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## Sex Quotas and Burkini Bans

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# Sex Quotas and Burkini Bans

Darren Rosenblum\*

*This Essay recounts how feminist theorists and activists managed to write their ideals into the fabric of French law and culture, and how nonfeminists began to appropriate those ideals. Parité, the 2000 law that requires half of all candidates for public office be women, saw French feminists first engineer a change in French universalism to respect sex difference; although not wholly successful, Parité advanced women's political inclusion. Then, like a drop of water in a pond, these feminist ideas disappeared in plain sight: they became intrinsic to French state norms and public values. As they became woven into such norms, however, politicians began to use them to promote exclusions: first excluding Muslims from full participation in the Republic with veil and burqa bans, then supporting exclusions of sex and class with a corporate board quota (CBQ). Most recently, feminist ideas have been called upon to exclude French Muslims with proposed burkini bans.*

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## I. INTRODUCTION

This Essay recounts how feminist theorists and activists managed to write their ideals into the fabric of French law and culture, and how nonfeminists began to appropriate those ideals to advance exclusions of Muslims.

The 1789 *Déclaration des droits de l'homme et du citoyen* (Declaration of the Rights of Man and of the Citizen) defines all

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citizens as equal under the law. Soon after the bicentennial of the *Déclaration des droits de l'homme* in 1989, feminists began an organized push to improve women's political representation through a quota.<sup>1</sup> In 2000, France adopted *Parité*, a law that requires that half of all candidates for public office be women.<sup>2</sup> For *Parité* to succeed, it had to account for the values of *universalisme*, which bars quotas that differentiate among citizens.<sup>3</sup> Feminists argued that since this *universel* was dual—male and female—*Parité* would justly give women half of the power of the body politic. *Parité*'s passage transformed feminist interest in sex difference and women's equality into a core *valeur républicaine*.

Then, like a drop of water in a pond, these feminist ideas disappeared in plain sight: they became intrinsic to French state norms and public values. As they became woven into state norms, however, politicians began to use them to promote exclusions. The feminism of *Parité* flipped from including women to excluding French citizens who were not *franco-français*.<sup>4</sup> Protecting women became a goal, justifying the Republic's chivalrous, even paternalistic, response to Muslim customs. French leaders embraced feminism as a way to defend the country against Islamic fundamentalism with bans on veils in public schools in 2004 and burqas in 2011.<sup>5</sup> Immediately

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1. FRANÇOISE GASPARD ET AL., *AU POUVOIR, CITOYENNES! LIBERTÉ, ÉGALITÉ, PARITÉ* 20-40 (1992). Under the universalist doctrine, all should be treated equally, without regard to membership in a particular group. All citizens universally benefit from this equal level of treatment. See *DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN DE 1789* [DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN OF 1789] art. VI (Fr.).

2. Loi 2000-493 du 6 juin 2000 tendant à favoriser l'égal accès des femmes et des hommes aux mandats électoraux et fonctions électives [Law 2000-493 of June 6, 2000 to promote equal access of women and men to electoral mandates and elective functions], *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE* [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 7, 2000, p. 8560.

3. See, e.g., Conseil constitutionnel [CC] [Constitutional Court] decision No. 82-146DC, Nov. 18, 1982, J.O. 3475 (noting that two of France's founding principles—article 3 of the Constitution of 1958 and article 6 of the 1789 Declaration of the Rights of Man and of the Citizen—oppose the categorization and division of citizens).

4. See, e.g., Steven Erlanger, *France Enforces Ban on Full-Face Veils in Public*, N.Y. TIMES (Apr. 11, 2011), <http://www.nytimes.com/2011/04/12/world/europe/12france.html> (discussing France's ban of veils in public places and how proponents of the law rely on the preservation of French culture and "the liberty and equality of women" for support).

5. Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 prohibiting the concealment of the face in the public space], J.O., Oct. 12, 2010, p. 18,344 (passed in 2010 and effective in 2011); Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law 2004-228 of March 15, 2004 concerning, as an application of the

after he engineered the 2011 burqa ban, conservative leader Jean-François Copé and his colleague Marie-Jo Zimmermann led the push for a corporate board quota.<sup>6</sup> With passage and implementation of the CBQ, feminism made a complete transformation, from marginal leftist theory to elite conservative discourse. Conservative Copé exploited feminist justifications for advancing women's corporate equality while true *Parité* feminists remained uninvolved.<sup>7</sup>

Most recently, feminist ideas have been called upon to exclude French Muslims with proposed burkini bans. From 2014 to 2016, feminist rhetoric resurfaced again as municipalities across southern France banned the "burkini," a modest, full-coverage bathing suit.<sup>8</sup> Particularly after the 2016 Bastille Day terrorist attack,<sup>9</sup> debate over how women dress themselves became a central component of the French state's response to terrorism. The Conseil d'État struck down burkini bans;<sup>10</sup> nevertheless, feminist arguments that promoted those bans helped further nationalist depictions of the Republic.

Through its four parts—respectively on *Parité*, the veil/burqa bans, the CBQ, and burkini bans—this Essay will show that the feminist push for women's inclusion came to play a role in deepening religious exclusions.

## II. *PARITÉ*: FEMINISM ENTERS THE STATE

In the late nineteenth century, Hubertine Auclert, a French suffragist, wrote that women should have half the seats in the

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principle of the separation of church and state, the wearing of symbols or garb that show religious affiliation in public primary and secondary schools], J.O., Mar. 17, 2004, p. 5190.

6. Quotas for women epitomize how feminism has come to exercise influence over states, and nowhere is this truer than in France. After *Parité* mandated equal numbers of female and male political candidates, the CBQ required sex diversity in boardrooms. Here, conservatives became content to deploy feminist arguments to force women's inclusion into the corporate board context.

7. Copé was depicted as an opportunist by a political opponent during the debates on the CBQ. Margaux Collet, *Danielle Bousquet: "Des forces conservatrices bloquent les avancées des droits des femmes,"* LIBERATION (Mar. 8, 2010, 6:29 PM), [http://www.liberation.fr/societe/2010/03/08/danielle-bousquet-des-forces-conservatrices-bloquent-les-avancees-des-droits-des-femmes\\_613990](http://www.liberation.fr/societe/2010/03/08/danielle-bousquet-des-forces-conservatrices-bloquent-les-avancees-des-droits-des-femmes_613990).

8. Amanda Taub, *France's 'Burkini' Bans Are About More Than Religion or Clothing*, N.Y. TIMES (Aug. 18, 2016), <https://nyti.ms/2blJXHp>.

9. Alissa J. Rubin et al., *Scores Die in Nice, France, as Truck Plows into Bastille Day Crowd*, N.Y. TIMES (July 14, 2016), <https://nyti.ms/2a22JY7>.

10. Conseil d'État [CE] [Council of State], Aug. 26, 2016, 402742. The Council of State acts as a supreme court of administrative justice, which reviews laws. CONSEIL D'ÉTAT, <http://english.conseil-etat.fr/> (last visited Nov. 5, 2017).

Assembly.<sup>11</sup> Nearly a century later, France experienced a powerful women's movement in the 1960s, much like the one happening in the concurrent second wave of feminism in the United States. In 1980, the first proposed sex quota included 20% of candidates in elections in towns of more than 2500.<sup>12</sup> A subsequent 25% version was passed by the National Assembly, but the Constitutional Council rejected it in 1982 as violating the indivisibility of the sovereign nation, an idea linked to universalism.<sup>13</sup> Universalism had blocked the first effort.<sup>14</sup> Enshrined in the 1789 *Déclaration des droits de l'homme et du citoyen*, universalism—a radical eighteenth century Enlightenment response to monarchy—meant that the state would consider each citizen as completely equal.<sup>15</sup>

In the 1990s, feminists reimagined the quota as *Parité* to survive consideration by the Constitutional Council.<sup>16</sup> This new approach required that half of all political candidates be women, although the legislature reserved no seats for women.<sup>17</sup> Women were half of humanity (*l'homme* in the sense of humankind) and so needed to be particularly included in the universal. The universal remained unchanged: it was still the ideal, now including rather than excluding women. *Parité* in this sense did not constitute minority representation, which would be impermissible under universalism. This dual universal became a public norm that even opponents had to embrace, in word if not by deed.<sup>18</sup>

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11. HUBERTINE AUCLERT, LA CITOYENNE: ARTICLES DE 1881 A 1891, at 52 (1982).

12. GILL ALLWOOD & KHURSHED WADIA, WOMEN AND POLITICS IN FRANCE 1958-2000, at 192 (2000). For an in-depth exploration of *Parité*, see ÉLEONORE LEPINARD, L'ÉGALITÉ INTROUVABLE: LA PARITÉ, LES FÉMINISTES ET LA RÉPUBLIQUE (2007).

13. CC No. 82-146DC, Nov. 18, 1982, J.O. 3475. The Conseil based its decision on article 3 of the 1958 Constitution and article 6 of the 1789 Declaration. *Id.* One member of the Conseil noted that "a text that reserved a certain proportion of places for women . . . without doing the same for men . . . would be contrary to the principle of equality." Georges Vedel, *Les 20% de femmes et la Constitution*, LE MONDE (Mar. 2, 1979), [http://www.lemonde.fr/archives/article/1979/02/03/les-20-de-femmes-et-la-constitution\\_2790260\\_1819218.html](http://www.lemonde.fr/archives/article/1979/02/03/les-20-de-femmes-et-la-constitution_2790260_1819218.html) (author's translation).

14. ALLWOOD & WADIA, *supra* note 12, at 206-07, 211.

15. William Bristow, *Enlightenment*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY 21-23 (Edward N. Zalta et al. eds., 2017), <https://plato.stanford.edu/archives/fall2017/entries/enlightenment/>; see also CLAUDE DU GRANRUT, ALLEZ LES FEMMES! LA PARITÉ EN POLITIQUE 34 (2002); GASPARD ET AL., *supra* note 1, at 51 (providing an example of how, when universalist ideals are upheld, groups such as women dramatically increase their position and presence in areas and activities from which they were previously shunned).

16. GRANRUT, *supra* note 15, at 30-32.

17. ALLWOOD & WADIA, *supra* note 12, at 206-07.

18. Conservative President Jacques Chirac expressed support for parity, but his center-right coalition ran less than 20% female candidates during the elections of 2002. See

Feminists made a concerted political effort to enact *Parité* as law.<sup>19</sup> Their deft strategizing targeted both the French intelligentsia and popular opinion. To skirt the anti-quota taboo in France, Françoise Gaspard—a former Socialist member of the National Assembly, its first openly lesbian member, and an intellectual and political leader of the *Parité* movement—argued that since women were not a minority, *Parité* was not a quota: “distingue du quota par sa philosophie même.”<sup>20</sup> The 85% male legislature agreed. Across party lines, it revised the Constitution in 1999 and passed the law in 2000, ensuring “equal access of women and men to electoral office and elected functions.”<sup>21</sup>

*Parité* did not realize advocates’ dreams of a rapid increase in women’s representation—women currently only constitute 38.6% of the National Assembly—but it did institutionalize the feminist goal of women’s equality elsewhere in the state and guarantee their place at the table.<sup>22</sup> Through *Parité*, feminism became a central yet adaptable

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Garance Franke-Ruta, *Liberté, Égalité, Sororité*, LEGAL AFF. (Jan.-Feb. 2003), [http://www.legalaffairs.org/issues/January-February-2003/feature\\_ruta\\_janfeb2003.msp](http://www.legalaffairs.org/issues/January-February-2003/feature_ruta_janfeb2003.msp).

19. See Laure Bereni et al., *Entre contrainte et ressource: les mouvements féministes face au droit*, 29 NOUVELLES QUESTIONS FÉMINISTES 6-7 (2010).

20. GASPARD ET AL., *supra* note 1, at 165; see also JOAN WALLACH SCOTT, *PARITÉ! SEXUAL EQUALITY AND THE CRISIS OF FRENCH UNIVERSALISM* (2005) (describing *Parité* as a universalist theory).

21. Loi 99-569 du 8 juillet 1999 relative à l’égalité entre les femmes et les hommes [Law 99-569 of July 8, 1999 on equality between women and men], J.O., July 9, 1999, p. 10,175. Enforcement mechanisms varied depending on the type of election. France’s semi-proportional system includes municipal, regional, European, and some senatorial elections that follow party lists, while others, notably National Assembly elections, require voters to select a particular candidate. *Id.*; see generally LÉPINARD, *supra* note 12 (discussing how *Parité* incentivizes equality of opportunity but not equality of results between men and women in politics). In list elections, prefectures would refuse to present nonconforming lists on the ballot. For executive posts and National Assembly seats, a party’s candidates overall must be half women and half men, and noncompliant parties accordingly lose funding. Loi 2000-493 du 6 juin 2000 tendant à favoriser l’égal accès des femmes et des hommes aux mandats électoraux et fonctions électives [Law 2000-493 of June 6, 2000 to promote equal access of women and men to electoral mandates and elective functions], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 7, 2000, art. XV.

22. Jemima Kelly, *France Elects Record Number of Women to Parliament*, REUTERS (June 18, 2017, 5:05 PM), <https://www.reuters.com/article/us-france-election-women/france-elects-record-number-of-women-to-parliament-idUSKBN19911E>. Any continued exclusion of women’s issues would be countered by the *Observatoire de la parité* and the *Délégation de l’Assemblée Nationale*, two governmental bodies that include several members of feminist associative networks, giving them the opportunity to be heard by the legislators. Laure Bereni, *Quand la mise à l’agenda ravive les mobilisations féministes. L’espace de la cause des femmes et la parité politique (1997-2000)*, 59 REVUE FRANÇAISE DE SCIENCE POLITIQUE 301, 315-16 (2009).

norm of the French state,<sup>23</sup> a norm open to racialized utilization.<sup>24</sup> Across party lines, leaders would soon find other uses for feminism's moral and political legitimacy.

### III. HOW FEMINISM EXCLUDES: THE VEIL AND BURQA BANS

Feminism, now an integral part of the state, came to play an exclusionary role with regard to Muslims, specifically Muslim women's bodies, first by restricting the veil in public schools, then by banning burqas in public places.<sup>25</sup> In 1989, that same bicentennial year that proved important for feminists, a public school in Creil expelled three girls for refusing to take off their headscarves.<sup>26</sup> SOS Racisme, France's most prominent anti-racism group, responded by arguing that veils should be allowed in public schools.<sup>27</sup> Gisèle

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23. Laure Bereni et al., *supra* note 19, at 11-12. As Laure Bereni argues, *Parité* saw "State feminism" take a central role in the French state. She notes that the mobilization of the movement during the 1990s permitted *Parité*'s claim to become part of the political agenda, and, in turn, the governmental and parliamentary instances of State feminism played an essential role in the consolidation of the reform. See Bereni, *supra* note 22, at 305-10, 314-21. *Parité* influenced the definition of the politics of State feminism, contributing to re-situate at the highest level of politics, all while furnishing a new grammar for the promotion of women's place in the professional sphere. Bereni, *supra* note 22, at 305-10, 314-21.

24. Etienne Balibar suggested this phenomenon: "there is a 'racist' utilization of feminism as there is a 'sexist' utilization of anti-racism." ÉTIENNE BALIBAR, *DES UNIVERSELS: ESSAIS ET CONFÉRENCES* 22 (2016).

25. Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 prohibiting the concealment of the face in the public space], J.O., Oct. 12, 2010, p. 18,344 (banning face coverings in public places); Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law 2004-228 of March 15, 2004 concerning, as an application of the principle of the separation of church and state, the wearing of symbols or garb that show religious affiliation in public primary and secondary schools], J.O., Mar. 17, 2004, p. 5190 (banning religious symbols in public schools); see also RÉGIS DEBRAY, *CE QUE NOUS VOILE LE VOILE: LA RÉPUBLIQUE ET LE SACRÉ* (2004) (commenting on Law 2004-228). The law only requires for large religious symbols to be banned from schools, but persons can still feel free to wear religious symbols in all other public places. Students may also continue to express their views through writings and free speech while at school. *Id.* at 22. However lofty the goals of French universalism, and of *Parité* in including women, minority women's identities are erased by this universalism that recognizes gender but ignores race. Minority women, as a consequence, may only find their political voice as culturally neutral (read "French") women, their racial and ethnic identity rendered invisible.

26. Youssef M. Ibrahim, *Arab Girls' Veils at Issue in France*, N.Y. TIMES (Nov. 12, 1989), <http://www.nytimes.com/1989/11/12/world/arab-girls-veils-at-issue-in-france.html>.

27. *Id.*

Halimi, soon to be a vocal *Parité* advocate, responded by quitting the group on television.<sup>28</sup>

Efforts to ban Islamic veils in public schools gathered steam after the U.S. terrorist attacks in 2001. *Parité*'s passage made women more visible, including female Muslims. This visibility brought wider attention to their attire, the modesty of which was not culturally French (*franco-français*).<sup>29</sup> Public schools provided the perfect site for regulation. There, "the students are not users like others, but minors in full learning of citizenship who attend a 'privileged site of the acquisition and learning of our common values, [and] an excellent instrument to ground the republican idea.'"<sup>30</sup>

Muslim women aroused a paternalist instinct in the still largely male political leadership: to *protect* women and girls from their men, their religion, and its "archaic" practices, leaders interpreted France's republican values, its *valeurs républicaines*, to *exclude* Muslim women's dress.<sup>31</sup>

Secularism has held powerful sway in the French Republic since the anti-clerical fervor of the French Revolution stripped the French state of Catholicism and even denuded many cathedrals of their religious statuary.<sup>32</sup> Enacted in the early twentieth century, the *Laïcité* statute established France as a strictly nonreligious republic and reflected the norms of gender exclusion.<sup>33</sup> France's policy actually

28. In 1989, Halimi supported the "dignity of woman," arguing that "the veil is a sign of submission" and an attack on *laïcité*. *Gisèle Halimi sur le port du voile à l'école* (France 3 television broadcast Nov. 2, 1989), <http://fresques.ina.fr/elles-centrepompidou/fiche-media/ArtFem00115/gisele-halimi-sur-le-port-du-voile-a-l-ecole.html>; see also Anne Chemin, *Burkini: au nom de quoi peut-on limiter la liberté vestimentaire des femmes?*, LE MONDE (Sept. 1, 2016, 12:34 PM), [http://www.lemonde.fr/idees/article/2016/09/01/le-burkini-une-question-de-principes\\_4991040\\_3232.html](http://www.lemonde.fr/idees/article/2016/09/01/le-burkini-une-question-de-principes_4991040_3232.html) (quoting the French argument before the European Court of Human Rights in the case challenging the veil ban).

29. *Franco-français* means not just French but francocentric. See Definition of *franco-français*, REVERSO DICTIONARY, <http://dictionary.reverso.net/french-definition/franco-fran%C3%A7ais> (last visited Nov. 5, 2017).

30. Chemin, *supra* note 28.

31. See, e.g., Europe 1, Laurence Rossignol dénonce le burkini, "profondément archaïque," YOUTUBE (Aug. 15, 2016), <https://www.youtube.com/watch?v=tpC6YYzMa0w>.

32. John McManners, *The Revolution and Its Antecedents*, in FRANCE: GOVERNMENT AND SOCIETY 161 (J.M. Wallace-Hadrill & John McManners eds., 1970); JONATHAN LAURENCE, BROOKINGS INSTITUTION, U.S.-FRANCE ANALYSIS SERIES: THE NEW FRENCH MINORITY POLITICS 1 (2003), <https://www.brookings.edu/wp-content/uploads/2016/06/laurence.pdf>.

33. The law that established *laïcité* was Loi du 9 décembre 1905 concernant la séparation des Eglises et de l'Etat. The veil ban shifted the interpretation of *laïcité* from barring institutional recognition to bar individual expression as well. Chemin, *supra* note 28 (quoting Stephanie Hennette Vauchez). For an expert study of the transformation of *laïcité* in



bars any official recordkeeping of racial and ethnic data and generally resists any “positive” or affirmative action to integrate Muslim immigrants.<sup>34</sup> Even so, France’s diversity is not new: prior to the twentieth century, many Protestants and Jews considered themselves French citizens. After the Vichy collaboration of World War II and the various colonies’ independence movements, France became a *de facto* multicultural society due to mass labor immigration from its colonies, especially those of North Africa.<sup>35</sup> Unlike nominally Catholic but often-atheist *franco-français* people,<sup>36</sup> Muslims tend to be more devout. They constitute France’s second-largest religious and primary ethnic minority.<sup>37</sup> This minority faces exclusion: “Narrowly linked to the exclusionary and racial conception of citizenship, *laïcité* did not respect its claimed trait of universalism.”<sup>38</sup>

Feminists who fought for *Parité* in the 1990s surely could not have anticipated France’s increasing Islamophobia in the post-9/11 context. Several prominent feminists such as Élisabeth Badinter and Gisèle Halimi, along with groups such as *Ni Putes Ni Soumises*, acted to promote the headscarf law’s exclusions as an advance in women’s emancipation.<sup>39</sup> Veil-ban supporters used feminist arguments to assert

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the twenty-first century, see STÉPHANIE HENNETTE VAUCHEZ & VINCENT VALENTIN, *L’AFFAIRE DU BABY LOUP OU LA NOUVELLE LAÏCITÉ* (2014). Based on *laïcité*, France even barred the collection of any data about race or ethnicity, due to past abuses in collecting ethnic data by government officials. T. Jeremy Gunn, *Religious Freedom and Laïcité: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 428 (2004); Michel Troper, *French Secularism, or Laïcité*, 21 CARDOZO L. REV. 1267, 1267 (2000); Jonathan Laurence, *Islam in France*, BROOKINGS INSTITUTION (Dec. 1, 2001), <https://www.brookings.edu/articles/islam-in-france/>; Laurence, *supra* note 32, at 2. France’s *laïcité* historically followed a norm that excluded sex equality. Florence Rochefort, *Ambivalences laïques et critiques féministes*, in *LE POUVOIR DU GENRE: LAÏCITES ET RELIGIONS 1905-2005*, at 65 (2007).

34. LAURENCE, *supra* note 32, at 2.

35. *Id.* at 1-2.

36. See Sylvie Kauffmann, Opinion, *God Is Back—in France*, N.Y. TIMES (Jan. 26, 2017), <https://nyti.ms/2kw8ei0> (citing polls finding that while 55% of French citizens identify as Catholic, only 5% to 8% go to church regularly).

37. JONATHAN LAURENCE & JUSTIN VAISSE, *INTEGRATING ISLAM: POLITICAL AND RELIGIOUS CHALLENGES IN CONTEMPORARY FRANCE* 15 (2006). However, estimates of minority and religious groups in France vary widely because the state is prohibited from collecting data on individuals’ religious beliefs or ethnicity. *Id.* at 17-20.

38. Florence Rochefort, *Introduction* to *LE POUVOIR DU GENRE: LAÏCITES ET RELIGIONS 1905-2005*, at 9, 20 (2007) (author’s translation) (italics added).

39. Françoise Gaspard, *Le Foulard de la Dispute*, 1 CAHIERS DU GENRE (HORS-SERIE) 75, 86-87 (2006). Supporters of the veil ban include Gisèle Halimi, Élisabeth Badinter, the group *Ni Putes Ni Soumises* (Neither Sluts nor Submissives), and the weekly magazine, *Elle*. *Id.* at 87; see also MAYANTHI L. FERNANDO, *THE REPUBLIC UNSETTLED: MUSLIM FRENCH AND THE CONTRADICTIONS OF SECULARISM* 175-78 (2014) (discussing Halimi and others’ arguments for supporting the ban).

that the state should protect Muslim women and girls from their religion and from their men. The same universalism that *Parité* had adapted to *include* women now functioned here to *exclude* others, notably due to ethnic and religious differences.<sup>40</sup> One veil ban advocate went so far as to warn that veil-wearing would invite the installation of an Islamic state in France.<sup>41</sup>

Notably, Françoise Gaspard, who had crafted and executed the *Parité* idea, opposed the veil ban, stating that the ban would only encourage its use.<sup>42</sup> For her, the duality of the French republic with regard to sex still invited a pluralist recognition of other differences, rather than exclusion of minorities.<sup>43</sup> Indeed, she referred to the pro-ban feminism as having a “*caractère liberticide*.”<sup>44</sup>

Advocates were mindful of the need to present the ban as neutral lest it be considered a relic of France’s colonialism. The law encompassed more religious symbols—large crosses and yarmulkes—although none were as prevalent as the veil.<sup>45</sup> Such denials of “exception” only proved the contrary—everyone knew that the law’s intent was to control the wearing of the veil.

In 2004, the National Assembly passed the ban, with an exception for small symbols.<sup>46</sup> The Conseil d’État ratified the law. While the wearing of large religious items in public schools did not necessarily violate *laïcité*, the items might “constitute an act of

40. Joan Scott linked French feminist adaptation of universalism with anti-immigrant sentiment. Joan Wallach Scott, *French Universalism in the Nineties*, 15 DIFFERENCES 32, 37-40 (2004).

41. Catherine Coroller, *Voile, l’heure des témoins*, LIBERATION (Nov. 19, 2003, 1:57 AM), [http://liberation.fr/grand-angle/2003/11/19/voile-l-heure-des-temoines\\_45237](http://liberation.fr/grand-angle/2003/11/19/voile-l-heure-des-temoines_45237) (quoting Fadela Amara, President of *Ni Putes Ni Soumises*).

42. FRANÇOISE GASPARD & FARHAD KHOSROKHAVAR, *LE FOULARD ET LA REPUBLIQUE* 55 (1995).

43. Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L. REV. 1119, 1162-63 (2006).

44. The feminism she described had a liberty-killing trait. Gaspard, *supra* note 39, at 87.

45. Elisabeth Roudinesco, *Le foulard à l’école, étouffoir de l’altérité*, LIBERATION (May 27, 2003, 11:09 PM), [http://www.liberation.fr/tribune/2003/05/27/le-foulard-a-l-ecole-etouffoir-de-l-alterite\\_434944](http://www.liberation.fr/tribune/2003/05/27/le-foulard-a-l-ecole-etouffoir-de-l-alterite_434944).

46. Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law 2004-228 of March 15, 2004 concerning, as an application of the principle of the separation of church and state, the wearing of symbols or garb that show religious affiliation in public primary and secondary schools], J.O., Mar. 17, 2004, p. 5190; *see also* DEBRAY, *supra* note 25, at 22 (contending that a ban on burqas is not an interdiction on the practice of Islam, but a preservation of secularism and respect for the public by limiting the penetration of such large religious symbols to political life).

pressure, provocation, proselytism, or propaganda” toward other students or the school.<sup>47</sup> The veil ban transformed *laïcité* from established neutrality toward an aggressive exclusion of overt religious expression.<sup>48</sup> This *nouvelle laïcité*, as Stéphanie Hennette Vauchez calls it, “limits not only the action of the state but also the liberty of individuals.”<sup>49</sup> With this change, *laïcité* went from a right to freedom from religious inequality to a duty to restrict. In feminist terms, Gaspard’s pluralist feminism lost while Halimi’s *liberticide* feminism won. Nonfeminist leaders took notice.

In 2009, National Assembly member Jean-François Copé began an effort to ban burqas. Burqas were “[une] bless[ure] pour la dignité de la femme,” an injury to the dignity of woman as an ideal, not “des femmes”—of women as a group.<sup>50</sup> France needed protection, Copé argued, from people who were “instrumentalizing religion” to disregard French *fraternité*, in which one’s face forms a civic presence.<sup>51</sup>

Feminist framings of the burqa debate proved useful for nonfeminists. Then-President Nicolas Sarkozy’s support persuaded some. He stated that

The issue with the burqa is not a religious one. It is an issue of the liberty and dignity of woman. The burqa is a sign of enslavement; it is a sign of abasement . . . . We cannot accept in our country that women would be prisoners behind a gate, cut from all social life, deprived of all identity. It is not the idea that we have of the dignity of woman.<sup>52</sup>

While Sarkozy focused on the dignity of women, Copé situated women as part of an idealized heteronormative life: “A trait of our civilization, one of the French singularities, is the exaltation of the art

47. Elisa T. Beller, *The Headscarf Affair: The Conseil d’État on the Role of Religion and Culture in French Society*, 39 TEX. INT’L L.J. 581, 611 (2004). Although arguments were made that this law violates individual religious freedom, the National Assembly determined that banning large religious symbols in public schools fostered the educational purpose of the school by promoting equality instead of religious division. Guy Coq, *Port du voile: un statu quo inacceptable*, LE FIGARO, Nov. 1, 2003, at 10.

48. See *supra* text accompanying note 33.

49. VAUCHEZ & VALENTIN, *supra* note 33, at 29-30.

50. Jean-François Copé, *La burqa n’est pas une exigence coranique*, SLATE (Fr.) (July 4, 2009), <http://www.slate.fr/story/7621/burqa-copé> (author’s translation).

51. Jean-François Copé, Opinion, *Tearing Away the Veil*, N.Y. TIMES (May 4, 2010), <http://www.nytimes.com/2010/05/05/opinion/05cope.html>.

52. Stéphanie Le Bars, *Pour Nicolas Sarkozy, “ce n’est pas un problème religieux,”* LE MONDE (June 23, 2009, 2:20 PM), [http://www.lemonde.fr/societe/article/2009/06/23/pour-nicolas-sarkozy-ce-n-est-pas-un-probleme-religieux\\_1210262\\_3224.html](http://www.lemonde.fr/societe/article/2009/06/23/pour-nicolas-sarkozy-ce-n-est-pas-un-probleme-religieux_1210262_3224.html) (author’s translation).

of living together, men and women.”<sup>53</sup> This *vivre ensemble* between men and women constituted “an inheritance of history, a trait of our identity.”<sup>54</sup> Copé, therefore, framed burqas as “walls of fabric” that upend the *vivre ensemble* of men and women.<sup>55</sup> Copé insisted that women’s faces must be exposed as part of their role in the *vivre ensemble* with men.<sup>56</sup> The heteronormativity of this *vivre ensemble*, if unintended by Copé, remains evident—it points to people relating across sexes, in what some might describe as a sexual market. The strong modesty of burqas violates this French ideal of the sexual nature of women’s (as well as men’s) visible faces and bodies. Actual feminists—like Halimi and many others—proved secondary in the law’s realization, even as they legitimized the opportunistic feminism of these prominent *hommes politiques*.<sup>57</sup>

Even so, the implicit heteronormativity of Copé’s *vivre ensemble* argument did not spring fully formed from his imagination. It recalls an entire strain of French feminism that emphasized heterosexuality, femininity, and how the erotics of sexual difference gave women power in society.<sup>58</sup> Other feminists, such as historian Mona Ouzouf and philosopher Élisabeth Badinter, focused on the *doux commerce* (passionate economy) between the sexes as a basis for feminism, a basis to oppose *Parité* as overly driven by equality in a way that submerged difference. “Muslims did not understand that open erotic play was integral to Frenchness,” therefore, these feminists questioned the inclusion of Muslim culture within the Republic.<sup>59</sup> For example, in an essay on chivalry, feminist Claude Habib insisted on French seduction as a bulwark against Islamism.<sup>60</sup>

Copé did not just allude to feminist theory—he explicitly included a nonbinding resolution in favor of respect for women’s

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53. Copé, *supra* note 50.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Voile intégral: Giséle Halimi pour une approche “graduée,”* LE POINT (Sept. 29, 2009, 7:09 PM), <http://www.lepoint.fr/actualites-societe/2009-09-29/voile-integral-gisele-halimi-pour-une-approche-graduee/920/0/381452>.

58. Joan Wallach Scott, Opinion, *Feminism? A Foreign Import*, N.Y. TIMES (May 20, 2011, 5:29 PM), <http://www.nytimes.com/roomfordebate/2011/05/18/are-french-women-more-tolerant/feminism-a-foreign-import>.

59. *Id.*

60. Eric Fassin, *L’après-DSK: pour une séduction féministe*, LE MONDE (June 29, 2011, 1:56 PM), [http://www.lemonde.fr/idees/article/2011/06/29/l-apres-dsk-pour-une-seduction-feministe\\_1542181\\_3232.html](http://www.lemonde.fr/idees/article/2011/06/29/l-apres-dsk-pour-une-seduction-feministe_1542181_3232.html).

rights.<sup>61</sup> His support for this provision, the burqa ban in general, and the soon-to-come CBQ, would garner support from some feminists as proof of his sincere commitment to women.<sup>62</sup> His burqa ban, derided at first as “inelegant,” passed in 2010.<sup>63</sup> The marriage of the fights against Islamic fundamentalism and for women’s rights was consummated.

Designer Hussein Chalayan exposed a logical fallacy in Copé’s argument that burqas remove sexual agency. Chalayan’s 1998 spring collection, which became a highlight of his 2011 solo exposition at the Musée des Arts Décoratifs, illustrated the complex meaning of veiling and voyeurism, and the power/vulnerability in both nudity and being entirely covered.

The collection continues to challenge both traditional Muslim mores against exposure and twenty-first-century French tendencies toward it.<sup>64</sup> Chalayan’s work foreshadowed how subsequent anti-

61. Article 1 of France’s Constitution was amended in 2008 to include a provision noting that the law would promote women and men having equal access to elected positions and professional responsibilities. Loi 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République [Constitutional Act 2008-724 of July 23, 2008 on the modernization of institutions of the Fifth Republic], J.O., June 24, 2008, p. 11,890. Copé voted in favor of the amendment. See *Séance du 21/07/2008: Scrutin public sur le projet de loi constitutionnelle de modernisation des institutions de la Ve République*, ASSEMBLEE NAT’L, <http://www.assemblee-nationale.fr/13/scrutins/jo9001.asp> (last visited Nov. 5, 2017) (listing who voted for the amendment).

62. In 2012, during the battle between François Fillon (France’s conservative Presidential candidate in the 2017 election) and Jean-François Copé for the presidency of the party (UMP), Michèle Tabarot, a female member of the National Assembly, published an op-ed (signed by numerous right-wing politicians and activists) explaining her support for Jean-François Copé. Her main argument was that Copé’s “actions in favor of women” were rooted in the Parity law and the CBQ. She also listed the burqa ban before concluding that she supported Copé for “his sincere commitment in favor of women” considering, *de facto*, the burqa ban as being a law in favor of women. Michèle Tabarot, *Pourquoi nous votons pour Jean-François Copé*, LE FIGARO (Sept. 30, 2012, 11:59 PM), <http://www.lefigaro.fr/mon-figaro/2012/09/30/10001-20120930ARTFIG00163-pourquoi-nous-votons-pour-jean-francois-cope.php>.

63. Copé, *supra* note 50.

64. At the time, the *New York Times* said: “Hussein Chalayan proved he possessed such power with his spring 1998 collection in England last season, a provocative exploration of Islamic women’s place in society using the chador as the fulcrum.” Constance C.R. White, *Hussein Chalayan’s High-Wire Act*, N.Y. TIMES (Apr. 21, 1998), <http://www.nytimes.com/1998/04/21/style/hussein-chalayan-s-high-wire-act.html>. The collection has drawn interest even many years later. See, e.g., Sarah Mower, *Hussein Chalayan Sent Fashion into the Stratosphere with His High-Concept ‘90s Shows*, VOGUE (Sept. 1, 2015, 2:00 AM), <http://www.vogue.com/13297724/hussein-chalayan-alexander-mcqueen-audrey-marnay/> (“[S]ome girls were naked from the waist down, the last completely nude save for a face covering. Most definitely no designer could attempt that now, but at the time Chalayan never meant to cause offense: ‘It was about how we define our territory culturally.’”); *Hussein Chalayan—Burka (1996)*, MISANTHROPE (Nov. 1, 2010), <http://ilikecatsmorethanpeople.blogspot.com/2010/11/>

burqa activists would use the language of feminism without actually engaging its ideals.

When opponents appealed the burqa ban to the European Court of Human Rights (ECHR), the Court rejected France's gender argument for the ban.<sup>65</sup> The ECHR responded skeptically, in part because some women embraced the practice, and a ban would hinder their personal freedom;<sup>66</sup> nonetheless, the Court upheld the ban, declaring that it was "not expressly based on the religious connotation of the clothing in question but solely on the fact that it conceals the face."<sup>67</sup> The focus of the ECHR was the effect on participating in or hiding from civic life.<sup>68</sup> It warned any state party to the ECHR to avoid stereotypes that foster intolerance.<sup>69</sup>

The veil and burqa bans exposed a previously unnoted paternalism beneath the universalist, republican mantle of the law: *women* needed inclusion *as* women in the polity. Copé redeployed *Parité's* logic with the new idea that women who—for ethnic or religious reasons—did not disappear into French *fraternité*, were being degraded, and needed rescue by the Republic.<sup>70</sup> Unenumerated Muslim minorities remained subject to both socio-economic exclusion *and* restrictions on their self-expression. These successful appropriations of originally progressive feminist arguments made those arguments available for later use by other French national and nationalist projects.

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hussein-chalayan-burka-1996.html. But see Gabriella Pounds, *Subverting the Avant-Garde: Nudity and Inferiority in Hussein Chalayan's Spring/Summer 1998 Collection*, COURTAULDIAN (Mar. 4, 2016), <http://www.courtauldian.com/single-post/2016/03/04/Subverting-The-Avant-Garde-Nudity-and-Inferiority-in-Hussein-Chalayan%E2%80%99s-SpringSummer-1998-Collection> (criticizing the show as "a deeply problematic attempt at reconstructing Muslim women's sartorial choices from a non-Muslim Western male perspective").

65. S.A.S. v. France, 2014-III Eur. Ct. H.R. 341, 370.

The Court takes the view . . . that a State Party cannot invoke gender equality in order to ban a practice that is defended by women—such as the applicant—in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms.

*Id.*

66. *Id.*

67. *Id.* at 379.

68. *Id.* at 380.

69. "[A] State which enters into a legislative process of this kind takes the risk of contributing to the consolidation of the stereotypes which affect certain categories of the population and of encouraging the expression of intolerance, when it has a duty, on the contrary, to promote tolerance." *Id.* at 379.

70. See Copé, *supra* note 51.

#### IV. THE CBQ

In 2003, as France implemented *Parité*, Norway enacted the world's first corporate board quota to remedy women's continued exclusion from corporate sector leadership.<sup>71</sup> Immediately after the 2009 ban on burqas, Marie-Jo Zimmermann, of the right-leaning Union pour un Mouvement Populaire (UMP), along with Copé proposed the CBQ to copy the Norwegian statute's 40% floor for either sex. The National Assembly passed the law in early 2011.<sup>72</sup> Although feminist arguments played a central role, they originated not from the feminist movement but from the conservative party to force *mixité* (sex diversity) into the corporate elite.<sup>73</sup> Unlike the left-driven campaign of *Parité*, conservatives drove the CBQ. As the veil and burqa bans demonstrated, these feminist arguments took on their own momentum without need for any self-identified feminist actor. This Part tells how France adopted the corporate quota and how its adoption further entrenched feminist inclusion through co-optation.

##### A. *State Feminism: The Adoption of the CBQ*

Following the success of Norway's quota, which saw near-absolute compliance by 2008, Zimmermann became interested in legislating corporate inclusion.<sup>74</sup> With women representing only 10%

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71. Oliver Staley, *You Know Those Quotas for Female Board Members in Europe? They're Working*, QUARTZ (May 3, 2016), <https://qz.com/674276/you-know-those-quotas-for-female-board-members-in-europe-they-re-working/>.

72. Loi 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle [Law 2011-103 of January 27, 2011 on the balanced representation of women and men on boards of directors and supervisory boards and professional equality], J.O., Jan. 28, 2011, p. 1680.

73. *Mixité* is a French term meaning sex diversity, but the "mixing" implies a mixing of the two sexes. The use of this distinct term reflects a central distinction drawn in the French context, even as diversity remains central in the United States. While *mixité* refers to a clear binary of male/female that is widely accepted in France, diversity carries a broader meaning in the United States.

74. Darren Rosenblum & Daria Roithmayr, *More Than a Woman: Insights into Corporate Governance After the French Sex Quota*, 48 IND. L. REV. 889, 890, 900 n.67 (2015). Women had achieved substantial levels of equality in most other sectors, and feminist activists such as Mari Teigen began to consider quotas as a way to balance the corporate sector. See, e.g., AAGOTH STORVIK & MARI TEIGEN, FRIEDRICH EBERT STIFTUNG, WOMEN ON BOARD: THE NORWEGIAN EXPERIENCE 4 (2010). Cultural biases and the binarist allocation of child rearing to females had left few women in the pool for corporate leaders, especially at the highest levels. See generally AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY (2015) (discussing the use of quotas in addressing diversity of corporate boards).

of French corporate leadership, Zimmermann agreed with the Norwegian business argument that including women would add talent and improve management. She expressed pride in how much the CBQ would enrich business and ameliorate a system that was a little too easy going.<sup>75</sup>

The leaders of the CBQ effort, Zimmermann and Copé, stand in marked contrast to the feminists who advanced *Parité*. Both are conservative politicians, and neither will admit wholeheartedly to a feminist orientation. In 2011, Zimmermann conveyed her hesitant feminism:

Today, my views on women's issues have greatly evolved. I look differently at the society, insofar as it does not leave a prominent place to women. I also appear to systematically claim a better recognition of women. If it is to be a feminist to claim equality for women, then yes, I am one of them.<sup>76</sup>

Zimmermann's reluctant feminism matches Copé's awkward mélange of paternalism and chivalry packaged as women's rights.

A conversation with a Norwegian minister who warned that the Germans might legislate first led Zimmermann to fast-track the CBQ to preserve France's reputation as a European leader.<sup>77</sup> Zimmermann secured the support of Copé, around whom conservatives had rallied after his successful use of feminism in the burqa debate. Copé saw protecting and advancing women as an opportunity for his then-rising political career. He agreed to support the CBQ possibly to burnish his nascent chivalrous credentials or as a riposte to feminists and those on the left who opposed the burqa ban.<sup>78</sup>

To justify the use of an actual quota that overrode French business leaders required Zimmermann and Copé to argue that the CBQ would prove profitable. Beyond the goal of advancing women,

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75. Margaret Maruani & Marion Paoletti, Interview, *Marie-Jo Zimmermann*, le devoir de déranger, 25 TRAVAIL, GENRE ET SOCIÉTÉS 5, 16-17 (2011); see also Rosenblum & Roithmayr, *supra* note 74, at 889-900 (discussing the quota's immediate effect and general compliance).

76. Maruani & Paoletti, *supra* note 75, at 12 (author's translation); see also Marie-Jo Zimmermann et al., Interview, *Marie-Jo Zimmermann: un engagement dans l'espace de la cause des femmes*, 17 HISTOIRE@POLITIQUE 87 (2012) ("I still do not define myself as a feminist but others consider me as one, so I guess I must be one of them.") (author's translation).

77. See S.G. Sebaoui, *Marie-Jo Zimmermann: "J'irai encore plus loin . . . jusqu'aux intercommunalités!"*, LE REPUBLICAIN LORRAIN (Jan. 17, 2017, 9:00 PM), <http://www.republicain-lorrain.fr/edition-de-metz-ville/2017/01/17/marie-jo-zimmermann-j-irai-encore-plus-loin-jusqu-aux-intercommunalites>.

78. See *supra* text accompanying note 7.



Zimmermann and Copé repeated the Norwegian business case argument—that a critical mass of women would deepen the talent pool with “women’s traits,” such as risk aversion and methodical analysis, that would improve profitability.<sup>79</sup> Without a critical mass, minority members become token. These paternalist tendencies toward the private sector echoed Copé’s regulating the “private” choice of wearing a burqa. Businesses resisted quotas and hoped voluntary measures would forestall legislation, but Zimmerman rejected this effort, insisting that a quota would “get things to move”; the legislature soon passed the law.<sup>80</sup>

The Law 2011-103, entitled “On the balanced representation of women and men on boards of directors and supervisory boards and professional equality,”<sup>81</sup> required *mixité* for some 2000 publicly traded companies in France.<sup>82</sup> Inspired by Norway’s law, the National Assembly framed the quota as a floor for both sexes,<sup>83</sup> not as a sex-specific quota.<sup>84</sup> The legislation imposed a six-year schedule for

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79. Forty percent surpasses the 30% critical mass level, the minimum inclusion required for a minority to affect a deliberative body. Below one-third representation, the minority essentially becomes token. ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 208 (1977).

80. Olivier Auguste, *Les grandes entreprises promettent la parité*, LE FIGARO (Apr. 19, 2010, 9:53 PM), <http://www.lefigaro.fr/entreprise/2010/04/19/05011-20100419ARTFIG00680-les-grandes-entreprises-promettent-la-parite-.php>. The legislature first adopted a corporate sex quota in 2006, but the Constitutional Council struck it down, notwithstanding the constitutional amendment that had enabled the *Parité* quota to be enacted, as the Council considered quotas in the corporate context to be a separate issue from the *Parité* quota. In response to the court’s decision, the legislature amended the constitution again in 2008 to allow quotas to promote women “to positions of professional and social responsibility,” establishing “the duty to promote gender parity as fundamental constitutional law.” Loi 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République [Constitutional Act 2008-724 of July 23, 2008, on the modernization of institutions of the Fifth Republic], J.O., June 24, 2008, p. 11,890; Julie C. Suk, *Gender Parity and State Legitimacy: From Public Office to Corporate Boards*, 10 INT’L J. CONST. L. 449, 454, 459 (2012) (internal quotation marks omitted).

81. Loi 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d’administration et de surveillance et à l’égalité professionnelle [Law 2011-103 of January 27, 2011 on the balanced representation of women and men on boards of directors and supervisory boards and professional equality], J.O., Jan. 28, 2011, p. 1680.

82. *Id.*; *France Sets Quota for Women on Big Companies’ Boards*, REUTERS (Jan. 13, 2011, 2:48 PM), <https://www.reuters.com/article/us-france-equality/france-sets-quota-for-women-on-big-companies-boards-idUSTRE70C5ZA20110113>.

83. STORVIK & TEIGEN, *supra* note 74, at 4.

84. See CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] arts. L225-17, L225-69, L226-4.

attaining these objectives: a 20% minimum for both sexes by 2014 and 40% by 2017.<sup>85</sup>

Two contrasts with *Parité* merit our attention. First, *Parité*'s failures might have laid the groundwork for the CBQ's harder remedies, such as the revocation of noncompliant nominations to the board and the potential freeze of board members' remunerations.<sup>86</sup> A second distinction: the law veered from the *Parité* theory of 50% of candidacies and instead mandated a 40% floor for either sex for board seats.<sup>87</sup>

The CBQ's passage immediately effected change.<sup>88</sup> Firms of all sizes sharply increased their levels of women's representation.<sup>89</sup> As a matter of general governance, French law limits individuals to four board memberships.<sup>90</sup> This rule, combined with the scale of France's economy—the fifth largest in the world—meant that the CBQ created

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85. See Véronique Magnier & Darren Rosenblum, *Quotas and the Transatlantic Divergence of Corporate Governance*, 34 NW. J. INT'L L. & BUS. 249, 256 (2014). Firms subject to the requirement included (1) private companies and joint-stock companies issuing shares and admitted for trading on a regulated market and (2) French corporations that, for three consecutive fiscal years, employed at least 500 permanent staff members and produced an annual revenue or balance sheet total of at least €50 million. See C. COM. arts. L225-17, L225-69, L226-4.

86. See C. COM. arts. L225-17, L225-69, L226-4. The French quota stopped short of the Norwegian penalty of dissolution for noncompliant firms. *Rules Regarding Gender Balance Within Boards of Public Limited Companies*, REGJERINGEN.NO (Dec. 20, 2005), <https://www.regjeringen.no/no/id4/>.

87. Loi 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle [Law 2011-103 of January 27, 2011 on the balanced representation of women and men on boards of directors and supervisory boards and professional equality], J.O., Jan. 28, 2011, p. 1680.

88. KARIMA BOUAISS & AGNES BRICARD, FEDERATION DES FEMMES ADMINISTRATEURS, LES FEMMES ADMINISTRATEURS AU SEIN DES CONSEILS D'ADMINISTRATION DES SOCIETES DU SBF 120 EN 2013, <http://www.federation-femmes-administrateurs.com/wp-content/uploads/2014/02/les-femmes-administrateurs-au-sein-des-conseils-dadministration-des-societes-du-sbf-120-en-2013.pdf> (last visited Nov. 5, 2017).

89. *Id.* By 2013, of the SBF-120 companies, two-thirds of the companies had between 20% and 40% of women on their boards, 5% exceeded 40% of women on their boards, and 83% of French women held only one directorship.

90. AFEF & MEDEF, CODE DE GOUVERNEMENT D'ENTREPRISE DES SOCIETES COTEES no. 18.4, at 16 (2016), <https://www.groupe-psa.com/content/uploads/2017/02/Code-de-gouvernement-dentreprise-des-societes-cotees-novembre-2016.pdf>. Smaller companies face more problems with compliance. Women in top executive positions remain low, at less than 6%. In a 2016 report, the Haut Conseil à l'Égalité entre les Femmes et les Hommes, a government agency, concluded that large firms would meet the goal but medium companies will fall short. DANIELLE BOUSQUET ET AL., HAUT CONSEIL À L'ÉGALITÉ ENTRE LES FEMMES ET LES HOMMES [TOWARDS EQUAL ACCESS OF WOMEN AND MEN TO POSITIONS OF PROFESSIONAL RESPONSIBILITY: PROPORTION OF WOMEN ON BOARDS] 5-6 (2016), [http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/hce\\_rapport\\_parite\\_eco\\_eng\\_20160209-2.pdf](http://www.haut-conseil-egalite.gouv.fr/IMG/pdf/hce_rapport_parite_eco_eng_20160209-2.pdf).

an enormous demand for women board members; firms wanted to secure the most “competent” women for their boards. As a result, seven of the top ten global firms are French, with high levels of women’s representation on their boards.<sup>91</sup> The efficacy of the CBQ may derive from conservatives’ incorporation of business goals and the widely held goal of profit rather than from a normative argument of equality.

Thanks to *Parité*, feminism reached through the state into corporate regulation to grasp a piece of the boardroom. The CBQ’s passage marked a historical moment when feminist ideas of women’s inclusion became such a fundamental part of public norms that feminists were not needed to make the argument: it was feminist influence rather than feminist activism. As feminist ideas disappeared in plain sight with the veil and burqa debates, here they became intrinsic to the very definition of French democracy. After the CBQ, related regulations advanced sex equality throughout French elites in government, education, and other areas of society.

However, as this Essay suggests, the CBQ was not just about the relationship between feminism and capital but also about how the new law advanced the norms of the veil and burqa bans. Indeed, reflecting on the CBQ, Copé and Zimmermann each linked the CBQ with France’s colonial past. In a 2011 colloquium in a jewel-like palace on the Champs-Élysées, Copé remarked that the test of a society’s civilization is in how it treats its women.<sup>92</sup> France was highly civilized, Copé seemed to insist—it promotes women to corporate elites and saves them from “an injury to the dignity of woman,” and ensures their inclusion in the *vivre ensemble*.<sup>93</sup> Rhetoric praising the CBQ’s civilizing effects resurfaced four years later, at a 2015 colloquium at the National Assembly in which Zimmermann praised Moroccan interest in a corporate board quota, noting that it reflected a desire to resist *intégrisme* or religious fundamentalism.<sup>94</sup> For her, Moroccan interest in a CBQ confirmed that women’s equality could civilize people in France or in its former colony.

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91. Tara Deronzier, *La France est le pays qui compte le plus de femmes dirigeantes*, FOCUSUR (June 13, 2014), <http://www.focusur.fr/actualites/2014/06/13/la-france-est-le-pays-qui-compte-le-de-femmes-dirigeantes>.

92. Jean-François Copé, Introduction at the Association France-Amériques event: Les femmes au conseil d’administration: ça change quoi? (Sept. 26, 2011) (author’s translation).

93. *Id.*; Copé, *supra* note 50.

94. Marie-Jo Zimmermann, Panel at the French National Assembly Conference (June 2015). *Intégrisme* references any religious fundamentalism, although in recent years it has been used solely to reference Muslim extremism.

### B. *Feminism Transformed: The Corporate Board Quota's Effects*

Espousing *valeurs républicaines*, nonfeminist actors deployed feminist arguments pioneered in the *Parité* effort to advance exclusions.<sup>95</sup> Then with the CBQ, feminism again appears inclusive—to force *mixité* into the corporate hierarchy. But let us pause to assess what feminism wrought once it entered the corporate sector. If *Parité*'s inclusion meant governance including women, the CBQ reflected a different kind of feminism: one that advanced some at the expense of others, which fortified exclusions. This subpart will describe those who profited and those who paid.

#### 1. Who Profits?

One goal of Norway's CBQ was to balance opportunities for people without regard to sex by improving women's opportunities.<sup>96</sup> CBQs reflect the way in which the private depends on the public—extending public norms into the private sphere fosters sex equality.<sup>97</sup> The sheer number of firms with board positions now reserved for women will elevate thousands of women to corporate boards.

This expansion created a rapid and immense distributive shift, a gold rush for women with a stream of new organizations.<sup>98</sup> While this was a far broader network than the tight group that previously held board positions, it remained one that benefited people of relative privilege. An “old girls network” grew, as did alumnae networks, social groups, educational programs, and coaching and executive

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95. See, e.g., Le Bars, *supra* note 52 (former president Nicholas Sarkozy describing the burqa as “a sign of enslavement”).

96. Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 BERKELEY BUS. L.J. 55, 87 (2009).

97. *Id.*

98. This gold rush had the support of French corporate leadership. The Institut Français des Administrateurs (IFA), along with “the union of bosses” AFEP/MEDEF engaged fully in the efforts to implement the CBQ. See Cécile Dumas, *Davantage de femmes à la table des patrons*, LIBERATION (Jan. 20, 2010), [http://www.liberation.fr/futurs/2010/01/20/davantage-de-femmes-a-la-table-des-patrons\\_605353](http://www.liberation.fr/futurs/2010/01/20/davantage-de-femmes-a-la-table-des-patrons_605353). It created a directory of CAC 40 directors—the CAC 40 being the largest and most actively traded companies listed on France's stock exchange—with detailed profiles in order to make it easier to hire women. Véronique Bruneau-Bayard & Dominique Pageaud, *Panorama 2010 des pratiques de gouvernance des bigcaps: Les tendances 2010*, ADMINISTRATEUR: LA LETTRE DE L'IFA, Dec. 2010, at 3; *CAC 40 Factsheet*, EURONEXT (Sept. 30, 2017), <https://www.euronext.com/en/products/indices/FR0003500008-XPAP/market-information>. In some sense, this effect may reflect Frances Olsen's work decades ago on how the intermingling of public norms that give rise to private goals as parties outside the state take advantage of the regulatory regime. See Frances E. Olsen, *International Law: Feminist Critiques of the Public/Private Distinction*, 25 STUD. TRANSNAT'L LEGAL POL'Y 157, 157-59 (1993).

search firms, all in the effort to identify, train, and place women on boards.<sup>99</sup> The annual “Women’s Forum”—a conference devoted to promoting women’s business leadership—now draws thousands of women.<sup>100</sup> But the fact remains that the CBQ necessarily provides an advantage to *elites*—often white, bourgeois women—not to broader groups of women.<sup>101</sup>

To retain their class power, business elites choose women who reflect their own existing elite-driven norms.<sup>102</sup> In addition, to get these positions, women may “man up”: engage in professional performances that demonstrate their masculinized skill sets to a male-driven marketplace.<sup>103</sup> Women in the workplace face a double bind as they need to perform masculinity to appear skilled but must also

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99. There are more than 400 women’s social networks today in France. *Les réseaux féminins permettent-ils aux femmes de réussir dans l’entreprise?*, RESSOURCES HUMAINES PAR SIA PARTNERS (Dec. 18, 2013), <http://rh.sia-partners.com/les-reseaux-feminins-permettent-ils-aux-femmes-de-reussir-dans-l-entreprise>. For examples of social groups, see ADMINISTRATION MODERNE, <http://www.administrationmoderne.com> (last visited Nov. 5, 2017) (created in 1998 as the first interministerial association of women civil servants that fights for sex equality in the administration); ARBORUS, <http://www.arborus.org> (last visited Nov. 5, 2017) (association created by the European observatory of equality that contains various associations and firms with the goal of helping promote equality in management); FEMMES 3000, <http://www.femmes3000.fr> (last visited Nov. 5, 2017) (association that strives to increase women’s participation in public life); PROF. WOMEN’S NETWORK, <http://www.pwn.global.net/> (last visited Nov. 5, 2017) (global federation with 3000 members created to promote women in business firms in Europe and provide networking and training platforms for professional women).

100. *Women’s Forum for the Economy & Society Chooses Paris for 2017 Global Meeting*, WOMEN’S F. FOR ECON. & SOC’Y (Aug. 3, 2017), <http://www.womens-forum.com/news/global-meeting-2017-in-paris>. For example, Fédération Femmes Administrateurs was created after the Copé-Zimmermann law to help women to be ready to work in CAC 40 administrations. FÉDÉRATION FEMMES ADMINISTRATEURS, <http://www.federation-femmes-administrateurs.com/> (last visited Nov. 5, 2017). It is a network in which experienced women can help non-experienced women in their future careers. This federation regroups diverse associations like Association Femmes AAA+, which was created in January 2011 to promote women lawyers in director positions of big companies, but also Administration Moderne, created in 1998, and Association des Femmes Diplômées d’Expertise Comptable Administrateur, created after the CBQ law to obtain the goal of 40% women directors in CAC 40 firms.

101. Anne Sweigart, *Women on Board for Change: The Norway Model of Boardroom Quotas as a Tool for Progress in the United States and Canada*, 32 NW. J. INT’L L. & BUS. 81A, 103A (2012).

102. Quotas may 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. See MICHEL PINÇON & MONIQUE PINÇON-CHARLOT, *SOCIOLOGIE DE LA BOURGEOISIE* (3d ed. 2005).

103. Darren Rosenblum, *Manning Up 2* (unpublished manuscript) (on file with author).

perform femininity to appeal to (most of) the men who may hire them. Ultimately, thanks to their gender performance-balancing act, these women may “feminize” the firm somewhat less than feminists hope.

## 2. Who Pays?

Quotas designed to foster equality result in real costs to men.<sup>104</sup> Absent state intervention, men form an elite that, in a monopolistic way, would cyclically replace itself with like-minded men. With quotas, men lose the near-exclusivity of their economic and social power and their attendant network dominance. The CBQ institutes a temporary glass ceiling for men, in place until the boards actually have 40% women. The ceiling means that most, if not all, new members for a period of time will be women; thereby ensuring that the few remaining “male” slots become more competitive. Many qualified men suffer real loss, especially those whose advanced career status renders their experience less transferrable.<sup>105</sup>

By definition, quotas essentialize sex. That sex difference, the essentialist binary, will determine who gets board positions. Gender equality remedies require that individuals—board members, political candidates, or students—fit into the male/female binary. The binary excludes persons of other sexes and genders, who then fall into a precarious uncertainty.<sup>106</sup> Given the performativity demands of elite positions, the hurdles for gender nonconforming individuals to rise to the top are largely insurmountable.

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104. Scholars have begun to label the way in which men have dominated political and corporate elites as men’s overrepresentation. Increasing women’s political and corporate representation reduces male advantages in leadership. If men no longer benefit from an extensive advantage in leadership competition, it would prove quotas’ efficacy. See Elin Bjarnegård & Rainbow Murray, *The Causes and Consequences of Male Over-Representation: A Research Agenda* 6 (Apr. 2, 2015), <https://ecpr.eu/Filestore/PaperProposal/88304081-30f9-4fe6-902a-d2323f3b37c9.pdf>.

105. Some economists argued that men supported *Parité* because they believed it increased their incumbency power and dominance. Guillaume R. Fréchette et al., *Incumbents’ Interests and Gender Quotas*, 52 AM. J. POL. SCI. 891, 892 (2008). Even if that study’s assertion faced criticism, it exposes the political complexity around *Parité*.

106. People may transition from one sex to another or occupy a middle ground as a third sex or intersex people. They may also change 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 drag kings 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) (discussing the fluidity of gender and sex).

Such costs may, however, hold benefits for individuals and society. Two benefits surface with regard to the loss of this monopoly on power: First, men may improve their skills to match demand, as do firms that compete harder after they lose monopoly power. Given what we know about diversity, firms may benefit even if men privately view this change as a personal cost. Second, sex equality in elite work may facilitate gender balance in family contexts.<sup>107</sup> For heterosexual couples, women's success may facilitate men's engaging in family work.<sup>108</sup>

Quotas may also undermine the sex binary by rebalancing the profile of typical corporate leaders to include women and reducing opportunity differentials based on sex. Including women in corporate leadership will reduce income and, eventually, disparities in care work. Forty percent acts as a floor that might ultimately impose a minimum number of men to serve on the board.<sup>109</sup> The CBQ's 40% floor instead of *Parité's* 50% requirement may shift this binarist emphasis. Because of this possibility, the CBQ may carry slightly fewer essentialist effects than *Parité*.

After the success of *Parité* and the CBQ, conservatives managed to reimagine the status of women as a national priority that—contrary to feminists' original goals—provided cover to institute paternalist protections against so-called backward practices such as traditional Muslim dress.<sup>110</sup>

## V. FEMINISM AND BURKINIS

With *Parité* and the CBQ, France's now-feminist *valeurs républicaines* mandated inclusion; however, the veil and burqa bans, and later attempts to ban burkinis, legislated exclusion by arguing that burkinis enslaved women.<sup>111</sup> In the years since the burqa ban and the

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107. See Darren Rosenblum, *Loving Gender Balance: Reframing Identity-Based Inequality Remedies*, 76 *FORDHAM L. REV.* 2873, 2879-80 (2008).

108. Sex neutral parental leave laws, as I have argued, affect men and women differently, particularly where women hold family responsibilities and men face stigma for taking leave. Here we can note that some Scandinavian leave laws incentivize both parents within a family structure to take parental leave. *Country Profiles: Sweden*, EUR. COMM'N: EMP., SOC. AFF. & INCLUSION, <http://ec.europa.eu/social/main.jsp?catId=1248&langId=en&intPageId=3658> (last visited Nov. 5, 2017). Families where both parents take leave receive, in aggregate, more time. Given heterosexual dominance, this incentivizes men to take leave.

109. As women come to dominate higher education perhaps reaching as high as two-thirds, quotas may eventually protect men. See Rosenblum, *supra* note 107, at 2873.

110. Copé, *supra* note 50.

111. See, e.g., Frédéric Cheutin et al., *Valls sur le Burkini: "Une vision archaïque de la place de la femme dans l'espace public,"* LA PROVENCE (Aug. 17, 2016, 6:55 AM), <http://>

CBQ, 2011-2016, France suffered several terrorist attacks, increasing *franco-français*' collective fear of Muslims.<sup>112</sup> This fear echoed the veil debate of the 1990s that a permissive attitude might lead to an Islamic state. Burkini bans in France began as early as 2009, spreading slowly.<sup>113</sup> In 2015-2016, the wildly popular novel *La Soumission* by Michel Houellebecq gripped France with its dystopic fantasy. The novel imagines that a moderate Islamist party would take over France with the support of the left and would then Islamize France.<sup>114</sup> The 2016 Bastille Day attack confirmed and intensified this fear. Reaction to the attack included panicked arguments that burkinis threatened public order.<sup>115</sup>

The 2014 ban in Wissous, a city near Paris, provides an example: for their seasonal outdoor swimming pool and beach, the rules forbade wearing "ostentatious religious signs susceptible to create public order disruption."<sup>116</sup> The penalties for ignoring the ban were relatively minor.<sup>117</sup> Despite the veil ban's use of non-Muslim-specific language, a court struck down the rule.<sup>118</sup> Nevertheless, more than thirty towns banned burkinis on their beaches, even though one mayor had never seen one.<sup>119</sup>

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[www.laprovence.com/article/politique/4078328/valls-sur-le-burkini-une-vision-archaique-de-la-place-de-la-femme-dans-lespace-public.html](http://www.laprovence.com/article/politique/4078328/valls-sur-le-burkini-une-vision-archaique-de-la-place-de-la-femme-dans-lespace-public.html).

112. *Timeline: Attacks in France*, BBC NEWS (July 26, 2016), <http://www.bbc.com/news/world-europe-33288542>.

113. Angelique Chrisafis, *French Woman Threatens Legal Action over 'Burkini' Ban*, GUARDIAN (Aug. 12, 2009, 10:48 AM), <https://www.theguardian.com/world/2009/aug/12/burkini-ban-islam-france>.

114. MICHEL HOUELLEBECQ, *SOUSSION* (2015).

115. Erin Mundahl, *The Debate over the Burkini Rages on in France*, WKLY. STANDARD (Aug. 18, 2016, 2:35 PM), <http://www.weeklystandard.com/the-debate-over-the-burkini-rages-on-in-france/article/2003889>.

116. Faiza Zerouala, *Le règlement controversé de Wissous-Plage à nouveau suspendu par la justice*, LE MONDE (Aug. 12, 2014, 6:41 PM), [http://www.lemonde.fr/societe/article/2014/08/12/le-reglement-controverse-de-wissous-plage-a-nouveau-suspendu-par-la-justice\\_4470635\\_3224.html](http://www.lemonde.fr/societe/article/2014/08/12/le-reglement-controverse-de-wissous-plage-a-nouveau-suspendu-par-la-justice_4470635_3224.html) (author's translation) (referencing specific examples such as the burqa or a patently oversized cross or star).

117. Penalties and enforcement for wearing a burkini vary widely. See, e.g., *id.*; Allain Auffray & Laure Equy, *Le burkini interdit dans une quinzaine de communes*, LIBERATION (Aug. 19, 2016, 6:41 PM), [http://www.liberation.fr/france/2016/08/19/le-burkini-interdit-dans-une-quinzaine-de-communes\\_1473469](http://www.liberation.fr/france/2016/08/19/le-burkini-interdit-dans-une-quinzaine-de-communes_1473469). One interviewee from the Collective Against Islamophobia in France explained that "Islamophobia is very emotional, there's not only a religious element, there is a sexist element and a racist element and with the burkini there's a real need to control women's bodies." Alissa J. Rubin, *Fighting for the 'Soul of France,' More Towns Ban a Bathing Suit: The Burkini*, N.Y. TIMES (Aug. 17, 2016), <https://nyti.ms/2bjAdNK>.

118. Zerouala, *supra* note 116.

119. Angelique Chrisafis, *French Mayors Refuse To Lift Burkini Ban Despite Court Ruling*, GUARDIAN (Aug. 28, 2016, 1:14 PM), <https://www.theguardian.com/world/2016/aug/>



Politicians repurposed the successful feminist arguments from the burqa debate for the burkini—focusing on ensuring women’s freedom from religiously forced modesty.<sup>120</sup> As with CBQs and *Parité*, politicians from both the left and right supported bans on Muslim women’s clothes. Leaders of various political persuasions appropriated feminist language to advance exclusions for Muslims in the name of protecting women’s ability to participate in French society.

In the burkini debate, feminist arguments bolstered restrictions on those *issus de l’immigration*, just as the burqa ban *vivre-ensemble* arguments had favored *franco-français* gender performance. Women who found agency in public life and embraced their female allure fit the *franco-français* model, while Muslim women who might prefer modesty would not.<sup>121</sup> One sociologist argued that wearing a burkini was “a visible sign of identitarian aggressivity.”<sup>122</sup> Then-Prime Minister Manuel Valls, a Socialist and regular supporter of feminist causes, vocally supported the ban, stating that burkinis were akin to slavery and violated what he views as French values.<sup>123</sup> Against this “provocation, the nation must defend itself.”<sup>124</sup> While Valls himself opposes strict enforcement, his feminist support for the ban draws on an exclusionary concept of women: “The burkini is not a new type of bathing attire, a trend. It is the translation of a political project, a counter-society, based on the enslavement of women.”<sup>125</sup>

Laurence Rossignol, the feminist Socialist minister for families, children, and women’s rights, echoed Copé’s civilization language. She described the burkini as being “profoundly archaic . . . . [T]he burkini is . . . a particular vision of the place of the woman. It cannot

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28/french-mayors-burkini-ban-court-ruling; *Le maire du Touquet n’a jamais vu un burkini, mais il l’interdit*, L’EXPRESS (Aug. 16, 2016, 12:28 PM), [http://www.lexpress.fr/actualite/societe/le-maire-du-touquet-n-a-jamais-vu-un-burkini-mais-il-l-interdit\\_1821707.html](http://www.lexpress.fr/actualite/societe/le-maire-du-touquet-n-a-jamais-vu-un-burkini-mais-il-l-interdit_1821707.html).

120. See, e.g., Europe 1, *supra* note 31 (describing the burkini as “profoundly archaic” and “a particular vision of the place of the woman”).

121. See, e.g., *supra* text accompanying notes 59–60.

122. Mathieu Bock-Côté, *Burkini: derrière la laïcité, la nation*, LE FIGARO: VOX (Aug. 18, 2016, 4:20 PM), <http://www.lefigaro.fr/vox/politique/2016/08/18/31001-20160818ARTFI G00185-condamner-le-burkini-pour-sauver-la-nation.php> (author’s translation).

123. Cheutin et al., *supra* note 111; Angelique Chrisafis, *French PM Supports Local Bans on Burkinis*, GUARDIAN (Aug. 17, 2016, 7:15 PM), <https://www.theguardian.com/world/2016/aug/17/french-pm-supports-local-bans-burkinis>.

124. Chrisafis, *supra* note 123.

125. Cheutin et al., *supra* note 111. However, Manuel Valls doesn’t support a national ban. In the same interview, he also talks about the lack of enforcement of the ban on burqas. *Id.*

be considered only as a question of fashion or individual liberty.”<sup>126</sup> Amusingly, Rossignol extended her fashion commentary to criticize H&M and Dolce & Gabbana for their “chaste clothes.”<sup>127</sup> Noted feminist Elizabeth Badinter—reprising her role in the veil debate—joined in with her own criticism of these clothes; both she and Rossignol view excessive modesty as anti-feminist.<sup>128</sup>

Ostensible bases for such bans included good moral standards (*bonnes mœurs*), *laïcité*, hygiene, and even safety, under the contrived theory that burkini-clad women would be harder to rescue.<sup>129</sup> Political discourse about burkinis seems to center on the belief that the wearing of more revealing bathing suits is a woman’s civic duty in order to engage in the *vivre ensemble*. Additionally, as the ECHR had foreseen in the burqa case, fear of terrorism played an explicit role in burkini legislation. A Cannes ordinance says: “Beach attire that ostentatiously displays a religious affiliation, while France and places of worship are the target of terrorist acts, is likely to create risks to public order.”<sup>130</sup> A local judge concurred that burkinis “would exacerbate tensions between beachgoers of all faiths . . . and present a risk to the public order.”<sup>131</sup>

Despite, or perhaps because of, their political and practical bases, local burkini bans did not survive national judicial review.<sup>132</sup>

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126. Europe 1, *supra* note 31.

127. Lucile Quillet, *Laurence Rossignol sur la mode islamique: “Les marques font la promotion de l’enfermement du corps des femmes,”* LE FIGARO: MADAME (Mar. 30, 2016), <http://madame.lefigaro.fr/societe/laurence-rossignol-indigne-mode-islamique-marques-musulmanes-rmc-300316-113612>.

128. Alice Pfeiffer, *La mode hisse les voiles*, M, LE MAGAZINE DU MONDE (May 2, 2016, 10:40 AM), [http://www.lemonde.fr/m-styles/article/2016/05/02/la-mode-hisse-les-voiles\\_4911939\\_4497319.html](http://www.lemonde.fr/m-styles/article/2016/05/02/la-mode-hisse-les-voiles_4911939_4497319.html).

129. *Fasquelle justifie son arrêté anti-burkini en évoquant des “risques de noyade,”* L’EXPRESS (Aug. 27, 2016, 6:53 PM), [http://www.lexpress.fr/actualite/monde/fasquelle-justifie-son-arrete-anti-burkini-en-evoquant-des-risques-de-noyade\\_1824881.html](http://www.lexpress.fr/actualite/monde/fasquelle-justifie-son-arrete-anti-burkini-en-evoquant-des-risques-de-noyade_1824881.html); see also Aurelien Breeden & Lilia Blaise, *Cannes, Citing Security Risks, Bans Full-Body ‘Burkinis’ from Its Beaches*, N.Y. TIMES (Aug. 12, 2016), <https://nyti.ms/2b38yR4> (translating Arrêté municipal 16/2754 du 28 juillet 2016 du maire de Cannes [Decree 16/2754 of July 28, 2016 of the Mayor of Cannes]).

130. Arrêté municipal 16/2754 du 28 juillet 2016 du maire de Cannes [Decree 16/2754 of July 28, 2016 of the Mayor of Cannes]; Breeden & Blaise, *supra* note 129.

131. Tribunal administratif [TA] [Administrative Court] Nice, Aug. 13, 2016, 1603470, M. Lemaitre.

132. The *Conseil d’État* explained that public authorities’ main role is to guarantee individual liberties. The only exception is if, and only if, public order cannot be guaranteed (e.g., by more police forces). *Conseil d’État* [CE] [Council of State], May 19, 1933, 17413, Rec. Lebon 541. Such bans faced legal challenges because localities passed them without any national action. Thomas Hochmann, *L’interdiction du “burkini” est une faute juridique et*

The Conseil d'État overturned the bans after the controversy reached a head over the course of the summer of 2016.<sup>133</sup> In late August, the Conseil stated that the localities should first maintain order then balance any bans with the value of access to the beach.<sup>134</sup> Focusing on the Villeneuve-Loubet rule, from a town near Nice where the Bastille Day terror attack occurred, the judge found no basis for a threat to public order.<sup>135</sup> The heightened emotion and anxiety resulting from the Nice terrorist attack did not justify the ban. The judge's decision focused on the personal liberty involved in one's own choice of clothing.<sup>136</sup> As Stéphanie Hennette Vauchez argued prior to the decision of the Conseil d'État, burkini laws restricted liberty and constituted discrimination against Muslims.<sup>137</sup> The decision now stands and is unlikely to be overturned unless by national legislative action or constitutional reform.

Immediately after the burkini decision, Gaspard reiterated her pluralist feminism to agree with the Conseil d'État's decision.<sup>138</sup> Had ban supporters reacted negatively to the decision, they may have sought national legislation to override it.<sup>139</sup> Banning the burkini would lead to its proliferation, Gaspard argued, and the ban would be

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*politique*, LE MONDE (Aug. 19, 2016, 6:44 AM), [http://www.lemonde.fr/idees/article/2016/08/19/l-interdiction-du-burkini-est-une-faute-juridique-et-politique\\_4984761\\_3232.html](http://www.lemonde.fr/idees/article/2016/08/19/l-interdiction-du-burkini-est-une-faute-juridique-et-politique_4984761_3232.html).

133. CE, Aug. 26, 2016, 402742. The *Conseil d'État* first analyzed the competence of the mayors issuing public orders, noting that mayors have to balance maintaining public order and respecting individual freedoms. *Id.* The court said that any restriction of beach access must be necessary, proportionate, adapted, and taken for one of the following reasons: proper access to the shore, swimming safety, hygiene, or decency. *Id.* Mayors cannot base their decision on accounts other than known (or proven) risks to public order. *Id.* The court said the local ordinance of Villeneuve-Loubet described no risk of public disorder coming from people wearing certain types of bathing attires and emphasized that the emotion and anxiety arising from the Nice terrorist attack were not enough to legally justify the ban. *Id.* The court held, therefore, that the mayor of Villeneuve-Loubet acted beyond his powers. *Id.* The court also described the local ordinance as presenting a serious and obvious violation of fundamental freedoms, notably the freedom of movement and the freedom of conscience. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. Stéphanie Vauchez, *Le burkini de l'état d'urgence*, LIBERATION: DO YOU LAW? (Aug. 23, 2016), <http://doyoulaw.blogs.liberation.fr/2016/08/23/et-le-burkini-devint-debat-national/>.

138. Julia Mariton, "*Légiférer pour interdire c'est simplement prendre le risque que les foulards revendicatifs se multiplient*," LA NOUVELLE REPUBLIQUE (Sept. 5, 2016, 12:00 PM), <http://www.lanouvellerepublique.fr/France-Monde/Actualite/Politique/n/Contenus/Articles/2016/09/04/Legiferer-pour-interdire-c-est-simplement-prendre-le-risque-que-les-foulards-revendicatifs-se-multiplient-2824144>.

139. *Id.*

*liberticide*.<sup>140</sup> While the Conseil d'État's reason prevailed over 2016's fearmongering, the debate exposed the other side of the CBQ's inclusion: here, predominant feminist arguments again advanced exclusion.

## VI. THE 2017 ELECTIONS: A TURN TO LIBERAL INCLUSIVITY?

Although popular, the reversal of burkini bans presaged another centrist shift—the presidential and legislative elections of 2017. Emmanuel Macron swept both elections with his new party, *La République en Marche*.<sup>141</sup> Their forward-looking image of France was more inclusive than traditional parties. As a result, of the 577 members of the National Assembly, approximately twenty legislators come from a background *issu de l'immigration*, although the press did not ascribe any religious affiliation to these leaders, following the state's prohibition of reporting religious identity.<sup>142</sup> One news source proclaimed, “The National Assembly is finally in the image of the country.”<sup>143</sup> Of these representatives, four women are of North African heritage—Sarah El Haïry, Fadila Khattabi, Anissa Khedher, and Sonia Krimi—and none of them wear a headscarf.<sup>144</sup> One woman deputy, Ramlati Ali, represents Mayotte, a small island off Madagascar, which voted to become a *Département* of France in 2011.<sup>145</sup> She wears a headscarf but insists it is not a Muslim veil but instead a *châle Mahorais*.<sup>146</sup>

Macron's views of the relationship between the state and religion are more liberal than those of Walls and Sarkozy. Macron, in separate statements, agreed with the veil ban for impressionable school-aged girls but disagreed with bans for adult women—in the workplace or

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140. *Id.*

141. Alissa J. Rubin et al., *Emmanuel Macron's Party and Allies Win Big in France*, N.Y. TIMES (June 18, 2017), <https://nyti.ms/2tACkpj>.

142. Guillaume Descours, *La diversité progresse à l'Assemblée nationale*, LE FIGARO (June 20, 2017, 12:40 AM), <http://www.lefigaro.fr/elections/legislatives/2017/06/20/38001-20170620ARTFIG00139-la-diversite-progresse-a-l-assemblee-nationale.php>.

143. Jean-Marie Pottier, *L'Assemblée nationale est enfin à l'image du pays*, SLATE (Fr.) (June 19, 2017, 11:19 AM), <http://www.slate.fr/story/147171/deputes-diversite>.

144. Descours, *supra* note 142.

145. Marina Mielczarek, *Mayotte devient le 101ème département français*, RFI (Mar. 31, 2011, 4:07 PM), <http://www.rfi.fr/france/20110331-mayotte-devient-le-101eme-departement-francais>.

146. Mme. Ali vigorously insisted that her veil is a local custom of Mayotte and not a Muslim one. Lalere.fr (@lalere), TWITTER (July 3, 2017, 12:25 PM), <https://twitter.com/lalere/status/881957147113918465>.

the university—as restricting the liberty of such women.<sup>147</sup> Bans would relegate women to life within their communities when *laïcité* stands against *communitarisme*. Macron argued that the French rule is *laïcité* not *laïcisme*—a belief in a civic religion.<sup>148</sup>

Macron's victory and that of his party repudiated the existing political order. But we cannot presume that he will reverse the paternalist tide carried so far in part by feminist rhetoric. The bans' continued success poses questions for feminisms that take hold, even tenuously, of the state's reins.

## VII. CONCLUSION

Feminists pursued inclusion in the Republic with *Parité* and they succeeded in convincing France to enshrine their essentialist norms. Once it became a *valeur républicaine*, feminism changed. It went from a 1990s outsider perspective to a central tenet of the twenty-first century, demonstrated by fluid feminist arguments by male leaders of both left (Socialist) and right (UMP) parties. Despite *Parité*'s limited success in actually fixing sex ratios in elected officialdom, the perseverance of male dominance in politics—combined with widespread use of feminist language—makes some of this feminism look more like old-school chivalry. France included women in economic leadership with the CBQ and reduced “enslavement” by restricting Muslim women's clothing, including veils, burqas, and, briefly, burkinis. Quotas legitimize certain identity differences to the exclusion of others. The linkage of feminism and the *valeurs républicaines* within universalism transformed French law, as it juxtaposed inclusive remedies (*Parité* and the CBQ) for sex difference against exclusionary ones (veil, burqa, and burkini bans) related to religion and ethnicity.<sup>149</sup> This transformation of feminism within the state poses genuine conflicts for feminist advocacy.

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147. *Replay du 4 février 2017 à Lyon*, EN MARCHE! (Feb. 4, 2017), <https://en-marche.fr/article/meeting-macron-lyon-video>. See also Ludovic Galtier, *Revivez l'intervention d'Emmanuel Macron dans "RTL Matin,"* RTL: PRESIDENTIELLE 2017 (Oct. 4, 2016, 4:24 PM), <http://www.rtl.fr/actu/politique/emmanuel-macron-est-l-invite-de-rtl-mercredi-5-octobre-et-repondra-a-vos-questions-7785111162>, an episode in the radio program *RTL Matin*.

148. Bruno Roger-Petit, *Théorie du genre et laïcité: plutôt Macron que Valls contre le pape François*, CHALLENGES (Oct. 3, 2016, 1:03 PM), [https://www.challenges.fr/politique/theorie-du-genre-et-laicite-plutot-macron-que-valls-contre-le-pape-francois\\_430720](https://www.challenges.fr/politique/theorie-du-genre-et-laicite-plutot-macron-que-valls-contre-le-pape-francois_430720).

149. Inclusion of sex difference supports arguments of democratic legitimacy. Julie Suk emphasizes the central role played by the corporatist tradition in the passage of the law in France and the way in which the law functions to legitimize the democratic state. See Suk, *supra* note 80, at 449.