WOMEN, DEMOCRACY, AND THE NINETEENTH AMENDMENT

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INTRODUCTION

One hundred years ago, in the wake of a global pandemic and a world war, suffragists succeeded in having a nineteenth amendment added to the U.S. Constitution.[1] To bolster support for involving the United States into World War I, President Woodrow Wilson argued that joining the war in Europe was necessary to protect democracy.[2] But suffragists responded that this was a hollow battle cry when half the adult population at home could not participate in democratic governance.[3] Their picketing and lobbying played a significant role in finally persuading President Wilson to support the woman suffrage amendment.[4] In January 1918, President Wilson declared that the federal amendment was a "war measure."[5] In September 1918, he emphasized that the amendment was "essential to the successful prosecution of the great war of humanity in which we are engaged."[6] In so doing, he acknowledged what the suffragists had said all along—that a more perfect democracy required the full participation of women in governance.

The text of the Nineteenth Amendment, eventually enacted by Congress in 1919 and ratified by the requisite thirty-six states in 1920, can best be understood as both a prohibition and a grant.[7] It did not grant women the right to vote. Rather, it prohibited the federal and state governments from abridging or denying the privilege of voting based solely on sex.[8] But it did grant Congress

[1] ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 216 (2000).

[2] *Id.* at 215.

[3] *Id.*

[4] *Id.* at 214-18.

[5] *Id.* at 216; *see also* Neil S. Siegel, *Why the Nineteenth Amendment Matters Today: A Guide for the Centennial*, 27 DUKE J. GENDER L. & POL'Y 235, 243-45 (2020) (describing President Wilson's shift from opponent to supporter of federal suffrage movement, suggesting reasons why he might have changed his position).

[6] *Id.* (quoting S. DOC. NO. 65-284, at 2 (1918)).

[7] The text of the Amendment reads: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIX.

[8] *Id.* In my new book from Oxford University Press, I explore how a narrow or "thin," rather than a more robust or "thick," interpretation of the Nineteenth Amendment emerged by the end of the decade after its ratification in 1920. PAULA A. MONOPOLI, CONSTITUTIONAL ORPHAN: GENDER EQUALITY AND THE NINETEENTH AMENDMENT (2020) [hereinafter MONOPOLI, CONSTITUTIONAL ORPHAN]. Much of the explanation for this puzzle is found in the use of narrow statutory construction as a matter of constitutional interpretation and the refusal of some state courts to extend the meaning of the Nineteenth Amendment to public office holding and jury service, both formal governance functions. *Id.* at 9-10. My book explores how Congress also failed to enact enforcement legislation pursuant to Section 2 of the Nineteenth Amendment. *Id.* at 8. This failure was a missed constitutional opportunity to

the power to enforce that prohibition. It doubled the size of the political community entitled to full citizenship, if that concept is defined as those Americans who hold the apex of political power: eligibility to vote. This effort to retrofit the original Constitution was an intergenerational effort spanning seventy-two years.[9] Thus, public memory is an important part of how we celebrate that amendment and how we think about its potential to enhance our liberal constitutional democracy today.[10] To divine the intentions of the American women who lobbied for a federal suffrage amendment, we should closely examine the discourse that surrounded that effort. When we conjure that memory, we are reminded that a central goal of suffragists in retrofitting the Constitution was self-governance. That, in turn, depended on their ability to enact laws and policies that furthered self-governance. One goal of suffragists in lobbying for the Nineteenth Amendment was to elevate women as citizens and create a space for them in the public sphere. It was to recognize their status as makers of law and policy on a par with men.[11] So one hundred years later, how can we still have such a "monosexual democracy"?[12]

In their book, *How to Save a Constitutional Democracy*, Professors Tom Ginsburg and Aziz Huq look at the connection between constitutional design

complete the task begun by the Amendment itself—to bring all women, including women of color, more fully into formal and informal democratic governance.

[9] *Id.* at 1, 155 & n.1.

[10] In a recent keynote speech celebrating the centennial of the Nineteenth Amendment, Professor Reva Siegel focused us on women as constitution makers and reminded us of the importance of public or collective memory in constitutionalism:

> [P]ublic memories are a particular kind of memory. . . . When we celebrate the Fourth of July we're celebrating our birth as a nation. . . . [W]hen we tell these stories from generation to generation, when we teach these stories from generation to generation, we're forming ourselves as a nation. . . . Collective memory is telling us who "we" are and it's guiding us in our intuitions and debating with one another what a "more perfect Union" looks like.

Reva B. Siegel, Keynote Address at the University of Colorado Law School Ira C. Rothgerber Jr. Conference on Constitutional Law: Women's Enfranchisement: Beyond the 19th Amendment at 28:13 (Apr. 3, 2020), https://www.youtube.com/watch?v=R43EesUpIb0&feature=youtu.be [https://perma.cc /UF9H-3ABR].

[11] *See* MONOPOLI, CONSTITUTIONAL ORPHAN, *supra* note 8, at 11 (citing Letter from Louise McKay to Alice Paul (Aug. 22, 1920) (on file with the Library of Congress)) (identifying suffragists' belief that it was political liberty they had secured upon ratification of the Nineteenth Amendment); *see also* Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 465, 472 (1995) ("Thus, the Nineteenth Amendment can be understood as protecting more generally full rights of political participation.").

[12] *See* Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L. REV. 1119, 1142 (2006) (noting that term "monosexual democracy" originated as a way to describe predominantly male composition of political class in France).

and the health of liberal constitutional democracies.[13] They also lay out a three-part framework to evaluate how likely such a democracy is to either be converted to authoritarianism by collapse or—even more likely—by democratic erosion.[14] The metrics in that tripartite benchmarking framework are rule of law, liberal rights of speech and association, and free and fair elections.[15] Ginsburg and Huq explore the salience of those three factors in assessing how well a democracy can forestall democratic erosion.[16] The latter two metrics, so essential to democratic governance, also have particularly gendered dimensions. The full participation of women in our democracy is not only morally right—such parity is central to both the legitimacy of the state and its continued existence. So it is important to examine the role that constitutional design, liberal rights of speech and association, and free and fair elections play in women's ability to engage in formal and informal governance. This Essay first describes the state of women's participation in formal and informal governance in our democracy. It then uses the benchmarks identified by Ginsburg and Huq as a frame within which to identify legislative, judicial, or regulatory mechanisms that could be used to make that participation more robust.

I. THE CURRENT STATE OF WOMEN'S PARTICIPATION IN FORMAL AND INFORMAL GOVERNANCE

During the current coronavirus pandemic, we see few women exercising political power on the most visible stages. The few that we have seen have been subject to misogynistic ridicule by the incumbent President. Our current situation reminds me of a conversation I had back in 2006. I had just given remarks on gender and constitutional design at a symposium called, "The Most Dangerous Branch? Mayors, Governors, Presidents and the Rule of Law."[17] A woman in the audience came up after the panel and told me that she had been working at the State Department on September 11, 2001. She went on to say that after the tragic events of that day, all the women "disappeared." What she meant was that women in policy-making positions in the department had been pushed into the background as the country and the government moved to a war footing. The men in the department had taken over decision-making authority and had excluded women from the public policy-making space.

[13] TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2018).

[14] *Id.* at 72-77.

[15] *Id.* at 10.

[16] *Id.*

[17] Paula A. Monopoli, Address at The Most Dangerous Branch? Mayors, Governors, Presidents and the Rule of Law: A Symposium on Executive Power (Mar. 24, 2006). My symposium panel remarks reflected the ideas proposed in my article, Paula A. Monopoli, *Gender and Constitutional Design*, 115 YALE L.J. 2643 (2006) [hereinafter Monopoli, *Gender and Constitutional Design*].

I was reminded of that conversation as we once again moved as a nation to what many have characterized as a war footing in response to a worldwide pandemic. My memory is made even more acute in the immediate wake of the recent Democratic primaries, in which all of the women candidates eventually left the stage.[18] There are few women on the President's White House Coronavirus Task Force.[19] The head of the Centers for Medicare & Medicaid Services, Seema Verma, is a woman of color but was rarely called to the podium by the incumbent President at the Task Force's daily briefings.[20] Ambassador-at-Large and physician Deborah Birx had a prominent role at the daily briefings but was often the object of interruption and "mansplaining" by others on the stage. In fact, there have been few, if any, women in visible, decision-making capacities in the current Administration during what has been the most broadly challenging time for our nation since the last world war.

The female leader who is arguably "the most powerful politician in the country" is Speaker of the House of Representatives Nancy Pelosi.[21] Pelosi and other congressional Democrats were banned from the public signing ceremony for the first major governmental effort to combat the pandemic, the Coronavirus Aid, Relief, and Economic Security ("CARES") Act.[22] The only people standing

[18] Danielle Kurtzleben, *Did Gender Keep Democratic Women from Winning the Presidential Primary?*, NPR (Apr. 17, 2020, 5:00 AM), https://www.npr.org/2020/04/17/818952460/did-gender-keep-democratic-women-from-winning-the-primary [https://perma.cc/5ETB-4A4D].

[19] *See* Michael Shear et al., *Who's on the U.S. Coronavirus Task Force*, N.Y. TIMES (May 7, 2020), https://www.nytimes.com/2020/02/29/health/Trump-coronavirus-taskforce.html.

[20] Administrator Verma is of South Asian descent, and her parents emigrated from "tiny villages in India" to the United States. Steven Porter, *Seema Verma's American Dream: Empower Consumers, Unleash Competition*, HEALTHLEADERS (Sept. 5, 2019), https://www.healthleadersmedia.com/strategy/seema-vermas-american-dream-empower-consumers-unleash-competition.

[21] Lisa Lerer, *Nancy Pelosi's Political Flex*, N.Y. TIMES (Jan. 17, 2019), https://www.nytimes.com/2019/01/17/us/politics/on-politics-pelosi-trump.html.

[22] Scott Wong, *Pelosi Not Invited by Trump to White House Coronavirus Relief Bill's Signing*, HILL (Mar. 27, 2020, 4:20 PM), https://thehill.com/homenews/house/489913-pelosi-not-invited-by-trump-to-white-house-coronavirus-relief-bills-signing [https://perma.cc/2CLU-XNSA]. This was one of many attacks on Pelosi by the incumbent President. Pelosi appears to be one of the few political leaders who can successfully unnerve him. *See* Manu Raju, *Pelosi and Trump Haven't Spoken in Five Months*, CNN (Mar. 24, 2020, 4:35 PM), https://www.cnn.com/2020/03/24/politics/nancy-pelosi-trump-talks/index.html [https://perma.cc/3D2V-23WW] (describing President's characterization of Pelosi as "third-grade politician" after she left meeting and his suggestion that Pelosi should be prosecuted after tearing up his State of the Union speech). His attempts to marginalize her have been frequent and overtly sexist, including references to her "incompeten[ce]" and characterization of her as a "political hack." *See, e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 17, 2020, 11:50 PM), https://twitter.com/realDonaldTrump/status/1251357415045500928?s=20.

behind the President and visible in the bill-signing photo-op were White Republican men.[23] The message was clear—those in power are, and should be, White men. And the President's tone is one of explicit misogyny and disrespect, aimed at women who are actually exercising power and leadership. For example, on March 27, 2020, the incumbent President said that he had a problem with the "governor of Washington" and the "woman in Michigan."[24] The first person he referred to by title was male Governor Jay Inslee.[25] The second, referred to without title, was female Governor Gretchen Whitmer.[26] The President admitted that he told Vice President Mike Pence that if a governor did not display appreciation of the President and the federal government's efforts, the Vice President should not return that governor's call: "Mike, don't call the governor of Washington. . . . Don't call the woman in Michigan. . . . You know what I say? If they don't treat you right, I don't call."[27] He continued his misogynistic attack on Twitter and extended it to Mary Barra, CEO of General Motors

[23] Cabinet member and Secretary of Transportation Elaine Chao and White House Coronavirus Task Force member, Coronavirus Response Coordinator, and Ambassador-at-Large Deborah Birx were in attendance but were not visible in the majority of the photographs of the event released by the press pool. *See, e.g.*, Elaine Pofeldt, *The Historic $2 Trillion CARES Act Will Be an Economic Lifeline for Gig Workers and Freelancers*, CNBC (Mar. 30, 2020, 10:24 AM), https://www.cnbc.com/2020/03/30/cares-act-will-be-an-economic-lifeline-for-gig-workers-freelancers.html [https://perma.cc/ZB2U-AZXH].

[24] Press Briefing by President Donald Trump, Vice President Mike Pence, and Members of the Coronavirus Task Force, The White House (Mar. 28, 2020) [hereinafter Coronavirus Press Briefing], https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-13/ [https://perma.cc/6PBC-MXU9].

[25] Christina Wilkie & Kevin Breuninger, *Trump Says He Told Pence Not to Call Governors Who Aren't 'Appreciative' of White House Coronavirus Efforts*, CNBC (Mar. 27, 2020, 8:31 PM), https://www.cnbc.com/2020/03/27/coronavirus-trump-told-pence-not-to-call-washington-michigan-governors.html [https://perma.cc/3N99-UBSX].

[26] *Id.*

[27] Coronavirus Press Briefing, *supra* note 24. The President said he has a "big problem with the young, a woman governor . . . from Michigan." Mikenzie Frost, *Trump of Whitmer: 'She is a New Governor, and It's Not Been Pleasant,'* WWMT (Mar. 27, 2020), https://wwmt.com/news/state/trump-of-whitmer-she-is-a-new-governor-and-its-not-been-pleasant [https://perma.cc/XB25-9QZN]. The President labeled her "Gretchen 'Half' Whitmer" in a March 27 tweet in which he said she was "way in over her head" and "[didn't] have a clue." Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 27, 2020, 10:29 PM), https://twitter.com/realDonaldTrump/status/1243726993537073152; *see also* Allan Smith, *'That Woman from Michigan': Gov. Whitmer Stands Out in the Pandemic. Just Ask Trump.*, NBC NEWS (Apr. 8, 2020, 7:21 AM), https://www.nbcnews.com/politics/donald-trump/woman-michigan-gov-whitmer-stands-out-pandemic-just-ask-trump-n1170506 [https://perma.cc/U7BS-QEXE].

("GM").[28] GM was one of the only companies actually ordered by the President under the Defense Production Act to produce ventilators.[29] It speaks volumes that one of the few major American companies to be ordered to produce a product under the Defense Production Act was one of the very few led by a woman.[30]

In the midst of a global pandemic and national emergency of historic proportions, women in the United States have been squeezed out of the public governing space. While journalists have noted that women lead the countries handling the pandemic most effectively,[31] in this country, we see few women governing on the public stage. The very design of our Constitution helps explain the puzzle of why there are so few women exercising power and raising their voices in public spaces. We should use the current moment to urge a completion of the constitutional retrofitting that began one hundred years ago with the ratification of the Nineteenth Amendment.

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[28] *See* Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 27, 2020, 11:16 AM), https://twitter.com/realDonaldTrump/status/1243557418556162050 ("As usual with 'this' General Motors, things just never seem to work out. They said they were going to give us 40,000 much needed Ventilators, 'very quickly'. Now they are saying it will only be 6000, in late April, and they want top dollar. Always a mess with Mary B. Invoke 'P'."). Note also that Rhode Island Governor Gina Raimondo was forced to dispatch the state police to the Rhode Island border to protect her residents from New York residents fleeing the pandemic in New York City and its suburbs. Nicholas Bogel-Burroughs, *Rhode Island Pulls Over New Yorkers to Keep the Virus at Bay*, N.Y. TIMES (Apr. 10, 2020), https://www.nytimes.com/2020/03/28/us/coronavirus-rhode-island-checkpoint.html. New York Governor Andrew Cuomo pushed back, arguing that this violated the constitutional rights of the citizens of New York, and threatening to sue her for impinging on his citizens' rights. *Id.* But, notably, he did not make similar threats to the male governor of Florida, Ron DeSantis, who had announced similar rules targeting New Yorkers coming into Florida. *See id.*

[29] Michael Wayland & Christina Wilkie, *Trump Orders General Motors to Make Ventilators Under Defense Production Act*, CNBC (Mar. 27, 2020, 5:21 PM), https://www.cnbc.com/2020/03/27/trump-orders-general-motors-to-make-ventilators-under-defense-production-act.html [https://perma.cc/NQF5-QNKD]. The President's retaliation came after failed negotiations with GM and his own refusal to nationalize any company under the Defense Production Act. *Id.* (describing Barra's refusal to comply with President's demand to reopen closed Lordstown, Ohio GM plant).

[30] *See* Emma Hinchliffe, *The Number of Female CEOs in the Fortune 500 Hits an All-Time Record*, FORTUNE (May 18, 2020, 7:15 AM), https://fortune.com/2020/05/18/women-ceos-fortune-500-2020/ [https://perma.cc/32CN-XEC8] (reporting that women CEOs lead thirty-seven, or 7.4%, of Fortune 500 companies).

[31] *See* Avivah Wittenberg-Cox, *What Do Countries with the Best Coronavirus Responses Have in Common? Women Leaders*, FORBES (Apr. 13, 2020, 8:27 AM), https://www.forbes.com/sites/avivahwittenbergcox/2020/04/13/what-do-countries-with-the-best-coronavirus-reponses-have-in-common-women-leaders/#1a3be663dec4 [https://perma.cc/63DZ-NT2W].

Any retrofitting of the Constitution leaves gaps in form and function. Much like retrofitting a car with an aftermarket sound system, the retrofitted product rarely works as well as if the system had been included in the original design. Similarly, when we retrofit our Constitution and add features decades later, we see that those aftermarket additions, like the Reconstruction Amendments and the Nineteenth Amendment, leave gaps to be filled. As a consequence, the broader promise of the Nineteenth Amendment—to elevate women as makers of law and policy on a par with men—was not fulfilled simply by ratification of the Amendment. For example, the United States has yet to have a woman head of state and government, unlike many other countries.[32] Such retrofitting of the Constitution requires additional judicial, legislative, and regulatory action beyond ratification to be complete.[33]

I have argued previously that much of the explanation for why we have not achieved parity in terms of women as makers of law and policy lies in our original constitutional design.[34] Those design choices also affect how well other features of our liberal constitutional democracy—like freedom of speech and association, and free and fair elections—function to create an equal governance space for women. This insight is particularly salient in a time of rising populism nationally and internationally, especially because the authoritarian strain of populism tends to valorize agentic male traits and leaders. It may also tend to enhance democratic erosion.[35] So how did our original constitutional design make this lack of female political leadership more likely? And how did retrofitting the Constitution to grant women formal political power for the first time in 1920 fail to result in more women as makers of law and policy?

II. GENDERED CONSTITUTIONAL DESIGN CHOICES

The Framers' design choices were informed by ancient gender schemas that associated men with reason and women with emotion.[36] The premise that

[32] *See* EILEEN MCDONAGH, THE MOTHERLESS STATE: WOMEN'S POLITICAL LEADERSHIP AND AMERICAN DEMOCRACY 112-18 (2009) (noting eighty-five countries that have already had women heads of state and government as of 2009). For a similar list as of 2017, see A.W. Geiger & Lauren Kent, *Number of Women Leaders Around the World Has Grown, but They're Still a Small Group*, PEW RES. CTR.: FACTTANK (Mar. 8, 2017), https://www.pewresearch.org/fact-tank/2017/03/08/women-leaders-around-the-world/ [https://perma.cc/5NLF-XQDH].

[33] *See* GINSBURG & HUQ, *supra* note 13, at 140-41 ("There are, in short, ample ways to change the practice of the Constitution, by legislation, by judiciary, and . . . largely by the sheer courage and force of will of the citizenry."). In this Essay, I extend that insight to the development of a constitutional amendment. Ratification of the Nineteenth Amendment was just the beginning of the process; these other mechanisms must follow in order for the intended transformation to be complete.

[34] Monopoli, *Gender and Constitutional Design*, *supra* note 17, at 2643-46.

[35] *See generally* GINSBURG & HUQ, *supra* note 13, at 78-83.

[36] Monopoli, *Gender and Constitutional Design*, *supra* note 17, at 2645.

governance required the ability to reason thus led to the exclusion of women from that function.[37] The Framers drew on ideas embraced by Hobbes, Locke, and Rousseau that the father should be the repository of indivisible authority within the family.[38] Alexander Hamilton's argument for a singular executive in terms of constitutional design reflects that foundational idea.[39] Although heavily contested by the Anti-Federalists, the form of executive that emerged from our constitutional design process was a singular, consolidated executive with plenary power.[40] That model echoed the British system we had just overthrown. But, as noted above, it was also derived from classical notions of the family as the original unit of government with the father as the sole representative to the public sphere. Like a father, the president should be the repository of all authority. Such authority should not be split if there were to be smooth, decisive governance. In other words, the choice of executive model was itself gendered.

Hamilton's insistence on the benefits of a singular rather than a plural form of executive, such as a multimember council, reflects these ideas about the family.[41] This unity of power was central to an effective executive in Hamilton's view, and he emphasized the need for a "vigorous Executive."[42] I have argued that Hamilton saw vigor and energy, albeit unconsciously, in masculine terms and as synonymous with virility.[43] He was very concerned with the executive being strong enough to defend the new nation and feared *weakness* in the executive, a trait typically associated with the feminine.[44] The idea that the executive should be able to act unilaterally, without consultation with the

[37] *Id.* (citing DIANA H. COOLE, WOMEN IN POLITICAL THEORY: FROM ANCIENT MISOGYNY TO CONTEMPORARY FEMINISM 22-23 (2d ed. 1993) (observing that perceived inability of women to reason was justification for their exclusion from citizenship in ancient Greek city-state)). Ratification of the Nineteenth Amendment in 1920 signaled a profound change in the structure of the American family—replacing virtual political representation by fathers and husbands with actual representation for women.

[38] *Id.*

[39] *Id.*

[40] Some Anti-Federalists cautioned against a singular executive exercising power akin to a king. *See, e.g.*, Philadelphiensis, *The President as Military King (Anti-Federalist No. 74)*, FREEMAN'S J., Feb. 6 & 20, Apr. 9, 1788, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 127, 128 (Herbert J. Storing ed., 1981) [hereinafter *Anti-Federalist No. 74*] ("Who can deny but the *president general* will be a *king* to all intents and purposes, and one of the most dangerous kind too; a king elected to command a standing army?"). The writer goes on to describe the President under the proposed constitution as even more dangerous because he will have "a negative over the proceedings of both branches of the legislature" and because "he is neither restrained nor assisted by a *privy council*, which is a novelty in government." *Id.*

[41] Monopoli, *Gender and Constitutional Design*, *supra* note 17, at 2645.

[42] THE FEDERALIST NO. 70 (Alexander Hamilton).

[43] Monopoli, *Gender and Constitutional Design*, *supra* note 17, at 2645-46.

[44] *Id.* at 2646.

legislative branch, reflects that fear of more feminine attributes like collaboration or consensus building. Hamilton's vision prevailed over that of the Anti-Federalists, who warned against consolidating power in one man and urged, at the very least, consultation with a privy council as an alternative.[45]

In my previous work, I have identified one consequence of this design choice of a consolidated executive: the slow progress of women in formal governance positions.[46] In *Federalist No. 70*, Hamilton laid out his case for an energetic and singular executive.[47] He described this ideal executive as decisive, with the ability to act with dispatch—traits essential to being nimble enough to protect the young country.[48] These "agentic" attributes are not gender neutral. In fact, men are seen as more assertive and forceful and women are perceived as more nurturing and interpersonally sensitive, which social psychologists characterize as "communal" attributes.[49] As a result, women are less likely to be seen as congruent with an executive who possesses full plenary power to act unilaterally, as head of both state and government and with the warrior function associated with the commander-in-chief role.[50] Such an expansive executive makes it difficult to break the stranglehold of our "monosexual" democracy, especially given the power of incumbency.

The Nineteenth Amendment did not alter these original constitutional design choices. It simply expanded the political community in terms of who could

[45] *Anti-Federalist No. 74*, *supra* note 40.

[46] *See, e.g.*, Monopoli, *Gender and Constitutional Design*, *supra* note 17; *see also* Eileen McDonagh & Paula A. Monopoli, *The Gendered State and Women's Political Leadership: Explaining the American Puzzle*, *in* FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES 169, 183-86 (Beverley Baines, Daphne Barak-Erez & Tsvi Kahana eds., 2012).

[47] THE FEDERALIST NO. 70, *supra* note 42.

[48] *Id.*

[49] *See* Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOL. REV. 573, 574 (2002) (describing agentic traits as those ascribed more strongly to men, including being "aggressive, ambitious, dominant, forceful, independent, self-sufficient, self-confident, and prone to act as a leader," and communal traits as those ascribed more strongly to women, including being "affectionate, helpful, kind, sympathetic, interpersonally sensitive, nurturant, and gentle"); *see also* Nichole M. Bauer, *Emotional, Sensitive, and Unfit for Office? Gender Stereotype Activation and Support Female Candidates*, 36 POL. PSYCHOL. 691, 696-99 (2015) ("The results are consistent: female candidates are rated most poorly when stereotypes are activated.").

[50] *See* McDonagh & Monopoli, *supra* note 46, at 177 ("The ancient claim that rulers derived their right to rule from their willingness to act in battle to protect those they seek to govern is also echoed in the Constitution, which connects the role of president to the role of Commander-in-Chief. . . . [B]y vesting the president with the Commander-in-Chief power, [the Founders] also retained the connection between the legitimacy of the president's claim to govern with the ancient claim of rulers' willingness to fight in battle for those they ruled. Citizens associate all men with this attribute even though individual men may not choose to exercise it . . . . [Thus] voters are unlikely to connect women with the role of Commander-in-Chief.").

engage in the governance function without adjusting the underlying architecture; an architecture that I would argue is skewed toward the masculine. The original design choice of a singular (or unitary) executive that combines the head-of-state, head-of-government, and commander-in-chief function all in one person is not only inherently gendered—it has gender consequences. And the impact of that design choice can be amplified by executive activism and the power of the courts via judicial review to define the scope of the executive as even more expansive.[51]

The Nineteenth Amendment also did not alter the original design choice of a presidential versus a parliamentary system.[52] The evidence is mixed as to whether such alternative systems benefit women candidates seeking to be the head of government.[53] In parliamentary systems, voters vote for party representatives who, in turn, select a head of the party who may become Prime Minister.[54] The percentage of American voters who say they would not vote for a woman remains high, and a majority of White women voters chose not to vote for Hillary Clinton in 2016.[55] One could hypothesize that in systems where the head-of-government function is separated from the head-of-state function, it might be easier to overcome gender bias in voters. The argument goes like this:

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[51] *See generally* Monopoli, *Gender and Constitutional Design*, *supra* note 17; *see also* GINSBURG & HUQ, *supra* note 13, at 135-36 (noting that the trend has been for judicial branch to give even more power to executive, especially in times of emergency).

[52] *See* GINSBURG & HUQ, *supra* note 13, at 176-78 (describing differing features of presidential, semipresidential, and parliamentary systems).

[53] *See* HELEN IRVING, GENDER AND THE CONSTITUTION: EQUITY AND AGENCY IN COMPARATIVE CONSTITUTIONAL DESIGN 132 (2008) ("The statistical and historical evidence does not support the conclusion that parliamentary systems are any more likely than presidential systems to produce women heads of government."). *But see* McDonagh & Monopoli, *supra* note 46, at 178 ("When we turn to democracies comparable to the United States, we find presidential systems that are much less marked by a unitary executive. Rather the executive branch of government is characterized by fragmentation, often including a split between a head of state and a head of government, as well as a greater connection with the legislative branch of government in the form of parliamentary association, if not control, of the executive branch.").

[54] *See* GINSBURG & HUQ, *supra* note 13, at 176-78.

[55] *An Examination of the 2016 Electorate, Based on Validated Voters*, PEW RES. CTR. (Aug. 9, 2018) [hereinafter PEW RESEARCH CENTER], https://www.pewresearch.org/politics/2018/08/09/an-examination-of-the-2016-electorate-based-on-validated-voters/ [https://perma.cc/2RF2-WKPS]. In a June 2019 poll by Ipsos for the Daily Beast, a majority of Democratic and Independent voters said that they are comfortable voting for a woman president but that they do not think their neighbors are comfortable voting for a woman. Press Release, Ipsos, Nominating Woman or Minority Come Second to Nominating Candidate Who Can Beat Trump 5 (June 17, 2019), https://www.ipsos.com/sites/default/files/ct/news/documents/2019-06/daily-beast-gender-topline-2019-06-17-v2.pdf [https://perma.cc/H8CE-J4KR]. Only 33% of survey respondents believed their neighbors would be comfortable with a female president. *Id.*

if voters simply vote for party representatives who themselves select the prime minister, then those party representatives might be better able to overcome gender schemas about masculine and feminine traits because they know the candidate in a much more personal way. Thus, it might be more likely that we would see a female head of government. And, indeed, in western democracies that are similar to us in norms and culture, we see that those who have had female heads of government tend to fragment the roles, separating the head-of-government from the head-of-state and commander-in-chief functions.[56] Many of those have either semi-presidential or parliamentary systems for selecting the head of government.[57]

For example, in 2016 we saw two viable female candidates in a parliamentary system vying for the position of prime minister in the United Kingdom, with Theresa May prevailing.[58] It is notable, however, that after several years of failing to gain a sufficient vote for her Brexit plan, May was forced to step down and was replaced with the agentic "bad boy," Boris Johnson. Unlike the hard-working, well-prepared May, Johnson is a disheveled, big-picture guy. Yet, unlike May, Johnson won more seats in Parliament for his party when he called a snap election and was able to get a vote in favor of his Brexit plan within months.[59] Similarly, in our most recent Democratic primary, we saw the rejection of a female candidate with detailed policy prescriptions, Senator Elizabeth Warren.[60] So it is not clear if gender bias can be neutralized by the

[56] McDonagh & Monopoli, *supra* note 46, at 178.

[57] *Id.* at 178-79.

[58] Steven Erlanger, *A Woman Will Lead Britain for 1st Time Since Thatcher*, N.Y. TIMES, July 8, 2016, at A6. While still Prime Minister, May was pushed to declare whether she had confidence in Johnson, who was her Foreign Secretary. Lizzy Buchan, *Theresa May Backs Boris Johnson Amid Claims He Is Seen As a 'Joke' By Diplomats*, INDEPENDENT (Aug. 29, 2017, 4:29 PM), https://www.independent.co.uk/news/uk/politics/theresa-may-boris-johnson-bakc-foreign-secretary-white-house-joke-diplomats-cabinet-europe-eu-a7918736.html [https://perma.cc/XYT3-EJ4G]. A number of officials and business leaders had asked journalists why May as Prime Minister had appointed "a fool" as her Foreign Secretary. *See id.* ("Intelligence chiefs were . . . wary of sharing sensitive information with [Johnson], while civil servants were 'horrified' by his lack of discipline . . . ."). So Johnson's being named Prime Minister to succeed May and then securing a vote in Parliament for his Brexit plan is particularly telling in terms of the salience of gender schemas in politics.

[59] Tim Ross et al., *Boris Johnson's Overwhelming Election Victory Upends Britain*, FORTUNE (Dec. 13, 2019, 5:04 AM), https://fortune.com/2019/12/13/boris-johnson-election-victory-upends-britain/ [https://perma.cc/R5EA-66F5].

[60] Senator Warren came in third in her own state of Massachusetts. Ella Nilsen, *Why Elizabeth Warren Lost Her Home State of Massachusetts*, VOX (Mar. 3, 2020, 10:31 PM), https://www.vox.com/2020/3/3/21161603/bernie-sanders-beat-elizabeth-warren-in-massachusetts [https://perma.cc/M9QJ-CJNT]. A candidate's performance in their own state has traditionally been a significant indicator of strength or weakness. But note that Massachusetts has a history of failing to elect women to statewide or federal office, so the traditional indicator was arguably less salient in Senator Warren's case. *See id.*

type of system chosen—presidential, semi-presidential, or parliamentary—in designing a constitutional democracy. And if the current pandemic is akin to war, we are likely to see American voters retreating into gendered stereotypes that male leaders can best protect them in a time of national emergency.[61] If a broad understanding of the Nineteenth Amendment as a mechanism by which women could participate fully in formal and informal governance is to be fulfilled, then it is important to understand how these design features of our Constitution may inhibit that goal.[62]

The Nineteenth Amendment ensured that states could not deny women eligibility to vote based solely on their sex. That Amendment engendered tremendous fear when it was ratified in 1920—both a fear of profound change in the social order and a fear of the impact of a massive expansion of the polity on the American political order.[63] The Amendment's retrofitting of the Constitution was challenged as an "unconstitutional constitutional amendment."[64] The theory was that the Amendment so expanded the electorate that it violated the basic compact between the original states and the federal government, undermining the individual autonomy of each state.[65] The Supreme Court rejected that theory and affirmed the decision below that the Amendment had been validly ratified.[66] Despite these concerns about its impact, the Nineteenth Amendment and its tremendous expansion of the electorate did not have a significant effect on the outcome of presidential elections for many years after its ratification.[67] However, in 1980, the so-called gender gap in voting

[61] Note that in a national security emergency, Americans have indicated that they are even more inclined to seek male leadership. *See* Jennifer L. Lawless, *Women, War, and Winning Elections: Gender Stereotyping in the Post-September 11th Era*, 57 POL. RES. Q. 479, 487 (2004). This reifies agentic constitutional design flaws.

[62] *See* Monopoli, *Gender and Constitutional Design*, *supra* note 17, at 2650.

[63] *See* MONOPOLI, CONSTITUTIONAL ORPHAN, *supra* note 8, at 4.

[64] *Id.* at 8; *see also id.* at 21-42.

[65] *Id.*

[66] Leser v. Garnett, 258 U.S. 130, 136-37 (1922).

[67] J. KEVIN CORDER & CHRISTINA WOLBRECHT, COUNTING WOMEN'S BALLOTS: FEMALE VOTERS FROM SUFFRAGE THROUGH THE NEW DEAL 281 (2016). But this should not be the sole measure of its success. Many scholars have explored the much broader meaning of the Nineteenth Amendment in their work. *See generally, e.g.*, Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J. F. 450 (2020); Tracy A. Thomas, *More Than the Vote: The Nineteenth Amendment As Proxy for Gender Equality*, 15 STAN. J.C.R. & C.L. 349 (2020).

began to emerge.[68] Women as a bloc began to swing presidential elections.[69] But that bloc did not hold—at least among White women voters—in 2016, despite the historic gender gap in favor of Hillary Clinton in pre-election polls.[70] Given the fate of all of the female candidates for the Democratic presidential nomination in 2020, it is not clear when women may finally break the gender

[68] The gender gap in voting is "the difference in the percentage of women and the percentage of men voting for a given candidate." *Gender Gap in Voting*, CTR. FOR AM. WOMEN & POL., http://www.cawp.rutgers.edu/facts/voters/gender_gap [https://perma.cc/5Q2S-YFYF] (last visited Sept. 27, 2020). Leading up to the 2016 election, the gender gap was as large as it had ever been. Danielle Paquette, *The Unexpected Voters Behind the Widest Gender Gap in Recorded Election History*, WASH. POST (Nov. 9, 2016, 1:45 PM). Statistician Nate Silver characterized it as "a massive gender split" in favor of Hillary Clinton, with her advantage among women averaging fifteen percent. Nate Silver, *Election Update: Women Are Defeating Donald Trump*, FIVETHIRTYEIGHT (Oct. 11, 2016, 6:26 PM), http://fivethirtyeight.com/features/election-update-women-are-defeating-donald-trump/ [https://perma.cc/HM7S-T6MM]. Silver concluded that "if Trump loses the election, it will be because women voted against him." *Id.* Silver's post gave rise to the hashtag #Repealthe19th, reflecting his observation that candidate Donald Trump would win if only men voted. *US Election 2016: #repealthe19th Tweets Urge US Women to be Denied Vote*, BBC NEWS (Oct. 13, 2016), http://www.bbc.com/news/election-us-2016-37639738 [https://perma.cc/UG7Q-CBTD]. But clearly Silver and the pundits were wrong. Clinton lost the election. While a majority of all women voters voted for Clinton, a majority of White women did not. PEW RESEARCH CENTER, *supra* note 55. The vast majority of Black women, however, voted for Clinton. Khushbu Shah, *Black Female Voters to Democrats: 'You Won't Win the White House Without Us,'* GUARDIAN (Apr 26, 2019, 6:46 PM), https://www.theguardian.com/us-news/2019/apr/26/black-women-voters-democrats-presidential-2020-african-american [https://perma.cc/H8JE-G2C5].

[69] CORDER & WOLBRECHT, *supra* note 67, at 272 ("[W]ithout the Nineteenth Amendment, Mitt Romney may well have been elected president in 2012. Exit polls showed Romney securing 52 percent of men's votes, while 55 percent of the women cast their ballots for Barack Obama." (citations omitted)).

[70] *See* Press Release, Ctr. for Am. Women & Politics, Historic Gender Gap Isn't Enough to Propel Clinton to Victory in 2016 Presidential Race (Nov. 9, 2016), http://cawp.rutgers.edu/sites/default/files/resources/post-election-gg-release-2016-presidential.pdf [https://perma.cc/4X3Y-TRZJ]. But there are signs of progress. *See* Jennifer M. Piscopo, *States of Feminist Resistance: Women Legislators Make a Difference*, MS. (Apr. 13, 2020), https://msmagazine.com/2020/04/13/states-of-feminist-resistance-how-progressive-women-legislators-make-a-difference/ [https://perma.cc/8X99-ZE2D] (describing significant 3.5% increase in women state legislators after 2018 election). And note that women's voting patterns explain how the Democrats took back the House of Representatives in 2018. Press Release, Ctr. for Am. Women & Politics, Women Voters Propel Democratic Takeover of U.S. House of Representatives; Large Gender Gaps Apparent in Most 2018 Senate and Gubernatorial Races (Nov. 8, 2018), http://cawp.rutgers.edu/sites/default/files/resources/press-release-women-voters-2018_0.pdf [https://perma.cc/F37H-ZCLS].

barrier to the presidency.[71] And part of the explanation for why we have lagged so far behind in expanding women's role as makers of law and policy may be found in the original design of our Constitution. In particular, the Framers' choice of a consolidated executive with plenary power, subject to the power of the judicial branch to interpret its scope in an expansive way, was not only gendered—it has continuing gender consequences.

The rise of recent populist executive activism is by its very nature associated with the masculine—agentic, outsized traits like those exercised by the incumbent President. In the past, we have seen other examples of executive activists that embody these traits, such as former Governor Arnold Schwarzenegger, who derided his opponents in the legislature in explicitly gendered terms as "girlie men."[72] But especially in this time of pandemic, we need more women making law and policy and need fewer agentic, populist leaders. Not to be essentialist, but as some observers have noted, the best outcomes during the pandemic have arguably come in countries headed by women.[73] Thus, one could argue that agentic, chest thumping has put us in more—not less—danger:

> Now, compare these [female] leaders [in Germany, Taiwan, New Zealand, Iceland, Finland, Norway, and Denmark] and stories with the strongmen using the crisis to accelerate a terrifying trifecta of authoritarianism: blame-"others," capture-the-judiciary, demonize-the-journalists, and blanket their country in I-will-never-retire darkness

[71] *See* Kurtzleben, *supra* note 18 (identifying close primary races, concerns about). It is notable, however, that women may break the barrier to the presidency through the vice presidency. 2020 Democratic nominee Joe Biden has named a woman, Senator Kamala Harris, to the ticket. Alexander Burns & Katie Glueck, *Harris Joins Biden Ticket, Achieving a First*, N.Y. TIMES, Aug. 12, 2020, at A1.

[72] Peter Nicholas, *Schwarzenegger Deems Opponents 'Girlie-Men'—Twice/Governor's Rhetoric Incites Mall Crowd, Infuriates Others*, SFGate (July 18, 2004, 4:00 AM), https://www.sfgate.com/politics/article/Schwarzenegger-deems-opponents-girlie-men-2707461.php [https://perma.cc/3EDN-JLRL]. For an analysis of how this comment was used in several contexts to conjure gendered attributes like weakness, see Joanna Grossman & Linda McClain, *The "Girlie Men" Slur and Similar Insults: How They Show the Persistence of Sex-Role Stereotypes*, FINDLAW (Sept. 21, 2004), https://supreme.findlaw.com/legal-commentary/the-girlie-men-slur-and-similar-insults.html [https://perma.cc/6EQM-TVTM].

[73] *See* Wittenberg-Cox, *supra* note 31 (noting that these women prime ministers and presidents have been among the most effective in controlling coronavirus spread and death rates). *But see* Jennifer M. Piscopo, *Women Leaders and Pandemic Performance: A Spurious Correlation*, POL. & GENDER (forthcoming 2020) (manuscript at 2), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/69FA5BD035CEE66F0FFFC61DF037DD0E/S1743923X20000525a.pdf/women_leaders_and_pandemic_performance_a_spurious_correlation.pdf [https://perma.cc/P4A4-33UP].

> (Trump, Bolsanaro, López Obrador, Modi, Duterte, Orban, Putin, Netanyahu. . .).[74]

It is not likely that we will amend the Constitution to transform our consolidated, singular executive model into, for example, a more collaborative, consensus-based three-person council. But we could push for a more constrained choice on the part of courts as to the elusive boundary between Congress and the President, a line that has moved over time toward encompassing more power within the executive.[75] And we could push for more relational, consensus-based checks and balances across the branches. For example, Ginsburg and Huq suggest a number of horizontal measures of interbranch accountability, including members of Congress serving in the Cabinet.[76]

III. LIBERAL RIGHTS OF SPEECH AND ASSOCIATION

We have long had tremendous gender disparity in the number of women who write op-eds and letters to the editor, who are quoted as experts by the media, and who are selected as "talking heads" on television news shows.[77] These are all forms of using one's voice to participate in informal governance. One theory for why this disparity exists is that women lack the confidence to express themselves and believe they are not expert enough to contribute. Catherine Orenstein, founder of The Op-Ed Project, has suggested that:

> By telling themselves they're not experts in anything, "women are pulling themselves out of the discussion . . . . A lot of them will in some way discount themselves and their knowledge. If you think about it, what

[74] Wittenberg-Cox, *supra* note 31 (third alteration in original).

[75] *See* McDonagh and Monopoli, *supra* note 46, at 179 (citing Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2075 (2009)); *see also* GINSBURG & HUQ, *supra* note 13, at 222-30.

[76] *See* GINSBURG & HUQ, *supra* note 13, at 150-54 (arguing for more intrabranch institutions of horizontal accountability, but noting that such mechanisms to enhance consensus-based decision-making are somewhat in "tension with the Madisonian account of mutually checking branches"); *see also id.* at 192-97, 217-18 (giving examples of what such checking institutions could look like and how they could be developed).

[77] Erika Fry, *It's 2012 Already: Why Is Opinion Writing Still Mostly Male?*, COLUM. JOURNALISM REV. (May 29, 2012), https://archives.cjr.org/behind_the_news/its_2012_already_why_is_opinio.php [https://perma.cc/43V7-UJS6] (providing statistics on disproportionate number of male bylines and noting how men act as gatekeepers of women's voices in this regard). White men contributed 82% of op-eds in the *Wall Street Journal*, 74% of op-eds in the *New York Times*, and 71% of op-eds in the *Washington Post*. *Id.*; *see also* Taryn Yaeger, *The Byline Survey Report, 2012: Who Narrates the World?*, BYLINE BLOG (May 28, 2012), https://theopedproject.wordpress.com/2012/05/28/the-byline-survey-2011/ [https://perma.cc/M5FX-PUAF].

> it means is that there's a disconnect between what we know and our sense that it actually matters."[78]

But there is also an increasingly important reason why women are withdrawing their voices from the public sphere. "Women are also more likely than men to face harassment when they publish their opinions. 'Speaking up makes you a target[.]' . . . So when they consider writing a letter, women have to ask themselves: 'Do I want to be that target?'"[79]

As noted above, there are few visible women on the current Administration's White House Coronavirus Task Force and in speaking roles at its briefings.[80] This reflects a broader pattern of the President's unwillingness to put women in power. The women who are in power, like Speaker Pelosi and Governor Whitmer, draw his ire.[81] The President's marginalizing behavior undermines them and the idea of female political leadership more generally.[82] His devaluation of their voices and his attacks on women in the press—particularly

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[78] Caroline Kitchener, *Why Do So Few Women Write Letters to the Editor?*, ATLANTIC (May 5, 2018), https://www.theatlantic.com/entertainment/archive/2018/05/why-do-so-few-women-write-letters-to-the-editor/559736/.

[79] *Id.*; *see also* Kimberly Probolus, Letter to the Editor, *A Woman's Plea: Let's Raise Our Voices!*, N.Y. TIMES, Feb. 3, 2019, at SR10 (highlighting *New York Times*'s failure to have gender parity in its opinion writers, noting that "the preponderance of men was off the charts"). In response to Probolus's letter, the *New York Times* sought more op-ed submissions from women and received a number of replies from women explaining why they were hesitant to write op-eds. Andrea Jones et al., Letters to the Editor, *Encouraging Women's Voices: Part 2*, N.Y. TIMES (Feb. 10, 2019), https://www.nytimes.com/2019/02/10/opinion/letters/nytimes-letters-to-the-editor-women.html.

[80] *See supra* note 19 and accompanying text.

[81] *See supra* notes 22, 24-27 and accompanying text.

[82] For example, the President used a tweet that said "LIBERATE MICHIGAN" to encourage the occupation of the Michigan statehouse by a group of heavily armed protestors, challenging Governor Whitmer's authority to extend her pandemic lockdown order. *See* Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 17, 2020, 11:22 AM), https://twitter.com/realDonaldTrump/status/1251169217531056130. Echoing attacks on Hillary Clinton, the protestors chanted, "Lock her up." Andrew Solender, *Armed Protestors Storm Michigan State House over COVID-19 Lockdown*, FORBES (Apr. 30, 2020, 9:25 PM), https://www.forbes.com/sites/andrewsolender/2020/04/30/armed-protesters-storm-michigan-state-house-over-covid-19-lockdown/#6dd4d02769b5 [https://perma.cc/ST8W-JDN7]. The President's Twitter attacks are also intended to diminish Speaker Pelosi in the eyes of his base and to make her a target for their anger. *See* Molly Roberts, Opinion, *A Rorschach Test for America*, WASH. POST, Oct. 18, 2019, at A19 (commenting on President's tweet of a photo of Pelosi pointing at him during a meeting, "Progressives look at the image and see a woman doing her job well and powerfully. They see a petulant man with his lips open to interrupt her and the men around him with their hands clasped and heads down in submission. Trump supporters look at it and see, well, a meltdown. Here's a lady throwing a hissy fit in the White House, and how dare she display such disrespect toward her exalted host?").

women of color—illustrate why we should call for a reconsideration of hate speech rules, one mechanism for protecting the voices of marginalized groups within our society.[83] Similar attacks on women have effectively chilled speech in the public sphere and call us to consider legislation that limits such attacks.[84]

Hate speech rules that protect women's voices are a way without constitutional amendment to cabin the impact of gendered design choices in the original Constitution. While this approach clearly has risks in terms of liberal constitutional democracy, half of the voting population has been silenced in the current world of the Internet. The chilling effect of anonymous comments after newspaper op-eds or on social media platforms like Facebook, which implicitly or explicitly threaten physical violence, has a disparate impact on women. Many female bloggers or writers of op-eds have retreated from publishing their work.[85] We need intervention through legislation or through regulatory pressure on online platforms to ensure robust rights of speech, petition, virtual assembly, and association for women.[86] Such legislative and regulatory intervention is worth the trade-offs in terms of First Amendment concerns, given that half of the

[83] *See* Annie Karni, *Trump's Virus Defense Is Often an Attack, and the Target Is Often a Woman*, N.Y. TIMES (Mar. 30, 2020), https://www.nytimes.com/2020/03/30/us/politics/trump-women-coronavirus.html; *see also* Leia Idliby, *CNN's Dana Bash Challenges Trump's Treatment of Female Reporters: 'It's Different,'* MEDIAITE (Apr. 20, 2020, 10:31 AM), https://www.mediaite.com/tv/cnns-dana-bash-challenges-trumps-treatment-of-female-reporters-its-different/ [https://perma.cc/BL2P-JCR2]. For discussion of the President's attacks on female reporters of color, in particular, see Fiona Pestana, *We Heart: Women Reporters of Color Taking Trump to Task*, MS. (Apr. 3, 2020), https://msmagazine.com/2020/04/03/we-heart-women-reporters-of-color-taking-trump-to-task/ [https://perma.cc/6B2P-YQYM]; Erik Wemple, *Yamiche Alcindor Wants an Answer, Thank You Very Much*, WASH. POST (Mar. 30, 2020, 6:11 PM), https://www.washingtonpost.com/opinions/2020/03/30/yamiche-alcindor-wants-an-answer-thank-you-very-much/.

[84] Note that my point about the President's comments is merely illustrative of the broader chilling effect of misogyny, and I am not actually arguing that such legislation would be upheld vis-à-vis the President's speech. However, it is notable that the government speech doctrine is not unlimited. Pleasant Grove City v. Summum, 555 U.S. 460, 467-69 (2009).

[85] *See, e.g.*, Vanessa Thorpe & Richard Rogers, *Women Bloggers Call for a Stop to 'Hateful' Trolling by Misogynist Men*, THE GUARDIAN (Nov. 5, 2011, 8:05 PM), https://www.theguardian.com/world/2011/nov/05/women-bloggers-hateful-trolling [https://perma.cc/XSE8-5JA4]. A survey by Amnesty International found that 33% of women in the United States reported being harassed online. Azmina Dhrodia, *Unsocial Media: The Real Toll of Online Abuse Against Women*, MEDIUM (Nov. 20, 2017), https://medium.com/amnesty-insights/unsocial-media-the-real-toll-of-online-abuse-against-women-37134ddab3f4 [https://perma.cc/34EX-HBMG]. More than 75% of overall survey respondents said that the harassment they faced led to changes in how they use social media and other online platforms. *Id.*

[86] *See generally* DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014) (describing variety of harms caused by cyber-harassment, evaluating current state of law, and proposing new legislative and judicial interventions).

electorate is being targeted by gendered attacks.[87] Otherwise, we are shrinking the public sphere for women, contrary to the broader promise of the Nineteenth Amendment to bring gender parity to our formal and informal governance structures.[88]

IV. FREE AND FAIR ELECTIONS

The Nineteenth Amendment retrofitted the Constitution by doubling the electorate. Professor Akhil Amar has described this moment as "the single biggest democratizing event in American history" and went on to note that "[e]ven the most extraordinary feats of the Founding and Reconstruction eras had involved the electoral empowerment and/or enfranchisement of hundreds of thousands, not millions . . . ."[89] But that amendment took seventy-two years to enact.[90] It is easier to revisit more rigorous enforcement of amendments that we already have than to amend the Constitution again. We have the Nineteenth Amendment. What emerged after a decade of interpretation of the Amendment was a thin conception of its meaning as a mere nondiscrimination-in-voting rule and not a broader equality norm.[91] As noted above, we can still fulfill the Nineteenth Amendment's broader promise by making our executive less expansive and more accountable and by making political speech less risky for women. Both of these goals can be achieved without constitutional amendment via case law made by the judicial branch, statutes enacted by the legislative branch, and regulations promulgated by the executive branch. There is also a third space in which we can intervene to help fulfill the Nineteenth Amendment's broader promise: free and fair elections. Not only did courts historically embrace a thin conception of the Amendment that we could now make more robust, but Congress never used the enforcement clause of Section 2 of the Nineteenth Amendment. No enforcement or civil rights legislation has ever been enacted pursuant to that enforcement clause, even though such legislation was introduced in Congress upon ratification in 1920.[92]

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[87] For a discussion of the trade-offs raised by hate speech bans in a liberal constitutional democracy, see GINSBURG & HUQ, *supra* note 13, at 172.

[88] For a discussion of how democratic erosion is characterized by such a shrinking of the public sphere, see *id.* at 197-98.

[89] AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 419 (paperback ed. 2006).

[90] See Thomas, *supra* note 67, at 1.

[91] *See generally* MONOPOLI, CONSTITUTIONAL ORPHAN, *supra* note 8, at 2, 4.

[92] *See id.* at 8, 43-69 (surfacing history around congressional debates about enforcement clause and fate of enforcement legislation introduced in 1920, and emphasizing central role of race in that story).

Recent voter suppression efforts by state legislatures—for example, voter ID laws—have a disparate impact on women, particularly women of color:[93]

> [O]ne third of all women have citizenship documents that do not identically match their current names primarily because of name changes at marriage. Roughly 90 percent of women who marry adopt their husband's last name. That means that roughly 90 percent of married female voters have a different name on their ID than the one on their birth certificate. An estimated 34 percent of women could be turned away from the polls unless they have precisely the right documents. . . .
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> . . .
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> . . . [T]he U.S. Patriot Act requires women's names on certain official government documents to be the same. Thanks to the Department of Homeland Security and the ever-tightening regulations on identification requirements, today a woman with a hyphenated name on one form of ID and just a maiden name on another is grounds for suspicion. Patriot Act guidelines specifically require identical forms of identification, which for many women, imposes a significant challenge.[94]

[93] NAT'L ORG. FOR WOMEN, VOTER SUPPRESSION TARGETS WOMEN, YOUTH AND COMMUNITIES OF COLOR (ISSUE ADVISORY, PART ONE) 2 (Aug. 2014), http://now.org/wp-content/uploads/2014/08/Voter-Suppression-Targets-Women-Youth-and-Communities-of-Color-Issue-Advisory-Part-One.pdf [https://perma.cc/SJ7A-QQ8E]; *see also* Barbara Arnwine & Eleanor Smeal, *The War on Voting Is a War on Women*, MSNBC (Oct. 20, 2013, 5:59 PM), http://www.msnbc.com/msnbc/the-war-voting-war-women [https://perma.cc/FQM3-BN68] (describing impact of such laws on women voting in the 2008 and 2012 elections: "Women make up the majority of student voters, elderly voters, and minority voters, according to the U.S. Census Bureau. Women have led voter turnout among eligible voters in every race that the Census Bureau has recorded since 1996 by three to four points. Nationwide, close to 60% of college students are women, and they voted at higher rates than college men in both the 2008 and 2012 presidential elections. Women over 65 vote in larger numbers than men in that cohort, and voter turnout is also higher among African-American women and Latinas, who have seen significant increases in voter participation since 2004. In fact, in 2012, black women had the highest turnout of all voting groups at 66%."); Mandy Velez, *The Surprising Ways Voter Suppression Particularly Hurts Women*, SALON (Jan. 14, 2018, 12:29 AM), https://www.salon.com/2018/01/13/the-surprising-ways-voter-suppression-particularly-hurts-women_partner/ [https://perma.cc/8LG3-H3HB] (describing how voter ID laws affect particular subgroups of women, including those who are poor or work hourly wage jobs; women who are abused; students, since a higher proportion of college students are women; and disabled/older women); Reid Wilson, *Five Reasons Voter Identification Bills Disproportionately Impact Women*, WASH. POST (Nov. 5, 2013, 10:35 AM), https://www.washingtonpost.com/blogs/govbeat/wp/2013/11/05/five-reasons-voter-identification-bills-disproportionately-impact-women/ (describing disparate impact on women of voter suppression laws in Texas).

[94] NAT'L ORG. FOR WOMEN, *supra* note 93, at 3-4.

In this centennial year of the Nineteenth Amendment, new scholarship has emerged arguing that Congress should finally use the Amendment's enforcement clause to invalidate state legislation that constricts voting.[95] For example, given the gender pay gap—especially for women of color—there is a disparate impact built into voting rules like Florida's recent legislation requiring former felons to pay all fees, fines, and restitution prior to re-enfranchisement.[96] Unfortunately, a recent U.S. District Court decision adopted a narrow view of the Nineteenth Amendment and found that it should be interpreted, like the Fifteenth Amendment, to require intentional discrimination to sustain a constitutional rights violation claim.[97] Thus, it may well require further congressional enforcement legislation to provide a foundation for courts to allow disparate impact claims under the Nineteenth Amendment. The Voting Rights Act of 1965 itself could be amended to add sex as a prohibited criterion for abridging or denying the franchise, or separate legislation could be enacted providing for a statutory basis for a disparate impact claim.[98] As noted above, the Nineteenth Amendment is both a prohibition and a grant.[99] It is designed to constrain the states, and Congress should look closely at using the power it was granted under Section 2 of the Nineteenth Amendment as we celebrate its centennial.

CONCLUSION

A significant number of Americans polled still indicate that, while they are comfortable voting for a woman for President, their neighbors are not.[100] As described above, politicians like the incumbent President still play on gender

[95] *See, e.g.*, Richard L. Hasen & Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It*, 108 GEO. L.J. 27, 47, 55-59 (2020) (proposing "a litigation strategy premised on a revived Nineteenth Amendment within the scope of a cluster of new voting rights claims").

[96] 2019 Fla. Laws 162 (codified at FLA. STAT. § 98.0751 (2020)); *see also McCoy, et al. v. Desantis, et al.*, SOUTHERN POVERTY L. CTR., https://www.splcenter.org/seeking-justice/case-docket/mccoy-et-al-v-desantis-et-al [https://perma.cc/ZC2M-ANLV] (last visited Sept. 27, 2020).

[97] Jones v. DeSantis, No. 4:19-cv-00300, 2020 WL 2618062, at *35 (N.D. Fla. May 24, 2020), *rev'd and vacated on other grounds*, 2020 WL 5493770 (11th Cir. Sept. 11, 2020).

[98] *See* Steve Kolbert, *The Nineteenth Amendment Enforcement Power (But First, Which One Is the Nineteenth Amendment, Again?)*, 43 FLA. ST. U. L. REV. 507, 564 (2016).

[99] *See supra* notes 7-8 and accompanying text.

[100] *See* Press Release, Ipsos, *supra* note 55, at 5. Only 33% of survey respondents believed their neighbors would be comfortable with a female president. *Id.* Pollsters often say that is a more reliable number since people are unwilling to say that they themselves are not comfortable with a female president. *See* Michelle Cottle, Opinion, *Are We Ready to Elect a Woman President?*, N.Y. TIMES, Jan. 16, 2020, at A22.

schemas in appealing to potential voters. During the 2016 election cycle, then-candidate Donald Trump sarcastically asked his audience, "And she looks presidential, fellows?" when referring to Hillary Clinton.[101] Clearly, such gender schemas about competence and fitness to govern still play a salient role in our politics. This reifies the catch-22 that female candidates face: either be punished for behaving in an agentic way because such behavior goes against gender norms or face pushback if they behave in collaborative ways since such behavior is incongruent with our agentic executive model.[102] There is evidence that voters "fit" the candidate to the office.[103] For example, research demonstrates that voters are more likely to select female candidates if they are running for legislative offices that voters associate more closely with communal behavior like collaboration.[104] Thus, how we structure the office itself matters. The Framers of our Constitution chose an expansive, agentic executive model—the very kind of model we would predict voters would match a candidate with masculine traits to more readily than a candidate with feminine traits.[105] And the Supreme Court has chosen to expand the role of the executive at various times

[101] Ashley Parker, *Donald Trump Says Hillary Clinton Doesn't Have 'a Presidential Look,'* N.Y. TIMES (Sept. 6, 2016), http://www.nytimes.com/2016/09/07/us/politics/donald-trump-says-hillary-clinton-doesnt-have-a-presidential-look.html?_r=0. For examples of the gendered nature of the 2016 presidential campaign and its discourse, see my remarks given prior to the election, published in Paula A. Monopoli, *Gender and the Structural Constitution*, 76 MD. L. REV. ENDNOTES 17, 21 (2016). The 2016 presidential election was striking in terms of having a candidate who openly mocked the appearance of female candidates and who played so crudely on gender schemas about who is suited to be a political leader. *See, e.g.*, Amy Chozick & Patrick Healy, *Sharing a Stage, Trump and Fiorina Will Face Complicated Challenges*, N.Y. TIMES, Sept. 15, 2015, at A17.

[102] VIRGINIA VALIAN, WHY SO SLOW?: THE ADVANCEMENT OF WOMEN 133-34 (1998) ("Having a style that is assertive[,] . . . rather than cooperative and participative, is especially costly for a woman."); Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743, 743 (2001) ("If [women] enact agentic behaviors . . . [they] suffer a *backlash effect* in the form of social repercussions."); *see also* Monopoli, *Gender and Constitutional Design*, *supra* note 17, at 2649.

[103] *See* VALIAN, *supra* note 102, at 134 ("[L]eaders are likely to be judged in terms of the fit between their sex and the conception of the job. If the job is seen as masculine, men will be considered more effective leaders, but if the job is characterized as feminine, women will be perceived as better leaders." (citation omitted)); *see also* McDonagh & Monopoli, *supra* note 46, at 181.

[104] Monopoli, *Gender and Constitutional Design*, *supra* note 17, at 2649 (citing Carol Mueller, *Nurturance and Mastery: Competing Qualifications for Women's Access to High Public Office?*, 2 RES. POL. & SOC'Y 211, 214 (1986)).

[105] *See* McDonagh & Monopoli, *supra* note 46, at 179 ("It is clear why the voters associate executive political leadership with men rather than with women, given the fundamental way the contemporary modern state in general and the executive branch in particular represent male traits, even in a democracy." (citing GENDER POWER, LEADERSHIP, AND GOVERNANCE (Georgia Duerst-Lahti & Rita Mae Kelly eds., 1995))).

in our history.[106] Thus, the fact that we lag behind other liberal constitutional democracies in female leadership is not surprising given our uniquely expansive executive.

When polled, voters respond to gender schemas and rate masculine traits as preferable to feminine traits for all levels of political office.[107] After September 11th, voters were even more concerned about security, and this had an impact on their willingness to accept female political leaders.[108] Voters have traditionally seen male candidates as better equipped to deal with national security issues.[109] In fact, some scholars linked a decline in the number of voters who reported that they would vote for a female candidate for President in the wake of September 11th to the increase in concern about national security at that time.[110] The current pandemic may be akin to war for these purposes, or it may be that voters associate it with health and caregiving and seek female leadership as a result.[111] In a remarkable invocation of her status as a mother as the basis for her moral authority, Atlanta Mayor Keisha Lance Bottoms called on her constituents and all Americans to dismantle systemic racism and embrace reform in response to the death of George Floyd, yet another person in a long line of Black men and women who have been the victims of police violence.[112] During a subsequent press conference in response to property destruction amidst otherwise peaceful protests of police violence, Mayor Bottoms began by saying, "Above everything else, I am a mother. I am a mother to four black children in

[106] *Id.*; *see also* GINSBURG & HUQ, *supra* note 13, at 144.

[107] Monopoli, *Gender and Constitutional Design*, *supra* note 17, at 2646-47 (citing Lawless, *supra* note 61, at 482).

[108] Lawless, *supra* note 61, at 485.

[109] *Id.*

[110] *See, e.g.*, Monopoli, *Gender and Constitutional Design*, *supra* note 17, at 2647 (citing Lawless, *supra* note 61, at 482); *see also, e.g.*, Deborah Alexander & Kristi Andersen, *Gender As a Factor in the Attribution of Leadership Traits*, 46 POL. RES. Q. 527, 535 (1993) (noting that 53.1% of voters thought that a man was better equipped to manage military spending, compared to 16.3% of voters who believed a woman was better equipped); Jennifer Agiesta, *Poll: Nine Weeks Out, a Near Even Race*, CNN (Sept. 7, 2016, 11:42 AM), http://www.cnn.com/2016/09/06/_politics-zone-injection/trump-vs-clinton-presidential-polls-election-2016/ [https://perma.cc/N2JP-HGHD] (reporting that voters trusted Trump over Clinton on terrorism, 51% to 45%, but trusted Clinton over Trump on foreign policy, 56% to 40%).

[111] In some cases of female executive leadership, we have seen that gender schemas may actually work in women's favor: "For example, in Chile, many people stated that they voted for President Michelle Bachelet because they were looking for a different, more compassionate approach to governance. Thus, traditional gender schemas did play a role in electoral choices—they simply worked in favor of the female candidate." Monopoli, *Gender and Constitutional Design*, *supra* note 17, at 2650.

[112] Keisha Lance Bottoms, Opinion, *When You Can't Save Your Boy*, N.Y. TIMES, June 4, 2020, at A27.

America, one of whom is 18 years old."[113] She then called on those engaged in such destruction to "go home" and told them they were "disgracing our city."[114] In so doing, the Mayor drew on motherhood as her authority for leading politically. While one strain of the argument for woman suffrage was the moral superiority of women and the benefit that would bring to governance, this was a different kind of invocation of motherhood. It evoked power. It connected motherhood to the exercise of political authority over citizens. Rare in American political rhetoric, perhaps this is a harbinger of a new kind of source of women's leadership in this country. Its impact on women's formal political leadership remains to be seen.

The progress of women as makers of law and policy has ebbed and flowed. In terms of formal political office, we are far from gender parity in Congress and state legislatures. There have never been more than nine women governors serving at the same time, and there has never been a Black woman governor.[115] After the 2016 election in Maryland, the state no longer had any women in its congressional delegation.[116] So, the progress of women in formal political leadership roles is not inevitable. In recent times, both Hillary Clinton's 2016 loss after having been a clear front runner in the polls and the elimination of every female candidate in the 2020 Democratic primary are recent illustrations of this lack of progress.[117] And women's informal acts of governance, through exercise of their First Amendment rights and participation in free and fair elections, have never been fully protected and are currently under even more acute attack. The suffragists who could not participate in elections before 1920 (and the many suffragists of color who could not participate even after 1920) used the panoply of First Amendment rights of speech, association, assembly, and petition to ensure that future generations of women could vote. We owe them no less than a continued effort to fully develop and protect those informal governance rights as well as our right to hold formal public office. Like the

[113] Ken Sugiura, *Full Text: Read Atlanta Mayor Keisha Lance Bottoms' Plea for Her City*, ATLANTA J.-CONST. (May 30, 2020), https://www.ajc.com/news/full-text-read-atlanta-mayor-keisha-lance-bottoms-plea-for-her-city/puDJ3iEafspuLZcbuq9rvO/ [https://perma.cc/GD54-HAE8].

[114] *Id.*

[115] *See History of Women Governors*, CTR. FOR AM. WOMEN & POL., https://cawp.rutgers.edu/history-women-governors [https://perma.cc/9M73-RPPZ] (last visited Sept. 27, 2020).

[116] Erin Cox, *Where Are the Women to Succeed Mikulski? A 'Leaky Pipeline' in Md. Politics*, BALT. SUN (Sept. 26, 2016, 12:40 PM), http://www.baltimoresun.com/features/women-to-watch/bal-maryland-women-politics-leaky-pipeline-20160926-story.html [https://perma.cc/2TZY-W7U8]; Rachel Weiner, *Van Hollen Defeats Edwards in Heated Maryland Primary for U.S. Senate*, WASH. POST (Apr. 27, 2016), https://www.washingtonpost.com/local/md-politics/2016/04/26/ad03cdf4-0bbc-11e6-bfa1-4efa856caf2a_story.html.

[117] *See supra* notes 18, 60, 68, 70 and accompanying text.

suffragists who knew that their struggle was intergenerational and that their efforts were only one piece of the long journey toward political, social, and economic equality, we understand that future generations will have to continue the work.[118]

Our Constitution is particularly difficult to amend as a matter of comparative constitutionalism.[119] Article V provides for an arduous process.[120] So, what is the likelihood that we could engineer such constitutional redesign? It will be difficult. But, since the 2016 election, there have been serious discussions about amending the Constitution to abolish the electoral college and about taking action to alter the composition of the Supreme Court.[121] And the current emergency may provide an exceptional opportunity to convince the American people that we have gaps in our original constitutional design. We should fill those gaps and complete the retrofitting of the Constitution by the Nineteenth Amendment. If not through the formal Article V amendment process, then we should act through judicial, legislative, and regulatory action to reflect the broader promise of a more perfect democracy where women are full participants in formal and informal governance. The Nineteenth Amendment's centennial is an opportune time for us to have a conversation about what remains to be done to achieve that goal.

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[118] *See* Siegel, *supra* note 10, at 30:08 ("For public memory then, we've got narratives that are constituting us as a community, that are creating our identity and our sense of justice, our sense of values as a people.").

[119] *See* GINSBURG & HUQ, *supra* note 13, at 139 (asserting that "most observers agree that the United States Constitution is one of the most rigid in the world in terms of being difficult to amend").

[120] *See* U.S. CONST. art. V; GINSBURG & HUQ, *supra* note 13, at 139.

[121] Josh Chafetz, *Illiberal Democracy*, N.Y. TIMES, Mar. 22, 2020, at BR13 (reviewing JESSE WEGMAN, LET THE PEOPLE PICK THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE (2020)); Burgess Everett & Marianne Levine, *2020 Dems Warm to Expanding Supreme Court*, POLITICO (Mar. 18, 2019, 5:04 AM), https://www.politico.com/story/2019/03/18/2020-democrats-supreme-court-1223625 [https://perma.cc/SCG6-L5GY] ("Sens. Kamala Harris, Elizabeth Warren and Kirsten Gillibrand told POLITICO they would not rule out expanding the Supreme Court if elected president, showcasing a new level of interest in the Democratic field on an issue that has until recently remained on the fringes of debate.").