal levels.

In 2000, the French legislature enacted Parity, the first explicit quota in French history. Parity requires political parties to name women as half of all candidates.⁴ Feminists and Socialists led the

¹ Note that this understanding of minority representation presumes a binary, while race and ethnicity typically present more complex interrelationships of identity.

² Darren Rosenblum, *Loving Gender Balance: Reframing Identity-Based Inequality Remedies*, 76 *FORDHAM L. REV.* 2873 (2008).

³ A decision of the French Constitutional Council dated March 16th 2006 struck down a previous CBQ tentative. *Decision No. 2006-533 DC of 16 Mar. 2006, Point 16* FRENCH CONSTITUTIONAL COUNCIL (Mar. 24, 2006), <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2006/2006-533-dc/decision-n-2006-533-dc-du-16-mars-2006.1005.html>.

⁴ ELEONORE LEPINARD, *L'EGALITÉ INTROUVABLE; LA PARITÉ, LES FEMINISTS ET LA RÉPUBLIQUE* [Impossible-to-Find Equality; Parity, Feminists and the Republic] (2007); JOAN WALLACH SCOTT, *PARITY!* (2005); Rosenblum, *supra* note 2, at 1123.

push for Parity, to remedy the chronic lack of women representatives in positions of political power. The legislature's earliest efforts to enact Parity met with rejection by the Constitutional Council (which is authorized to review enacted laws prior to their implementation.)⁵ In response to the Council's decision, the legislature amended the French constitution through a supermajority, which paved the way for Parity's subsequent enactment.

In contrast to the corporate board member, in the National Assembly and other regional and municipal legislatures, the elected officeholder exercises direct power. Alliances and compromise constitute critical ingredients for advancing a legislative agenda, but the representative elected does not exercise advisory power – she exercises direct power herself. Candidacy for electoral office should include a wide swathe of engaged citizens, and not merely the technocratic elite whose educations funnel them into managerial positions in France's largest private sector organizations. Politicians are, if lucky at the start of their career, elected – and then become incumbent candidates, seeking to profit from incumbency. To be sure they become familiar with and skilled at political maneuvering – but again, any such skills required mean they do the job better; they are not prerequisite qualifications for the office.

C. Corporate Quota Challenges & the Virtues of a Corporate Board Quota

Corporate representation, from a liberal economic frame, may constitute an intrusion of public notions of equity into the ordering and arrangement of private affairs. Professional managers must have firm- and industry-specific skills to get hired, and then furthermore must continually invest in broadening and strengthening their skill sets as they move up the ranks. In short, within the corporate elite, human capital talent becomes more concentrated and less numerous through attrition as one looks higher within the executive class. Cultural biases and the binarist allocation of child rearing to females have left few women in the pool, especially at the highest levels. However, government policy cannot easily alter elite corporate hiring, no matter how widely subscribed the business case may be, especially for top executive positions. The one area of reprieve from this thicket is the board of directors.

1. Corporate Board Directorship Seats: Good Governance, Symbolism, Path of Least Resistance

Boards are not legislatures; they are reactive bodies that approve or question and approve decisions made by the executive within the corporate governance structure (Bainbridge, 2012: 44-45). Boards confer legitimacy in normal times, and in times of strife (e.g. if managers are seen to not be managing in shareholder interests, it is the board of directors that would commence proceedings to remedy such an unfortunate state of affairs), a capable independent board can and should stand up to management, up to and including, in extremis, removing a CEO (and also overseeing the hiring of his/her replacement). On other occasions, such as modifying bylaws, a board can have an explicitly managerial role. A board adopts resolutions and approves financial statements for publication.

The Board offers forces agitating for representational improvement for women in corporate France many virtues compared to other locations for a quota within a corporate entity. Intervening in the composition of middle managerial ranks, upper managerial ranks or even the rarefied and powerful executive committee would likely prove highly contentious for established interests.

Furthermore, a board of directors position requires periodic rather than daily commitments to the firm. Individuals may serve on more boards than one, subject to statutory limits. Traditionally board members were senior current or former executives with deep generalist experience in business and macro-economic cycles. The post-crisis shift opens the board to a more diverse range of experiences. Above all, the prized balance in the board's composition is a group of people with broad expertise.

⁵ Julie Chi-hye Suk, *Gender Parity and State Legitimacy: From Public Office to Corporate Boards 5* (Benjamin N. Cardozo Sch. of Law, Working Paper No. 326).

The skill sets required are not as specific as those required by operating managers in a firm. An interesting upside of situating equality in the board is that once implemented, women with experience on a board will find that they are in demand on other boards, fostering and growing “old girls’ networks.” As board composition reaches critical mass, not only will women be represented symbolically as equals, but the content of their decision making as a board may evolve, if subtly.

2. French Corporate Self-Regulation

From 1995 onward, French Industry undertook various self-regulatory initiatives, culminating in reports and codes of behavioral standards such as Viénot Reports 1 and 2, the Bouton Report, and the AFEP-MEDEF Report. This last became the basis for the AFEP-MEDEF Code, the gold standard for governance standard for companies issuing shares for trading on a regulated market. Even so, the AFEP-MEDEF Code is not binding, rather it serves as a sort of good housekeeping seal of approval for governance.

In April 2010, the Code set certain parity objectives to be achieved progressively for women on boards of “at least twenty percent female directors within three years and at least forty percent within six years.

The goal under this effort was that if the private sector itself adopted a voluntary quota, the private sector would convey seriousness with regard to gender diversity and the government might withdraw the obligation of the corporate board quota, or at the very least extend its imposition to a later date. This was precisely the same time that the Sarkozy government began to devise a plan for modifying women’s representation in industry as an assertion of French civilizing tendencies. Thus, by the time the private sector proposed a voluntary structure, the bill had advanced too far for its proponents to retreat, and the corporate board quota passed.

3. Changing the Constitution & the French Corporate Landscape

On January 27, 2011, France’s legislature changed the French corporate landscape, passing Law no. 2011-103 on the equal representation of men and women on boards of directors and supervisory boards. It establishes the principle that boards of directors, supervisory boards of private companies or joint-stock companies of any size, listed and unlisted, must strive for an equal representation of men and women.

The legislature distinguished between private corporations and public sector businesses and established minimum percentages to be met and a schedule for attaining these objectives. Three main categories of corporations face regulation: 1) private companies and joint-stock companies that issue shares admitted for trading on a regulated market; 2) French corporations that, for three consecutive fiscal years, satisfy certain criteria (employing at least 500 permanent staff members and producing an annual revenue or balance sheet total of at least €50 million); and 3) public institutions and certain businesses that are subject to the democratization rules of the public sector. The law itself defines the aims of its legal framework, as well as the “broad outline” of gender equality policy. It stipulates sanctions for companies that fail to respect the aims or broad outline imposed.

4. Giving the Corporate Board Quota Teeth

In 2011, the law making this requirement mandatory passed with a compliance mechanism that, to say the least, has teeth.⁶ Law 2011-103 (January 27, 2011) was entitled “On the equal representation of

⁶ Although the French Constitutional Court had previously rejected a similar quota, a 2008 amendment authorized the change. La loi constitutionnelle no 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République

men and women on boards of directors and supervisory boards and professional equality.” In drafting what would become the final law, conservative lawmakers replicated many features of the Norwegian quota. The law established the principle that boards of directors, supervisory boards of private companies or joint-stock companies of any size, listed and unlisted, must strive for an equal representation of men and women. Framed not as a sex-specific quota but a floor for both sexes, the law required boards of directors, supervisory boards of private companies or joint-stock companies of any size, listed and unlisted, to strive for an equal representation of men and women.

The legislation established minimum requirements over a schedule: a 20% minimum for both sexes by 2014 and 40% by 2017.

Sanctions against non-compliant firms were designed to be swift and significant: non-compliant firms faced the revocation of non-compliant nominations and the possibility of freezing board members' fees. The French quota stopped short of the Norwegian statutory remedy, which required dissolution for non-compliant firms. The law required firms to comply with the quota in two stages: regulations mandated that firms have at least twenty percent women by January 1, 2014 and the full forty percent by January 1, 2017.

5. Public Policy Goals expressed through Private Organizations

It is worth noting that a quota in the corporate context is one imposed by the public sector on the private sector. The corporation exists thanks to the state's incorporation process, and therefore it is entirely appropriate for the state to implement and force changes within the corporate sector, including requirements on the gender composition of the board (Rosenblum, 2010). Given this public imposition over the private sector, having this imposition take place within the board context as opposed to the executive context constitutes a lesser burden on firms.

While in the US context, regulatory meddling that might impair the ability of a firm's managers to keep their firms profitable would have been a non-starter, the French Corporatist state places greater emphasis on public norms even within the private sector (SUK 2012). Within the French context as in the US context, shareholders elect the board members, who in turn choose the executives. In practice, the board constantly renews itself through staggered terms in which a third of members may be renewed or retired. CEO dismissal or hiring is infrequent at best, at least ideally, and so while the incoming nominees do, in theory, have authority and power over the top executive manager, in practice that power is unlikely to be exercised often or other than in extremis situations. Shareholder primacy, in which the firm's principal goal is to serve the shareholders, plays a central role. Even in firms where a stakeholder vision may prove relevant, it does not necessarily account for the best interests of the individuals who work for the corporation or interact with the corporation.

Part II. Changes & Results: Understanding the Performance Gap between Parity & the French Corporate Quota

This Part will first explore how Parity both improved women's representation and failed to attain the promised levels of inclusion. It will first describe the differential in improvement. Then it will examine various theories to comprehend the discrepancy between the efficacy of the two quotas. Finally, it will hint at potential improvements for such inequality remedies.

(Contd.) _____

[Constitutional Law No. 2008-724 of July 23, 2008 on the Modernization of Institutions of the Fifth Republic], art. 1, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], July 23, 2008.

A. Political Parity & CBQ: Before & After

Political representation by sex in the national assembly was 14% before the parity amendment was implemented. As of May 18, 2014, it has risen to twenty-seven percent, well short of the fifty percent parity standard or the forty percent critical mass standard. The French state allows for a High Council to observe the compliance with parity norms.⁷

By contrast, corporate representation of women in directorships was 10% in 2009, and only 4 firms had reached the 20% threshold. Given the threat of having a corporate board's activities declared null through non-compliance with the phased in goals of 20% by 2014 and 40% by 2017, the compositions of corporate boards of directors in France have changed dramatically. When the bill was introduced, nominations from general meetings in 2010 doubled this percentage: almost a third of new directors were women, and thirty percent of CAC 40 companies had reached the FCBQ's twenty percent intermediate level. In absolute terms, the number of female directors has risen from 60 to 119 in two years. This percentage remains low, however, for SBF80 companies, in which only fifteen percent of directors are women. The spike in the number of women on corporate boards after the public discussion and eventual adoption of the FCBQ suggests that the bill's introduction played a key role in this change. Thus, a certain correlation may be inferred between the intervention of the legislature and the recent improvement seen in CAC 40 corporations in terms of gender equality.

The radical improvement in the private sector compared to much more slight improvement in the public sector may seem ironic. After all, in the highly symbolic domain of public representation, parity most "naturally" flows – the state should be structured in a way that embodies equality. By contrast the private sector, in which discrimination may run rampant and presumptions of competence reassert established notions of "qualified" individuals, proved more capacious in responding to equality measures.

B. Election/Nomination Mechanics are Key Drivers

The main difference between changes in political representation and corporate representation cleave, intriguingly, around the notion of candidates versus directorship seats. In short, political parity stipulates gender balance in electoral lists only – either for a National Assembly seat, or a balanced list for regional and municipal slates of candidates. The parties are judged by what their ballot offerings look like. Publishing a balanced list of candidates is all that is required to happen; then the electorate has its vote. In the corporate context, a firm's nominating committee list and the list of directorship seat holders typically match exactly: shareholders typically rubber-stamp a pre-defined outcome.

⁷ Article 15 of the law n° 2000-493 states that an annual report will be presented to the Parliament on actions undertaken in favor of men-women equality in politics. See Loi no 2000-493 du 6 juin 2000 tendant à favoriser l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives [Law No. 2000-493 of June 6, 2000 tending to promote equal access of women and men to electoral mandates and elective offices] J.O. [OFFICIAL GAZETTE OF FRANCE], JUNE 6, 2000, available at

<http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000400185&fastPos=1&fastReqId=561230684&categorieLien=id&oldAction=rechTexte>. An observatory on Parity ("Observatoire de la Parité") was already in place since 1995, following the election of president Jacques Chirac. It was replaced in January 3rd, 2013 by a high council on equality between women and men ("Haut Conseil à l'égalité entre les femmes et les hommes") which aims at "ensuring concerted efforts with the civil society and encouraging public debate on the main orientations of the men-women equality policies." See *Presentation and Role*, HAUT CONSEIL À L'ÉGALITÉ ENTRE LES FEMMES ET LES HOMMES [HIGH COUNCIL ON EQUALITY BETWEEN WOMEN AND MEN], <http://www.haut-conseil-egalite.gouv.fr/hcefh/presentation-et-missions/> (last visited Nov. 5, 2014).

C. Candidates versus Seats: Process-based or Outcome-based

Voter bias may bear the blame for a weaker than expected increase in women's political representation. Professors from New York University (Frechette, Maniquet & Massimo, 2008) alleged that male and female voters simply prefer voting for male candidates by twenty-two percent. The benefits of incumbency in France may be less dramatic than they are in the US, and at least one study has questioned the Frechette findings, but incumbency does confer an advantage, suggested at least by the continued dominance of male representatives.⁸

A second explanation expands upon the posited preference for male candidates by voters of either gender, and adds to it party dynamics. Party leaders may elect to not offer a full parity slate – and may also be content to forgo the matching state funds that such a stance triggers. In effect, parity is a suggestion, not something bound by mortal fear (as is the case for a corporate directory board whose authority might be nullified for non-compliance. In France, the larger parties (UMP, Socialist) do not rely upon public financing of elections as much as do the smaller parties, and therefore they can afford a cavalier attitude towards that money. (Zimmerman, 2005). Whereas smaller parties, even the most conservative parties such as the National Front, would have higher levels of women among their candidates so as to be eligible for state funds.

A targeted seat law would mandate that half of all seats in the legislature be women and therefore the only candidates who could run for the designated seats would be female candidates. These seat quotas which some countries have adopted, radically reduce choice for voters, but would ensure equal representation in the National Assembly. For example, if you were living in a district randomly assigned to have a female seat, then you are going to have two or more females vying for the seat. The problem arises, however, that each of these candidates is more likely to be a new politician with less power within the legislature due to a lack of a network of power within the legislature since fewer women had already been in office. Typically in countries that have quotas by seat, such as India, the quota is for regional or municipal contexts rather than at the national level, where the distributional costs of having a relatively less-connected representative may prove smaller.

Another angle is how geography matters in electoral politics. An elected representative is, in theory, supposed to be, essentially, like the electorate member selecting her, certainly in regard to geography, and less rigidly in other social positioning indexical measures. When one represents the Gironde, it may be to parlay that experience into representing Provence in the National Assembly. As a result, networks of women elected officials who are helping each other and consolidated women-inflected points of view for policies are likely to arise and evolve less rapidly than those advanced by their counterparts in corporate boards.

D. Other CBQ Success Drivers

In contrast with the public context, the nomination & shareholder election/approval of candidates for corporate board directorships appears to be a straightforward affair judged simply the sexed outcome, in which distortions by voter preferences, biases, and party machinations play no role.

Furthermore, the corporate sector may well have embraced parity more enthusiastically because firms accept the underlying business case for quotas: board balance leads to better governance which leads to corporate performance enhancements. Numerous studies linking bringing on women in leadership positions to higher returns on equity and higher stock prices. Catalyst compared over 500 leading U.S. firms between 2001 and 2004 and found a positive correlation between board diversity and performance. Catalyst concluded that firms with the greatest proportion of women board members showed significantly higher returns on investment (ROI), return on equity (ROE), and return on

⁸ Rainbow Murray, Mona Lena Krook & Katherine A.R. Opello, *Elite Bias, Not Voter Bias: Gender Quotas and Candidate Performance in France* (Presented at the European Conference on Politics and Gender, 2009).

invested capital than those with the smallest proportion (Catalyst, 2007). A similar study came to a slightly different conclusion. A study examining 112 leading firms over five years found a positive relationship between board diversity (gender, race, ethnicity) and both ROI and ROA, but suggested that performance may be inducing diversity rather than vice versa (Erhardt, Werbel, and Shrader, 2003). In short, the acceptance of the business case meant that the French corporate sector willingly agreed to self-regulate with regard to sex diversity.

Another attribute that may account for the corporate sector's improved results flows from its target of corporate directorships, instead of the thorny thicket of measuring and apportioning upper management and executive board positions across the breadth of French industry, each with its own history, traditions and cultural norms.

E. Office Holders and Board Members are Individuals with Incentives

At the individual level, a board seat is a part-time position, prestigious and lucrative, but part-time. Thus once a woman is elected to one corporate board, she makes a quite strong candidate for board membership of a different firm – likely in some other industry but of comparable size. She also has an incentive in terms of incremental board compensation to share her expertise and influence with as many as is practicable (and of course there would be practical upper limits to this). Thus, once the nominal goal of increasing women's representation on corporate boards is agreed to, the mutual back scratching, revolving door and "old girls' network" effects start to become relevant and compound the advantages. Furthermore, in terms of individual ambition, there is another way in which corporate board member women differ from women elected officials. Elected officials have prohibitions from self-dealing that are quite strict. There is no shame in self advancement from one's corporate board position.

Conclusion

In conclusion, the corporate board quota is at once both more modest and more aggressive. The CBQ is more modest because it only governs the board of directors and not the executive committee; therefore, the quota affects the less powerful body of power in the corporate context than the legislature is in the political context. It is also more modest in targeting the Critical Mass standard over the Parity standard. As noted, this difference allows greater flexibility and may encourage compliance. However, the CBQ is more aggressive with regard to the means taken. In the corporate context the means are a requirement of seats rather than candidacies. While in the political context there was a softer means used to affect a stronger target, in the corporate context there is a firmer means for a less powerful target. The utility of the corporate board quotas when comparing them to the political quota perspective is the ability to use them as examples for rethinking remedies for inequality, including notably efforts to engage political parties with the broader benefits of gender equality. Particular quotas and positive or affirmative action remedies could be analyzed with the insight from the corporate quotas, so that these political remedies are constructed with a wide menu of options both with regard to means and the targeted ends of the equality sought by the remedy itself.

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Author contacts:

Darren Rosenblum

Visiting Professor

Washington College of Law, American University

Email: drosenblum@law.pace.edu