



2013

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Recommended Citation

Van Cleave, Rachel A. (2013) "Luogo e Spazio, Place and Space: Gender Quotas and Democracy in Italy," *University of Baltimore Law Review*: Vol. 42: Iss. 2, Article 6.

Available at: <http://scholarworks.law.ubalt.edu/ublr/vol42/iss2/6>

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LUOGO E SPAZIO, PLACE AND SPACE: GENDER QUOTAS AND DEMOCRACY IN ITALY¹

Rachel A. Van Cleave²

Space is power. Having a place, a seat, an ability to occupy a particular space can empower, in part by mere presence, but also by enabling a voice to be heard, to provide new perspectives, new ways of thinking and doing.³ Certainly, the recent Arab Uprisings⁴ and the

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1. Copyright © 2012 Rachel A. Van Cleave.
 2. Rachel A. Van Cleave, Dean and Professor of Law, Golden Gate University School of Law. Dean Van Cleave has engaged in extensive research on Italian criminal justice, specifically violence against women, as a Fulbright Scholar. She wishes to thank the University of Baltimore School of Law and its Applied Feminism Center for the opportunity to present this paper at the March 2–3, 2012 conference; the *University of Baltimore Law Review* staff for their patience working with Italian materials and sources; Golden Gate University School of Law's generous financial support of this project; Golden Gate University School of Law's library staff; her research assistants, Melani Johns (J.D., 2011) and Brian Ford (J.D., 2013); the libraries at the *Corte di Cassazione* and the *Camera dei deputati* in Rome for access as well as helpful research guidance by the staff; Anna Esposito, Ferdinando Berelli, Stefania Rossi and Bianca d'Amico for their company while the author was in Rome; Diane Ghirardo for sparking an interest in gendered space and power as well as for translation and editorial advice on an earlier version; Michele Benedetto Neitz, Laura Cisneros for substantive and structural comments; Golden Gate University School of Law's Scholarship Support Group; and Joseph Schottland for unfailing encouragement and moral support. Of course, any errors are the author's.
 3. In a keynote address at Golden Gate University School of Law's Diversity Graduation, Nancy O'Malley, District Attorney for Alameda County in California, emphasized the importance of having a seat at the table where decisions are being made. She stated, "If you [women, people of color, and LGBT people] are not at the table, there is a good chance you are on the menu." Nancy O'Malley, Dist. Att'y, Alameda Cnty., Cal., Keynote Address at the Golden Gate University School of Law's Diversity Graduation (May 17, 2011). Similarly, at the Third Annual Chief Justice Ronald M. George Lectureship, Tani Cantil-Sakauye, Chief Justice of the California Supreme Court, as well as participants on a panel of chief justices, repeatedly stated the importance of "having a seat at the table." Tani Cantil-Sakauye, Chief Justice, Cal. Sup. Ct., Remarks at the Golden Gate University School of Law's Third Annual Chief Justice Ronald M. George Lectureship (Oct. 18, 2011). In addition, during the two-day conference at the University of Baltimore School of Law, *Applying Feminism Globally*, participants said the phrase "a seat at the table" at least a half-dozen times. Remarks at the University of Baltimore School of Law, *Applying Feminism Globally Conference* (Mar. 2–3, 2012).
 4. E.g., Ethan Bronner, *A Moment Leveled, Solidarity for Shiites and Large-Scale Demonstrations: Bahrain Tears Down Pearl Sculpture*, N.Y. TIMES, March 19, 2011,

“Occupy” movement⁵ took the forms they did, at least in part, because the participants understood the importance of physically occupying symbolically loaded spaces and places to promote political and social ideas and ideals.⁶ Conversely, exclusion from a place or

at A10 (discussing the Bahraini government’s destruction of the famous pearl sculpture at the center of Pearl Square in the capitol city Manama, Bahrain), *available at* <http://www.nytimes.com/2011/03/19/world/middleeast/19bahrain.html>.

Thousands of pre-democracy demonstrators occupied Bahrain’s symbolic center, Pearl Square, in a month-long rally claiming a 300-foot sculpture of a pearl, held by six sweeping arches, designed to honor the six gulf states of the Gulf Cooperation Council (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and United Arab Emirates), whose economies thrived on the pearl industry before the oil boom. *Id.*; Michael Slackman, *Bahrain Takes the Stage With a Raucous Protest*, N.Y. TIMES, Feb. 16, 2011, *available at* http://www.nytimes.com/2011/02/16/world/middleeast/16bahrain.html?pagewanted=1&_r=1&partner=rss&emc=rss. Bahrain’s foreign minister, Sheik Khalid bin Ahmed al-Khalifa, stated that the monument was destroyed “to remove a bad memory The whole thing caused our society to be polarized.” Bronner, *supra*. He further stated, “We don’t want a monument to be a bad memory.” *Id.* Thus, the government also appreciated the symbolic nature of Pearl Square and decided to destroy it due to its power. See Associated Press, *Bahrain Demolishes Monument at Pearl Square: Pearl Roundabout Symbol Was Rallying Point for Activists*, NBC NEWS (Mar. 18, 2011, 5:55 PM), http://www.msnbc.msn.com/id/42125406/ns/world_news-mideastn_africa/#.T8_6Pb-He_0.

5. See Peter Millership, *World intrigued by “Occupy Wall Street” Movement*, REUTERS (Oct. 11, 2011, 11:36 AM), <http://www.reuters.com/article/2011/10/11/us-usa-wallstreet-world-idUSTRE79A3OB20111011> (observing that popular movements against the powerful elite have been staged in Tahrir Square, Cairo, Green Square, Tripoli, Syntagma Square, Athens, and Zuccotti Park, New York, expanded to Occupy movements in Tampa, Florida, Portland, Oregon, Los Angeles, California, Chicago, Illinois, and then inspired similar movements at the London Stock Exchange and Madrid’s Puerta del Sol square); Julianne Pepitone, *Hundreds of Protesters Descend to “Occupy Wall Street”*, CNNMONEY (Sep. 17, 2011, 7:07 AM), http://money.cnn.com/2011/09/17/technology/occupy_wall_street/?cnn=yes&hpt=ibu_c2 (noting that “[p]rotestors arranged to meet and discuss their goals on the iconic Wall Street Bull statue . . . as well as at a ‘people’s assembly’ at One Chase Manhattan Plaza,” as part of a “leaderless resistance movement” modeled on the Arab uprisings); Kenneth Rapoza, *‘Occupy Wall Street’ Creators Raise the Stakes, Gun for G8 and NATO*, FORBES (Jan. 26, 2012, 10:18 AM), <http://www.forbes.com/sites/kenrapoza/2012/01/26/occupy-wall-street-creators-raise-the-stakes-gun-for-g8-and-nato/> (reporting that Occupy Wall Street selected the NATO and G8 summits in Chicago, May 2012, as new targets for its movement).
6. See Susana Torre, *‘Claiming the Public Space: The Mothers of Plaza de Mayo,’* in *SEX AND THE ARCHITECTURE* (Diana Agrest, Patricia Conway & Leslie Weisman eds.), *reprinted in GENDER SPACE ARCHITECTURE: AN INTERDISCIPLINARY INTRODUCTION* 140, 141–42 (Jane Rendell, Barbara Penner & Iain Borden eds., 2000) (describing how women in Argentina appropriated a public space, the Plaza de Mayo, which was symbolically important in silent protest against “disappearances” of thousands of people, including their children and husbands, in the mid-1970s by the Argentine military). Torre discusses the impact of this occupation in both gender and spatial terms. *Id.* at 142.

“negative presence”⁷ often has the effect of silencing and of marginalizing those who are excluded.⁸ What do space, place, and power have to do with electoral quotas for women in Italy? As in other countries, women in Italy have been affirmatively excluded from many public and political spaces⁹ until relatively recently.¹⁰ Italian law has enforced and reinforced such exclusions, this negative presence and marginalization of women in Italian public life.¹¹ This article examines how the law has been used to exclude women from political space and place in Italy, and more generally, the impact this has had on women’s citizenship rights as well as the impact on democracy.¹² In addressing these issues, this article also details the more recent attempts to provide access to important political spaces, namely at the national and local levels of government.¹³ Framing this discussion in terms of space and place helps dislodge the issue of quotas from the stigma with which they are associated in the United States, in particular.¹⁴ In addition, this perspective seeks to eschew

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7. Shirley Ardener, *The Partition of Space*, in *WOMEN AND SPACE: GROUND RULES AND SOCIAL MAPS* (Shirley Ardener ed., 1993), *reprinted in GENDER SPACE ARCHITECTURE: AN INTERDISCIPLINARY INTRODUCTION* 112, 113–14 (Jane Rendell, Barbara Penner & Iain Borden eds., 2000).
 8. See bell hooks, *Choosing the Margin as a Space of Radical Openness* in *BELL HOOKS, YEARNINGS: RACE, GENDER AND CULTURAL POLITICS* (1989), *reprinted in GENDER SPACE ARCHITECTURE: AN INTERDISCIPLINARY INTRODUCTION* 203, 205, 207–08 (Jane Rendell, Barbara Penner & Iain Borden eds., 2000) (providing a poignant account of the pain of discussing issues of “space and location” when living in both the space at the margin, as a black woman the space of the oppressed, as well as “at the center,” the space of the dominant as a professor at a major American university).
 9. While the term “public space” includes “political space,” I believe that it is helpful to consider “political space” more specifically, particularly in the context of electoral quotas. See Laura Palazzani, *La Cittadinanza tra Uguaglianza e Differenza: Le Istanze del Femminismo Giuridico*, 219 *ARCHIVIO GIURIDICO* 321, 333 (1999) (asserting that the public/private dichotomy results in the “masculine public” that politically dominates the depoliticized “feminine”).
 10. See *infra* notes 30–41, 72–81 and accompanying text.
 11. See *infra* Part III.A.
 12. See *infra* Parts I, III.A.
 13. See *infra* notes 124, 127, 130, 133–39, 143–50 and accompanying text.
 14. See Ruth Rubio-Marín, *A New European Parity-Democracy Sex Equality Model and Why it Won’t Fly in the United States*, 60 *AM. J. COMP. L.* 99, 118–19 (2012) (arguing that a set of social, legal, historical, and cultural factors make the use of quotas to achieve a parity democracy unlikely in the U.S. because women’s political exclusion was traditionally assumed rather than statutorily implemented, as opposed to racial disparity, which was written into the Apportionment Clause and the Fugitive Slave Clause of the Constitution). The reactionary movements in the U.S. resisting women’s rights rely heavily on family-related specificities of women in child-rearing and household management and have created a presumption that measures requiring equality in the public and private spheres amount to affronts to the traditional family.

the vexed dichotomies of formal versus substantive equality and equality of opportunity versus equality of results. Instead, the structure of space, place, and power provides a richer lens through which to consider electoral quotas to create political space for women, broaden representation, and enhance democracy.¹⁵

Part I of this article briefly outlines the traditional “equality” approaches for evaluating quotas, in order to illustrate that notions of equality are only partially useful for resolving questions of electoral quotas for women. This section also considers the meaning of the term quota and explains that there is a broad array of measures that comes within the term electoral quota. This range of methods for increasing the presence of women in elected offices calls for a broader and richer lens through which to view them.¹⁶ Part II explores the framework of space, place, and power to consider how this perspective might reshape the discussion of quotas and other affirmative measures to increase the number of women in elected office. Part III delves into the history of equality struggles in Italy beginning with an in-depth look at the legally sanctioned negative presence of women. This section also briefly describes relatively recent efforts of the feminist movement to bring about equality from women’s external, negative presence. Finally, Part IV turns to specific examples of efforts to undo this proscription and establish what a number of Italian scholars describe as “equilibrium” of the sexes in political representation.¹⁷ The Italian Parliament and the Constitutional Court have been the protagonists in this effort, with one institution advancing quotas while the other resists and then both

Id. at 119–24; see also Aili Mari Tripp, *Creating Collective Capabilities: Women, Agency, and the Politics of Representation*, 19 COLUM. J. GENDER & L. 219, 224–25 (2010) (indicating that there is little discussion of collective strategies to address women’s political disempowerment in the U.S. because the liberal philosophical frame in the U.S. does not encompass a sense that women have experienced collective disempowerment, as opposed to individual inadequacy).

15. Anne Phillips explored similar issues, specifically challenging arguments against the importance of presence. ANNE PHILLIPS, *THE POLITICS OF PRESENCE* (1995). My research reinforces her arguments but considers the specific example of electoral quotas in Italy and the history of the deliberate exclusion of women from citizenship rights. See *infra* Parts III.A, IV.
16. See *infra* Part I.
17. See MARILA GUADAGNINI & LUCIA AMARAL, *Introduzione*, in DA ELETTRICI A ELETTE: RIFORME ISTITUZIONALI E RAPPRESENTANZA DELLE DONNE IN ITALIA, IN EUROPA E NEGLI STATI UNITI [From Electric to Elected: Institutional Reforms and Representation of Women in Italy, in Europe and in the United States] 7 (Marila Guadagnini ed., 2003); *infra* Part IV.

switching roles.¹⁸ This section also describes the current status of electoral quotas in Italy.¹⁹

I. FORMAL EQUALITY ESCHEWS “DISCRIMINATION TO REMEDY DISCRIMINATION”

Traditional notions of equality dictate that government should not use discrimination in the form of quotas to correct past discrimination.²⁰ On the basis of this assumption, the law must remain neutral unless there is current discrimination, which is appropriate to prevent and to remedy.²¹ This section explores the limitations of this approach in the U.S. and contrasts it with differences in the Italian Constitution.²² This section also considers different forms of electoral quotas.²³

In the U.S., the traditional equality framework is consistent with the constitutional approach to individual rights; the Constitution acts as a negative force limiting the government’s ability to infringe on certain rights of individuals.²⁴ The U.S. approach also helps to explain why, despite a history of exclusion and discrimination against women, people of color, and other minorities, the state has limited abilities to implement affirmative policies to correct or rectify past

18. See *infra* Part IV.

19. See *infra* text accompanying notes 141–42, 242–50, 257.

20. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003); Blanca Rodriguez-Ruiz & Ruth Rubio-Marín, *Constitutional Justification of Parity Democracy*, 60 ALA. L. REV. 1171, 1177 (2009); Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L. REV. 1119, 1170 (2006).

21. See, e.g., *Grutter*, 539 U.S. at 351–52.

22. See *infra* text accompanying notes 24–29.

23. See *infra* text accompanying notes 30–41.

24. See Tripp, *supra* note 14, at 219 (arguing that while the liberal philosophical approach emphasizes individual capabilities, it must also encompass the collective capability to act, and must include principles of agency, before women can reach the full potential of citizenry). Collective strategies, like the introduction of quotas make it possible to tackle structural gender disparities in ways that cannot be achieved by individualistic approaches to gender equality, and enhance the effectiveness of individualistic strategies. *Id.* at 224–25; see also Rubio-Marín, *supra* note 14, at 100 (noting that Europe is gradually shifting from an equal rights/opportunities sex equality framework to a parity democracy equality model, which enables the genders to participate in all domains of citizenship equally). The parity democracy model emphasizes that equality between the sexes in both the public and private domain is necessary for a properly functioning democracy, rather than merely a nicety that formal equality is expressed in a categorical rule of not treating the sexes differently, as opposed to a substantive equality mandate which would ensure that there are no disadvantages attached to a person’s sex. *Id.* at 105, 113.

discrimination and exclusion.²⁵ Clearly, an approach triggered only when discrimination is present is not capable of promoting inclusion.²⁶

By contrast, the Italian Constitution, like other post-war constitutions, includes positive language setting out what the government must do to protect individual rights.²⁷ While the use of positive rights language does not eliminate the need for an equality analysis, such language directing government to remove barriers to equality establishes a basis for this analysis to expand beyond the cramped considerations of formal equality. The key here is that constitutional acknowledgement of the need to address obstacles to equality allows history and context to inform and thus enrich an equality analysis, opening the door to remedial measures designed to overturn discriminatory practices and laws.²⁸ Exposing the history and context of the “negative presence” of women in public life, for

25. See, e.g., *Grutter*, 539 U.S. at 333, 351–52.

26. Rosenblum, *supra* note 20, at 1128 (providing a compelling and comprehensive explanation of the difference between the French concern with “parity” to support quotas and the concern in the United States with combating discrimination, and how these distinct perspectives make quotas impossible to support in the U.S., but tenable in France, at least as to women). Other approaches have examined the impact that extremely low numbers of women in elected office have had on the ability to achieve a “true democracy.” Blanca Rodriguez-Ruiz & Ruth Rubio-Marín, *The Gender of Representation: On Democracy, Equality, and Parity*, 6 INT’L J. CONST. L. 287, 289 (2008) (“[A] model of democracy based on gender parity completes the transition from the liberal state to the democratic state.”). See also Blanca Rodriguez-Ruiz & Ruth Rubio-Marín, *supra* note 20, at 1182–83 (arguing that gender parity is necessary because the democratic state is currently a patriarchal state as a response to the concern that parity would require affirmative action for other underrepresented groups). Negative rights, or the right to engage in an activity free from governmental interference, are the traditional framework of rights in the U.S. Generally, negative rights adequately serve the interests of the political majority in a democracy. However, positive rights to engage in an activity allow politically under-represented groups in a democracy to correct structural shortfalls, even if the correction requires governmental assistance. See Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 883 n.12 (1989). See generally Paul N. Cox, *The Question of “Voluntary” Racial Employment Quotas and Some Thoughts on Judicial Role*, 23 ARIZ. L. REV. 87 (1981) (exploring the validity of “voluntary” affirmative action plans versus the validity of “involuntary” quotas); Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward and “Entirely New Strategy”*, 44 HASTINGS L.J. 79 (1992) (discussing the potential to establish new economic and social standards in the United States by ratifying the International Covenant on Economic, Cultural and Social Rights).

27. See *infra* text accompanying notes 91–92 (discussing the Italian Constitution equality provisions in more detail).

28. See Yvonne Galligan, *Bringing Women in: Global Strategies for Gender Parity in Political Representation*, 6 U. MD. L.J. RACE, RELIGION, GENDER, & CLASS 319, 319–29 (2006); discussion *infra* Part III.A.

example, understood as a condition established and perpetuated by legal and social frameworks, can enhance an awareness of the need to broaden inclusion, as well as help clarify what such reforms might look like.²⁹

Several countries use reserved seat quotas for elected or appointed positions,³⁰ which guarantee that women will hold political office and thus a place in government.³¹ Yet, this definition does not represent what Italy and other countries have designed in attempts to increase the number of women in elected offices. Other countries approach the problem of few women in politics less directly by enacting laws that impose requirements on the formation or presentation of candidate lists, ensuring that women have a place on the ballots that may then lead to a place in government.³² As of 2007, twenty-six countries had adopted candidate quota laws requiring political parties to put forth a certain percentage of female candidates.³³ Space matters even in such apparently trivial matters as placement on the ballot. Eleven of the countries with candidate quotas further insist on placement mandates to ensure that women candidates are not listed at the bottom of the ballot.³⁴ These countries have found that when women candidates are so placed they rarely take office because their party's proportionate share of seats is unlikely to be great enough to reach the bottom of the ballot.³⁵ For example, Mexico's electoral law

29. See Galligan, *supra* note 28, at 319–21; *infra* Part III.A.

30. DRUDE DAHLERUP, WHAT ARE THE EFFECTS OF ELECTORAL GENDER QUOTAS?: FROM STUDIES OF QUOTAS DISCOURSES TO RESEARCH TO QUOTA EFFECTS 25 (2006), available at <http://ipsa-rc19.anu.edu.au/Dahlerup.ipsa06.pdf> (setting out a chart listing elected reserved seats in countries such as Rwanda, Jordan, Burundi and countries with reserved seats for appointed positions, such as Tanzania, Pakistan and Kenya).

31. *Id.* at 6, 25.

32. See Galligan, *supra* note 28, at 321–23.

33. Leslie A. Schwindt-Bayer, *Making Quotas Work: The Effect of Gender Quota Laws on the Election of Women*, 34 LEGIS. STUD. Q. 5, 6–7 (2009) (describing Argentina as the first country to adopt candidate quota laws); see also Galligan, *supra* note 28, at 321–29 (analyzing the success of candidate quotas and ballot placement requirements).

34. Schwindt-Bayer, *supra* note 33, at 11–12.

35. See e.g., Lourdes Garcia-Navarro, *In Egypt's New Parliament, Women Will Be Scarce*, NPR, ALL THINGS CONSIDERED (Jan. 19, 2012), <http://www.npr.org/2012/01/19/145468365/in-egypts-new-parliament-women-will-be-scarce> (describing recent elections in Egypt which resulted in less than 2% of parliamentary seats going to women and explaining that women on party lists were placed “far down on those lists, meaning they had virtually no chance of getting into office”).

requires parties to list candidates alternating between men and women candidates.³⁶

Another creative example is a 2004 Italian law designed to increase the number of women elected to the European Parliament.³⁷ This law provided that, for the 2004 and 2009 elections, neither sex could make up more than two-thirds of the candidates.³⁸ While this is similar to one of the laws discussed below,³⁹ this law included the additional measure of reducing monetary reimbursements by up to one-half for any party that presented a list of candidates in violation of the two-thirds maximum of either sex.⁴⁰ Thus, the law directly impacted political parties by creating both incentives to include more women as well as penalties for not doing so.⁴¹

The discussion in Part IV of regional laws in Italy reveals that there are a number of other creative affirmative measures governments can pursue to improve the likelihood of increasing the number of women in elected office.⁴² The definition of quotas used in the traditional equality analysis is primarily about reserved seats, and is therefore inapposite when it comes to evaluating other affirmative measures.⁴³ An alternative to traditional notions of formal equality, the lens of space and place, enriches an exploration of the use of electoral quotas.

II. GENDERED SPACE AND PLACE

Political space everywhere is gendered. Gendered spaces reinforce the dichotomy between public and private spheres in how it relegates women to the domestic, private sphere while men claim control of the public.⁴⁴ This dichotomy has systematically denied women access to

36. Código Federal de Instituciones y Procedimientos Electorales [COFIPE] [Federal Code for Electoral Institutions and Procedures], art. 220, Diaro Oficial de la Federación [DO], 14 de Enero de 2008 (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/COFIPE.pdf>.

37. See Leggi 8 aprile 2004, n. 90, art. 3, in Gazzetta Ufficiale della Repubblica Italiana[G.U.] 9 aprile 2004, n. 84 (It.), available at <http://gazzette.comune.jesi.an.it/2004/84/1.htm>.

38. *Id.* at art. 3, para. 1.

39. See *infra* note 152 and accompanying text.

40. L. n. 90, art. 3, para. 2/2004 (It.). A similar mechanism was enacted in France to achieve greater parity in elections for the National Assembly. See Rosenblum, *supra* note 20, at 1146 (discussing the French law requirement that a party's lists include one-half men and one-half women and provides for a reduction in state financial support proportionate to degree to which the list does not meet this standard).

41. See L. n. 90, art. 3/2004 (It.).

42. See *infra* notes 206–17, 228–43 and accompanying text.

43. See *supra* notes 30–32 and accompanying text.

44. See Leslie Kanés Weisman, *Women's Environmental Rights: A Manifesto*, in HERESIES: A FEMINIST PUBLICATION ON ART AND POLITICS (1981), reprinted in

public space and therefore to political space.⁴⁵ Indeed, *especially* political space. Of course, political space is only one of many gendered spaces. Historically, men have been the architects of most spaces because they have dominated the professions and careers that create, define, and thus, control spaces.⁴⁶ From constructing separate-sex public bathrooms,⁴⁷ to determining the layout of cities,⁴⁸ to structuring government and governmental institutions,⁴⁹ men have

GENDER SPACE ARCHITECTURE: AN INTERDISCIPLINARY INTRODUCTION 1, 2 (Jane Rendell, Barbara Penner & Iaina Borden eds., 2000).

45. *See id.* at 2–4.
46. *See* AARON BETSKY, *BUILDING SEX: MEN, WOMEN, ARCHITECTURE AND THE CONSTRUCTION OF SEXUALITY* 20–42 (1995) (describing the impact of male dominance in the fields of architecture and city planning).
47. Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture and Gender*, 14 MICH. J. GENDER & L. 1, 55–56 (2007) (discussing how the gendering of public bathrooms is harmful to transgender people); *see also* LESLIE KANES WEISMAN, *DISCRIMINATION BY DESIGN: A FEMINIST CRITIQUE OF THE MAN-MADE ENVIRONMENT* 10 (1992) (discussing how “man-made space encodes and perpetuates white male power and superiority and the inferiority and subordination of women and minorities”). Indeed, the need for separate-sex bathrooms posed a symbolic and annoying obstacle to women’s full participation in political and governmental life. Senator Mikulski discusses her advocacy for a women’s bathroom in the Senate. Senator Barbara Mikulski, *Opening Dialogue*, University of Baltimore’s Feminist Legal Theory Conference: Applied Feminism and Democracy (Mar. 2, 2012), 42 U. BALT. L. REV. 211 (2013). Similarly, Justice Ruth Bader Ginsburg has referred to the installation of a women’s bathroom—equal in size to the men’s bathroom—in the justice’s robing room, upon her appointment to the Supreme Court of the United States in 1993, as a milestone in the progress of women in the American legal profession. Ruth Bader Ginsburg, *The Supreme Court: A Place for Women*, 32 SW. U. L. REV. 189, 198 (2003); *see also* Ruth Bader Ginsburg, *Women’s Progress at the Bar and on the Bench*, 54 FED. LAW. 50, 51–52 (2007) (noting that American law schools notably lacked adequate bathrooms for women prior to the 1970s).
48. Stephanie Lasker, *Sex and the City: Zoning “Pornography Peddlers and Live Nude Shows,”* 49 UCLA L. REV. 1139, 1139 (2002) (describing how planners zone pornography to keep it out of most women’s lives, thus also excluding women’s voices from discussions about pornography). The list of gendered spaces in education, in the professions and in the military could go on at great length, with the common denominator being denying women access to all of them until relatively recently.
49. For a detailed discussion of the structure of the United State’s federal government by American draftsmen and the Founding Fathers, *see* Ray Forrester, *The Four American Constitutions: A New Perspective*, 44 HASTINGS L.J. 963, 967–68 (1993) (noting that even after the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments, “no women, black or white, were enfranchised [with the right to vote]”). For a thorough and fascinating discussion of the evolving role of American women in society and public life in light of the American Revolution, the American Constitution, and the debates of men in State legislatures concerning the role of women in American society, *see* Samantha Ricci, *Rethinking Women and the Constitution: An Historical*

enforced and reinforced gender stereotypes in assembling these spaces.⁵⁰ The gendered nature of these spaces and places inevitably controls women.⁵¹ As one critical architectural theorist states:

Space, like language, is socially constructed; and like the syntax of language, the spatial arrangements of our buildings and communities reflect and reinforce the nature of gender, race, and class relations in society. The uses of both language and space contribute to the power of some groups over others and the maintenance of human inequality.⁵²

Argument for Recognizing Constitutional Flexibility with Regards to Women in the New Republic, 16 WM. & MARY J. WOMEN & L. 205, 205–07 (2009). In Italy, women made up 3.7% of the constituent assembly that was charged with drafting a new constitution after World War II. ELISABETTA PALICI DI SUNI, *TRA PARITÀ E DIFFERENZA: DAL VOTO ALLE DONNE ALLE QUOTE ELETTORALI 38* (2004) [BETWEEN PARITY AND DIFFERENCE: FROM WOMEN'S VOTE TO ELECTORAL QUOTAS].

50. I do not intend this statement to create a conflict between men as a group and women as a group; rather, this merely acknowledges the historical fact that men have excluded women from many professions and careers, including architecture, city planning, medicine, ecclesiastical hierarchies, and law and government, to name a few. See Lasker, *supra* note 48, at 1175 (“It has become clear that virtually all human environments are designed, built, and managed by male dominated professions using assumptions that tend to reinforce existing female stereotypes.”) (quoting *NEW SPACE FOR WOMEN 1* (Gerda R. Wekerle et al. eds., 1980)). Certainly, I do not ignore the significant efforts of many men in the recent past to overturn this system. For example, Senator Mikulski emphasized the important support and guidance she received from her male colleagues. Senator Barbara Mikulski, *Opening Dialogue*, University of Baltimore’s Feminist Legal Theory Conference: Applied Feminism and Democracy (Mar. 2, 2012), 42 U. BALT. L. REV. 211 (2013).
51. The focus of this article is women. However, certainly the gendered structure of space also controls transgender people. See Dylan Vade, *Explaining Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 261, 273–275 (2005) (arguing against the sex-gender dichotomy as too narrow to protect the “gender galaxy” since “[t]he ways to be transgender are endless”). Cf. Kogan, *supra* note 47, at 18 (noting that while white men and women in nineteenth century America were required to ride in gender segregated rail cars, black women and children were not allowed passage in the ladies’ car. Instead, they were, “relegated to smoking cars and other second-class accommodations with white and black men”); Ann R. Tickamyer, *Public Policy and Private Lives: Social and Spatial Dimensions of Women’s Poverty and Welfare Policy in the United States*, 84 KY. L.J. 721, 736–40 (1996) (discussing the need to scrutinize the “spatiality of communities, labor markets, and households, all of which can be shown to be subtly gendered” to better address poverty).
52. WEISMAN, *supra* note 47, at 2; see also Leslie M. Rose, *The Supreme Court and Gender-Neutral Language: Setting the Standard or Lagging Behind?*, 17 DUKE J. GENDER L. & POL’Y 81, 81–84 (2010) (analyzing the exclusionary impact of gender-specific language in U.S. Supreme Court opinions and arguing for gender-neutral language).

Analogous to the ways in which architecture “exists fundamentally as the expression of an established social order,”⁵³ legal and political structures reflect placement of power with the dominant group.⁵⁴ Political space, in particular, plays a significant role in structuring a society’s spaces, and in turn, power exercised through politics has a dramatic impact on people, especially on women, and specifically on women’s political rights and citizenship.⁵⁵

Political space is gendered in many ways. Relevant to this article, political space is gendered insofar as it has created the “negative presence”⁵⁶ of women in the structure of government, which has allowed for laws that further limit and stifle women’s citizenship and public voice.⁵⁷ Part III below sets out specific examples.⁵⁸ Even in the U.S., women were excluded from having a voice in government because they were denied the right to vote until 1920.⁵⁹

Political space is also gendered due to the stereotypes it reinforces about the qualities necessary to be effective in this space.⁶⁰ As one scholar has pointed out, “[t]he more expansive the executive, the more masculine or agentic it becomes in the eyes of [its] citizens.”⁶¹ This, in turn, impacts whether voters believe women can fill these roles.⁶² The circular and self-fulfilling nature of this problem is further highlighted by the claim that legally created space in the form of quotas will lead voters to become more comfortable with women in elected office, and thus, more inclined to vote for them even if

53. WEISMAN, *supra* note 47, at 178.

54. See DOLORES HAYDEN, *THE POWER OF PLACE: URBAN LANDSCAPE AS PUBLIC HISTORY* 22–29 (1995) (discussing how the mapping of geographical space in cities both illustrates and reinforces exclusion from political space).

55. See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1857–59 (1994); Margaret Moore, *Sub-State Nationalism and International Law*, 25 MICH. J. INT’L L. 1319, 1322 (2004); Adelaide H. Villmoare, *Feminist Jurisprudence and Political Vision*, 24 LAW & SOC. INQUIRY 443, 451–52 (1999).

56. *E.g.*, hooks, *supra* note 8, at 208–09.

57. See Anne Marie Goetz & Shireen Hassim, *Introduction: Women in Power in Uganda and South Africa*, in *NO SHORTCUTS TO POWER: AFRICAN WOMEN IN POLITICS AND POLICY MAKING* 1, 5–8 (Anne Marie Goetz & Shireen Hassim eds., 2003).

58. See *infra* Part III.

59. U.S. CONST. amend. XIX.

60. Paula A. Monopoli, *Why So Slow: A Comparative View of Women’s Political Leadership*, 24 MD. J. INT’L L. 155, 158–59 (2009) (examining the stereotypical masculine attributes associated with the “Commander-in-Chief” role of the U.S. President).

61. *Id.* at 158.

62. *Id.* at 158–59.

quotas are repealed or phased out.⁶³ Indeed, each of the studies indicates that measures that promote the election of women can lead to continued election of women even once those measures are no longer in effect.⁶⁴ While electoral quotas may be difficult to justify under a traditional equality analysis, when men have had a practical monopoly on political space and have exercised this power to oppress women's citizenship and other rights—as they have in Italy—the only effective solution is to break up this monopoly and create political space for women.⁶⁵

Restricted political space in Italy denied women the right to vote until after World War II; banned women from many professions and careers, including elected office; and linked their citizenship to that of their husbands.⁶⁶ The history of deliberate and explicit exclusion of women from political space provides a compelling justification for implementing strategies designed to affirmatively open political space for women with a goal of achieving substantive equality.

III. GENDER EQUALITY AND REPRESENTATION IN ITALY

The context of historical negative presence in public life, and especially political life in Italy, is important background for evaluating the adoption of electoral quotas. This section first traces the slow and limited progress of equality in Italy featuring the roles played by the Constitutional Court and the government—institutions dominated by men.⁶⁷ Next, this section describes the limited success Italian women have had using spaces and places outside of governmental institutions.⁶⁸ Out of both a distrust of governmental institutions as well as necessity, Italian women have exerted pressure on government from the outside to insist upon inclusion.⁶⁹ Of course,

63. See Rikhil R. Bhavnani, *Do Electoral Quotas Work After They Are Withdrawn? Evidence from a Natural Experiment in India*, 103 *Am. Pol. Sci. Rev.* 23, 29–31 (2009) (concluding that after quotas lapse women are still successful in subsequent elections), available at <http://trikhilbhavnani.com/Bhavnani%20Do%20electoral%20quotas%20work%20after%20they%20are%20withdrawn.pdf>; Maria De Paola et al, *Can Gender Quotas Break Down Negative Stereotypes? Evidence from Changes in Electoral Rules*, 94 *J. PUB. ECON.* 344, 346–47, 350–51 (2010) (examining voter patterns after electoral quotas were found unconstitutional in Italy and concluding that such measures are somewhat successful in breaking down negative stereotypes about women's ability to be effective political officials).

64. See Bhavnani, *supra* note 63, at 34; De Paola, *supra* note 63, at 348.

65. See *infra* text accompanying notes 20–21, 75–123, 182–94.

66. See discussion *infra* Part III, for more specific discussions of each of these limitations on women's citizenship in Italy.

67. See *infra* text accompanying notes 82–123.

68. See discussion *infra* Part III.B.

69. See discussion *infra* Part III.B.

the need to continue to resort to spaces external to political space further exacerbates the negative presence of women in government.⁷⁰

A. A History of Negative Presence

It almost goes without saying that the ability to assume elected office is an extremely important component of citizenship; nonetheless, this is merely one of many aspects of citizenship that has been denied women until relatively recently.⁷¹ In Italy, full citizenship for women has drawn tantalizingly close in the last thirty years.⁷² A description of the types of laws that specifically denied women full citizenship and excluded them from political life, and the extremely long road to reforming those laws, helps to illustrate why a form of quotas emerged as the best response to this history. Quotas and other affirmative measures can open spaces of political life to women after a history of decidedly and deliberately exclusionary laws.⁷³

Italy began to recognize rights most commonly associated with citizenship for women only within the last sixty years.⁷⁴ These rights include the right to vote;⁷⁵ to autonomy as to their individual citizenship;⁷⁶ to participate in the judicial system as lay jurors, judges and lawyers;⁷⁷ as well as the right to hold political and other governmental offices.⁷⁸ Yet, Italy has been slow to recognize most of these rights. Some Italian commentators have noted that the concept of citizenship was built without consideration of the presence of women.⁷⁹ This may help to explain this delay. However, many laws

70. See discussion *infra* Part III.B.

71. See LUCIA CHIAVOLA, *LIBERAZIONE DELLA DONNA: FEMINISM IN ITALY* 58 (1986); Eileen McDonagh, *Citizenship and Women's Election to Political Office: The Power of Gendered Public Policies*, in *GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP* 201, 201–02 (Joanna L. Grossman & Linda C. McClain eds., 2009).

72. See *infra* text accompanying notes 81–122.

73. See Ann Peters & Stefan Suter, *Representation, Discrimination, and Democracy: A Legal Assessment of Gender Quotas in Politics*, in *GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP* 174, 174–75 (Joanna L. Grossman & Linda C. McClain eds., 2009).

74. See *infra* notes 81–122 and accompanying text.

75. See *infra* notes 81–86 and accompanying text.

76. See *infra* notes 87–93, 99–05 and accompanying text.

77. See *infra* notes 105–22 and accompanying text.

78. See *infra* notes 94–97 and accompanying text.

79. Franca Bimbi & Alisa Del Re, *A Cinquant'anni dal Voto*, in *GENERE E DEMOCRAZIA: LA CITTADINANZA DELLE DONNE A CINQUANT'ANNI DAL VOTO* 11, 12 (Franca Bimbi & Alisa Del Re eds., 1997).

that denied women equal citizenship rights expressly excluded women, and therefore, cannot be considered mere oversights.⁸⁰

1. The Franchise

Men in government did not grant women in Italy the right to vote until after World War II in the Italian Constitution of 1945.⁸¹ Indeed, the issue of the franchise for women was controversial from the beginning of Italy's unification in 1861.⁸² Women of Tuscany and Lombardia-Veneto had enjoyed the right to vote, but upon unification they were suddenly disenfranchised because the Kingdom of Italy did not provide for women's suffrage.⁸³ While the issue of extending the right to vote to women was raised shortly after unification, the opposition continued to prevail.⁸⁴ A law enacted during fascism allowed women to vote in local administrative elections, but not in political—meaning regional and national—elections. Unfortunately, this seemingly progressive law was followed immediately by the abolition of the same local entities.⁸⁵ Finally, a governmental decree of 1945 declared that the right to vote extended to women.⁸⁶

80. See *infra* notes 100–09, 113–17 and accompanying text.

81. Art. 48 (1) Costituzione [Cost.] (It.) (“Any citizen, male or female, who has attained majority, is entitled to vote.” [“Sono elettori tutti i cittadini, uomini e donne, che hanno raggiunto la maggiore età.”]). See generally P. Orman Ray, *The World-Wide Woman Suffrage Movement*, 1 J. COMP. LEGIS. & INT’L L. 220 (1919) (reporting women's suffrage efforts through World War I). England was the first western government to grant a limited right of suffrage to women in 1834. *Id.* at 220–21. Ireland followed shortly after in 1837, and then several Germanic governments permitted women to vote by male proxy during the 1850s and ‘60s, including several Austrian and Prussian provinces. *Id.* at 221–22. Throughout the 1870s and 80s, the right to vote in municipal elections began to be granted to women in the U.S., the British Empire, and Europe. *Id.* at 222–28. Norway became the first independent state to grant full parliamentary suffrage to women in 1913. *Id.* at 234. Holland extended complete suffrage to women in 1916, with Sweden, Denmark, and Iceland granting full suffrage in 1919. *Id.* at 235. The U.S. recognized women's right to vote with the adoption of the Nineteenth Amendment to the U.S. Constitution in 1920. Karen M. Morin, *Political Culture and Suffrage in Anglo-American Women's West*, 19 WOMEN'S RTS. L. REP. 17, 17–18 (1997). By contrast, it was not until 1971 that women in Switzerland were able to vote at the federal level, and not until 1990 that the last of the twenty-six cantons extended the right to vote to women, after compelled by the Swiss Federal Supreme Court. Peters & Suter, *supra* note 73, at 174.

82. PALICI DI SUNI, *supra* note 49, at 38.

83. *Id.*

84. *Id.* at 38–40.

85. *Id.* at 40–41.

86. Decreto Legislativo 2 febbraio 1945, n. 23 (It.); see also PALICI DI SUNI, *supra* note 49, at 41.

2. Hurdles to Implementing Constitutional Equality

Women were allowed to be candidates for the Constituent Assembly that drafted the post-war constitution.⁸⁷ Twenty-one women were elected to the Constituent Assembly, which accounted for about 3.7% of the Assembly.⁸⁸ While these women were a small minority, at least one commentator asserts that their presence required the entire Assembly to write a constitution that “took into account the needs and expectations of those who represented more than one-half of the population.”⁸⁹ The end result was that women had a formal “place” in the new constitution; specifically, article three declares, “All citizens have equal social dignity and are equal before the law, without distinctions of sex, race, language, religion, political opinion, personal and social conditions.”⁹⁰ This provision also states that the republic has a responsibility to remove economic and social obstacles that limit equality among citizens,⁹¹ yet equality rights for women were implemented slowly and reluctantly.⁹² One justification given by the *Consiglio di Stato* (Council of State, an advisory body to the Italian Government on administrative matters) was that some constitutional provisions, particularly those related to equality, merely set out guidelines for future legislation and did not create immediately enforceable rights.⁹³

The Italian Constitution also specifies that women have the right to hold elected positions.⁹⁴ Despite these and other provisions declaring

87. Decreto Legislativo 10 marzo 1946 n. 74 (It.). The only requirement imposed on candidates was that they be at least 25 years old. *Id.*

88. PALICI DI SUNI, *supra* note 49, at 42.

89. *Id.*

90. Art. 3 Costituzione [Cost.] (It.) (“Tutti i cittadini hanno pari dignità sociale e sono eguali davanti alla legge, senza distinzione di sesso, di razza, di lingua, di religione, di opinioni politiche, di condizioni personali e sociali.”).

91. Art. 3 Costituzione [Cost.] (It.) (“È il compito della Repubblica rimuovere gli ostacoli di ordine economico e sociale, che, limitando di fatto la libertà e l’eguaglianza dei cittadini, impediscono il pieno sviluppo della persona umana e l’effettiva partecipazione di tutti i lavoratori all’organizzazione politica, economica e sociale del Paese.” [“It is the duty of the Republic to remove economic and social obstacles that in fact limit liberty and equality among citizens, that impair full development of one’s humanity and effect participation of all workers in the political, economic and social organizations of the country.”]).

92. See MANLIO BELLOMO, *LA CONDIZIONE GIURIDICA DELLA DONNA IN ITALIA: VICENDE ANTICHE E MODERNE* [THE LEGAL CONDITION OF WOMEN IN ITALY: ANCIENT AND MODERN EVENTS] 166, 168 (1996).

93. *Id.*

94. Art. 51 (1) Costituzione [Cost.] (It.) (“Tutti i cittadini dell’uno o dell’altro sesso possono accedere agli uffici pubblici e alle cariche elettive in condizioni di eguaglianza, secondo i requisiti stabiliti dalla legge.” [“All citizens of each sex may

equality between the sexes, the initial prevailing interpretation was that these constitutional declarations were subject to legislative action to implement.⁹⁵ It was not until after a decision by the Constitutional Court in 1960⁹⁶ that the Italian Parliament finally began to abolish obstacles and restrictions on women's ability to hold public or elected office.⁹⁷ However, these actions were slow in coming.⁹⁸

Despite these first, timid steps toward parity, a married woman's citizenship remained dependent upon that of her husband.⁹⁹ A 1912 law established that a married woman could not hold citizenship different from that of her husband.¹⁰⁰ Thus, if an Italian woman married a non-Italian she lost her citizenship.¹⁰¹ In addition, if her Italian husband changed his citizenship, her citizenship was changed as well.¹⁰² This remained law until 1975 when the Constitutional Court finally declared a portion of this law unconstitutional.¹⁰³ Only in 1983 did women achieve full equality between spouses on the issue of citizenship, when Parliament enacted a law that extended citizenship to non-Italians who married Italian women,¹⁰⁴ thus granting parity in citizenship nearly forty years after the creation of the new constitution.

hold elected and public offices under equal conditions, according to the requirements established by law.”). See *infra* text accompanying note 204 (discussing a second sentence that was added to this section).

95. PALICI DI SUNI, *supra* note 49, at 50.
96. Corte Costituzionale della Repubblica Italiana 18 maggio 1960, n. 33, available at <http://www.giurcost.org/decisioni/1960/0033s-60.html> (declaring such restrictions in violation of the constitution); see also MARILISA D'AMICO, *IL DIFFICILE CAMMINO DELLA DEMOCRAZIA PARITARIA* [THE DIFFICULT ROAD TO A DEMOCRACY OF PARITY] xxii (2011).
97. Licia Califano, *Azioni Positive e Rappresentanza Politica Dopo le Riforme Costituzionali* [Positive Actions and Political Representation after the Constitutional Reforms], in *DONNE POLITICA E PROCESSI DECISIONALI* 47, 48 n. 2 (Licia Califano ed., 2004).
98. See *infra* text accompanying notes 141–43.
99. Legge 13 giugno 1912, n. 555 art. 10, in G.U. 30 giugno 1912, n. 153 (It.), available at <http://www.agenziabrasitalia.it/leggi/legge13giu1912n555.htm>.
100. *Id.*; see also PALICI DI SUNI, *supra* note 49, at 96 (tracing this law to article 14 of the Italian civil code of 1865 as well as to article 12 of the Napoleonic code).
101. L. n. 555 art. 10/1912 (It.).
102. *Id.* at art. 11.
103. Corte Costituzionale della Repubblica Italiana, 16 Aprile 1975, n. 87 (It.), available at <http://www.giurcost.org/decisioni/1975/0087s-75.html> (declaring this law in violation of article 29 of the constitution since it creates serious moral, legal and political inequality between spouses). The court addressed only article 10 that divested an Italian woman of her citizenship if she married a foreigner.
104. Legge, 21 aprile, 1983, n. 123, in G.U. 26 aprile 1983, n. 112 (It.); see also Califano, *supra* note 97, at 48 n.2; PALICI DI SUNI, *supra* note 49, at 97–98.

In addition to these inexplicable delays in establishing equal laws pertaining to citizenship, equal access to the judicial system for Italian women was also slow in coming. Participation in the judicial system, such as the right to vote and the right to individual citizenship not linked to one's spouse, is an important component of full citizenship rights. A post-war law, enacted before the creation of the new constitution, provided the basis for women to participate in the judicial system as lay jurors.¹⁰⁵ This law specifically declared that there should be no distinction on the basis of sex.¹⁰⁶ Although this forbade distinctions on the basis of gender, and therefore women could serve as lay members of juries, this law gave with one hand and took away with the other. It limited the number of women on the list of each *comune* to no more than one-third of the total number of those eligible to serve as lay jurors.¹⁰⁷ Furthermore, a 1956 law stated that at least one-half of the lay jurors must be men (three out of six) on the *Corte d'assise*.¹⁰⁸ The relatively new Constitutional Court upheld this limitation, finding that such a provision did not violate principles of equality and indeed was necessary for the improvement and efficient functioning of different public offices.¹⁰⁹ In effect, when initially confronted with quotas, the court found no constitutional violation.¹¹⁰

A 1919 law¹¹¹ declared that women were free to practice any profession, private or public work, but included exceptions based on sex. A series of laws enacted by the fascist government essentially voided the minimal level of equality created by this provision.¹¹² Women were prohibited from teaching literature and philosophy in the high schools and from being school principals, presidents, or directors of professional schools.¹¹³ This chipping away of professional options for women, thus intensifying their

105. Regio Decreto 31 maggio 1946, n. 560 art. 5, in G.U. 4 luglio 1946, n. 147 (It.); see also PALICI DI SUNI, *supra* note 49, at 73.

106. R.D. n. 560 art. 5/1946 (It.); see also PALICI DI SUNI, *supra* note 49, at 73.

107. R.D. n. 560 art. 5/1946 (It.); see also PALICI DI SUNI, *supra* note 49, at 73.

108. Legge, 27 dicembre 1956, n. 1441, in G.U. 3 gennaio 1957, n. 2 (It.), available at <http://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=1957-01-03&atto.codiceRedazionale=056U1441¤tPage=1>; see also PALICI DI SUNI, *supra* note 49, at 76.

109. Corte Cost. 24 settembre 1958, n. 56, 1958, G.U. 18 ottobre 1958, n. 253 (It.), available at <http://www.cortecostituzionale.it/actionPronuncia.do>.

110. See *id.*

111. Legge, 17 luglio 1919, n. 1176. This law has since been repealed.

112. See PALICI DI SUNI, *supra* note 49, at 69–70 (listing various laws passed by the Italian fascist government that limited professions for women).

113. See *id.* (citing several laws enacted by the fascist government).

marginalization, was further highlighted by two laws that prohibited women from occupying more than 10% of the positions in any public or private workplace, except for “jobs for which women are particularly well suited.”¹¹⁴ Even after the war, women’s exclusion from exercising judicial authority remained clear.¹¹⁵ Two women elected to the Constituent Assembly proposed express language in article 51 that would have declared, “Women have access to all grades and levels of the judiciary.”¹¹⁶ The Constituent Assembly members, over 96% of whom were men, voted down this proposal.¹¹⁷

As to the effect of the constitutional provisions expressly providing for equality, the *Consiglio di Stato* took the position that the provisions in the new constitution would not take effect until Parliament enacted new laws consistent with the new constitution; that is, laws that defined precisely how to implement such changes.¹¹⁸ Thus, women were left with the rather circular reasoning that, until Parliament enacted laws consistent with the new constitution, the prior, albeit possibly unconstitutional, laws were to remain in effect.¹¹⁹ It was not until 1960 that the Constitutional Court addressed this issue.¹²⁰ At that point, the court concluded that the distinction based on sex in the 1919 law violated the constitutional principles of equality as defined in the new 1948 constitution.¹²¹ This decision eventually resulted in a new law that guaranteed women access to all jobs, professions, and public office, including the judiciary, without limitation.¹²² Given the resistance of those within political institutions to dismantling entrenched barriers to equality, it is not surprising that the Italian women’s movement attempted to change from outside these institutions.

114. See *id.* at 70 (citing regio decreto-legge 15 ottobre 1938, n. 1514 (It.); regio decreto-legge 20 giugno 1939, n. 898).

115. *Id.* at 71.

116. *Id.* at 72.

117. See *id.*

118. Cons. Stato, IV, Jan. 18, 1957, n. 21 [in Foro it. 1957, III, 41 – with a note].

119. See Corte Cost., 13 maggio 1960, n. 33, Giur. it. 1960 (It.), available at <http://www.giurcost.org/decisioni/1960/0033s-60.html>; Cons. Stato, IV, 18 gennaio 1957, n. 21, Foro it. 1957, III, 41 (It.).

120. *Id.*

121. *Id.*

122. Legge 9 febbraio 1963, n. 66, in G.U. 19 febbraio 1963, n. 48 (It.), available at <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1963-02-09;66>.

Subsequently, this law was interpreted to have abrogated the requirement that at least one half of all lay jurors at the *Corte d'assise* be women. PALICI DI SUNI, *supra* note 49, at 80.

B. The Italian Women's Movement—From Outside Political Institutions

Italy's feminist movement in the 1970s aggressively sought to end male dominance of all spheres of public life and male control over women in their private lives as well.¹²³ A full history of the women's movement in Italy is beyond the scope of this article.¹²⁴ Rather, this section describes a few examples of Italian women exerting some political power outside of governmental institutions to advance laws of particular importance to women—the franchise, the right to an abortion, and changes to archaic rape laws.¹²⁵ Italian feminism in the 1970s took “a radical anti-institutional” stance¹²⁶ since governmental institutions continued to exclude women. Certainly, the limited success of the movement illustrates that women can assert political power outside of the institutions of government through an effective civil society. On the other hand, these examples also reveal the serious disadvantages women face when they are denied political space within public institutions. Upon the unification of Italy, women in Tuscany and Lombardia-Veneto lost the right to vote, and all Italian women were denied this right for more than fifty years, despite protests in the streets and piazzas.¹²⁷ This fifty-year struggle resulted in Italian women acquiring the right to vote in 1946—a small, albeit important, access to political space.¹²⁸

Yet access to political rights did not ensure access to political space, which meant that other anachronistic laws took even longer to change.¹²⁹ For example, to control of the space of women's bodies, the fascist penal code of 1930, *Codice Rocco*, criminalized abortions.¹³⁰ To preempt a referendum that would have decriminalized abortion, the Italian Parliament enacted law number

123. See *Introduction: Coming from the South*, in *ITALIAN FEMINIST THOUGHT: A READER* 10–11 (Paola Bono & Sandra Kemp eds., 1991).

124. Readers wishing to explore Italian feminism may initially consult *ITALIAN FEMINIST THEORY AND PRACTICE* (Graziella Parati & Rebecca West eds., 2002) and *ITALIAN FEMINIST THOUGHT: A READER* (Paola Bono & Sandra Kemp eds., 1991).

125. See *infra* notes 127–29, 131–38 and accompanying text.

126. Teresa de Lauretis, *The Practice of Sexual Difference and Feminist Thought in Italy: An Introductory Essay*, in *SEXUAL DIFFERENCE: A THEORY OF SOCIAL-SYMBOLIC PRACTICE* 1, 6 (Teresa de Lauretis ed., Teresa de Lauretis & Patricia Cicogna trans., The Milan Women's Bookstore Collective, 1990).

127. PALICI DI SUNI, *supra* note 49, at 37–38.

128. See *id.* at 41.

129. See *infra* notes 130–34 and accompanying text.

130. *Codice Penale* [C.p.] arts. 545–555 (1930). For the only English translation of the 1930 Italian Penal Code, see *Italian Penal Code*, in *THE AMERICAN SERIES OF FOREIGN PENAL CODES* (John Delaney ed., Edward M. Wise trans., 1978).

194 in 1978 to regulate voluntary abortions within the first ninety days of pregnancy and criminalize abortions that did not comply with the law.¹³¹ This law allowed for abortions in specific and very narrow circumstances and also included a provision that allowed doctors to refuse to perform abortions.¹³² Despite waves of women taking to the streets,¹³³ a referendum drafted by women to repeal this law failed in 1981, thus allowing male-dominated political space to continue to control women's bodies.¹³⁴ Also during the 1970s, women organized several protests against sexual violence,¹³⁵ to raise awareness about sexual violence within families,¹³⁶ and to advance voter initiatives to reform outdated rape laws.¹³⁷ Eventually, a number of women's groups presented 300,000 signatures in support of a new rape law to Parliament.¹³⁸ Certainly, this was a very powerful statement that came about despite the historic exclusion of women from political institutions. However, it was not until 1996, nearly twenty years later, that Parliament finally enacted changes to the rape laws; but Parliament did not adopt all of the changes sought by the voter initiative.¹³⁹ While work outside political institutions has led to some very modest advances for women, the difficulties encountered with such measures and the glacial pace of these

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131. Legge 22 maggio 1978, n. 194, in G.U. 2 maggio 1978, n. 140 (It.), *translated and available at* http://www.columbia.edu/itc/history/degrazia/courseworks/legge_194.pdf; *see also* Yasmine Ergas, *1968–79 Feminism and the Italian Party System: Women's Politics in and Decade of Turmoil*, 3 COMP. POL. 253, 265–71 (1982) (demonstrating women's efforts to put into place legal and completely unrestricted abortions).
132. *See* L. n. 140/1978 (It.), *translated and available at* http://www.columbia.edu/itc/history/degrazia/courseworks/legge_194.pdf.
133. Emma Baeri, *Cerniere di Cittadinanza: Il Progetto Femminile degli anni '70*, in UNA DEMOCRAZIA INCOMPIUTA [*Critical Aspects of Citizenship: The Feminist Project of the 70s*, in AN INCOMPLETE DEMOCRACY] 154, 160–61 (Nadia Maria Filippini & Anna Scattigno eds., 2007).
134. *See id.* at 164–65. While this example is not directly related to the serious disproportionate representation of men in the Italian Parliament, the failure of this referendum illustrates the continued dominance of women by men. Certainly, this also illustrates that not all women support access to abortions.
135. *Id.* at 167 (describing a nighttime march called “take back the night”).
136. *Id.*
137. *Id.* at 168.
138. *Id.* at 169.
139. For discussions of aspects of Italy's reform of its rape law, *see* Rachel A. Van Cleave, *Renaissance Redux? Chastity and Punishment in Italian Rape Law*, 6 OHIO ST. J. CRIM. L. 335, 335–37 (2008) (focusing on a provision that allows a reduced sentence for sexual assaults which a judge determines are “less serious”); Rachel A. Van Cleave, *Rape and the Querela in Italy: False Protection of Victim Agency*, 13 MICH. J. GENDER & L. 273, 274–75, 292 (2007) (analyzing the failure of the new law to do away with the ancient requirement that adult women specifically request prosecution).

advances only further support the need for mechanisms designed to create space for women in government.¹⁴⁰ Such space is much more likely to facilitate the protection of women's civil and political rights.

IV. ELECTORAL QUOTAS IN ITALY

The account of electoral quotas involves a back-and-forth between the Italian Parliament and the Constitutional Court about the constitutionality of the methods enacted for creating political space for women. Currently, the issue remains before Parliament.¹⁴¹ While this institution initially enacted electoral quotas, it no longer seems inclined to reenact quotas at the national level.¹⁴²

In a series of measures beginning in 1993, the Italian Parliament enacted reforms to remove obstacles to women's access to workplaces and to elected positions.¹⁴³ While a full consideration of women in the workplace is beyond the scope of this article,¹⁴⁴ affirmative measures to achieve equal access to public and political spaces began with a focus on the workplace.¹⁴⁵ In 1991 the Italian Parliament enacted a law that called on public and private employers at the local and national levels to institute affirmative measures to achieve "substantive equality for women in the workplace and . . . remove obstacles that impede equal opportunity."¹⁴⁶ The law required that, within one year of the enactment, all of these entities adopt plans for carrying out the goals of this law.¹⁴⁷ The Constitutional Court upheld this law as a legitimate exercise of legislative authority to ensure equal opportunities for women.¹⁴⁸ The

140. See generally Van Cleave, *Rape and the Querela*, *supra* note 139, at 289 (suggesting that a twenty year period between popular protest about rape laws and the legislative change of those laws indicates the slow pace of advances for women in Italy).

141. See generally Marila Guadagnini, *The Debate on Women's Quotas in Italian Electoral Legislation*, 4 SWISS POL. SCI. REV. 97, 97–101 (1998) (discussing the enactment and subsequent repeal of women's voting quotas in Italy).

142. See *id.*

143. See *id.*

144. See generally Lara Lazzaroni, *Donne, Lavoro e mestieri negati* [Women, Work and Professions Denied] (2005), available at <http://www.uilfpl.it/pdf/Donne,%20Lavoro%20Lazzaroni.pdf> (last visited May 6, 2012) (providing a condensed history of Italian women's struggle for access to all employment).

145. See *infra* note 146.

146. Legge 10 aprile 1991, n. 125 art. 1(1) (It). The law also provided for reimbursement of expenses associated with implementing such affirmative measures. L. n. 125/1991, art. 2 (It).

147. L. n. 125/1991, art. 2(6) (It.).

148. Corte. Cost., 26 marzo 1993, n. 109 (It.). See Rosalba Valenzano, *La Nozione di Azione Positiva del Dibattito Italiano*, in LAVORO DELLE DONNE E AZIONI POSITIVE [The idea of affirmative measures in the Italian debate, in WOMEN'S WORK AND

1991 law formed the basis for the enactment of other laws to carry out the goal of creating spaces in a variety of workplaces for women.¹⁴⁹ For example, a 1992 law established a national fund to encourage and support women entrepreneurs who wished to start their own businesses.¹⁵⁰ It was against this backdrop that Parliament enacted laws intended to increase the presence of women in elected offices.

In the context of significant electoral reforms,¹⁵¹ the Italian Parliament adopted two laws that relied on different mechanisms for increasing the numbers of women in elected offices. One law mandated that for *comunali* (city) and *provinciali* (provincial) elections, “on the lists of candidates neither sex may represent more than two-thirds of the candidates listed.”¹⁵² Thus, this measure ensured that political parties would include women on their lists of candidates, but did not guarantee that any women would necessarily be elected.¹⁵³ In discussions of this law, senators stated that the goal of this law was “to overcome a serious deficit in our democracy . . . a serious underrepresentation of women.”¹⁵⁴ In addition, there was concern that moving from a proportionate system to majority rule would further exacerbate this problem as it had in France.¹⁵⁵ Another law, addressing the election of members of the *Camera dei deputati*, the lower house of Parliament, required that the list of representatives from each party alternate the names of men and women on the

AFFIRMATIVE MEASURES] 253 (Mario Giovanni Garofalo ed., 2002) (discussing further the laws following the 1991 law and related decisions by the Constitutional Court).

149. See Valenzano, *supra* note 148.

150. Legge 25 febbraio 1992, n. 215, art. 3 (It.). This law has since been abrogated. Decreto legislativo 11 aprile 2006, n. 198 (It.).

151. Alessandro Pizzorusso & Emanuele Rossi, *Le Azioni Positive in Material Elettorale, in* DONNE IN QUOTA: E GIUSTO RISERVARE POSTI ALLE DONNE NEL LAVORO E NELLA POLITICA? [*Affirmative action in election rules, in* WOMEN IN QUOTA: IS IT RIGHT TO RESERVE PLACES FOR WOMEN IN THE WORKPLACE AND IN POLITICS?] 169, 170 (Bianca Beccalli ed., 1999) (noting that electoral reforms included substituting a proportionate system with a majority one and direct elections of mayors and provincial presidents).

152. Legge 23 febbraio 1995, n. 43, art. 1(6) (It.) (“In ogni lista regionale e provinciale nessuno dei due sessi può essere rappresentato in misura superiore ai due terzi dei candidati”) (governing elections of consigli delle Regioni); Legge 25 marzo 1993, n. 81, art. 5(2) (It.) (“Nelle liste dei candidate nessuno dei due sessi può essere di norma rappresentato in misura superiore ai due terzi.”).

153. D’AMICO, *supra* note 96, at 28 (describing this law as a “list quota” guaranteeing only that women were on the list of those who could be elected).

154. Pizzorusso & Rossi, *supra* note 151, at 171 n.8 (quoting Atti Senato, 11 marzo 1993).

155. *Id.* at 171.

ballot.¹⁵⁶ These lists are used to fill 25% of the seats in the *Camera dei deputati*, and once created, the lists are *bloccate* or frozen.¹⁵⁷ That is, voters do not vote for individuals, but rather for the parties, and since seats are distributed according to the results of the election, alternating names on the party lists would ensure that women would fill every other seat won by parties in elections.¹⁵⁸ Despite the different approaches of these two laws, the Constitutional Court declared them both unconstitutional.¹⁵⁹

Taking a formalistic view of articles 3 and 51 of the Italian Constitution, the Constitutional Court found that these affirmative measures were unconstitutional.¹⁶⁰ The court explained that while section 2 of article 3 requires the republic to pursue affirmative measures to remove obstacles to equality, such actions are to provide equal opportunities and may not impair the electoral rights of all citizens.¹⁶¹ The court relied on article 48 of the constitution, which declares that all citizens who have reached the age of majority may vote.¹⁶² The court stated that use of quotas, whether by list quotas or alternating seats, interferes with the citizen's right to vote when sex is the basis for determining who is or is not on the list or seated as a member of Parliament.¹⁶³ The court also relied on the language of article 51, which states that citizens of each sex may hold elected office on equal terms and concluded that any form of quotas based on the sex of candidates violates the equality provision of this article.¹⁶⁴ The court determined that these reasons alone were enough to declare the quota laws constitutionally illegitimate, but then went on to "better clarify other aspects of the issue."¹⁶⁵ The court did not analyze closely the differences between the quotas for candidate lists

156. Legge 4 agosto 1993, n. 277, art. 1 (It.) (amending Decreto Presidente della Repubblica 30 marzo 1957, n. 361, art. 4 (It.)). The 1993 law added the following sentence to the article describing how parliamentary seats are allocated to the different parties: "Le liste recanti più di un nome sono formate da candidati e candidate, in ordine alternato." ["The lists with more than one name are made up of male and female candidates in alternating order."].

157. Pizzorusso & Rossi, *supra* note 151, at 174.

158. D'AMICO, *supra* note 96, at 28; PIZZORUSSO & ROSSI, *supra* note 151, at 174.

159. Corte Cost., 12 settembre 1995, n. 422 (It.).

160. *Id.*

161. *Id.* § 6; D'AMICO, *supra* note 96, at 29–30.

162. Corte Cost., 12 settembre 1995, n. 422, § 3 (It.).

163. *Id.* § 4.

164. *Id.*

165. *Id.* § 5.

and the alternating seating of men and women, but lumped the two approaches together to find them both unconstitutional.¹⁶⁶

The court acknowledged that the language of the quota laws is “neutral” because neither sex is referred to explicitly.¹⁶⁷ Nonetheless, the court concluded that the purpose was to ensure that a certain number of places on the candidate lists was reserved for women (as to law number 81) or to ensure that women actually obtained parliamentary seats (as to law number 277), providing a so-called opportunity for women to be elected versus women actually taking representative seats.¹⁶⁸ In concluding that these mechanisms for determining candidates and members of parliament on the basis of sex violate the constitution’s equality provisions, the court also acknowledged that “positive actions” are within the scope of article 3 requiring the republic act to remove obstacles to equality.¹⁶⁹ The court stated that measures enacted to achieve equality for women in the workplace¹⁷⁰ and to promote female entrepreneurship¹⁷¹ are legitimate affirmative actions pursuant to that section of article 3. However, the court specified that those measures do not infringe on the electoral rights of all citizens specified in article 51, which is very specific about prohibiting any differentiation on the basis of sex.¹⁷² Indeed, the court states that electoral quotas rely on discrimination now to remedy past discrimination and this is “expressly prohibited by article 51 of the constitution.”¹⁷³ Somewhat ironically, both Parliament and the court sought to protect the rights of the electorate; Parliament by creating political space for women¹⁷⁴ and the court by prohibiting any form of discrimination based on sex as to the candidates on the ballot.¹⁷⁵

Interestingly, the court seemed to speak directly to women and equality advocates, stating:

[S]ince [this court’s] inception [in 1956], when presented with issues related to equality, this [c]ourt has worked

166. D’AMICO, *supra* note 96, at 31 (stating that the court actually confused the two approaches).

167. At least one commentator describes this approach as a “gender-neutral regulation.” Drude Dahlerup, *What are the Effects of Electoral Gender Quotas?*, 6 (July 2006), <http://ipsa-rc19.anu.edu.au/Dahlerup.ipsa06.pdf>.

168. Corte Cost., 12 settembre 1995, n. 422 (It.).

169. *Id.*

170. Legge 10 aprile 1991, n. 125 (It.).

171. Legge 25 febbraio 1992, n. 215 (It.).

172. Corte Cost., 12 settembre 1995, n. 422 (It.).

173. *Id.* § 6.

174. *Id.* § 3.

175. *Id.* § 8.

toward the goal of eliminating all forms of discrimination, deciding in favor of measures that promote equality. However, these have always involved measures that did not directly infringe on the fundamental rights of all citizens.¹⁷⁶

This statement could reveal the court's concern with how equality advocates might perceive it based upon this decision; perhaps, in part, because at the time of this decision no woman had been a part of the court.¹⁷⁷ Finally, the court suggested that political parties are certainly free to adopt affirmative measures voluntarily.¹⁷⁸ The court stated "the results sought by the law found unconstitutional may be achieved by persuading the political parties to realize that it is no longer possible to delay the need to reach equal representation of women in public life, particularly in elected positions."¹⁷⁹ Nearly ten years later, the court would concede that the political parties had done next to nothing to achieve equilibrium.¹⁸⁰

Following the 1995 decision, statistical evidence demonstrates that Italian political parties did not heed the call to voluntarily increase the number of elected women representatives.¹⁸¹ This is best illustrated by considering the number of women in elected positions in the years before this decision. In 1968, women made up 2.8% of the *Camera dei deputati* and 3.4% of the Senate.¹⁸² The percentage of women in the two houses combined was at 2.9% in 1968, the lowest point historically.¹⁸³ This combined percentage slowly increased to 3.2% in 1972, 6.8% in 1976, and 7.2% in 1979, but took a slight dip in 1976 to 7.1%, then climbed to 10.8% in 1987.¹⁸⁴ The combined percentage dipped again in 1992 to 8.6%.¹⁸⁵ The 1994

176. *Id.* §7.

177. *See Giudici costituzionali dal 1956* [Constitutional Court of Italy: Constitutional Court Judges since 1956], CORTE COST., http://www.cortecostituzionale.it/ActionPagina_210.do.

178. Corte Cost., 12 settembre 1995, n. 422, Racc. uff. corte cost. 1995, 7 (It.).

179. *Id.*

180. *See infra* note 219 and accompanying text.

181. *See infra* notes 182–94 and accompanying text.

182. Marila Guadagnini, *La Cittadinanza Politica: La Presenza delle donne in Parlamento negli anni novanta*, in *GENERE E DEMOCRAZIA: LA CITTADINANZA DELLE DONNE A CINQUANT'ANNI DAL VOTO* [*Political Citizenship: The Presence of Women in Parliament in the 1990s*, in *GENDER AND DEMOCRACY: WOMEN'S CITIZENSHIP FIFTY YEARS AFTER THE VOTE*] 51, 54 n.10 (1997).

183. Alessandra Pescarolo, *Esclusione o alterità? L'Italia e il Governo Locale Della Toscana*, in *UNA DEMOCRAZIA INCOMPIUTA* [*Exclusion or Otherness? Italy and the Local Tuscan Government*, in *AN UNREALIZED DEMOCRACY*] 183, 191.

184. *Id.*

185. *Id.*

election, the one election carried out under the 1993 quota law before it was declared unconstitutional by the Constitutional Court, resulted in women acquiring 15.1% of the seats in the *Camera dei Deputati*; “certainly more than in prior elections, yet not close to the level of parity sought by the 1993 law.”¹⁸⁶ This resulted in a combined percentage of 12.8%.¹⁸⁷ In the subsequent 1996 elections the presence of women in the *Camera dei Deputati* slipped to 11.4%¹⁸⁸ for a combined result of 9.9%.¹⁸⁹ By 2001, women made up only 9.2% of representatives in the *Camera* and *Senato* combined.¹⁹⁰ In 2006 women made up 16% of both houses combined.¹⁹¹ Currently, women make up 18.75% of the *Senato*¹⁹² and 21.43% of the *Camera dei deputati*,¹⁹³ together constituting 20.09%. It is unclear why the numbers have increased somewhat. Despite this increase, many Italian commentators have lamented the serious underrepresentation of women in Parliament, with some decrying these low numbers as “scandalous.”¹⁹⁴ Indeed, the number of women elected to office in Italy compares very poorly to that in many other countries.¹⁹⁵

186. Guadagnini, *supra* note 182, at 54.

187. Pescarolo, *supra* note 183, at 191.

188. Guadagnini, *supra* note 182, at 54–55.

189. Pescarolo, *supra* note 183, at 191.

190. Califano, *supra* note 97, at 48 n.1. *But see* Pescarolo, *supra* note 183, at 191 (stating that the combined result was 10.3% in 2001).

191. Pescarolo, *supra* note 183, at 191.

192. *Statistics XVI Legislature*, SENATO.IT, (Sept. 22, 2012), <http://www.senato.it/leg/16/BGT/Schede/Statistiche/Composizione/SenatoriPerEta.html>.

193. Chamber of Deputies, *Composition of the House - Distinction of Deputies by Age and Sex*, CAMERA.IT, (Sept. 14, 2012), http://www.camera.it/Camera/view/doc_viewer_full?url=http%3A//www.camera.it/564%3Ftiposezione%3DC%26sezione%3D1%26tabella%3DC_1_2&back_to=http%3A//www.camera.it/571.

194. *See, e.g.*, Maria Luisa Boccia, *Crisi e critica della rappresentanza*, in *UNA DEMOCRAZIA INCOMPIUTA [Crisis and critique of representation, in INCOMPLETE DEMOCRACY]* 304 (Nadia Maria Filippini & Anna Scattigno eds., 2007). Many of the other references in this article to Italian works express concerns about the underrepresentation of women in Italy. While these numbers are low compared to many other countries, they are slightly better than the numbers in the United States, where women make up 17% of each the House of Representatives and the Senate. The 112th Congress has 17 women in the Senate (17%). *Office of History and Preservation, Office of the Clerk. Women in Congress, 1917–2006*, HOUSE.GOV, <http://womenincongress.house.gov/historical-data/representatives-senators-by-congress.html?congress=112> (last visited Sept. 23, 2012).

195. *See* Ami Sedghi, *International Women's Day 2012: Women's Representation in Politics*, THE GUARDIAN (Mar. 7, 2012, 8:00 PM), <http://www.guardian.co.uk/news/datablog/2012/mar/07/women-representation-in-politics-worldwide> (ranking Italy number 57 out of 143 countries regarding percentage of women representatives in Parliament).

The creation of the Charter of Fundamental Rights of the European Union, the *Carta di Nizza*,¹⁹⁶ in 2000 further highlighted this issue at the European level. Article 23 of this charter provides that “[e]quality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.”¹⁹⁷ While this charter is not binding, the Italian Constitutional Court has relied on provisions of this charter in other decisions,¹⁹⁸ and this provision in particular is relevant to the question of *quote rose*,¹⁹⁹ or “pink quotas.” Yet, when the issue of electoral quotas for women was before the Italian Constitutional Court again in 2003, the court did not refer to the *Carta di Nizza*.²⁰⁰

The next parry in the back and forth between the Italian Parliament and the Constitutional Court on the issue of electoral quotas²⁰¹ arose while the legislature was in the process of amending constitutional articles 117 and 51 in 2003.²⁰² A constitutional amendment to article 117 added a section stating, “The regional laws shall remove every obstacle that impedes full parity between men and women in social, cultural and economic life and shall promote parity of access to elected offices for women and men.”²⁰³ Another constitutional

196. Known in Italy as the *Carta di Nizza*. See *Bill of Rights*, EUROPEAN PARLIAMENT INFORMATION OFFICE IN ITALY, http://www.europarl.it/view/it/cittadinanza_europea/carta_dei_diritti.html (last visited Dec. 11, 2012).

197. Charter of Fundamental Rights of the European Union, 200 O.J. (C 364) 1, art. 23, available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf (last visited Dec. 11, 2012).

198. Califano, *supra* note 97, at 50, n.8 (referring to Corte Cost., 12 novembre 2002, n. 445 (It.); Corte Cost., 11 aprile 2002, n. 135 (It.)).

199. A number of Italian scholars use this term when referring to quotas for women. See, e.g., D’AMICO, *supra* note 96, at 34.

200. See Corte Cost., 13 febbraio 2003, n. 49 (It.), available at <http://www.giurcost.org/decisioni/2003/0049s-03.html>.

201. The Italian Parliament and the Constitutional Court have engaged in other such back-and-forth exchanges. See William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 MICH. J. INT’L L. 429, 449–52 (2004) (describing Constitutional Court findings that changes to the Code of Criminal Procedure violated the constitution and subsequent Parliamentary amendments to the constitution to allow for such changes).

202. See Marila Guadagnini, *Gendering the Debate on Political Representation in Italy: A Difficult Challenge*, in STATE FEMINISM AND POLITICAL REPRESENTATION 131, 144–47 (Joni Lovenduski ed., 2005); Elisabetta Palici Di Suni, *Gender Parity and Quotas in Italy: A Convolved Reform Process*, 35 W. EUR. POL. 380, 384–85 (2012).

203. Legge Cost. 18 ottobre 2001, n. 3 (It.), available at <http://www.parlamento.it/parlam/leggi/01003lc.htm> (adding section 7 to article 117 of the Constitution) (“Le leggi regionali rimuovono ogni ostacolo che impedisce la piena parità degli uomini e

amendment, that had been approved after its first reading in the *Camera dei deputati*, but was not yet final, would eventually add the following sentence to section 1 of article 51, “to that end [of establishing equal access to public and elected offices] the Republic shall promote with appropriate measures equal opportunity between women and men.”²⁰⁴ In addition to these constitutional amendments, Parliament also enacted a constitutional law that states, “In order to attain equilibrium of representation of the sexes, the law shall promote conditions of equal access to the electoral process.”²⁰⁵ While these changes to the constitution were being enacted, the autonomous region of Valle d’Aosta adopted a regional law, which provided that “[e]very list of candidates for the election of the *Consiglio* must include candidates of both sexes.”²⁰⁶

Oddly enough, at the same time that the Italian government was working on constitutional reforms to overturn the Constitutional Court’s 1995 decision striking electoral quotas, it challenged the Valle D’Aosta law cited above requiring the presence of both sexes on candidate lists.²⁰⁷ The government argued that the Valle D’Aosta law violated article 51 of the constitution and was inconsistent with

delle donne nella vita sociale, culturale ed economica e promuovono la parità di accesso tra donne e uomini alle cariche elettive.”).

204. Art. 51 Costituzione [Cost.] (It.), available at <http://www.senato.it/istituzione/29375/131289/131328/131332/articolo.htm> (“A tale fine la Repubblica promuove con appositi provvedimenti le pari opportunità tra donne e uomini.”).
205. Legge Cost 31 gennaio 2001, n. 2 (It.), available at <http://www.parlamento.it/parlam/leggi/01002lc.htm> (“Al fine di conseguire l’equilibrio della rappresentanza dei sessi, la...legge promuove condizioni di parità per l’accesso alle consultazioni elettorali.”).
206. Legge regionale 13 novembre 2002, n. 21 (It.), available at http://www.consiglio.regione.vda.it/banche_dati/leggi_regolamenti/dettaglio_i.asp?pk_lr=2682&versione=S (“Ogni lista di candidati all’elezione del Consiglio regionale deve prevedere la presenza di candidati di entrambii sessi.”). This provision was subsequently amended to provide that “[i]n every list of candidates for the election of the Consiglio regionale neither sex may represent more than 20% of the candidates on the list.” L. Reg. 7 agosto 2007, n. 22 (It.), available at http://www.consiglio.regione.vda.it/banche_dati/leggi_regolamenti/dettaglio_i.asp?pk_lr=4124. Other similar regional statutes and laws were enacted between 2002 and 2010, but the Valle D’Aosta law was the subject of a constitutional court decision discussed above. For a comprehensive list of laws, court decisions and other materials relevant to the question of electoral quotas, see D’AMICO, *supra* note 96, at 146–229.
207. D’AMICO, *supra* note 96, at 34. See also Lorenza Carlassare, *La legittimità della “preferenza di genere”: una nuova sconfitta della linea del Governo contro la parità* [The legitimacy of “gender preferences”: a new defeat of the Government’s position against parity] 55 GIUR. COST. 81, 83 (2010) (“[T]he government’s stubborn opposition to laws that attempt to carry out the constitutional laws favoring equality in elected offices is nearly incredible.”).

the court's decision of 1995, claiming that the law amounted to a quota for women candidates because it required a minimum of one woman candidate on all lists.²⁰⁸ The government argued that the court had previously disregarded any distinction between electoral laws that simply required women be on lists of candidates and thus eligible for election, so-called *eleggibilità*, and laws that ensured a certain number of women would hold elected office, or so-called *candidabilità*.²⁰⁹ However, in its 2003 decision, the court examined this distinction more closely, as well as the effect of ensuring access to electoral slates.²¹⁰ The court found that this law, and others like it, did not violate the constitutional equality norms.²¹¹

The court first stated that the measure at issue involved only candidate lists and those who could be on the lists, *eleggibilità* and not *candidabilità*.²¹² In addition, the court held that the Valle D'Aosta measure did not create inequality to address past inequality and thus did not infringe on the rights of voters.²¹³ Rather, this measure merely denies political parties the ability to present lists of candidates made up of individuals of only one sex.²¹⁴ It is not entirely clear how this is different from the law found unconstitutional in 1995 that did not permit either sex to make up more than two-thirds of a list, other than the fact that the prior law set out a specific percentage of the list reserved for one sex.²¹⁵ However, in its 2003 opinion the court acknowledged that its analysis was consistent with an "evolved" constitutional paradigm.²¹⁶ The court then cited to the constitutional law of 2001, which expressly directs

208. See Corte Cost., 13 febbraio 2003, n. 49 (It.), available at <http://www.giurcost.org/decisioni/2003/0049s-03.html>; GUADAGNINI, *supra* note 202, at 144–47; Rodriguez-Ruiz & Rubio-Marin, *Constitutional Justification of Parity Democracy*, 60 ALA. L. REV. 1171, 1177 (2005).

209. Corte Cost., 13 febbraio 2003, n. 49 (It.).

210. See *id.*

211. See *id.* § 5.

212. See *id.* § 3.1.

213. See *id.* § 4.

214. See *id.* § 4, 4.1.

215. See generally Giuditta Brunelli, *Un Overruling in tema di norme elettorali antidiscriminatorie* [An Overruling on the issue of anti-discrimination electoral measures] 5 LE REGIONI 902 (2003) (commenting on Corte Cost., 13 febbraio 2003, n. 49 (It.)); Antonio D'Aloia, *Eguaglianza Sostanziale e Azioni Positive in Materia Elettorale*, in VERSO UNA DEMOCRAZIA PARITARIA – MODELLI E PERCORSI PER LA PIENA PARTECIPAZIONE DELLE DONNE ALLA VITA POLITICA E ISTITUZIONALE [Substantive Equality and Affirmative Electoral Measures, in TOWARD A DEMOCRACY OF PARITY – APPROACHES FOR ACHIEVING FULL PARTICIPATION OF WOMEN IN POLITICAL AND INSTITUTIONAL LIFE] 49, 61 (Anna Falcone ed., 2011).

216. See Corte Cost., 13 febbraio 2003, n. 49 (It.).

the regional electoral laws to promote conditions of parity for access to the electoral process precisely with the goal of achieving equal representation of the sexes.²¹⁷ The court found the Valle D'Aosta law consistent with the constitutional law.²¹⁸

While stating that the following fact was not decisive, the court harkened back to its earlier call for political parties to take voluntary actions to increase the number of women elected to political positions, and stated that since "political parties have not demonstrated much, if any, propensity to act voluntarily to achieve greater equality of representation, as the court had urged in its 1995 opinion, now the parties are constrained by law pursuant to the recent constitutional law."²¹⁹ The court seemed to suggest that the failure or reluctance of political parties to address this issue resulted in the enactment of legal requirements to achieve a goal of greater sexual parity for elected offices.

While the Constitutional Court did not address the pending changes to article 51 of the constitution in its 2003 opinion, it set out quite emphatically the effects of this change in a 2005 opinion.²²⁰ The 2005 Constitutional Court case involved a 1993 law²²¹ requiring that, for positions subject to competition examinations, at least one-third of those taking the examination be women. The *Consiglio di Stato* challenged a competition examination for director of a local museum that, pursuant to the 1993 law, required that at least one-third of the examinees be women.²²² The *Consiglio di Stato* claimed that a man had been excluded from this particular competition due to his sex.²²³ The court dismissed this challenge with a short opinion stating that the lower court had relied only on the Constitutional Court's decision of 1995 and did not take into account the changes to article 51 of the constitution, the 2001 constitutional law, and the Constitutional Court's decision of 2003.²²⁴ The court provided an initial glimpse of its interpretation of the changes to article 51, stating that "with this new language, the law is no longer limited to prohibiting discrimination on the basis of sex, . . . but now assigns to the

217. *See id.* at 4.

218. Corte Cost., 13 febbraio 2003, n. 49 (It.).

219. *Id.* § 4; *see also* Yvonne Galligan, *Bringing Women in: Global Struggles for Gender Parity in Political Representation*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 319, 332 (2006) (despite the creation of formal party rules in the reform of the Italian Communist Party that included a 40% quota for women, in 2003 women made up only 24% of the party's deputies).

220. Cort Cost., 12 gennaio 2005, n. 39 (It.).

221. Decreto Legislativo 3 febbraio 1993, n. 29 (It.).

222. Corte Cost., 12 gennaio 2005, n. 39 (It.).

223. *Id.*

224. *Id.*

Republic the obligation of promoting equal opportunity between men and women.”²²⁵ Thus, although the court did not set out a comprehensive interpretation of the changes to article 51, the court nonetheless described these changes as a clear shift in the constitutional approach to gender equality.²²⁶

In 2010, the court had the opportunity to apply the new article 51 to electoral quotas.²²⁷ Like the 2005 decision, the 2010 opinion also involved a regional election law of the Campania region.²²⁸ Similar to the law governing Italian representation in the European Parliament, this law provides that in every electoral list neither sex may be represented by more than two-thirds of the candidates.²²⁹ Furthermore, the law voided every list that did not comply with this requirement.²³⁰ However, the provision that the *Consiglio di Stato* challenged was one that directed voters to “select one or two names [from the list of candidates]. If [the voter] selected two names, one must be male and the other must be female, otherwise the second name selected would be void.”²³¹ The government claimed that this portion of the law violated both articles 3 and 51 of the constitution.²³² The law violated article 3, according to the government, because it treated the second candidate unequally based on his or her sex if he or she was of the same sex as the first candidate selected by the voter.²³³ The law violated article 51 because it tied access to an elected position to the sex of the second candidate selected by the voter and was thus an improper basis for unelectability.²³⁴ The Region of Campania emphasized the neutrality of the language used in the statute, which would void both a selection

225. *Id.*

226. *Id.*

227. Corte Cost., 15 dicembre 2009, n. 4 (It.).

228. Legge regionale 27 marzo 2009, n. 4, in Boll. Uff. Reg. Campania, 14 aprile 2009, n. 23 (It.).

229. *Id.* art. 10(2).

230. *Id.* 10(3).

231. *Id.* art. 4(3) (“L’elettore può esprimere . . . uno o due voti di preferenza . . . Nel caso di espressione di due preferenze, una deve riguardare un candidato di genere maschile e l’altra un candidato di genere femminile della stessa lista, pena l’annullamento della seconda preferenza.”). It is not clear why some regional laws use the term “gender” rather than “sex.” However, it does not seem likely that the regions using the term gender intend this to indicate any particular “gender theory.” See Marco Olivetti, *La c.d. “preferenza di genere” al vaglio del sindacato di costituzionalità. Alcuni rilievi critici [The so-called “gender preferences” and their constitutionality. A few critical points/observations]* 1 GIUR. COST. 84, 86 n.7 (2010).

232. Corte Cost., 15 dicembre 2009, n. 4, (It.), § 1 (setting out the government’s argument).

233. *Id.*

234. *Id.*

of two women as well as a selection of two men candidates.²³⁵ The court set out an extensive summary of the Campania's argument, which includes a timeline of the court's related decisions, changes to the constitution in between the decision number 422 of 1995 and the decision number 49 of 2003, other legislative measures, European Charters, *La Carta Nizza*, as well as Commission decisions.²³⁶ In particular, the Campania region pointed to the language of the amendment to article 51 directing the republic to promote equal opportunity between men and women using appropriate provisions.²³⁷

The court described the law challenged as one that seeks to achieve greater equilibrium between the sexes in elected office while also seeking to avoid infringing on the rights of the Italian voters to vote for the candidate(s) of their choice.²³⁸ The court further explained the Campania law as giving voters an opportunity to select two candidates; a voter need not select two.²³⁹ In addition, the law does not void the entire ballot if the voter selects two candidates of the same sex; rather, the law voids only the second selection.²⁴⁰ Given these aspects of this law, the court concluded that it creates a greater possibility of achieving greater equality in the election of women, but does not impose election of particular candidates.²⁴¹ Thus, the court found that this law constitutionally promotes equality without being coercive or intruding on the rights of voters.²⁴²

The Campania law in fact resulted in the election of more women.²⁴³ In the March 2010 regional elections, out of sixty seats up for election, fourteen women were elected.²⁴⁴ While about 23% may not seem like much, it is certainly a dramatic improvement from the election of only two women in 2005 in this region.²⁴⁵ In addition, this

235. *Id.* § 2 (setting out Campania's argument).

236. *Id.* § 3 (summarizing Campania's briefed arguments).

237. Corte Cost., 14 gennaio 2010, n. 4, (It.), available at <http://www.giurcost.org/decisioni/2010/0004s-10.html> (setting out Campania's argument in support of its election law).

238. *Id.* § 3.2.

239. As one commentator has pointed out, another option voters have is to simply vote the list without expressing a preference for any candidates. Olivetti, *supra* note 231, at 87.

240. Corte Cost., 14 gennaio 2010 n. 4, (It.), § 1.3, available at <http://www.giurcost.org/decisioni/2010/0004s-10.html>.

241. *Id.* § 3.3.

242. *Id.* § 3.2.

243. See Stefania Leone, *La preferenza di genere come strumento per "ottenere, indirettamente ed eventualmente, il risultato di un'azione positive,"* 1 GIUR. COST. 93, 94 (2010).

244. *Id.*

245. D'AMICO, *supra* note 96, at 45; Leone, *supra* note 243, at 93, 94.

result is better than that achieved in other regions.²⁴⁶ Piemonte elections achieved the same results as those in Campania (fourteen women out of sixty positions),²⁴⁷ but in Lombardia, only seven women were elected out of eighty seats²⁴⁸ (about 8.7%) and only twelve out of seventy-one seats in Lazio were filled by women (about 17%).²⁴⁹ Meanwhile, in Calabria and Basilicata, no women were elected at all.²⁵⁰ While these developments are certainly promising, a number of attempts to enact electoral quotas at the national level since the constitutional changes have failed.

For example, one proposal presented in 2004 would have restored the limit that neither sex make up more than two-thirds of a party's candidate list.²⁵¹ In addition, this proposal would have required that men and women candidates be listed in an alternating fashion.²⁵² This proposal would have also included reduced state financial support for political parties presenting candidate lists in violation of these requirements.²⁵³ This proposed law was approved by the Senate, but modified to require the presence of 50% of each sex in a party's candidate lists.²⁵⁴ However, the conclusion of the legislative session meant that this never became law. Another proposal would have required that no more than three candidates of the same sex could be listed consecutively on a party's list in the election following enactment of the law, and in the subsequent election, no more than two candidates of the same sex could be so listed.²⁵⁵ This measure was presented by the government but was blocked in the Senate after disagreement among the majority.²⁵⁶ This particular proposal would have applied to only two elections, and thus was limited in time.²⁵⁷

The back and forth between the Italian Parliament and the Constitutional Court was settled after the constitutional amendments; yet, nearly ten years after these changes, attempts to reenact electoral

246. *Id.* at 93, 94 n.10.

247. *Id.*

248. *Id.* at 94 n.10.

249. *Id.*

250. *Id.*

251. JOCELYNE PRAUD & KARL A. HENRIQUES, THE SASK. INST. OF PUB. POLICY, CONSTITUTIONALIZING AND LEGISLATING PARITY DEMOCRACY: THE CASES OF FRANCE AND BELGIUM 56, 14 n.9 (2008).

252. GIOVANNI CHIOLA, PROBLEMI SULLE QUOTE ROSE (2008).

253. *Id.* at 81–83, 198–200.

254. D'AMICO, *supra* note 96, at 62.

255. CHIOLA, *supra* note 252, at 83–85, 204–05.

256. *Id.* at 85.

257. *Id.* at 84.

quotas at the national level have failed in precisely the political spaces in which women are attempting to gain greater access.²⁵⁸ This is another example of reforms that come tantalizingly close to achieving equality yet proceed at a grudgingly sluggish pace. Of course, the irony is that women's meager representation in Parliament endures in large part because the male-dominated Parliament has not successfully enacted laws to alleviate this problem.

V. CONCLUSION

Aside from traditional notions of equality, the principal argument against electoral quotas for women is that quotas are based on an assumption that women can better represent other women.²⁵⁹ This in turn, is based on an essentialist understanding of women's identity.²⁶⁰ Certainly, awareness of essentialism and the need to ensure that no universal female identity is presumed has played an important role in broadening feminism to include more than simply white, middle class women. However, in the context of elected positions, where women have been deliberately excluded, as in Italy,²⁶¹ it is important to weigh anti-essentialist concerns against the continued monopolization of political space by men. The history of how this monopoly has severely limited citizenship rights of women demonstrates how critically powerful political space is and how important it is to enact mechanisms to open political space to more women.²⁶² Furthermore, creating greater political space for women can help to address essentialist perceptions by debunking deeply rooted stereotypes about the proper role of women in Italy.²⁶³ A recent United Nations report stating that "[v]iolence against women remains a significant problem in Italy,"²⁶⁴ links the structural issue of male dominance in the public and private sectors as one explanation for both the high rate of violence against women as well as the dramatic underreporting of this violence. The Special Rapporteur recommends, among other specifics, that Italy address the "gender disparities in public and private sectors . . . to increase the number of women . . . in the

258. See *supra* notes 201–02, 250–57 and accompanying text.

259. Rosenblum, *supra* note 20, at 1182.

260. Rosenblum, *supra* note 20, at 1135–37.

261. See *supra* notes 181–84 and accompanying text.

262. See *supra* notes 111–18 and accompanying text.

263. See *supra* notes 9–11, 15 and accompanying text.

264. Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*, at 14, U.N. Doc A/HRC/29/16/Add.2 (June 15, 2012) (by Rashida Manjoo), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-16-Add2_en.pdf.

political, economic, social, cultural and judicial spheres.”²⁶⁵ Opening these public spaces to women can eliminate women’s negative presence and both broaden and deepen political discourse.²⁶⁶ It would be unfortunate if anti-essentialist concerns were the basis for perpetuating women’s negative presence in the political arena.

265. *Id.* at 23.

266. *See supra* note 140 and accompanying text.

