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Envisioning a U.S. Government that Isn't 84% Male: What the United States Can Learn from Sweden, Rwanda, Burundi, and Other Nations

NANCY MILLAR*

I. INTRODUCTION

The November 2006 elections ushered in “a cast of characters that is astonishingly diverse by American historical standards,” exulted a *New York Times* writer shortly after Election Day, including Nancy Pelosi, new Speaker of the House—“the most powerful woman ever to sit in Congress”—and second in line to the presidency.¹ “While these are important firsts, what seems more important is that it is starting to seem normal to have ethnic minorities and women holding—or seriously contending for—the highest offices in the land.”² A few months later, Hillary Clinton announced her presidential candidacy.³

Pelosi and Clinton are breaking new ground for women, but do they reflect a groundswell of women’s political strength? The United States is an advanced industrialized nation with a high standard of living, a vocal feminist movement, and broad constitutional guarantees of civil liberties, but its level of women’s political representation in Congress (16% in the Senate, 16.1% in the House)⁴ lags behind the percent of women in the upper and lower houses of, for example, Afghanistan (27.3%), Argentina (35%), Rwanda (48.8%), and Sweden (47.3%).⁵

This paper will explore solutions to American women’s low representation in elected political office based on strategies that have increased women’s representation in other countries. The list of nations above is an intentionally disparate sampling—these countries have different histories, governments, ethnic/religious/political make-ups, and standards of living, but they share one important characteristic: They

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1. Bob Herbert, *Ms. Speaker and Other Trends*, N.Y. TIMES, Nov. 9, 2006, at A33.

2. *Id.*

3. Dan Balz, *Hillary Clinton Opens Presidential Bid*, WASH. POST, Jan. 21, 2007, at A1.

4. CTR. FOR AM. WOMEN & POLITICS, EAGLETON INST. OF POLITICS, RUTGERS UNIV. [hereinafter CAWP], WOMEN IN ELECTIVE OFFICE: 2007 (2007), <http://www.cawp.rutgers.edu/Facts/Officeholders/elective.pdf>.

5. Global Database of Quotas for Women, <http://www.quotaproject.org/country.cfm> (last visited Sept. 7, 2007).

have all made increasing women's representation in politics a priority through passage of quotas at the political-party or subnational levels, constitutional amendments, or national election laws. How long until the United States catches up?

II. WHY IS WOMEN'S POLITICAL REPRESENTATION IMPORTANT?

Before addressing methods for increasing women's political representation, it is important to understand why this might be a worthwhile goal. There are a number of arguments traditionally put forward to justify increasing women's representation.⁶

First, the presence of women in government may directly benefit women in the electorate: "Studies have found that a high level of political representation for women is correlated with a high level of gainful employment among women [and] a high level of education among women as compared to men"⁷ Regardless of whether political representation leads to women's improved status or women's improved status leads to increased representation, the result is the same: Women (both politicians and voters) benefit from this symbiosis, and the level of women's political representation serves as an indicator of women's status in society generally.

Second, female politicians may represent other women better than men do, by introducing and voting "for legislation that is of more interest to women" and representing women "better in terms of ideology and policy priorities."⁸ Various polls of U.S. voters, analyzed by the Center for American Women and Politics of the Eagleton Institute of Politics at Rutgers, show significant gender gaps on various issues, including affirmative action, military intervention in Bosnia and North Korea, and support for social programs.⁹ One small study in India, done after pas-

6. For a more detailed analysis of these arguments, see Carol Bacchi, *Arguing for and Against Quotas*, in *WOMEN, QUOTAS AND POLITICS* 32, 32-51 (Drude Dahlerup ed., 2006) (detailing how concepts such as equality, representation, citizenship, and rights apply to the debate on quotas).

7. Drude Dahlerup, *Introduction to WOMEN, QUOTAS AND POLITICS* 3, 11 (Drude Dahlerup ed., 2006); see also GESINE FUCHS & BEATE HOECKER, *WITHOUT WOMEN MERELY A HALF-DEMOCRACY* 4 (2004), <http://library.fes.de/pdf-files/id/02611.pdf> ("[T]he representation of women in parliament is positively linked to the extent of gainful employment among women. The Nordic countries show a generally high level of employment among women, whereas countries with a medium or low level of representation of women in parliament are characterized by a medium or low level of female employment.") (emphasis omitted).

8. Kevin Arceneaux, *The "Gender Gap" in State Legislative Representation: New Data To Tackle an Old Question*, 54 *POL. RES. Q.* 143, 144 (2001).

9. CAWP, *THE GENDER GAP: ATTITUDES ON PUBLIC POLICY ISSUES* (1997), <http://www.cawp.rutgers.edu/Facts/ggapissues.pdf> (finding that 36% of women versus 52% of men said U.S. affirmative action programs should be abolished; 37% of women versus 52% of men favored sending troops to Bosnia; 30% of women versus 49% of men favored the use of troops if North

sage of a quota law there, suggested that female leaders were more likely to invest public resources in community projects more closely linked to women's concerns.¹⁰ Another study found that while feminist women in office were the most likely to advocate for women's interests, non-feminist women were more likely than feminist men to do so, which supports the theory that women qua women make differences for other women.¹¹

A third argument is that women's experiences are distinct from those of men and should be represented in the government. While this argument tends to treat women as a homogenous group without acknowledging the significant differences among them,¹² women *do* have experiences that are different from those of most men—for example, acting as primary caregivers or facing gender discrimination—and these may influence their decisions about which issues to pursue.¹³

Finally, supporters of increased women's representation suggest a justice-based argument—because women make up half of the population, they are entitled to equal representation through half of the political seats,¹⁴ and because historically women have been discriminated against, positive action is required to bring them to the same level as men, in terms of experience and advantages. To remedy men's existing

Korea invaded South Korea; and 47% of women versus 60% of men said the government should cut funding to social programs).

10. Raghavendra Chattopadhyay & Esther Dufo, *Women as Policy Makers: Evidence from a Randomized Policy Experiment in India*, 72 *ECONOMETRICA* 1409, 1440 (2004).

11. Debra L. Dodson, *Acting for Women*, in *THE IMPACT OF WOMEN IN PUBLIC OFFICE* 225, 236 (Susan J. Carroll ed., 2001) ("If the choice is between a feminist woman and a feminist man who share equally high levels of attitudinal support for feminist policy goals, the chances are better that the woman, rather than the man, will act for women."); see also Edith J. Barrett, *Black Women in State Legislatures*, in *THE IMPACT OF WOMEN IN PUBLIC OFFICE*, *supra*, at 185, 192 ("[W]omen legislators have shown themselves to be different from men in their policy priorities. Studies have found women state legislators to be more liberal than men, even when controlling for party membership, and women state legislators tend to be more concerned with feminist issues than their male colleagues.") (citations omitted).

12. See, e.g., DRUDE DAHLERUP, *QUOTAS—A JUMP TO EQUALITY? THE NEED FOR INTERNATIONAL COMPARISONS OF THE USE OF ELECTORAL QUOTAS TO OBTAIN EQUAL POLITICAL CITIZENSHIP FOR WOMEN* 4 (2002), http://www.quotaproject.org/CS/CS_Comparative.pdf ("Quotas also touch upon the present philosophical dilemma within feminist theory about 'the category women' and point to the old problem, so well-known by the feminist movement, that not all women identify with the group 'women[.]' . . . Women as a group are both the Achilles heel of the feminist movement and its *raison d'être*.").

13. See, e.g., Dodson, *supra* note 11, at 225 (suggesting that "Anita Hill's treatment by the all-male Senate Judiciary Committee during the Clarence Thomas confirmation hearings called into question whether women's experiences, perspectives, and interests can be represented in institutions composed almost exclusively of men").

14. The counterargument is that not every characteristic should be represented in government. See, e.g., ROLAND PENNOCK, *DEMOCRATIC POLITICAL THEORY* 314 (1979) ("[N]o one would argue that morons should be represented by morons."). But see *supra* text accompanying notes 6–13 for why women in particular should be represented.

privilege, then, something more than inaction is required.¹⁵

While women's political impact may be difficult to quantify, their representation in government has been deemed sufficiently important by the United Nations ("UN"), the United States, and many other countries to be included as a major goal in post-conflict reconstruction. President Bush has equated women's political participation with a strong democracy,¹⁶ and increasing the number of women in government is sometimes seen as a way for a country to modernize and "join" the international community.¹⁷

Women's political representation has evolved into an international priority¹⁸ and a stated goal in the post-conflict constitution drafting of several countries:

In Afghanistan, Burundi and Iraq, constitutional drafting processes led to the introduction of electoral quotas and other mechanisms aimed at ensuring a certain level of women's participation in parliament and in governmental structures. . . . Despite the vast differences between the countries, they share certain commonalities—the intersection between domestic women's movements and the international community in supporting the election of women to parliament.¹⁹

Women's political representation was also a key issue at the United Nations Fourth World Conference on Women, held in Beijing in 1995. The Beijing Declaration and Platform for Action, unanimously adopted by 189 governments, specified a minimum quota of 30% women in decision-making positions.²⁰ Between 30% and 35% has been suggested as the "critical mass or level that enables female legislators to effectively

15. See Bacchi, *supra* note 6, at 35.

16. Press Release, The White House, President and Mrs. Bush Celebrate Women's History Month and International Women's Day (Mar. 7, 2006), available at <http://www.whitehouse.gov/news/releases/2006/03/print/20060307> ("Across the world, the increasing participation of women in civic and political life has strengthened democracies. A democracy is strong when women participate in the society.").

17. See, e.g., Clara Araújo & Ana Isabel García, *The Experience and the Impact of Quotas in Latin America*, in WOMEN, QUOTAS AND POLITICS, *supra* note 6, at 83, 87. In post-dictatorship rebuilding in many Latin American countries during the 1980s and 1990s, the "improvement of women's situation in the society became part of the political agenda of re-democratization" and "the extension of women's rights was seen as a means of overcoming traits that gave these countries a less modern image vis-à-vis the international community." *Id.*

18. Dahlerup, *supra* note 7, at 4–5 ("[A] country's image in the international community is of growing importance today. This aspect of globalization has increased the opportunities for women's movements to play the international card [T]he Beijing Platform has been very influential, and women's movements all over the world have attempted to give the controversial demand for gender quotas legitimacy by referring to the Platform for Action.").

19. Press Release, Inter-Parliamentary Union, One Out of Five Parliamentarians Elected in 2005 Is a Woman (Feb. 27, 2006), available at <http://www.ipu.org/press-e/gen220.htm>.

20. U.N. DEV. FUND FOR WOMEN, SECURITY COUNCIL RESOLUTION 1325 ANNOTATED AND EXPLAINED 5, http://womenwarpeace.org/toolbox/Annotated_1325.pdf (last visited Sept. 7, 2007); see also S.C. Res. 508, U.N. Doc. S/RES/1325 (Oct. 31, 2000); Bojana Stoparic, *U.N. Takes*

create and promote policy objectives.”²¹ This idea stems from, among other sources, a 1992 study by the United Nations Division for the Advancement of Women:

Minorities, such as women who are successful in a male world, according to a classic theory of minority behaviour, absorb the dominant culture to such an extent that they tend to dissociate themselves from other women, to underrate their own success and to perceive any discrimination they meet as a result of their own shortcomings. It takes a minority of a certain minimum size, 30–35%, to be able to influence the culture of groups and to facilitate alliances between group members.²²

The UN argues that a critical mass allows women to “have a visible impact on the style and content of political decisions,” citing the Nordic countries as an example where a critical mass of women in government has resulted in newfound attention to “issues that have long been ignored, such as equal rights, women’s control over their own bodies, child care, and protection against sexual violence.”²³

Of course, a government that is one-third female hardly reflects a world that is half female. So, while this “critical mass” of 30% to 35% may be necessary for women’s presence to be felt in political governance, it is insufficient to achieve *equal* impact.

The UN Department of Economic and Social Affairs notes: “A significant presence of women in parliament does not, in itself, guarantee

Measure of Women’s Equality, WOMEN’S ENEWS, Feb. 27, 2005, <http://www.womensenews.org/article.cfm/dyn/aid/2200/context/cover>.

21. Lisa Schnall, *Party Parity: A Defense of the Democratic Party Equal Division Rule*, 13 AM. U. J. GENDER SOC. POL’Y & L. 381, 382 n.2 (2005) (quoting Joni Lovenduski, *Women & Politics: Minority Representation or Critical Mass?* 54 PARLIAMENTARY AFF. 743, 744 (2001)); see also Donley T. Studlar & Ian McAllister, *Does a Critical Mass Exist? A Comparative Analysis of Women’s Legislative Representation Since 1950*, 41 EUR. J. POL. RES. 233, 233 (2002); U.N. DEV. PROGRAMME, WOMEN’S POLITICAL PARTICIPATION AND GOOD GOVERNANCE: 21ST CENTURY CHALLENGES 71 (2000), <http://www.pogar.org/publications/other/undp/gender/gender-pub-21st-century2000e.pdf>.

22. MARILEE KARL ET AL., HIGHER AGRICULTURAL EDUCATION AND OPPORTUNITIES IN RURAL DEVELOPMENT FOR WOMEN (1997) (citing a 1992 United Nations Division for the Advancement of Women study), available at <http://www.fao.org/docrep/W6038E/w6038e06.htm>; see also U.N. OFFICE AT VIENNA CTR. FOR SOCIAL DEV. & HUMANITARIAN AFFAIRS, WOMEN IN POLITICS AND DECISION-MAKING IN THE LATE TWENTIETH CENTURY 107 (1992).

23. The Secretary-General, *Monitoring the Implementation of the Nairobi Forward-Looking Strategies for the Advancement of Women*, ¶ 20, delivered to the Commission on the Status of Women, U.N. Doc. E/CN.6/1995/1 (Feb. 1, 1995). But the UN itself is far from attaining the 30% target. See U.N. DEV. FUND FOR WOMEN, *supra* note 20, at 5 (“[O]nly two women have served as Ambassadors on the Security Council since 1992. Between 1992–2002, 5.4% of the Ambassadors sent to represent countries at U.N. Headquarters were women. At the General Assembly First Committee on Security and Disarmament between 1992–2002, women headed 7% of country delegations. Women are consistently and significantly under-represented in peace negotiations and are often entirely absent [from many international decision-making bodies].”).

that women have achieved equality in the political sphere. Nor does it guarantee that greater attention will be given to gender issues or translated into policies and action on gender equality.”²⁴ Thus, the election of a critical mass—or more—of women to government is only a step in the process of achieving gender equality in terms of number *and* impact, but it is nonetheless an important step.

Regardless of whether the aspiration is a third or a half, the United States falls short. It was the first country to recognize women’s right to run for office, in 1788, and one of the first thirty countries to recognize women’s right to vote, in 1920.²⁵ But today the number of women in the U.S. government places us at sixty-seventh in the world.²⁶

Consistent with general patterns elsewhere, American women’s representation is higher in state and local offices. After the November 2006 elections, women comprised 23.5% of state legislatures and seventy-six women were elected to state executive office.²⁷ The number of women serving in state legislatures has increased more than fivefold, from a mere 4.5% in 1971.²⁸ At the city level, 14.4% of U.S. cities with populations over 100,000 had female mayors in 2006, while 17.3% of cities with populations over 30,000 were headed by women.²⁹

These types of statistics repeat worldwide. In France, where a 2000 law called Parity mandated that political parties present candidate lists consisting of fifty–fifty female-male candidates, the “most dramatic success . . . has been in municipal elections[,] where women have obtained near-Parity in many positions. . . . More importantly, these local elections create larger numbers of experienced politicians to run for higher offices.”³⁰

Globally, women constitute 9% of mayors and 20.9% of local councilors (urban local representatives, such as city- or town-council members), according to a survey by an international-research organiza-

24. U.N. DEP’T OF ECON. & SOC. AFFAIRS, PROGRESS TOWARDS THE MILLENNIUM DEVELOPMENT GOALS, 1995–2005: GOAL 3: PROMOTE GENDER EQUALITY AND EMPOWER WOMEN, at 11 (2005), http://unstats.un.org/unsd/mi/goals_2005/goal_3.pdf.

25. Inter-Parliamentary Union, Women’s Suffrage, <http://www.ipu.org/wmn-e/suffrage.htm> (last visited Sept. 5, 2007).

26. Inter-Parliamentary Union, Women in National Parliaments, <http://www.ipu.org/wmn-e/classif.htm> (last visited Sept. 5, 2007).

27. Press Release, CAWP, Women Post New Record Numbers in State Legislatures, but Lose Ground at Statewide Level (Nov. 27, 2006), http://www.cawp.rutgers.edu/Facts/Elections/Post_election06_StLeg_Stwide_Results.pdf.

28. CAWP, WOMEN IN STATE LEGISLATURES 2007 (2007), available at <http://www.cawp.rutgers.edu/Facts/Officeholders/stleg.pdf>.

29. CAWP, <http://www.cawp.rutgers.edu/Facts/Officeholders/mayors-curr.html> (last visited Sept. 5, 2007).

30. Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L. REV. 1119, 1147 (2006).

tion comprised of cities and national associations.³¹ In a way, American women's slow advancement toward equal representation in government seems out of place. For example, American women enjoy many more freedoms and rights than other women around the globe, 59% of women participate in the labor force, and women are more likely than men to enroll in college.³² Of course, they continue to earn less money than men for equal work,³³ shoulder more childcare and household responsibilities,³⁴ and are more likely to live in poverty.³⁵ But putting that aside, their workplace advancements would seem to signal women's ascension in the public sphere, if not in their private lives.

At least in politics, however, women are far from attaining equal representation, and Americans seem content with a government where women are just 16% of their political leaders. This lack of outrage about a government that looks so different from its constituents can be blamed partly on the media. After several "Year of the Woman" elections, voters thought that women were not only catching up, but taking over. In fact, only two additional women were elected to the House of Representatives and none to the Senate in 1988, the first such "Year of the Woman."³⁶ In the elections two years later, Congress's numbers remained exactly the same.³⁷ And in 1992, perhaps the quintessential "Year of the Woman," five female Senators and forty-seven female Representatives were elected, bringing women's representation to just 5%

31. United Cities and Local Governments, Statistics: World, <http://www.cities-localgovernments.org> (follow "Gender statistics" hyperlink) (last visited Sept. 5, 2007). Those totals vary widely by region: Africa, 12.2% female mayors and 30.1% female councilors; Asia and the Pacific, 5.6% female mayors and 17.5% female councilors; Middle East and the Mediterranean, 0.8% female mayors and 2.1% female councilors; Europe, 10.5% female mayors and 23.9% female councilors; Central America, 4.8% female mayors and 24.1% female councilors; and Latin America, 5.5% female mayors and 26.1% female councilors. *Id.*

32. U.S. BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK 2-3 (2005), <http://www.bls.gov/cps/wlf-databook-2005.pdf>.

33. See, e.g., INST. FOR WOMEN'S POLICY RESEARCH, MEMO TO JOHN ROBERTS: THE GENDER WAGE GAP IS REAL I (2005), <http://www.iwpr.org/pdf/C362.pdf>.

34. See, e.g., JOHN P. ROBINSON & GEOFFREY GODBEY, TIME FOR LIFE: THE SURPRISING WAYS AMERICANS USE THEIR TIME 104 (1997) ("[W]omen still do almost 80 percent of the child care . . ."); see also Joan Williams, *Toward a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. ILL. U. L. REV. 89, 92 n.16 (1998).

35. See, e.g., LEGAL MOMENTUM, READING BETWEEN THE LINES: WOMEN'S POVERTY IN THE UNITED STATES, 2003 (2004), <http://www.legalmomentum.org/womeninpoverty.pdf> ("Women were about 40% more likely to be poor than men in 2003, with a poverty rate of 12.4% compared to 8.9% for men. Almost one of every eight women was poor, compared to about one of every eleven men. The gender gap was even larger among the aged, with aged women over 70% more likely to be poor than aged men.").

36. Janine Jackson, *Women Candidates in '92 Election Coverage*, EXTRA!, Sept. 1992, available at <http://www.fair.org/index.php?page=1204>.

37. *Id.*

and 10.8%.³⁸

III. DOES THE UNITED STATES NEED QUOTAS?

Perhaps because of this complacency and the resulting lack of debate, the United States seems content with its “incremental”³⁹ approach to gender equality in governance—a gradual evolution based on equality of *process* and the presumption that prejudice against women will disappear as society evolves, employed most notably in the Nordic countries.⁴⁰ In contrast, post-conflict countries and other new democracies often adopt the “fast track” approach,⁴¹ which focuses on equality of *result* and demands affirmative action to correct the exclusion and discrimination that keep women from public office.⁴²

By mandating positive actions and quotas from the outset, Iraq, Afghanistan, Rwanda, Burundi, and others are acknowledging not only that women’s inclusion is an important goal, but indeed that it is so important that it needs to take place now, not a century from now.

In keeping with its incremental style, the traditional U.S. approach to gender inequality involves defensive anti-discrimination laws rather than positive action. But continuing inequality between American women and men, especially in the area of political governance, after 107 years of suffrage, raises the question of whether a new approach is needed.⁴³

To remedy unequal numbers of women and men in elected office, ninety-seven countries, including those mentioned above, have passed measures that promote women’s political representation, including quotas at the political-party and subnational levels, constitutional amendments, and national-election laws.⁴⁴

A quota is simply a “proportional share assigned to a person or group.”⁴⁵ Our political system uses, for example, geographical quotas,

38. CAWP, WOMEN CANDIDATES FOR CONGRESS 1974–2006 (2006), http://www.cawp.rutgers.edu/Facts/CanHistory/canwincong_histsum.pdf.

39. Dahlerup, *supra* note 7, at 6.

40. *Id.* at 7–8. But see Mark P. Jones, *Gender Quotas, Electoral Laws, and the Election of Women: Lessons from the Argentine Provinces*, 31 COMP. POL. STUD. 3, 5 (1998) (“A country with a low percentage of women in its national legislature cannot (in the short or medium term) adopt a ‘Scandinavian political culture’ or dramatically increase its level of economic development. By contrast, a gender quota law can be enacted in any country through the legislative process.”).

41. Dahlerup, *supra* note 7, at 8.

42. *Id.* at 9.

43. See, e.g., Tom Mullen, *Affirmative Action*, in THE LEGAL RELEVANCE OF GENDER 247 (Sheila McLean & Noreen Burrows eds., 1988).

44. Global Database of Quotas for Women, *supra* note 5.

45. BLACK’S LAW DICTIONARY 1285 (8th ed. 2004); see also Richard L. Barnes, *Quotas as Satin-Lined Traps*, 29 NEW ENG. L. REV. 865, 865 (1995); Andrew M. Dansicker, *A Sheep in*

assigning more representatives to more highly populated areas. So-called "negative quotas," which set *upper* limits on numbers, rather than minimums, are used frequently. The Immigration and Nationality Act, for example, assigns a specific percentage of the total annual immigration into the United States to each nation,⁴⁶ and quotas on imported goods are common.⁴⁷ Further, the U.S. Supreme Court has held in the context of race-based university admissions that programs designed to attain a "critical mass" of non-white students did not transform the program into a quota or violate the Fourteenth Amendment's Equal Protection Clause where the law school in question had a "compelling interest in attaining a diverse student body."⁴⁸ The Court focused on the "substantial" benefits of diversity in the university context.⁴⁹

One nonlegal roadblock to the implementation of quotas is the entrenched vision of politics held by Americans. "The substantial resistance to gender quotas in older democracies illustrates the extent to which the electoral systems are considered to be 'natural,' even if there are significant variations between countries."⁵⁰ This may help explain why post-conflict nations more readily embrace gender quotas and other political innovations—their electoral systems are unformed and their decision makers perhaps more willing to engage in idealism.

Opponents of gender quotas argue that they are undemocratic because they restrict voters' choices of candidates, discriminate against men who want to stand for election, or reward individual women who may not be deserving of assistance.⁵¹ In fact, quotas may *expand* voters' options as political parties seek candidates in different places and ways, and women who might never have otherwise considered running for office decide to participate.⁵² Further, the argument that quotas might discriminate against men presupposes that men are more qualified, or at least more willing, to run for office, so that any woman running for office above the 16% average is taking the spot of a man who would otherwise stand for election. But assuming this to be true—that there are more men than women who want to be elected—isn't this likely the

Wolf's Clothing: Affirmative Action, Disparate Impact, Quotas and the Civil Rights Act, 25 COLUM. J.L. & SOC. PROBS. 1, 1 (1991).

46. 8 U.S.C.A. § 1153 (West 2007).

47. See, e.g., *Sec'y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 615 (1950) ("[T]he Sugar Act of 1948 [which placed quotas on imported sugar] represented an effort to deal with . . . the harmful effects on interstate and foreign commerce of progressively depressed sugar prices of earlier years created by world surpluses . . .").

48. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

49. *Id.* at 330.

50. Dahlerup, *supra* note 7, at 10–11.

51. See, e.g., Mullen, *supra* note 43, at 246–50.

52. See Dahlerup, *supra* note 7, at 11.

result of discrimination? And if this *is* the result of discrimination, it is circular logic to resist quotas on the grounds that they will deny seats to men who don't deserve them in the first place. Similarly, the "merit" or "let-the-best-man-win" argument again stems from the status quo, in which men are arguably more qualified for political office because they have had more training and opportunity to participate.⁵³ Continuing to allow political representation to be governed by "merit," without recognizing the history of discrimination that has brought us to where we are, is to continue to discriminate against women and other underrepresented groups.

While affirmative action and quotas are routinely criticized, they are an increasingly common tool for enlarging women's political representation internationally. More important, they have met with some success: Among those countries with quotas, women's political representation stands at 19.4%,⁵⁴ versus a worldwide average of 17.5% (including both quota and non-quota countries).⁵⁵ The numbers vary widely—from 2% in Egypt to 48.8% in Rwanda—depending on enforcement, legal sanctions for noncompliance, what percentages are specified in the quotas, and whether the quotas are mandatory or voluntary.⁵⁶

On a pragmatic level, the implementation and enforcement of quotas can be difficult and can significantly impact their effectiveness.⁵⁷ Enforcement difficulties can also skew the statistics—for example, if every country with a quota system had 100% effective enforcement measures in place, each country's political representation would meet or exceed its quota. Thus, if the fourteen countries with constitutional quotas each mandated a minimum of 33% women in government and had 100% effective enforcement, then the average women's representation among them would be at least 33%.

At the implementation stage, failure to observe new laws and creative attempts to skirt the requirements have led to some disappointing results. In France, for example, where the 2000 Parity law mandated that the political parties present candidate lists consisting of fifty-fifty female-male candidates, male politicians created new parties or switched

53. See also Mullen, *supra* note 43, at 252–54.

54. Global Database of Quotas for Women, *supra* note 5.

55. Women in National Parliaments, *supra* note 26 (averages range from 9.6% in the Arab States to 41.6% in the Nordic countries).

56. Global Database of Quotas for Women, *supra* note 5.

57. See, e.g., Dahlerup, *supra* note 7, at 10 ("Contrary to what is usually expected, a quota provision of, say, 30 percent does not automatically lead to a considerable and rapid increase in women's representation. In public debates as well as in research, the focus is mainly on the passionate debates over the introduction of quotas, while the no less important implementation process is often neglected.").

party affiliations so additional men could run for office.⁵⁸ A Somalian law mandating a 12% quota for women in the National Assembly and a 25% quota in the regional assemblies has been largely ignored by clan leaders.⁵⁹ Similarly, in Liberia a nonbinding guideline issued to political parties requiring that their candidacy lists include 30% women has been ignored.⁶⁰

In places where women have successfully "infiltrated" the government, they continue to face gender-related barriers to their acceptance and effectiveness. Lani Guinier tells the story of the first Mexican American woman ever elected to the school board in a small Texas county: After her election, the Board voted to change its agenda policy, requiring a second vote to add any new agenda items.⁶¹ As women's presence in government increases, maximizing their impact becomes a concern.⁶²

A number of other potential problems associated with the implementation of quotas have been suggested but not thoroughly studied, including the possibility of a "glass ceiling" that traps women at the quota percentage and prevents them from rising above it.⁶³ This did not materialize in Rwanda, where women have exceeded their allotted percentage.⁶⁴ Stigma, often raised as an argument by quota and affirmative-action opponents, is another possibility. On one hand, stigma exists already and perhaps quotas are a remedy, rather than a cause:

[W]omen, like all disempowered and historically discriminated categories[,] face some kind of stigmatization. . . . [T]he discourse surrounding gender quotas for women politicians should focus on quotas as one tool to remove this stigmatization. The stigmatization comes from past discrimination against women, not from reform efforts aimed at addressing and repairing the damage done by discrimination.⁶⁵

58. Rosenblum, *supra* note 30, at 1146–47.

59. U.N. DEV. FUND FOR WOMEN, BEYOND NUMBERS: SUPPORTING WOMEN'S POLITICAL PARTICIPATION AND PROMOTING GENDER EQUALITY IN POST-CONFLICT GOVERNANCE IN AFRICA 27–28 (2006), http://www.womenwarpeace.org/issues/peaceprocess/CAMILLE_Final_UNIFEM_Beyond_Numbers_FINAL.pdf.

60. *Id.* at 29.

61. LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 75 (1994).

62. See, e.g., U.N. DEV. PROGRAMME, WOMEN'S POLITICAL PARTICIPATION AND GOOD GOVERNANCE: 21ST CENTURY CHALLENGES 76 (2000) (describing Latin American efforts to encourage women in office, including development of a system to support female mayors and councillors in Ecuador).

63. DAHLERUP, *supra* note 12, at 6.

64. Global Database of Quotas for Women, <http://quotaproject.org/country.cfm> (follow "Rwanda" hyperlink) (last visited Sept. 7, 2007).

65. Gihan Abou-Zeid, *The Arab Region*, in WOMEN, QUOTAS AND POLITICS, *supra* note 6, at 190.

On the other hand, assuming that a government contains a critical mass of women, does stigma matter? If a 30% or 35% critical mass is sufficient for women to push forward their agendas and quotas guarantee that at least that critical mass will be elected during each election year, then any stigma should have a negligible effect.

Similarly, in a nation where all female politicians are part of a quota system or where both female *and* male politicians are included in the quota (as in a fifty-fifty system), stigma becomes less important. Overall, perhaps *how* women got into office is less important than the fact that they *got* there. As one woman put it, "It is better to be in a position of power than not to be in a position of power."⁶⁶

IV. WHAT ARE THE OPTIONS FOR THE UNITED STATES?

A. Political-Party Quotas

Of the ninety-seven countries with quotas, sixty-nine have passed quotas within 168 political parties, producing an average representation of 18.9%.⁶⁷ Of these, voluntary-party quotas are the most common, used in eleven of the twenty countries with women's political representation above 30%.⁶⁸

The process of becoming an elected official has been described as a series of hurdles: first, an individual's self-selection; then the party's selection of that individual as a candidate; and finally, the voters' election of a candidate.⁶⁹

In an analysis of Norway's quota system, University of Houston professor Richard E. Matland writes that "[i]n virtually all countries at the outset of this process the pool of eligible candidates is slightly more than 50 percent female."⁷⁰ However, another researcher found that recruitment may be an effective tactic because "women candidates may need more encouragement to run [and w]omen candidates are also more

66. Gerlind Wallon, *Tapping into the Pool of Women*, 3 EMBO REP. 300, 304 (2002) (quoting Mary Clutter, Assistant Director of the U.S. National Science Foundation).

67. Global Database of Quotas for Women, <http://quotaproject.org/system.cfm> (last visited Oct. 8, 2007).

68. U.N. Dep't of Econ. & Soc. Affairs, Inter-Parliamentary Union, United Nations Expert Group Meeting, *Background Paper: The Participation of Women and Men in Decision-Making: The Parliamentary Dimension*, 4-5, U.N. Doc. EGM/EPWD/2005/BP.2 (Dec. 22, 2005), available at <http://www.un.org/womenwatch/daw/egm/eq1-men/docs/BP.2%20Background%20Paper%20IPU.pdf>.

69. Richard E. Matland, *The Norwegian Experience of Gender Quotas*, in *THE IMPLEMENTATION OF QUOTAS: EUROPEAN EXPERIENCES* 64, 64 (Julie Ballington & Francesca Binda eds., 2005) (citing Pippa Norris, *Legislative Recruitment*, in *COMPARING DEMOCRACIES: ELECTIONS AND VOTING IN GLOBAL PERSPECTIVE* (Lawrence LeDuc, Richard G. Niemi & Pippa Norris eds., 1996)).

70. Matland, *supra* note 69, at 64.

likely than men to report that they were recruited.”⁷¹ Further studies of recruitment as a route to increasing women’s representation are needed.

Regarding the third hurdle, a 2004 report of the Political and Social Affairs Division of Canada’s Parliament found that female candidates who made it to the final election stage did almost as well as men:

The major hurdle for women in Canada appears to be at the party level rather than at the polls. . . . The 64 women elected in January 2006 represented 17% of all women candidates running for office in that election, only slightly lower than the 19% success rate for male candidates.⁷²

This result is echoed worldwide—in New Zealand in 2005, for example, women were 26.6% of candidates in the election and 32.2% of the winners.⁷³ In Portugal, women were 32.3% of candidates and 21.3% of the winners.⁷⁴ When women run for election, they generally tend to do as well as men.⁷⁵

In the second hurdle, political parties—described as the “gatekeepers” of elections, in terms of nominations and elections—can play an important role in women’s representation.⁷⁶ Political parties in many countries use quotas, written into their bylaws or constitutions, to encourage or mandate women’s leadership at the party level.

For example, the charter and bylaws of the U.S. Democratic Party state, “The National Convention shall be composed of delegates equally divided between men and women.”⁷⁷ This rule was added to the national party’s charter in 1980.⁷⁸ In *Bachur v. Democratic National Party*, the equal-division rule was challenged by a male voter, who claimed that his constitutional rights were violated by the requirement that he must vote for a maximum of four female and four male delegates.⁷⁹ The court rejected his claim, holding that encouraging women’s

71. KIRA SANBONMATSU, *CANDIDATE RECRUITMENT AND WOMEN’S ELECTION TO THE STATE LEGISLATURES* 5 (2003) (citations omitted), <http://www.cawp.rutgers.edu/Research/Reports/Sanbonmatsu2003.pdf>.

72. JULIE COOL, *LIBRARY OF PARLIAMENT, WOMEN IN PARLIAMENT* 6 (2006), <http://www.parl.gc.ca/information/library/PRBpubs/prb0562-e.pdf>.

73. INTER-PARLIAMENTARY UNION, *WOMEN IN PARLIAMENT IN 2005: THE YEAR IN PERSPECTIVE* (2005), http://www.ipu.org/pdf/publications/women06_en.pdf.

74. *Id.*

75. *See, e.g.,* JENNIFER L. LAWLESS & RICHARD L. FOX, *WHY DON’T WOMEN RUN FOR OFFICE?* 1 (2004), http://www.brown.edu/Departments/Taubman_Center/womeninoffice.pdf; SANBONMATSU, *supra* note 71.

76. Dahlerup, *supra* note 7, at 10.

77. DEMOCRATIC NAT’L COMM., *THE CHARTER & THE BYLAWS OF THE DEMOCRATIC PARTY OF THE UNITED STATES*, art. II, § 4 (as amended Oct. 3, 2003), *available at* <http://www.democrats.org/pdfs/charter.pdf>.

78. *Bachur v. Democratic Nat’l Party*, 836 F.2d 837, 838–39 (4th Cir. 1987).

79. *Id.* at 838.

political representation as party delegates was a rational and important goal:

When we balance the broad, encompassing First and Fourteenth Amendment protection enjoyed by the National Party and the State Party against the limited restriction on Bachur's right to vote for delegates, we can only conclude that [Maryland's version of the national rule] does not unconstitutionally infringe on Bachur's right to vote. . . . Means to stimulate greater female participation were ineffective until the Equal Division rule was formulated and adopted. The use of affirmative action on the part of a political party to broaden its base was approved in [*Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), where the Republican party permitted unaffiliated voters to vote in Republican primaries.] . . . We see no principled difference between opening a primary election to unaffiliated voters and a gender limitation on eligible candidates as a means to broaden public participation in party affairs, particularly from a segment of the party that historically has been grossly underrepresented.⁸⁰

The Republican Party's version of the equal-division rule is less strict, instructing that "[e]ach state shall endeavor to have equal representation of men and women in its delegation to the Republican National Convention."⁸¹ Perhaps because of the aspirational language, the Republicans routinely put forward fewer female candidates than the Democrats until the early 1990s.⁸²

The Green Party's bylaws require all committees to "have two co-chairs unless directed to have a different number by the [National Committee]. Gender balance and co-chairs from different states shall be the norm, though under extraordinary circumstances committees may choose another arrangement."⁸³ A state party seeking membership in the national Green Party must demonstrate "[e]vidence of commitment to, and good faith efforts to achieve, gender balance in party leadership and representation."⁸⁴ In the spring 2007 elections, twenty-nine women, or 29% of the party's total candidates, ran for office.⁸⁵

Because candidates are often chosen from among active members,

80. *Id.* at 842–43.

81. REPUBLICAN NAT'L COMM., THE RULES OF THE REPUBLICAN PARTY 14(d) (2004), <http://www.gop.com/About/AboutRead.aspx?AboutType=4&Section=16>.

82. CAWP, STATEWIDE ELECTIVE EXECUTIVE WOMEN 1969–2007 (2007), <http://www.cawp.rutgers.edu/Facts/Officeholders/stwidehist.pdf>.

83. OFFICIAL BYLAWS OF THE GREEN PARTY OF THE UNITED STATES, art. 3, <http://www.gp.org/documents/bylaws.shtml> (last visited Sept. 7, 2007).

84. RULES & PROCEDURES OF THE GREEN PARTY OF THE UNITED STATES, art. 2, § 1 <http://www.gp.org/documents/rules.shtml> (last visited Sept. 7, 2007). (CPT 2, SEC 1)

85. Green Party Election Results, <http://www.greens.org/elections/> (last visited Sept. 25, 2007).

membership in a party is an important path to political candidacy. "Active" members go to party meetings, discuss party issues, join committees, and participate in the selection of candidates.⁸⁶ Opportunities for women to participate within the party—through women's committees, for example—may contribute to their increased activism and, in turn, lead to additional female candidates.⁸⁷

In Sweden, where the government is 47.3% female, the three main political parties have used voluntary 50% quotas and recommended targets for women on their party lists since the late 1980s and early 1990s.⁸⁸ In 1995, Sweden became the first country to have an equal number of women and men in ministerial posts, and at present, the Swedish cabinet has 52.4% women ministers.⁸⁹ The party rules developed over time from so-called "soft quotas," which were recommendations or targets, to more formal rules adopted by some of the parties.⁹⁰ In the Social Democratic Party, for example, women's representation increased from 41% in 1991 to 48% in 1994, the first election with quotas in place.⁹¹

Of the seven major parties in Norway, five have officially adopted quotas.⁹² Norway's Socialist Left Party and the Liberal Party introduced gender quotas in 1975.⁹³ Norway's largest political party, the Labour Party, adopted quotas in 1983 and implemented them in the 1985 election.⁹⁴ Representation jumped from 15.5% in 1973 to 25.8% in 1981 and then to 34.4% in 1985.⁹⁵ "In just two election periods (1981–1989)," reports Professor Matland, "women's representation within the Labour Party delegation went from 33 percent to 51 percent. In the party nominating caucuses, a candidate's sex went from being a factor of some relevance to one of primary significance. Every other candidate had to be a woman."⁹⁶

86. WOMEN IN POLITICS AND DECISION-MAKING IN THE LATE TWENTIETH CENTURY, *supra* note 22, at 29.

87. *Id.* at 49.

88. Global Database of Quotas for Women, <http://quotaproject.org/country.cfm> (follow "Sweden" hyperlink) (last visited Sept. 7, 2007); INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, SWEDEN: WOMEN'S REPRESENTATION IN PARLIAMENT, http://www.idea.int/news/upload/sweden_women.pdf (last visited Oct. 8, 2007).

89. Women's Learning Partnership for Rights Dev. & Peace, Leadership Facts & Figures, <http://www.learningpartnership.org/resources/facts/leadership> (last visited Sept. 7, 2007).

90. Lenita Freidenvall et al., *The Nordic Countries: An Incremental Model*, in WOMEN, QUOTAS AND POLITICS, *supra* note 6, at 73.

91. *Id.* at 75.

92. Matland, *supra* note 69, at 68.

93. *Id.* at 67.

94. *Id.* at 68.

95. *Id.* at 67–68.

96. *Id.*

Professor Matland attributes the Norwegian emphasis on diversity among candidates to a few factors:

First, it is very clearly seen as a legitimate principle of representation. While the Anglo-American outlook on the selection of . . . Members of Congress . . . very much focuses on the individual and the selection of a specific candidate on the basis of group characteristics is often seen as an anathema and a violation of the liberal principle of choosing the most qualified person, in the Norwegian context, this is simply . . . a non-issue. . . . Furthermore, decentralized group representation is an effective way of integrating factions and guaranteeing party peace. . . . Finally, Norwegian party leaders often see a diverse slate as important in appealing to various groups of voters.⁹⁷

Although Swiss women did not achieve the right to vote until 1971,⁹⁸ their representation in governance today is 25%.⁹⁹ The Social Democratic Party of Switzerland has a 40% quota for women on party lists.¹⁰⁰ Constitutional quota regulations were proposed in 1996 and 2000, but did not pass.¹⁰¹

Portugal's Parliament passed a gender-quota law in August 2006.¹⁰² The law dictates that each party's election list for legislative, local, and European elections include at least 33.3% women.¹⁰³ Initially, the law passed Parliament but was vetoed by the president, who objected to an enforcement provision excluding from elections any lists of candidates that were not 'one-third female.'¹⁰⁴ The revised version stipulates that parties that do not comply with the 33.3% quota may not have their election costs reimbursed by the government.¹⁰⁵ Whether this less-stringent enforcement mechanism will be effective remains to be seen.

Despite existing political-party rules in the United States, American women are not winning elections in numbers anywhere close to men. But because American voters choose candidates through election primaries, political parties play a smaller role in elections than they do in some other countries, so political-party quotas may be a less-effective means of promoting women's representation in the United States.¹⁰⁶ On the

97. *Id.* at 66.

98. Women's Suffrage, *supra* note 25.

99. Global Database of Quotas for Women, <http://quotaproject.org/country.cfm> (follow "Switzerland" hyperlink) (last visited Sept. 7, 2007).

100. *Id.*

101. *Id.*

102. *Women to Make Up Third of Portugal Elections*, INDEP. ONLINE (S. AFR.), Aug. 8, 2006, http://www.int.iol.co.za/index.php?art_id=QW1155042542255B216&set_id=1&click.

103. *Id.*

104. *Id.*

105. *Id.*

106. See, e.g., Mona Lena Krook et al., *Western Europe, North America, Australia and New*

other hand, because they require only the parties' commitments and are thus relatively easy to implement, party quotas could be an efficient way to increase women's representation quickly.

B. National Quotas Mandated in the Constitution

Fifteen countries use constitutional quotas to ensure women's representation in their national parliaments.¹⁰⁷ Their effectiveness varies dramatically, from a 2% female parliament in Bangladesh to 48.8% in Rwanda.¹⁰⁸ The average is 22.4%.¹⁰⁹

The presence or absence of sanctions for noncompliance plays an important role in the effectiveness of quotas. As might be expected from the statistics above, Bangladesh does not impose sanctions for noncompliance with its quotas, while Rwanda does.¹¹⁰ Types and effectiveness of legal sanctions vary, though: In Paraguay (10% in the lower house) and Mexico (22.6%), ballots that do not meet the quota requirements are not accepted by election authorities, but in other countries, such as South Africa (32.8%), there are no sanctions at all.¹¹¹

As demonstrated by South Africa and other examples, sanctions are neither necessary nor sufficient for 100% quota success. Even in countries with quotas that mandate voting ballots where women's names occupy a minimum percentage of all candidates listed, for example, female representation may not increase due to the placement of their names in ballot positions where they are unlikely to win election.¹¹²

Zealand: Gender Quotas in the Context of Citizenship Models, in *WOMEN, QUOTAS AND POLITICS*, *supra* note 6, at 194, 214–26.

107. Global Database of Quotas for Women, *supra* note 67.

108. *Id.*

109. *Id.*

110. Global Database of Quotas for Women, *supra* note 5.

111. Monique Leyenaar, *Achieving Political Gender Balance: Use of Parity Quotas and Quota Laws*, WIDE ANGLE, July 2004, http://www.pbs.org/wnet/wideangle/printable/rwanda_briefing_print.html; see Global Database of Quotas for Women, <http://quotaproject.org/country.cfm> (follow "Mexico" hyperlink) (last visited Sept. 7, 2007) (17.2% of those in the upper house and 22.6% of those in the lower house of Mexico are women); Global Database of Quotas for Women, <http://quotaproject.org/country.cfm> (follow "Paraguay" hyperlink) (last visited Sept. 7, 2007) (8.9% of those in the upper house and 10% of those in the lower house of Paraguay are women); Global Database of Quotas for Women, <http://quotaproject.org/country.cfm> (follow "South Africa" hyperlink) (last visited Sept. 7, 2007). Despite South Africa's lack of legal sanctions, its main political party chose to observe the quota:

In South Africa's first democratic election in 1994, the African National Congress (ANC) adopted a 30% quota for women on political party lists. As a result, the representation of women increased from below 3% to 27% in one election in 1994. In the 1999 election, women were placed in every third position on the national party list. At the local level . . . the ANC has adopted a 50% quota for women on party lists.

Id.

112. See Krook et al., *supra* note 106, at 209.

Some countries use the “zipper” or “zebra” method to combat this problem, alternating women’s and men’s names on ballots.¹¹³ Argentina, Costa Rica, and Belgium, among others, use “double quotas,” which combine a mandated minimum percentage of women with rules about gendering the “rank order” of candidates on lists.¹¹⁴ These three countries also have additional sanctions in place, such as rejecting electoral lists with less than the required number of women.¹¹⁵

The fast-track system’s golden child is Rwanda. Before the 2003 elections, only 25.7% of the country’s legislature was female, leading to the inclusion of quotas in the country’s 2003 constitution.¹¹⁶ In the country’s first legislative elections since the 1994 conflict, voters elected women to 48.8% of the seats in the Rwandan Chamber of Deputies, surpassing Sweden as the country with the highest percentage of women in office.¹¹⁷

Other rebuilding nations are succeeding at increasing women’s representation. Iraq’s constitution mandates that 25% (sixty-nine of 275) of the national assembly members be women.¹¹⁸ In the 2005 election, seventy out of 200 female candidates were elected, exceeding the 25% quota.¹¹⁹ Burundi’s 2004 constitution stipulates a 30% quota for women in parliament; if the quota is not met, a process of “co-optation” follows, where the electoral administration adds more members to the parliament to meet the quota.¹²⁰ In 2005, women held 30.5% of the lower house

113. See *id.*

114. Drude Dahlerup & Anja Taarup Nordlund, *Gender Quotas: A Key to Equality? A Case Study of Iraq and Afghanistan*, 3 EUR. POL. SCI. 91 (2004), available at http://www.essex.ac.uk/ECPR/publications/eps/onlineissues/summer2004/research/dahlerup_nordlund.htm.

115. COOL, *supra* note 72, at 8.

116. Judith Kanakuze, *Quotas in Practice: The Challenge of Implementation and Enforcement in Rwanda*, THE IMPLEMENTATION OF QUOTAS: AFRICAN EXPERIENCES 98 (Julie Ballington ed., 2004), available at http://www.quotaproject.org/publications/Quotas_Africa.pdf. Article 9 of the constitution stipulates that the State undertakes to uphold “equality between women and men reflected by ensuring that women hold at least 30% of the positions in decision-making bodies[.]” while Article 76 specifies that the:

Chamber of Deputies is composed of eighty (80) members . . . [including twenty-four] female members, two per province and the city of Kigali, elected by the District Councils, City Councils, and the Kigali City Council, to which are added the Executive Committees of the women’s structures in the provinces, the city of Kigali, the cities, the districts, and the sectors.

Id. at 97.

117. Inter-Parliamentary Union, *Elections in Rwanda Produce Record Result for Women*, WORLD OF PARLIAMENTS, Dec. 2003, <http://www.ipu.org/news-e/12-7.htm>.

118. U.N. Dev. Programme, Programme on Governance in the Arab Region, <http://www.undp-pogar.org/countries/elections.asp?cid=6> (last visited Sept. 7, 2007).

119. *Id.*

120. Global Database of Quotas for Women, <http://www.quotaproject.org/country.cfm> (follow “Burundi” hyperlink) (last visited Sept. 7, 2007).

seats.¹²¹

Afghanistan's constitution and electoral law guarantee the representation of women in the lower house and provincial councils.¹²² In the lower house, sixty-eight seats, or 27% of the total spots, have been reserved for women candidates, while two seats have been set aside for women delegates in each provincial council.¹²³ If there are not enough women on the candidate lists to fill the seats allocated to women in a particular constituency, the seats in question remain vacant until the next election.¹²⁴ The president appoints one-third of the members of the upper house, and half of those appointees must be women.¹²⁵ To date, Afghanistan's lower and upper houses are 27.3% and 22.5% female, respectively.¹²⁶

In France, a 1999 constitutional amendment required political parties to create election party lists that are fifty-fifty female-male, with a financial penalty if this commitment is not upheld. The fifty-fifty rule was an answer to a French court decision declaring quotas unconstitutional on the basis that they "violated the principle of equality before the law, which precluded all types of division of voters and candidates into categories for political voting."¹²⁷ The country's constitutional compromise was Parity—since the amendment treats both genders the same, there is no longer a constitutionally questionable "division."

Constitutional quotas are used frequently in post-conflict nations where new constitutions are being written or in countries undergoing major transitions in government, as in Latin America during the 1980s and 1990s.¹²⁸ This is an effective and dramatic approach to achieving equality in governance, but it would be difficult in the United States. Many constitutional amendments are proposed each year,¹²⁹ but none have passed since 1992, when the Twenty-Seventh was finally approved—202 years after its introduction.¹³⁰ The only other amend-

121. *Id.*

122. AFGHAN CONST. ch. 5, arts. 83–84.

123. *Id.*

124. Global Database of Quotas for Women, <http://www.quotaproject.org/country.cfm> (follow "Afghanistan" hyperlink) (last visited Sept. 7, 2007).

125. *Id.*; see also AFGHAN CONST. ch. 5, art. 84 ("The President appoints fifty percent of [members of the Meshrano Jirga] from among women.").

126. Global Database of Quotas for Women, *supra* note 124.

127. Krook et al., *supra* note 106, at 210 (citation omitted).

128. See Araújo & García, *supra* note 17, at 87–88.

129. C-Span.org, Capitol Questions: Congress, <http://www.c-span.org/questions/weekly54.asp> (June 9, 2000).

130. U.S. CONST. amend. XXVII ("No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."). See generally Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677 (1993).

ments that dealt specifically with women's rights were the Nineteenth Amendment, proposed in 1878 and passed forty-two years later,¹³¹ and the Equal Rights Amendment ("ERA"), which passed Congress in 1972, but was ratified by only thirty-five of the necessary thirty-eight states by the July 1982 deadline.¹³²

More important than the time and difficulty of amending the Constitution, perhaps, is the virtual absence of debate in the United States about women's equal representation—unlike in the Nordic and Latin American countries and in post-conflict nations. Because of that absence, there is little of the momentum needed to pass a constitutional amendment.

C. *National Quotas Mandated in Laws or Regulations*

National-election laws provide another route to gender quotas, without requiring a constitutional amendment. Forty-two nations have instituted quotas in their election laws, resulting in parliaments that are 20.7% female.¹³³

Belgium is an interesting example of this type of regulation: It passed a law in 1994 specifying a gradual increase in the maximum of each gender allowed on party lists, specifying that neither gender could constitute more than three-quarters of the candidates on 1996 lists; in 1999, neither gender could constitute more than two-thirds of the candidates.¹³⁴ If a party could not find enough women (or men) to fill 33% of its list, those spots had to be left open.¹³⁵ Women's representation increased from 9.4% in 1994 to 23.3% in 1999, but fell short of the one-third goal because parties "tended to place their female candidates in list positions where they were unlikely to win election."¹³⁶ A 2002 law extended the quotas, mandating that the lists must include an *equal* share of women and men.¹³⁷ In the first election to which the law applied, in 2003, the top three positions on the lists could not be held by members of the same sex—and Belgian voters elected a government that was 35.3% female.¹³⁸ In later elections, candidates of different sexes occu-

131. Glenn Collins, *For Sale: Shrine to Suffragists; U.S. Covets House of Women's Rights Movement*, N.Y. TIMES, Nov. 14, 1999, at 39.

132. Dana Canedy, *Advocates of Equal Rights Amendment Resume Their Fight*, N.Y. TIMES, May 4, 2003, at 41.

133. Global Database of Quotas for Women, *supra* note 67.

134. Global Database of Quotas for Women, <http://quotaproject.org/country.cfm> (follow "Belgium" hyperlink) (last visited Sept. 7, 2007).

135. *Id.*

136. Krook et al., *supra* note 106, at 209 (citation omitted).

137. *Id.* at 208.

138. *Id.* at 209.

pied the top two positions on this list.¹³⁹ Today, Belgium's lower and upper houses are 34.7% and 38% female, respectively.¹⁴⁰

A gradual rollout of a national quota law, like that used in Belgium, might help American voters and political parties deal with the introduction of a gender quota. It is useful to examine some of the strategies that lead to the introduction and subsequent reauthorizations of the Violence Against Women Act,¹⁴¹ a successful bill that targeted women as a distinct group. Nonetheless, it is likely that any federal law would encounter many of the same difficulties faced by a constitutional amendment.

D. Subnational Quotas Mandated in Constitutions or Laws

Thirty-two countries have passed constitutional or legislative quotas mandating women's inclusion at the subnational level.¹⁴² Quotas for local elections often exist simultaneously with national-level quotas in many countries, as a way to establish different quota percentages at different levels of government¹⁴³ or because national quotas are sometimes more controversial and more difficult to pass.¹⁴⁴

In the early 1990s, India launched a "radical political experiment," constitutionally mandating the creation of village governing bodies called "panchayats," with at least one-third of the seats reserved for women.¹⁴⁵ "Roughly 74% of India's population of one billion resides in villages. Thus, the village panchayats constitute a critical vehicle to ensure meaningful participation in local affairs and grassroots develop-

139. *Id.*

140. Women in National Parliaments, *supra* note 26.

141. Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 18 & 42 U.S.C. (2000)).

142. Global Database of Quotas for Women, *supra* note 67.

143. See, e.g., Global Database of Quotas for Women, <http://quotaproject.org/country.cfm> (follow "Dominican Republic" hyperlink) (last visited Sept. 7, 2007) (the Dominican Republic has a 50% quota at the municipal level and a 33% quota at the national level).

144. See, e.g., Global Database of Quotas for Women, <http://quotaproject.org/country.cfm> (follow "India" hyperlink) (last visited Sept. 7, 2007). Although India passed a 33% local quota, efforts to pass a national amendment have failed. *Id.*

145. Louise Harmon & Eileen Kaufman, *Dazzling the World: A Study of India's Constitutional Amendment Mandating Reservations for Women on Rural Panchayats*, 19 BERKELEY WOMEN'S L.J. 32, 32-33 (2004). Harmon and Kaufman point out various counterarguments to the Indian quota:

[S]ome argued that women would merely stand in as proxies for their husbands. Others argued that women were uninterested in serving on panchayats, that they lacked knowledge about the world outside the home, and were incompetent to govern. Skeptics feared that women who became involved in local governance would ignore the needs of their children, their cattle, and their men. There was also the unarticulated concern that empowering the women of rural India would threaten the status quo—a status quo based on assumptions of male superiority and rightful domination.

Id. at 33.

ment.”¹⁴⁶ A demand for a similar constitutional amendment at the national level, where women constitute single-digit percentages in the House of the People, has been repeatedly rejected since 1996.¹⁴⁷

In contrast, Argentina was the first country in Latin America to adopt a national quota for women's participation in Congress, which later led to the adoption of subnational quotas.¹⁴⁸ In addition to a national law requiring that at least 30% of the candidates on party lists be women and in such positions that they have a chance of getting elected, almost all of its provinces have quota laws regulating the elections of their respective legislatures and local councils.¹⁴⁹ Professor Mark P. Jones describes these local laws as part of a “contagion effect,” where after the passage of the national Ley de Cupos in 1991, twenty-one of Argentina's twenty-four provinces and the federal capital “enacted similar gender quota laws for the election of provincial legislators and (in most cases) municipal councilors.”¹⁵⁰ He notes that the Argentine provinces “employ a wide variety of methods to elect their provincial legislators.”¹⁵¹ This diverse system differs from that of the United States, he writes, where the states use methods very close to those used at the national level.¹⁵² Argentina's provinces elected 10.51% women in 1991 without use of any quotas; 16% in 1993, when seven provinces used quotas; and 16.34% in 1995, when seventeen provinces used quotas.¹⁵³

American states have increasingly become battlegrounds for laws that failed at the national level. The anti-abortion movement, for example, has begun a state-by-state campaign to repeal abortion laws.¹⁵⁴

146. *Id.* at 34 (citation omitted). The idea of women's representation in the panchayats was first articulated by Mahatma Gandhi. He said, “As long as [woman] has not the same rights in law as man, as long as the birth of a girl does not receive the same welcome as that of a boy, so long we should know that India is suffering from partial paralysis.” *Id.* at 66. The day before his assassination, in 1948, Gandhi wrote a constitution:

[It explains how] panchayats would be organized, their various functions, and the qualifications for serving on the panchayats. Among the qualifications is the requirement that the individual believe in the ideal of inter-communal unity, equal respect and regard for all religions, and equality of opportunity and status for all irrespective of race, creed or sex.

Id. at 71 (citations and internal quotation marks omitted).

147. *Id.* at 54–55.

148. Elisa María Carrio, *Argentina: A New Look at the Challenges of Women's Participation in the Legislature*, in *WOMEN IN PARLIAMENT: BEYOND NUMBERS* 164, 164, 168 (2005); see also Jones, *supra* note 40, at 7.

149. Carrio, *supra* note 148, at 165, 168.

150. Jones, *supra* note 40, at 6–7 (citation omitted).

151. *Id.* at 7.

152. *Id.*

153. *Id.* at 9.

154. See, e.g., Dante Chinni, *A Shift in Antiabortion Strategy?*, *CHRISTIAN SCI. MONITOR*, July

Similarly, many states are responding to stalled federal immigration legislation by passing their own.¹⁵⁵ This trend, combined with the fact that many states have passed their own equal-rights amendments in lieu of an Equal Rights Amendment to the U.S. Constitution¹⁵⁶ and the fact that women already generally hold higher percentages of government seats at the local and state levels,¹⁵⁷ suggests that any new proposal to increase women's representation in electoral politics may fare better at the state rather than the national level.

V. WHAT ARE THE LEGAL ARGUMENTS RELEVANT TO QUOTAS?

A. *Equal Protection Clause*

The Equal Protection Clause of the Fourteenth Amendment states that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."¹⁵⁸ Justice Ginsburg set out the standard of Fourteenth Amendment constitutional scrutiny for statutes that classify individuals on the basis of gender in *United States v. Virginia*: "Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."¹⁵⁹ This is a two-part analysis, in which the government must prove that (1) there is a legitimate and important state interest served by the policy, and (2) that the policy is substantially related to the achievement of that legitimate state interest.¹⁶⁰

The Supreme Court held a law that discriminated against women unconstitutional for the first time in the 1971 case of *Reed v. Reed*,¹⁶¹ which was later cited in *United States v. Virginia*:

26, 2005, at 9; Dan Gilgoff, *A Break in the Ranks*, U.S. NEWS & WORLD REP., Mar. 13, 2006, at 32.

155. See, e.g., Jerry Seper, *States Stepping Up To Tackle Immigration Laws; Bills Seek Stricter Enforcement*, WASH. TIMES, July 18, 2006, at A3; Correy E. Stephenson, *Immigration Reform: Coming to a State Near You*, DAILY REC. (KAN. CITY, Mo.), May 30, 2006, available at 2006 WLNR 9395086.

156. As of 1997, eighteen states had adopted constitutions or constitutional amendments providing equal rights for women: Alaska, California, Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Montana, New Hampshire, New Mexico, Pennsylvania, Texas, Utah, Virginia, Washington, and Wyoming. Paul Benjamin Linton, *State Equal Rights Amendments: Making a Difference or Making a Statement?*, 70 TEMP. L. REV. 907, 911-16 (1997).

157. Women's Campaign Forum, *Women in Elective Office 2006*, http://www.wcfonline.org/free_details.asp?id=19 (last visited Sept. 7, 2007).

158. U.S. CONST. amend. XIV, § 1.

159. 518 U.S. 515, 531 (1996). It should be noted that the Supreme Court has not yet heard a constitutional challenge to a gender-based affirmative action program. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 781 (2d ed. 2005).

160. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

161. 404 U.S. 71, 77 (1971).

[T]he Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities. Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men).¹⁶²

The Court has recognized discrimination against women as pervasive and longstanding, and has acknowledged similarities between racism and sexism: “While the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, ‘overpower those differences.’”¹⁶³

Furthermore, the use of positive action to achieve equality for women is not new to U.S. law: “Sex classifications may be used to compensate women ‘for particular economic disabilities [they have] suffered,’ to ‘promot[e] equal employment opportunity,’ to advance full development of the talent and capacities of our Nation’s people.”¹⁶⁴ In the context of a pregnancy-discrimination case, the Court wrote that the purpose of Title VII of the Civil Rights Act of 1964¹⁶⁵ is “to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees.”¹⁶⁶

Indeed, the Court includes both remedial and preventive action in

162. *Virginia*, 518 U.S. at 532 (citation and footnote omitted).

163. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994) (quoting Note, *Beyond Batson: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1921 (1992)); see also *Frontiero v. Richardson*, 411 U.S. 677, 684 n.13 (1973):

Indeed, the position of women in this country at its inception is reflected in the view expressed by Thomas Jefferson that women should be neither seen nor heard in society’s decisionmaking councils. . . . [T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself “preservative of other basic civil and political rights”—until adoption of the Nineteenth Amendment half a century later.

Id. (citation and footnote omitted).

164. *Virginia*, 518 U.S. at 533 (citations omitted).

165. 42 U.S.C. § 2000e (2000).

166. *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 288 (1987) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971)) (internal quotation marks omitted).

its definition of a "proper remedy for an unconstitutional exclusion[:] . . . eliminate [so far as possible] the discriminatory effects of the past and . . . bar like discrimination in the future."¹⁶⁷ In *Califano v. Webster*, the Court upheld a section of the Social Security Act that gave preferential treatment to female retirees, stating, "Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as . . . an important governmental objective."¹⁶⁸

Based on legal precedent, it seems likely that states could implement quota laws for women that would meet the requirements of the Equal Protection Clause of the Fourteenth Amendment. As a method of remedying a longstanding historic inequality between women and men in elected public office, laws mandating women's inclusion in governance bear a substantial relationship to a legitimate and important state interest—a diverse government. A diverse government, in turn, requires that women acquire "equal opportunity to aspire, achieve, participate in and contribute to society."¹⁶⁹

A number of considerations might make a quota law more palatable to the Court. First, a gender-neutral quota—for example, a minimum of 33% women and a minimum of 33% men, or 50% women and 50% men—might withstand constitutional scrutiny more easily than a law that merely dictates women's inclusion at a certain level. In *Orr v. Orr*, the Court wrote, "Where . . . the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex."¹⁷⁰

In *Mississippi University for Women v. Hogan*, the Court held that a women-only nursing school violated the Equal Protection Clause, but acknowledged that "[i]n limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened."¹⁷¹ The Court urged that any inquiry must focus on the "actual purposes" of the

167. *Virginia*, 518 U.S. at 547 (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965)) (internal quotation marks omitted).

168. *Califano v. Webster*, 430 U.S. 313, 317 (1977). A few years before, the Court reversed a district court's ruling that a Navy regulation requiring the discharge of men after nine years without a promotion, but allowing women to serve for thirteen years without a promotion, violated the Fifth Amendment's Due Process Clause. *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975). The Court reasoned that because women had less opportunity for advancement, they thus required a longer period to achieve the same goal. *Id.* at 508.

169. *Virginia*, 518 U.S. at 532.

170. 440 U.S. 268, 283 (1979).

171. 458 U.S. 718, 728 (1982).

statute or conduct in question.¹⁷²

In 2001, the Court of Appeals for the Eleventh Circuit upheld a fire department's 36% female hiring quota in *Danskine v. Miami Dade Fire Department*.¹⁷³ The court cited *Engineering Contractors Association of South Florida Inc. v. Metropolitan Dade County*,¹⁷⁴ which stated that redressing discrimination against women is a sufficiently important objective to "sustain a gender-conscious affirmative action program."¹⁷⁵ Analogizing to race-based affirmative action, the court in *Engineering Contractors* wrote that "the true test of an affirmative action program is usually not the nature of the government's interest, but rather the adequacy of the evidence of discrimination offered to show that interest."¹⁷⁶ The court found that "a proponent of a gender-conscious affirmative action program must present not only probative evidence of discrimination, but sufficient probative evidence of it."¹⁷⁷ In that case, the evidence of discrimination was a mix of statistical and anecdotal.¹⁷⁸

By combining a quota's potential to directly increase the number of women in elected political office, as seen in many nations around the world, with the Supreme Court's repeated recognition of women's historic exclusion from full participation in U.S. social and political life, a law mandating gender equity in political governance may survive constitutional scrutiny under the Fourteenth Amendment.

B. First Amendment

The U.S. Supreme Court has held that political parties' right to freedom of association is protected by the First and Fourteenth Amendments, and that this right includes not only an individual voter's right to associate with the political party of her choice, but also a political party's right to "identify the people who constitute the association."¹⁷⁹

Some courts have upheld political-party quotas challenged under the First Amendment's guarantee of "the right of the people peaceably to assemble."¹⁸⁰ In *Marchioro v. Chaney*, the Supreme Court of Wash-

172. *Id.*

173. 253 F.3d 1288, 1301 (11th Cir. 2001).

174. 122 F.3d 895 (11th Cir. 1997).

175. *Id.* at 908.

176. *Id.* at 906 (internal quotation marks and citation omitted).

177. *Id.* at 910.

178. *Id.* at 911.

179. *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986) (internal quotation marks and citation omitted)). *But see Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 547 (1987) (holding that a state civil-rights act that required men's business and professional clubs to admit women did not violate the members' freedom of private association under the First Amendment).

180. U.S. CONST. amend. I.

ington held that a state law requiring equal-gender representation on state political-party committees did not violate the state's Equal Rights Amendment or the constitutional right to free association.¹⁸¹ The *Marchioro* court reasoned that the state was permitted to mandate equal representation in political-party committees as a means to promote the equality required under Washington's Equal Rights Amendment:

The legislature has found that in the conduct of the offices of state committees there shall be an absolute equality of rights between the sexes. . . . There is an equality of numbers and an equality of rights to be in office and to control the affairs of the state committee.¹⁸²

Whether restricting candidate lists to fifty-fifty female-male would be found constitutional outside of the state-ERA context is a difficult question.¹⁸³ One can envision challenges under the Supreme Court's stance that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."¹⁸⁴ Even relying on *Mississippi University for Women*, the decisions of the Court of Appeals for the Eleventh Circuit, and other precedent, it is unlikely that the Supreme Court would find restricted party lists constitutional.

VI. CONCLUSION

One hundred and fourteen years after the world's first women achieved suffrage,¹⁸⁵ questions about whether the worldwide average of 17% female representation in government is enough are everywhere—in countries emerging from genocide, civil war, and dictatorships, and in countries that have simply decided that the long-term incremental approach to women's representation is just not working. Given the international support for gender quotas and their success in both new and established democracies, the U.S. electorate should consider quotas as a legitimate means to achieve an important goal: gender equality in governance. The Supreme Court has repeatedly recognized women's history of oppression and discrimination, and the use of affirmative action to rectify this history is appropriate. Under the Court's analysis in *Grutter v. Bollinger*,¹⁸⁶ the use of programs that encourage a "critical

181. 582 P.2d 487, 493, 495 (Wash. 1978), *aff'd*, 442 U.S. 191 (1979).

182. *Id.* at 492.

183. See Rosenblum, *supra* note 30, at 1170 n.251 (discussing cases that found that party quotas violated the Constitution).

184. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); see also Gail Russell Chaddock, *Quotas Boost Women Pols*, CHRISTIAN SCI. MONITOR, May 14, 1997 (discussing a British court decision that struck down the Labour Party's 50% quota).

185. Women's Suffrage, *supra* note 25. In 1893, women won suffrage in New Zealand. *Id.*

186. 539 U.S. 306, 333–34, 343 (2003).

mass" of individuals to produce a diverse group is an acceptable approach to redressing some types of past discrimination.

Additionally, Hillary Clinton's 2008 presidential campaign may provoke discussion of women's role in U.S. politics—a discussion that will include the fact that women constitute 16% of the U.S. government and that the United States ranks just sixty-seventh in the world in this important indicator of social progress. And perhaps from this conversation will come the debates and momentum needed to formally guarantee women's equal representation in our government.