Loving Gender Balance: Reframing Identity-Based Inequality Remedies

Darren Rosenblum

Follow this and additional works at: https://ir.lawnet.fordham.edu/flr

Recommended Citation
Available at: https://ir.lawnet.fordham.edu/flr/vol76/iss6/9

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
Loving Gender Balance: Reframing Identity-Based Inequality Remedies

Cover Page Footnote
Associate Professor, Pace Law School. For helpful encouragement, conversations, and comments, I thank Elizabeth Cooper, Bridget J. Crawford, Sheila R. Foster, Emily Ming-Sue Huoh, Sonia Katyal, and Robin Lenhardt. For invaluable research assistance, I thank Christa D'Angelica, Kathleen Lange, Michael Stevens, and Shamik Trivedi.

This article is available in Fordham Law Review: https://ir.lawnet.fordham.edu/flr/vol76/iss6/9
**LOVING GENDER BALANCE: REFRAMING IDENTITY-BASED INEQUALITY REMEDIES**

*Darren Rosenblum*

**INTRODUCTION**

The egalitarian voice of the U.S. Supreme Court resonates forty years after it abolished antimiscegenation laws in *Loving v. Virginia.* While *Loving*'s vigor influences contemporary debates on sex-related marriage restrictions, its impact extends to the hopes and tensions that undergird and unite equality movements. Half a world away, Norway's Corporate Board Quota (CBQ), recently began enforcing a forty percent floor for both sexes on publicly traded companies' boards of directors.

At first glance, *Loving*'s affirmation of an interracial marriage in the face of the state's opprobrium seems impossibly divergent from the CBQ. *Loving* concerned de jure racial discrimination while the CBQ remedies de facto corporate gender inequality. *Loving* also struck down state-sanctioned criminal penalties for interracial marriage, while the CBQ aims at the private sector. *Loving* is the prototypical test-case litigation, complete with the perfectly named plaintiff and a compelling story. In contrast, the CBQ coldly regulates publicly listed corporations. Finally, and perhaps most significantly, race and gender inequality remedies differ sharply from one another.

Even so, parallels exist between *Loving* and the CBQ. Both attempt to subvert inequalities—marriage's restriction on same-race couples and corporate leadership's maleness. Each also involves government attempts to insert equality into inherently "private," yet state-defined, institutions. Given these consistencies, present-day attempts to remedy inequality, such as the CBQ, reflect the purchase *Loving* still carries.

* Associate Professor, Pace Law School. For helpful encouragement, conversations, and comments, I thank Elizabeth Cooper, Bridget J. Crawford, Sheila R. Foster, Emily Ming-Sue Huoh, Sonia Katyal, and Robin Lenhardt. For invaluable research assistance, I thank Christa D'Angelica, Kathleen Lange, Michael Stevens, and Shamik Trivedi.

1. 388 U.S. 1 (1967).
Loving’s logic is profoundly topical in balancing universality with particularity and sameness with difference. Should colorblind or race-conscious remedies predominate in equality jurisprudence? Is the goal equality or multiraciality? Are just or effective solutions exclusive to one side of the blind/conscious debate?

This essay explores contemporary iterations of this debate in the context of gender equality. Shifting frames of identity and nationality create new lenses for observing well-trodden debates over blindness and consciousness in race and gender inequality. Given the centrality of globalized interactions in our economic and personal lives, it is only appropriate that we utilize these tools in legal debates as well. Yet comparisons among remedies for race and gender inequality necessarily confront pivotal challenges, and such scholarship demands rigorous method. This essay uses transnational and transidentity examinations of widely divergent remedies to cross-fertilize crucial but often wooden equality debates.

First, this essay illustrates how Loving’s logic remains foundational to identity equality debates. Part II describes and compares three gender-related remedies: Norway’s CBQ, the United States’ Title IX of 1972, and France’s Parity Law of 2000. Each of these laws operates on an assumption of gender consciousness rather than gender blindness, but the CBQ’s implicit goal of gender balance distinguishes it from the other remedies. Part III explains how critical race evaluations of minority access to corporate power reveal the pervasive implementation flaws in race-conscious remedies. These defects arise in “softer” remedies such as affirmative action as well as in “harder” remedies such as quotas. Critical constructions of identity and power, despite varying along cultural lines, provide a unifying logic for understanding these developments. Finally, this essay argues that the novelty of the CBQ among inequality remedies suggests the potential for harmonious gender balance, just as Loving lowered barriers to interracial, multiracial, or even postracial harmony.

I. LOVING’S LEGACY

In 1959, a grand jury indicted Mildred Jeter and Richard Loving for violating Virginia’s antimiscegenation law. After pleading guilty to the charge, the trial court exiled the Lovings from the state and the Virginia

---

4. As I have argued in Internalizing Gender: Why International Law Theory Should Adopt Comparative Methods, 45 Colum. J. Transnat’l L. 759 (2007), comparative methods reveal far more about cultural difference as reflected in law than traditional international law methodology.
7. Gender, as well as race, varies along cultural lines. See Rosenblum, supra note 4.
Supreme Court of Appeals affirmed their convictions. The Supreme Court, Virginia advanced an equal application theory, arguing that the law applied equally to whites and blacks. The Supreme Court rejected this argument, holding that Virginia's statute violated the Fourteenth Amendment's Equal Protection Clause by discriminating on the basis of race and the Due Process Clause by impeding the fundamental right of marriage.

Two key elements of Loving animate contemporary inequality debates, namely, its colorblind rationale and its countermajoritarian impulse to protect group rights in a democracy.

A. Interpreting Loving: Colorblind but Not Multiracial

In Loving, the Court articulated a colorblind perspective on the Constitution: "[T]his Court has consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." The Court then declared that "[w]e have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." The Court grounded its rejection of Virginia's equal application in this colorblind approach.

Although Loving marked the death of antimiscegenation laws, it did not give birth to a multiracial society. For example, many in the United States continue to accept de facto racial segregation in marriage. Indeed, some argue that colorblindness precludes an emphasis on multiraciality.

9. Id. at 3-4.
10. Id. at 7-8. Virginia argued that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree.
11. Id. at 10. The U.S. Supreme Court stated that "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." Id. The Court also rejected Virginia's argument regarding the original intent of the drafters. Id. (citing McLaughlin v. Florida, 379 U.S. 184 (1964)); see id. at 11-12. "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." Id. at 12.
12. Id. at 11 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).
13. Id. at 11-12.
14. Id. at 9. The Court stated that "the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." Id.
a colorblind argument, the prevalence of racially homogamous marriages\textsuperscript{17} does not bar equality. This places personal racial preferences in spouse selection as beyond reproach.\textsuperscript{18} Colorblind attempts to resolve racial inequities sit firmly within a universalist presumption of experience and rights.

Contrasting colorblindness with color consciousness, Rachel Moran argues that although \textit{Loving} successfully pushed colorblindness into marriage and family policy, it failed to cure racial discrimination. However, as Moran observes, viewing race as a "biological irrelevancy" does not shift "the ongoing social and psychological significance of race in choosing a sexual partner, selecting a spouse, or raising a family."\textsuperscript{19} Indeed, Moran notes that a brief stint of colorblindness cannot single-handedly both eliminate race in spouse selection and foster a multiracial society in light of the centuries-long history of U.S. antimiscegenation laws.\textsuperscript{20} Although \textit{Loving} removed state barriers to intermixing, it alone could not eliminate personal preference barriers. Although it would not be feasible to institute marriage quotas, other countries have encouraged racial mixing through a variety of policies.\textsuperscript{21}

Thus critical race theorists advocate a color-conscious vision to recognize race's continued relevance.\textsuperscript{22} They argue that colorblindness depends on the identical treatment of all people in a universalist construction of law. \textit{Loving} framed the law as ostensibly colorblind, leaving racism as a personal choice relating to freedom of association. This choice advances broader multiracial goals, so long as individuals choose to exercise their freedom to marry across racial lines. Notwithstanding the historic view, even color-conscious remedial efforts like desegregation and affirmative action betray America's commitment to individual liberty and equal treatment." Moran, supra note 15, at 2.


20. Id. at 6. Permitting individuals of all races to conjugate as they wish might remedy institutional and economic legacies of racism, but it arises in a context at a most personal level that may not rise to the challenge as easily as other contexts. See id. at 6–7. Thus, as some have argued, racism persisted, and still persists, in the market for marital love, demonstrating the need for more assertive efforts by the state to promote equality. See id. at 194–96.

21. In Brazil, for example, \textit{branqueamento} (whitening) and \textit{mestiçagem} (mixing) were state goals that were "rhetorically idealized and promoted as the national norm," effectuated by restrictive immigration laws that encouraged European immigration and discouraged or prohibited immigration of peoples of African, Asian, and Indian ancestry. Tanya Kateri Hernandez, \textit{To Be Brown in Brazil: Education and Segregation Latin American Style}, 29 N.Y.U. Rev. L. & Soc. Change 683, 687 (2005).

22. Moran, supra note 15, at 2. "Proponents of color-consciousness, on the other hand, argue that the color line still exists and cannot be ignored. For them, the ideal of colorblindness has been betrayed by centuries of segregation and discrimination." Moran, supra note 15, at 2.
democratic achievements of universalist constructions, racism's blatant persistence requires identity-conscious remedies.

Relying on the myth of an unbiased meritocracy, U.S. jurisprudence maintains that colorblindness is the primary vehicle to combat racism. Voluntary efforts toward diversity and corporate social responsibility have met with only partial success. Increased state involvement is the only way society will conquer inequality. The CBQ constitutes a radical entry into this arena. It forces not equality but gender balance through its mandate of a forty percent minimum for each gender on corporate boards. This gender balancing permits a range of acceptable outcomes, while pure equality would require exact parity. Out of hesitation or political expediency, the U.S. Left, to the extent one exists, has studiously avoided such ambitious goals in the wake and ruin of socialist and communist utopian movements. However, moving the state beyond majoritarian interests requires the articulation of an affirmative goal of equity. Loving's colorblind emphasis may advance equality efforts to a degree, but it is efforts such as the CBQ that articulate equality's logical extension and thereby contribute to realizing it.

B. Countermajoritarian Equality Efforts

Today, overturning antimiscegenation laws seems self-evident, but in 1948, when the California Supreme Court became the first court to reject such a law, approximately ninety-six percent of the public opposed marriage equality for interracial couples. Nearly twenty years later, as the U.S. Supreme Court decided Loving, seventy percent of the public opposed interracial marriage. Indeed, antimiscegenation laws existed in several southern states until only recently. Although toothless in the wake of Loving, such laws' persistence reflects statewide norms.

Racism's continued currency dramatizes the critical role of countermajoritarian institutions such as the federal courts. Imagine the injury if Virginia had prevailed with its equal application theory, or if contemporary referenda (think Romer v. Evans or anti-same-sex marriage amendments) or suppressions of "activist judges" succeeded. In this context, the CBQ and Loving each reflect the state's potentially activist role in combating discrimination.

Facing overwhelming opposition, *Loving* clearly stated a simple principle: that the state cannot be biased in legitimating individuals' choice of spouse. While *Loving*'s colorblindness restrained its impact, and although causality would be difficult to prove, courts may effect measurable differences in societal attitudes toward previously proscribed behavior.

For example, the Massachusetts Supreme Judicial Court extended marriage rights to same-sex couples in *Goodridge v. Department of Public Health*.\(^{28}\) Since that decision, public opposition to same-sex couples in Massachusetts has dropped sharply. Public opinion has begun to align with the court's marriage equality norm, even if only by pushing marriage opponents to embrace civil unions. Norway may realize a similar result in the CBQ's wake. Until recently, women constituted less than ten percent of corporate board members in Norway.\(^ {29}\) This statistic will shift radically as corporations comply with the CBQ by speedily adding women board members. Over time, sexist attitudes in the Norwegian corporate sphere could reasonably be expected to lessen as gender balance norms become standard.

II. GENDER-CONSCIOUS REMEDIES FOR INEQUALITY

The CBQ is the most recent of a long line of gender inequality remedies. This part will explore this and two other remedies that involve allocating resources or rights based on some proportionality and compare them to the CBQ: France's Parity Law (Parity) of 2000 and the United States' Title IX of 1972. Beyond gender-neutral, formal antidiscrimination norms, these efforts enunciate positive policy shifts to foster equality. They interact with underlying gender norms and tactics in both complementary and divergent ways. Each remedy reflects an exercise of some feminist power that Janet Halley and others call governance feminism.\(^ {30}\) Parity requires political parties to present women as half of their candidates.\(^ {31}\) Title IX imposes, among other remedies, a requirement that the federal funding of collegiate sports programs be proportional to enrollment gender ratios. The distinctions among these remedies point to the tensions among gender-conscious remedies.

---

30. Governance feminism is the installation of feminists and feminist ideas in actual legal and institutional sites of power. Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 Harv. J.L. & Gender 335, 340 (2006). In a sense, such quotas and quota-like provisions, constitute the ultimate institutionalization of feminist power, a point that merits further exploration.
A. Balancing Gender: Norway's CBQ

The CBQ reflects the widespread promotion of gender equality efforts in Norway.\(^\text{32}\) At the time of the CBQ's passage in 2004, women's participation in government leadership and civil society was quite high, but the number of women holding corporate board positions languished at levels below ten percent.\(^\text{33}\) The CBQ joined other corporate governance requirements that threaten dissolution for noncompliance by state-owned and publicly held corporations, including all those listed on the Oslo Stock Exchange.\(^\text{34}\) As of July 2007, sixty percent of companies had complied with the law,\(^\text{35}\) and at the witching hour of January 1, 2008, nearly all covered corporations complied with the mandate.\(^\text{36}\) The CBQ not only reflects Norway's interaction between the public and private sectors that far surpasses that of the United States, but also signals a strong sense of experimentalism with regard to entrenched inequality remedies.\(^\text{37}\)

Norway, like other Scandinavian countries, takes gender equality seriously. With the CBQ, Norwegian policy seeks to insert women into private-sector leadership, matching their already relatively elevated political and civic representation. This effort dovetails with policy incentives to shift men toward paternal responsibilities,\(^\text{38}\) such as reserving four weeks of


\(^{33}\) See Seim, supra note 29, at 8. This reflected, as some assert, the predominantly socialist orientation of the feminist movement, which led to women's reluctance to participate in capital, perhaps viewed as the "enemy," as well as to lower levels of women in private-sector work as compared to the state-sector.

\(^{34}\) The law covers state-owned limited liability companies, state-owned enterprises, companies incorporated by special litigation, intermunicipal companies, and privately-owned public limited liability companies, of which there are about 500 on the Norwegian stock exchange. Norway Ministry of Children and Equality, supra note 2. Companies that fail to conform to general corporate governance rules, including the Corporate Board Quota (CBQ), typically comply after notice by the government, rendering dissolution an unlikely remedy. Id. According to the Public Limited Companies Act, "substantial public interests" may prevent dissolution. Id. In the interim, companies must pay fines until they comply fully with the law. This regulation applies to different situations such as requirements regarding the board of directors, the general manager, the auditor, and the annual accounts. Id.


\(^{36}\) Telephone Interview with Siri Øyslebø Sorensen, Researcher, Norwegian Univ. of Sci. and Tech. (Feb. 25, 2008). Because the enforcement mechanism is so recent, final data is not yet available.

\(^{37}\) Scandinavian nations consistently earn top rankings in terms of economic competition and technological prowess, but they simultaneously maintain a particularly socialist form of democracy with health, education, and unemployment benefits, as well as retirement and parental leave.

\(^{38}\) Beginning in 1972, Swedish political parties began to regulate levels of women's representation. Int'l Inst. for Democracy and Electoral Assistance, Sweden: Women's Representation in Parliament (n.d.), available at
parental leave for fathers. Obligations that most societies place on women have become family tasks that include men. The sum of these efforts reduces gender inequality, leading to greater gender balance.

Norway has begun to transform what would traditionally be considered “women’s work” into broader, gender-neutral societal duties. As women enter corporate boardrooms, men increasingly push strollers. In this context, the CBQ is only the next step in facilitating gender-balanced access to resources and responsibilities within Norway. Through the CBQ, public policy penetrates the corporate board of directors, one of the most exclusive of private-sector spheres.

Critics of the CBQ assert that it unforgivably intrudes into a private area that corporations should self-regulate. Laissez-faire theories emphasize that public regulation should govern only state and quasi-state actors, an attitude that prevails in the United States. Public institutions, however, construct the legal entities of the corporation and the family. The CBQ envisions a broader and stronger pool of candidates for corporate boards. The CBQ’s threat of dissolution reminds us that it is the law that creates corporations. The striking threat of dissolution may be potent enough to surmount the logistic complexity that compliance with the CBQ requires.

B. Parity: The Duality of Democracy

The CBQ is an extension of other countries’ political representation quotas. Among those quotas, France’s Parity, adopted in 2000, marks a radical shift in understanding French democracy as gendered. Parity requires that half of all candidates for public office be women and utilizes


39. Press Release, supra note 32; see also Beret Bråten, On the Daddytrack, Kilden, Nov. 5, 2005, http://kilden.forskningsradet.no/c17224/artikkel/vis.html?tid=39122. Bråten states that, “[i]f the daddytrack is to be realised, then it must also apply to working life.... It makes it okay for the man to take parental leave in spite of career ambitions and often ambiguous cultural signals. They experience it as increasing their options.” Id.

40. Feminist theorists have analyzed the various relationships among public and private: state versus family (feminists and antifeminists/traditionalists), state versus market (interventionists and laissez-faire economists), and market/family (the domain of mostly feminists and class scholars). These key tropes, along with a fuller account of the CBQ, are the subject of a separate publication. See generally Darren Rosenblum, Feminizing Capital: The Economic Imperative for Women’s Corporate Leadership, 6 Berkeley Bus. L.J. (forthcoming 2009).

41. See Seim, supra note 29, at 9.

42. See Olsen, supra note 3. The public/private distinction evades simple definition, as contracts exist only within the law and as recognized by the law.
two distinct enforcement mechanisms that reflect different election systems. For list elections, such as municipal, regional, European, and certain senatorial elections, political parties whose lists include fewer than half women candidates will not appear on the ballot. For uninominal elections concerning executive or National Assembly positions, a party that sponsors a pool of candidates composed of less than fifty percent women will lose proportional state funding.

Parity has had marked success in bringing women into the French political system, particularly in municipal elections where women’s representation has risen to almost fifty percent. Nearly all political parties meet the list requirements, but none meet the fifty percent requirement in uninominal races. Although Parity imposes financial penalties, larger political parties have tended to shoulder that cost rather than comply with the law. One consequence is that women still constitute only eighteen percent of the National Assembly.

France admits that Parity’s goals have not been met and that further measures are still needed. Yet some scholars hypothesize that the French electorate is biased toward male representatives and that this, in turn, explains the law’s failure to meet its stipulated goals. Regardless of its shortcomings, France’s ambitious legislation has succeeded in transforming the nation’s political scene, as evident in President Nicolas Sarkozy’s voluntary observance of Parity in cabinet selections.

With its goal of fifty percent women candidates, Parity reflects the underlying theory of France’s dual polity—political representation should reflect this duality. In the interest of equality, Parity protects men from


46. The French Senate, for example, has 320 members, each elected for 9-year terms. Approximately one-third of the Senate faces the voters every three years, in an irregular combination of list ballots and direct elections. See id.

47. This raises a separate issue of whether the penalties have been underpriced.

48. See Observatoire de Parité entre les femmes et les hommes, supra note 45.

49. Id. Still, France has seen some benefits from the Parity Law. U.N. Comm. on the Elimination of Discrimination Against Women, supra note 44.

50. See Francois Maniquet et al., Endogenous Affirmative Action: Gender Bias Leads to Gender Quotas (2005).

51. See Observatoire de Parité entre les femmes et les hommes, supra note 45.
women constituting a majority of political candidates because, were they to do so, the parties would be subject to the same penalties. By focusing on a fifty percent proportion, Parity reflects a more exacting version of the CBQ in this public, and highly symbolic, context.

On its face, Parity seems to go in the opposite direction of Loving—it inscribes difference instead of removing it from the constitution. Yet Parity seeks to encourage equality through the duality of representation. Some argue that by ascribing difference to the core of the republic, Parity escapes the universality/particularity bind. However, critics assert that this simply codifies an essentialist understanding of sex differences. Any remedy for group inequality relies on some essentializing notions of identity, but the question is whether the legal structures involved heighten or diminish identity-based differentials. Parity’s bold move sought to ensure gender equality in the pool of candidates for public office, and its full transformative potential will continue to unfold.

As Parity attempts to establish equality at one of the highest levels of society, political representation, Title IX seeks to remedy inequality in the development of a broader range of society, education.

C. Mandating Imbalance: Title IX’s Proportionality Standard

In contrast to both the CBQ and Parity, Title IX relies on the entirely distinct methodology of requiring substantial proportionality to reduce and/or eliminate gender-related harm in education. While Congress clearly did not intend Title IX to be a quota, closer examination of Title IX’s provisions reveals quota-like aspects, since it compares opportunities by sex and only allows limited disparities. Like the CBQ and Parity, Title IX achieves adjustments in gender inequality with wide-ranging effects. However, by attaching funding to the student population’s gender ratio, Title IX creates the risk that, as the near future brings more heavily

56. Id.
female student populations, the law may come to foster gender imbalance rather than remedy it.

Congress passed Title IX in 1972 to extend the protections of the 1964 Civil Rights Act to federally funded educational institutions on the basis of sex. Although Congress did not specify the form of Title IX's effect on collegiate athletics, it directed the Department of Health, Education and Welfare Office for Civil Rights (OCR) to enact relevant regulations. The OCR's 1979 policy interpretation enunciated three variations of “full and effective accommodation” a federally funded institution could exercise to comply with Title IX. First, the institution should ensure that male and female students have intercollegiate sports opportunities in numbers substantially proportionate to their respective enrollments; second, where one sex has been underrepresented, the program expansion should respond to the developing interest and abilities of the members of that sex; finally, barring such expansion, the present program should effectively include the underrepresented sex.

Title IX's first compliance option requires substantially proportionate opportunities, a standard that functions much like a quota. The U.S. Court of Appeals for the First Circuit affirmed the validity of the substantial proportionality test in Cohen v. Brown University. Despite subsequent limitations, critics allege that substantial proportionality remains the only possible compliance option for many institutions. Title IX's

---


60. The statute states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a) (2000).


63. Id. at 127.

64. Id. at 127.

65. 991 F.2d 888, 891 (1st Cir. 1993); see Jennifer R. Capasso, Structure Versus Effect: Revealing the Unconstitutional Operation of Title IX's Athletics Provisions, 46 B.C. L. Rev. 825, 825–26 (2005) (citing Cohen, 991 F.2d 888); see also Mahoney, supra note 55, at 954–58.


67. Capasso, supra note 65, at 837 (citing Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608, 613 (6th Cir. 2002)). Originally, if a specific program received federal financing, the entire institution had to comply with Title IX, as opposed to certain subdivisions, such as the athletic department. In 1984, the Supreme Court in Grove City College v. Bell, 465 U.S. 555, 573–74 (1984), limited Title IX's coverage to programs directly benefiting from federal financial assistance. Danielle M. Ganzi, Note, After the Commission: The Government's Inadequate Responses to Title IX's Negative Effect on Men's Intercollegiate Athletics, 84 B.U. L. Rev. 543, 555 (2004) (quoting Grove City Coll. v. Bell, 465 U.S. 555, 573–74 (1984)). Three years later, Congress responded with the 1987 Civil Rights Restoration Act, which reestablished the institutionwide effect of Title IX by
proportionality requirement reflects an underlying redistributive response to gender inequality: the use of a quota system.

Despite Title IX’s quota-like enforcement method, quota-phobia dominated the debate surrounding it.\(^{68}\) One sponsor asserted that “we are striking down quotas. The thrust . . . is to do away with every quota.”\(^{69}\) Others feared still more assertive remedies\(^{70}\) or reverse discrimination.\(^{71}\) As one critic alleges, “[A] system that requires a certain number of persons to be granted an opportunity based solely on one characteristic—such as sex—without regard for other qualifications—such as ability—is a ‘quota system’ in every sense of the words.”\(^{72}\) This quota-phobia continues today, as it mirrors the fundamental reticence to recognize group rights within the United States and serves as a blind spot in the drafting of gender inequality remedies.\(^{73}\) In avoiding the creation of a quota, Congress instituted a quota-like mechanism that may prove less effective at fostering gender balance than explicit quotas.

Title IX’s mechanism, which centers on the sex ratio of the student body rather than that of the broader national population (approximately fifty-fifty), seems designed to avoid appearances of a quota. By focusing on the student body, at a time when the majority of students were men, Congress created a remedy that aided women based on their proportion in the student population rather than their overall population. However, because of Title IX’s structure, the growing disparity between the numbers of men and women in higher education will drive Title IX’s significance.

Women will make up sixty percent of all college students by 2010\(^{74}\) and will eventually reach two-thirds or even seventy percent of the college student population.\(^{75}\) The substantial proportionality test links to gender

\(^{68}\) Mahoney, supra note 55, at 949.

\(^{69}\) Id. at 946 (emphasis omitted) (quoting 117 Cong. Rec. 30,409 (1971)).

\(^{70}\) Id. at 947. Representative Edith Green, the chairperson of the Special House Subcommittee on Education, felt that any quota, even one enacted to redress gender discrimination, would be harmful. She stated, “To my way of thinking a quota system would hurt our colleges and universities. I am opposed to it even in terms of attempting to end discrimination on the basis of sex.” Id. (quoting 117 Cong. Rec. 39,262 (1971)).

\(^{71}\) Id. at 948. Senator Daryl Beall noted that a gender quota could result in reverse discrimination against others: “As we eliminate [sex discrimination in education], I hope that we are not establishing still another form of bias.” Id. (quoting 118 Cong. Rec. 5813 (1972)).


ratios in the student population rather than in the general population. This linkage ensures that as the ratio of men in the student population decreases, men's collegiate athletic funding will also diminish. Demography is destiny. Title IX will become a program that favors one gender over another, even though men have higher levels of participation in collegiate sports. By doing so, Title IX may legitimize gender imbalance and sharpen absolute disparities; it would constitute one of the few arenas in which the law would favor women over men. One could argue that such imbalances rectify long-standing sexism in collegiate funding and sports, but this imbalance reflects the appeal of the CBQ gender balance model.

D. The CBQ, Parity, and Title IX: Gender Balance, Equality, and Proportionality

Both Parity's equality and Title IX's proportionality mechanisms contrast markedly with the CBQ's direct effort to encourage what one could call gender balance. The CBQ will provide opportunity with a floor for both genders and "protect" each gender with a ceiling for the other. The CBQ sets a range for compliance so that the pendulum of gender balance cannot swing too far. It works not only by promoting women, but also by protecting men from becoming voiceless in corporate leadership. Gender balance on corporate boards results.

By contrast, Parity and Title IX face shortcomings in potentially reifying essentialist visions of identity. Each of these remedies confronts limitations in application that undermine their effectiveness. The Parity Law's exactitude with regard to equality may render compliance challenging for political parties, and Title IX's substantial proportionality requirement may ultimately reinforce gender differences as college demographics shift to a substantial female majority. Second-wave goals that focus exclusively on empowerment contrast sharply with broader goals of gender equity. Gender equality efforts must move beyond a second-wave women-centered position toward a vision of gender balance, like that manifested by the CBQ.

The ungainliness of both Parity and Title IX underscores the CBQ's nuanced prescription of a tolerable range of acceptable outcomes, without overprecision, a range that reflects a balance with regard to gender. Gender's currency depends on the power disparity between men and

---


76 See generally Mahoney, supra note 55. The National Women's Law Center reports that male athletes exceed the number of female college athletes, even though women make up more than fifty-three percent of the college population. See Press Release, supra note 75. In addition, male sports like football tend to generate the most income for schools. Kevin J. Rapp, Note, Forced to Punt: How the Bowl Championship Series and the Intercollegiate Arms Race Negatively Impact the Policy Objectives of Title IX, 80 Ind. L.J. 1167, 1168 (2005). Rapp notes the extent to which schools benefit from other funding for a strong men's football program, id. at 1169, while critics counter that such funding should be considered along with other funding, and that such impacts violate the "effective accommodation test" of Title IX, id. at 1169, 1172.
women. To the extent society minimizes such power differentials, the need for inequality remedies will likewise ebb. Norway's CBQ adopts the feminist goal of eliminating the "m > f" power relationship. In addition, gender balance reflects a goal similar to that of some forms of multiraciality: the erasure of difference as a marker of power. Like multiraciality, which Moran argues would arise from race-conscious efforts, gender balance finds its roots in gender-conscious remedies such as the CBQ.

Quotas, especially those built on a binary, confront another crucial challenge in essentializing gender. How does one count those who have transitioned from one gender to another, or more importantly, those whose gender identity defies simple categorization, whether by biology or by intent? As I have argued elsewhere, beyond transgender individuals' lives, the gender binarism wreaks multiple nefarious effects on public policy more broadly. Any remedy for group inequality relies on some essentializing notions of identity. Each of these gender equality remedies requires that individuals, whether board members, political candidates, or students, fit into one side of the male/female binary for calculation. The CBQ presumably includes transgender individuals to the extent that they have legally transitioned. Ironically, achieving gender balance relies on labeling gender. In some way, then, these remedies' pursuit of gender balance may also serve to limit gender fluidity and maintain the gender binary.

These gender-conscious remedies move beyond Loving's vision of a colorblind society. Scholarship drawing on transgender challenges to the gender binary reflects the importance of moving beyond fixed definitions of identity. Recent scholarship recognizing the fluidity and indeterminacy of race enlightens an acknowledgement of gender's fluidity.

The complex ways in which equality remedies interact with each other expose parallels with other equality jurisprudence debates. Just as the CBQ's gender balance focus reveals advantages in contrast with other gender equality remedies, it also exposes conflicts among other equality

79. Many transgender people transition from one gender to another, with or without medical assistance, without the purpose of "passing" as the other gender. Categories such as drag queens and kings and genderfuck involve people who play around with gender identity and may not fall into such easy categorization. See generally Kate Bornstein, Gender Outlaw: On Men, Women, and the Rest of Us 65-69 (1994).
efforts. Advanced exploration of such tensions in the race context yield interesting conclusions, as the following part discusses.

III. GENDER, RACE, AND THE CORPORATE LADDER

Remedies for group inequality occasionally play out in perverse ways in their effects on individuals. Professors Devon Carbado and Mitu Gulati have looked at the inadequacies of the corporate ladder for minorities.81 Professor Douglas Branson examines women's lack of a "seat at the table" in corporate governance.82 Both studies reflect the real consequences of essentialist dangers. This part explores the lessons drawn from the impact of such policies on individuals and ultimately contrasts current minority inclusion policies with "harder" remedies such as the gender-conscious quotas.

A. Questioning the Ladder

1. Shortcomings in Minority Promotion Strategies

Decades have passed since efforts began to integrate minority representation in government (through the Voting Rights Act83) and in the corporate world (through affirmative action). In response, critical analyses of such policies reflect the rich debate over identity-conscious remedies. Carbado and Gulati examine affirmative action to ascertain which minority individuals benefit from reaching the "top of the corporate ladder"84 and at what cost. Through reality-based hypotheticals, Carbado and Gulati undermine the plausibility of the "ladder" presumption that, once placed at the top, minority managers will assist minority employees.

Similar to the CBQ's attention to the apex of the corporate hierarchy, Carbado and Gulati focus on management to question the presumption that minority executives will perform as role models for other minorities by engaging in mentoring, stereotype negation, racial monitoring,85 racial accountability,86 racial cooperation, and racial comfort.87 In this "ladder critique," Carbado and Gulati argue that minorities may fail to aid other minorities because of the "institutional rewards of racial disidentification

84. Carbado & Gulati, supra note 81, at 1647, 1652–54.
85. Id. at 1658–59, 1662–63. In such monitoring, the corporation members monitor what they do and say in order to avoid offending nonwhite colleagues. Id. at 1662–63.
86. Id. at 1664. In this accountability, corporate members must account for decisions that have a negative impact on minorities. Id.
87. Id. at 1665. Such comfort is provided by nonwhites who bear "the burden of making whites feel comfortable with their nonwhite identity." Id.
and institutional costs of perceived racial group association.\textsuperscript{88} Certain advancement traits such as "overconfidence, a willingness to take high risks, and a high degree of ethical plasticity,"\textsuperscript{89} give minorities the ability to reach top positions. Minorities who reach the top consist of "racially palatable" nonwhites\textsuperscript{90} rather than "racially salient" individuals. Advancement occurs for those who engage in majority-identified behavior. To overcome racial disadvantage, minorities feel compelled to rely on luck and attempt high-risk projects.\textsuperscript{91} Because corporate work often involves teamwork, white executives assume minorities do not work well in the corporate environment and must prove their capacity to "manage other nonwhites."\textsuperscript{92} The aforementioned practices lead corporate culture and practice to discourage the performance of "antidiscriminatory institutional work" historically executed by law.\textsuperscript{93}

Carbado and Gulati’s critique arises in the context of the United States, where minority advancement occurs through voluntary diversity efforts and, sometimes, affirmative action. Norway’s CBQ arises in a very different context. Gender, not race, is the focus and the state plays a very proactive role. Underlying both the CBQ and U.S. minority promotion efforts is the goal of integrating an excluded group into corporate management. The ladder critique’s conclusions pose two questions for the CBQ: how do minority and gender representation interact in the CBQ’s context, and do the CBQ’s goals suffer from the same ladder critique of minority inclusion in corporate power?

The ladder critique challenges the CBQ’s goal of gender integration in the corporate context, as both race and gender diversity efforts confront limitations. Women corporate leaders face the dilemma of performing masculinity, just as minorities confront performing whiteness. Those women who attain positions at the top of the ladder fail to bring other women with them. While tasked to empower diversity efforts, these women also must take risks to combat stereotypical images of underperformance. One image comes to mind: former Hewlett-Packard Chief Executive Officer Carly Fiorina’s much-heralded rise led to a precipitous fall as the risks she took failed to become successes.\textsuperscript{94} This example demonstrates the ladder critique’s relevance to gender equality concerns.

In Norway, class and gender issues form the core of inequality efforts. Mandated union representation on corporate boards prior to the CBQ’s

\textsuperscript{88} Id. at 1654.
\textsuperscript{89} Id. at 1654–55.
\textsuperscript{90} The authors use the term "nonwhite" interchangeably with the term "minority."
\textsuperscript{91} Carbado & Gulati, supra note 81, at 1673.
\textsuperscript{92} Id. at 1675–77.
\textsuperscript{93} Id. at 1690–92.
\textsuperscript{94} See Joe Nocera, Carly Fiorina’s Revisionist Chronicles, N.Y. Times, Oct. 14, 2006, at Cl (discussing former Chief Executive Officer Carly Fiorina’s firing from Hewlett-Packard).
passage reflects an ongoing attempt to insert equality into corporate leadership. Such efforts reflect Norway’s wealth and relative homogeneity. Multiethnic societies have different forms of inequities and related efforts for racial, ethnic, and caste inclusion. Such complex contexts may lead to competing claims for group remedies.

The Supreme Court did not address such competing claims in Loving. Rather, Loving reflects a norm of antidiscrimination that rejected race restrictions on fundamental rights. Affirmative action and the ladder critique fall on the other side of the colorblind/race-conscious divide. The complex relationship among racialized individuals surfaces in the race-conscious analysis of Carbado and Gulati. They emphasize the point that whites benefit from disidentified minorities, thus undermining diversity efforts even as minorities join predominantly white firms in greater numbers. This phenomenon exposes the immediacy of moving beyond a solely colorblind model toward one that incorporates the often contradictory implications of race-related efforts.

B. The CBQ as a Ladder to Power

Although the CBQ’s efficacy will reveal itself over time, several components compare favorably with the remedies Carbado and Gulati criticize. First, the CBQ requires a far higher level of participation by each gender than that envisioned in most affirmative action schemes. A substantial presence of a minority group, whether people of color or women, may exert more power than token individuals would. Tokenism, explored by Professor Lani Guinier for blacks in the voting rights context and by Branson for women in the corporate board context, exposes the limited utility and even futility of minor levels of minority representation.

First, later generations of voting rights litigation attempted to empower minorities in legislatures through the Voting Rights Act. After the Voting Rights Act led to the election of blacks in many districts, these representatives still played a token role in the exercise of political power. As part of a small minority, several legislators of color still were marginalized from the power center. As Guinier has argued, the complex dynamics of political power leave small excluded groups in an unenviably weak position.

Likewise, the presence of a few women on corporate boards may leave them as a token female presence. Branson examines this context, and his results reflect several parallels with Guinier’s discussion of black political representatives in overwhelmingly white legislatures. Branson analyzes the

---

96. See Branson, supra note 82.
98. See Guinier, supra note 95.
social behavior of the majority when a single minority individual enters the
homogenous fold. Her token status draws jokes and criticism. Tokens face other pressures: speaking for “all women” or attracting notice for “female status” rather than for achievements. The token must balance drawing attention to her accomplishments with the risk of showing up her male peers. A token may go so far as allowing the dominant group to apply a nonthreatening stereotype to her, such as the mother role. In addition, this token treatment taxes the individual’s mental and physical health, costing productivity, further reducing advancement potential.

As additional minority members arrive, the majority circles as it perceives an increased threat, heightening the severity of the ridicule. The token’s presence not only causes unwanted focus on her actions, but tends to strengthen the bonds and commonality among the dominant male group, a phenomenon Branson labels as “boundary heightening.” In response and to garner the approval of the dominant group, women may actually turn against other women to disassociate themselves from the “typical woman” label, a point that echoes a similar observation by Carbado and Gulati.

As a result, the minority member will not rise beyond the intermediate levels, which explains why corporations promote fewer women to senior management positions. Senior executives form the pool for board positions, reducing numbers still further. In light of these results, corporations may try to eliminate tokenism by increasing the critical mass of women. Quotas are the most direct way to achieve this change. Tokenism exposes a political as well as a social problem in the integration of minority individuals into largely homogenous institutional settings. Without increasing women’s numbers beyond a token level, it is difficult to conclude that progress has been made in improving gender diversity. Change will come if all corporations adopt provisions that conform to a high level of gender balance. Without them, corporate boards will struggle with inclusion issues.

100. Id.
101. Id. at 113–14.
102. Id. at 114.
103. Id. at 119. When the token allows herself to be encapsulated in a role, she may feel comfort in filling it, but the stereotype may delay or limit her ability to achieve promotions and recognition. Id. See generally Rosabeth Moss Kanter, Men and Women of the Corporation (1977).
105. Branson, supra note 82, at 121–23.
106. Id. at 117–18.
107. Id. at 118–21.
108. Id. at 110.
109. Id.
110. Id.
The work of both Guinier and Branson reflect that differences grow more prominent when a minority reaches higher levels of representation. This difference reflects the potential for identity differentiation when minorities occupy substantial numbers, a potential lacking in the Carbado and Gulati study. When meaningful numbers of participants shift, this will have a pronounced effect on enabling minorities, whether women or people of color, to enter corporate or legislative institutions.

The CBQ surmounts the token problem of minority isolation with its forty percent floor. This substantial presence also creates the potential for overcoming cultural bias, whether that bias is whiteness (in Carbado and Gulati) or maleness (in the CBQ). The hazard of this substantial presence argument, as antiessentialists will point out, is the reliance on cultural feminism. Cultural feminists believe in core differences between men and women. Antiessentialists reject this assertion, perceiving the reality that any one woman can easily fail to reflect these “feminine” cultural norms. This quota conundrum raises the undeniable reality that any one woman is not necessarily better at representing women in general than any one man. Margaret Thatcher comes to mind not only for her general conservatism, but also for her efforts to deepen her voice during her first campaign for prime minister. Women in any position of power, whether political or corporate, may succeed through the adoption of certain typically masculine traits. This phenomenon mirrors Carbado and Gulati’s picture of successful minority corporate managers performing whiteness. While one woman may not suffice, the presence of a large number of women would represent more gender diversity than the current set of tokens surrounded by male corporate chieftains.

Some who support affirmative action bristle at “harder” identity remedies such as quotas for their heightened identitarianism. Even among those who generally support group inequality remedies, the essentialism of the CBQ and other women’s representation quotas arouse substantial resistance and discomfort, in part due to the danger of essentializing group identity. Antiessentialist and antisubordination analyses reveal core challenges for any race-conscious or gender-conscious remedies, especially considering their occasional perverse effects.

Gender diversity affects corporate decision making. Beyond breaching the masculine homogeneity of the board, gender-based differences in communication and teamwork may create new problem-solving

---

111. See generally Guinier, supra note 95.
112. Also known as “different voice feminism” and “cultural feminism,” relational feminism gained popularity in the early 1980s for its radical departure from liberal feminist theory and its controversial claims regarding women’s “true nature.” Originating at least in part with psychologist Carol Gilligan’s book In a Different Voice, relational feminism posits that women are fundamentally and materially different from men. Robin West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1, 14 (1988); see also Leslie Bender, From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law, 15 Vt. L. Rev. 1, 20 (1990) (“Gilligan’s work . . . can fairly be characterized as an archetypical manifestation of difference theory.”). Cultural feminists contend that women
techniques. Some argue that women solve moral dilemmas with different standards and approaches than men, or even that women are more effective negotiators. It is true that, as Carbado and Gulati articulate in the race context, the women who attain power in the private or public sector may continue to reflect the norms established by a masculinized power structure. Even if the individual women benefiting from the quota were not actively, or even passively, seeking to diversify the gendered power structure, their significant collective presence would foster more freedom of promotion and better decision making for the entire workforce.

Quotas might prove useful even if the least progressive women attain power through them—one could argue that they would still advance gender balance more than the patriarchal leftovers that occupy our corporations and government. Flipping the male/female binary toward a more balanced power relationship would entail undermining entrenched subordinations including those of gender inequality. The ladder critique reflects the continuing struggle to define a race-conscious understanding of remedies for group inequality. Both the substantial presence and state-driven efforts of the CBQ carry some potential to surpass the stalled affirmative action efforts Carbado and Gulati criticize.

IV. CONCLUSION: FRAME SHIFTING FOR LOVING'S FUTURE

Loving is, regardless of one's position on group inequality debates, a crucial case. It spawned rich and contentious debates over the relationship between colorblindness and race-consciousness in antidiscrimination law. Framing Loving's blind/conscious debate in the context of comparative gender equality efforts exposes the extent to which it influences a multitude of equality efforts.

Loving's legacy gains richness and revived analytic purchase through a set of border crossings. Nationality and identity each serve as a frame to place atop the core theoretical dilemma of blindness and consciousness in equality remedies. These dialectics of gender/race redistributive remedies traverse identity and nationality lines. Scholars intending to understand identity-based inequality remedies would benefit from the breadth offered by such crossings.

Shifting frames of identity and nationality inspires a reconsideration of the ambivalent relationship between group inequality remedies and identity of any form. In each of these contexts, efficacy confronts the ambivalence of the subordinate group in realizing envisioned rights and equitable redistributions. Examples include the French electorate's preference for male candidates and women's lower interest in sports, and what might be responsible for responding to life's problems with an ethic of care (rather than the masculine ethic of justice), which is characterized by such traditionally "female values" as love, compassion, and selflessness. See Bender, supra, at 19–20.

understood as low interest among women in corporate board positions. These points affirm the findings of Gulati and Carbado, that the disenfranchised have tenuous and even ambivalent relationships with exclusionary institutions, whether governmental (as in Parity and Voting Rights Act remedies), corporate (as in the CBQ and affirmative action), or civic (Title IX). Janet Halley, in encouraging a “break” from feminism, attempts to look beyond identity politics. Recognizing complexity in executing identity-based remedies opens the door to asking more challenging questions. What would inequality remedies look like without reference to particular group identity? Given the proliferation of intersections, along with incessant border-crossings, posing such questions acquires additional urgency. Loving’s legacy going forward demands incorporating richer understandings of human interaction, forging as well as blurring the frontiers of both universalist and difference-conscious remedies.

---

114. See Halley, supra note 77.