

## The Next Forty Presidents

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## THE NEXT FORTY PRESIDENTS

ORI ARONSON\*

A thought experiment in feminist constitutionalism, this Article explores a radical argument: allow only women to be elected as the next forty U.S. presidents. While on its face blatantly discriminatory, the forty female presidents rule turns out to be a robustly justifiable idea, along multiple axes of political fairness, and not to women alone—rather to the electorate as a whole. Due to several of its unique characteristics, the presidency turns out to be particularly fitting to innovation that would correct past injustices of political exclusion. Corrective justice, affirmative action, feminist critique, voter autonomy, and the democratic costs of identity politics all provide support to the strategy suggested in the Article, arguably outweighing rejoinders and critiques, both fairness-based and consequentialist.

While adoption of the forty female presidents rule is not expected to happen in the foreseeable future, its serious consideration reveals a set of novel arguments in the fields of political fairness, gender equality, and democratic representation, and hints at the institutional contours of a temporal theory of corrective justice. Through the exploration of the suggested corrective strategy, our moral and institutional imaginations are, hopefully, broadened.

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INTRODUCTION

The defeat of Hillary Rodham Clinton in the 2016 presidential election ended a historic run, being the first time a major party had slated a woman as its candidate for President of the United States. While other, nonmajor, parties have done so before,<sup>1</sup> and while each of the two major parties has already once selected a female vice-presidential nominee,<sup>2</sup> 2016 was seen by many as the closest a woman has ever realistically gotten to becoming president. A woman president would have been a glass-shattering moment in American political history, bending the arc of the moral universe a little closer to justice. As such, the fact of its political feasibility should be a cause for celebration to all Americans, regardless of gender or party affiliation. Clinton did not win though, the glass ceiling remains intact, and the future of feminist political mobilization is again up for grabs.<sup>3</sup>

With Donald J. Trump in the White House, we are left wondering what exactly it would have meant, in terms of gender relations and identities, to have a woman as the forty-fifth president, and, *ipso facto*, what it means for the first ever real woman candidate to have lost the election. It is arguable whether Clinton's loss should be viewed as a defeat to all American women, or to the totality of feminist

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1. Prior to Mrs. Clinton, over 20 other women have been nominated by mostly minor and fringe parties as presidential candidates. This dates back to 1872 (Victoria Woodhull, of the Equal Rights Party), although the lion's share of these candidacies have emerged only since the second half of the twentieth century. Jo Freeman, *The Women Who Ran For President*, JO FREEMAN, <http://www.jofreeman.com/politics/womprez03.htm> [<http://perma.cc/6VHM-WRHM>].

2. Geraldine Ferraro was the Democratic vice-presidential candidate in 1984; Sarah Palin was the Republican vice-presidential candidate in 2008. *Women Presidential and Vice Presidential Candidates: A Selected List*, CTR. FOR AM. WOMEN & POLITICS, [http://www.cawp.rutgers.edu/levels\\_of\\_office/women-presidential-and-vice-presidential-candidates-selected-list](http://www.cawp.rutgers.edu/levels_of_office/women-presidential-and-vice-presidential-candidates-selected-list) [<http://perma.cc/Z3PQ-B7YB>].

3. See, e.g., Deborah Cohan, *Writing Grabs Back: Creativity, Resistance and Activism in the Trump Era*, 3 INTERDISC. PERSP. ON EQUALITY & DIVERSITY 1, 1 (2017) (suggesting artistic and scholarly writing as a mechanism for reacting to the new political condition); Joanne Faulkner, "White Women Elected Trump": *Feminism in 'Dark Times,' Its Present and Future*, 1 CONTINENTAL THOUGHT & THEORY 650, 650 (2017) (addressing the political significance to feminism of the women's marches movement that followed the election of President Trump); Melissa Phruksachart, *Who will save us from the Pantsuit Nation? Reading liberal media in the age of Trump*, 17 FEMINIST MEDIA STUD. 513, 513 (2017) (citing "a crisis of leadership among contemporary women's movements" that calls for a redefinition of their purposes and strategies).

causes. Had she won, it is debatable whether such a victory would have been considered a victory to all American women, regardless of race, creed, age, ideology, or party affiliation. The first woman to be elected president—if this ever happens—will not be “any woman,” just as the first African American president was not representative of all African Americans, nor necessarily the best proponent of causes related to their interests.<sup>4</sup> Hillary Clinton, for example, was a white, sixty-nine-year-old, former First Lady, Democrat, with a very certain set of values, ideologies, policy preferences, life experiences, affiliations, and character traits. In the age of intersectional identity politics, many people who might have thought that it is time for the United States to elect a female president could still reasonably believe—and apparently did in fact believe—that she was not the one they would have liked as president. In other words, other considerations that figure into a citizen’s choice of leader in a democracy, such as ideology, competence, and character, can reasonably outweigh one’s preference to electing the first woman president.

Indeed, not all women voted for the female candidate in the last presidential election,<sup>5</sup> and there are good reasons to appreciate this fact, in and of itself: we should not want people to vote for (or against) a candidate just because of his or her membership in a specific identity group. While gender might be a relevant consideration in the rational choice of a leader (for symbolic reasons, functional ones, or both), it would be irrational to vote *purely* based on gender distinctions, with no heed to other elements such as the candidate’s party affiliation, positions, intelligence, charisma, and track record.<sup>6</sup> Similarly, a woman president cannot and should not expect unconditional support from female or feminist voters: they might not agree with her actions and they might not accept her positions, on gender issues as on any other topic of public policy.<sup>7</sup> The upshot is clear, as

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4. This is the primary puzzle explored by Michael Eric Dyson, in *THE BLACK PRESIDENCY: BARACK OBAMA AND THE POLITICS OF RACE IN AMERICA X* (2016) (“[Obama’s] presidency . . . raises the question of how much closer the election of a single black man may bring us to a more just and inclusive society.”). A starkly critical answer to the question is suggested by William A. Darity Jr., *How Barack Obama Failed Black Americans*, *ATLANTIC* (Dec. 22, 2016), <https://www.theatlantic.com/politics/archive/2016/12/how-barack-obama-failed-black-americans/511358> [http://perma.cc/M3Z9-9BER].

5. See, e.g., Alec Tyson & Shiva Maniam, *Behind Trump’s victory: Divisions by race, gender, education*, PEW RESEARCH CTR. (Nov. 9, 2016), <http://pewresearch.org/fact-tank/2016/11/09/behind-trumps-victory-divisions-by-race-gender-education> [http://perma.cc/7VQ8-YWT7] (citing exit poll results according to which 42% of women voters elected Donald Trump).

6. There is evidence that voters understand this as well. See, e.g., DEBORAH JORDAN BROOKS, *HE RUNS, SHE RUNS: WHY GENDER STEREOTYPES DO NOT HARM WOMEN CANDIDATES* 73–79 (2013) (describing comprehensive data showing a minor role for gender stereotypes in voters’ choice of elected officials, albeit in sub-presidency levels of government).

7. For an illustrative collection of arguments of the kind leveled against Hillary

nothing stated to this point is new: the first female presidency, if and when it arrives, would be a singularly historic event, but it would also just be a single presidency—with all the varying pains and pleasures that constituencies derive from their singularly different leaders.

Perhaps an actual feminist reform of the presidency is needed. We might imagine a gendered modification to the institution of the President of the United States that would go beyond the historical significance of the fact that a woman had a chance to hold the office at one time or another. One way to do this is to look back in time, before looking forward again into the future. The U.S. presidency has been occupied by very different persons over the nearly two and a half centuries since the establishment of the office, each with distinct positions and affiliations. People of different beliefs and expectations celebrated some and decried others, and most have felt a little bit of both toward all. One obvious thing however that was *not* exceptional about any of the presidents to have so far held the office was the fact that they were all men. The reason, of course, was that only men were ever seriously up for election to the presidency in the history of the U.S., up to the 2016 election.

Think of the richness of male leadership this fact has enabled the U.S. polity to experience over the generations: while not nearly representative of the diverse identities and communities that comprise it, the U.S. constituency did get to be governed by Democrats and Republicans, conservatives, liberals, and centrists, Northerners and Southerners, highbrow intellectuals and down-to-earth populists, Episcopalians, Unitarians, Presbyterians, Methodists, Baptists, Quakers, and a Catholic, whites and an African American, lawyers, soldiers, farmers, teachers, businessmen, journalists, governors, senators, congressmen, an engineer, an actor, an athlete, men in their 40s, 50s, 60s, and 70s, healthy and disabled, and so forth.

Clearly, the first woman president, when she arrives, will not be all of that. She will only present a sliver of what female political leadership—to the extent that such a thing exists—is like, and she will only represent a sliver of what the U.S. body politic is made of. Clearly, to get an idea of the potential that a “female presidency” holds for the U.S., comparable to the one we have about male leadership, a single such presidency cannot do. Indeed, it would seem that to level the proverbial playing field, in terms of both corrective

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Clinton, *see* FALSE CHOICES: THE FAUX FEMINISM OF HILLARY RODHAM CLINTON 25 (Liza Featherstone ed., 2016). On the other side of the aisle, *see* Jessica Valenti, *Opinion: The fake feminism of Sarah Palin*, WASH. POST (May 30, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/28/AR2010052802263.html> [<http://perma.cc/X7SG-Y8AP>].

justice and prolific and pluralist experiences, we would need to have some forty women presidents in a row—from hereon and for the next several generations. This Article suggests such a thought experiment and seeks to show that there are several good reasons to consider a new constitutional norm that would require all candidates for the next forty U.S. presidencies to be women, while no men would be allowed on major party tickets.

This sounds like a radical reform, and in the context of the U.S. constitutional system its political feasibility indeed seems far-fetched. But the purpose of this Article is to illustrate that if you think about this long enough and consider the main arguments, it is in fact difficult to fully and rationally oppose this view. A rule that would ensure that the next forty presidents are women turns out to be an attractively just policy, with few social drawbacks, and with a capacity to transcend ideological and sectorial divides in its favor (in this it also differs from comparable reforms that would secure representation for other minorities in the presidency, as I elaborate below). This does not mean the reform is on its way, but starting to imagine reform is certainly a good point of departure. Perhaps more accessibly, the Article can be read as a thought experiment locating feminist constitutionalism in the realm of intergenerational justice. It explores the contours of a sequential model of corrective justice, applying a heightened version of affirmative action to a unitary institution of governance, usually considered the most important in the country, that has also been purely restricted to men for the entirety of its existence. This context presents a unique analytical challenge for normative theory, and the discussion of what I term *the forty female presidents rule* reveals that there is room for innovation in tackling such problems of gender inequality in the intergenerational sphere.

In what follows, I first discuss the meaning of the idea of a “female presidency” (Part I). The purpose of this Part is to establish the modest point that the gender of our president matters, and not only to his or her voters. Having only men presidents in the past has qualitatively affected the institution of the presidency, and therefore introducing the forty female presidents rule will also have real-life implications to the office of the executive. Part II then describes the idea of, and main justifications for, the forty female presidents rule. Although it derives from the logic of affirmative action and reparatory justice, I focus mostly on the benefits the suggested rule offers society as a whole, and consider more briefly the justice-for-women aspects of the model. Arguing from general social benefits is supposed to attract greater support for the suggested model, and also

treads what seems to me the less obvious grounds for its adoption. Part III discusses the main rejoinders to the model. It considers external critiques, focusing on the ostensible injustices to men and to voters more generally from the exclusion of men from the presidency, as well as critiques that are internal to the model, asking why should it be limited to women (rather than other historically subordinated groups), and why it should be limited to the presidency (rather than other elected offices that have been subject to past exclusions). Not all of the challenges to the model are fully resolvable, and yet I believe it retains much persuasive force. At the least, it is meant to expose our fairness reflexes and our normative imaginations to the possibility of institutionally contingent corrections to past practices that dare to intervene in constitutional fixtures.

### I. THE IDEA OF THE FEMALE PRESIDENCY

The defeat of Hillary Clinton in the 2016 presidential election was a sour end to what may be considered a “good year” for women in political leadership in post-industrialized democracies. It came four months after the selection of Theresa May as Prime Minister of the United Kingdom,<sup>8</sup> one of Europe’s two largest economies, the other being Germany, led since 2005 by Angela Merkel.<sup>9</sup> In the United Nations, outgoing Secretary General Ban Ki-moon publicly called for the member states to elect a woman to succeed him, for the first time ever;<sup>10</sup> although another man—António Guterres—was eventually selected.<sup>11</sup> Other noteworthy international institutions are already led by women, including the International Monetary Fund (Christine Lagarde) and the World Health Organization (Margaret Chan).<sup>12</sup> Few would disagree that a leaders’ summit involving these countries and institutions would be a unique and notable sight, reflecting an

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8. Sheena McKenzie, *Theresa May becomes new British Prime Minister*, CNN (July 14, 2016, 4:23 AM), <http://www.cnn.com/2016/07/13/europe/theresa-may-david-cameron-british-prime-minister/index.html> [<https://perma.cc/ZR3H-RUAB>].

9. *Angela Merkel Fast Facts*, CNN (Sept. 27, 2017, 8:53 AM), <http://www.cnn.com/2012/12/30/world/europe/angela-merkel---fast-facts/index.html> [<https://perma.cc/J4MP-MQPQ>].

10. Edith M. Lederer, *UN chief says he'd like a woman to be next secretary-general*, AP (Aug. 16, 2016), <https://apnews.com/40016094e318463bafa7c00126f47da1/un-chief-says-hed-woman-be-next-secretary-general> [<http://perma.cc/PUJ5-KQR5>].

11. *António Guterres appointed next UN Secretary-General by acclamation*, U.N. (Oct. 13, 2016), <http://www.un.org/apps/news/story.asp?NewsID=55285#.WcVmNmXEldc> [<http://perma.cc/AK8X-FN3K>].

12. Radhika Sanghani, *Just 9 of the 73 'most powerful people in the world' are women*, TELEGRAPH (Nov. 4, 2015, 4:48 PM), <http://www.telegraph.co.uk/women/womens-business/11975481/Forbes-power-list-2015-Women-make-up-just-9-of-the-73-most-powerful.html> [<http://perma.cc/6K6C-DFTT>].

undeniable cumulative shift in gender politics and in equality of political opportunity in the twenty-first century. Though if it would also signify a shift in the nature and quality of leadership is unclear. In other words, beyond symbolics, we must still consider whether the gender of our leaders in fact matters.

There is ample evidence today to support the belief that it does, even if we do not exactly know how or why. Women tend to perform differently than men in situations of political decision-making in executive, administrative, and judicial functions. They seem to exhibit a greater tendency than men toward peace and reconciliation in situations of conflict.<sup>13</sup> Even if “[v]ery few women seek political offices with the intention of representing women’s interests per se,”<sup>14</sup> they are still more likely than men to show a concern to the special social conditions of women and to spheres of human experience shared mostly by women.<sup>15</sup> There is evidence that, as judges, women tend to be harsher in sentencing criminal defendants,<sup>16</sup> and less paternalistically forgiving than men to female offenders,<sup>17</sup> but more receptive to gender-related wrongs, such as women’s claims of employment discrimination.<sup>18</sup> Whether women are likely to be more “feminist” in their ideological attitudes—to support rules and rulings that benefit women over the status quo—is a question open for debate and contextual analysis.<sup>19</sup> Still, thanks to some combination of nature and

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13. See, e.g., Catherine Powell, *How Women Could Save the World, If Only We Would Let Them: From Gender Essentialism to Inclusive Security*, 28 YALE J.L. & FEMINISM 271, 271–72 (2017) (reviewing quantitative and qualitative studies indicating that women’s participation in international conflict resolution tends to promote values of peace and reconciliation).

14. Virginia Sapiro, *Research Frontier Essay: When Are Interests Interesting? The Problem of Political Representation of Women*, 75 AM. POL. SCI. REV. 701, 711 (1981).

15. *Id.*

16. See, e.g., Darrell Steffensmeier & Chris Hebert, *Women and Men Policymakers: Does the Judge’s Gender Affect the Sentencing of Criminal Defendants?*, 77 SOC. FORCES 1163, 1174 (1999) (finding “female judges on average are more likely to incarcerate offenders . . . and to sentence those imprisoned to slightly longer sentences . . . than are male judges.”).

17. See Max Schanzenbach, *Racial and Sex Disparities in Prison Sentences: The Effect of District-Level Judicial Demographics*, 34 J. LEGAL STUD. 57, 90 (2005) (concluding “a greater proportion of female judges on the bench is associated with a lower sex disparity for the sentencing of serious crimes.”).

18. See, e.g., Rosalind Dixon, *Female Justices, Feminism, and the Politics of Judicial Appointment: A Re-Examination*, 21 YALE J.L. & FEMINISM 297, 312 (2010) (reviewing—while critiquing—empirical studies that have shown “a clear and statistically significant link between a judge’s gender and voting behavior in gender cases,” an effect that is “particularly clear and consistent in cases involving claims of employment discrimination based on sex or gender under Title VII”).

19. Compare Michele L. Swers, *Are Women More Likely to Vote for Women’s Issue Bills than Their Male Colleagues?*, 23 LEGIS. STUD. Q. 435, 440 (1998) (finding “gender exerts a substantial influence, though secondary to ideology, on legislators’ votes on



nurture, their political behavior is often nonetheless distinguishable from that of men<sup>20</sup>—and that is the important point for the purposes of the current Article.

If women in politics are not a mere replication of men in politics, then we have been missing *something* by never electing a woman as our leader. This might be a different style of leadership or management,<sup>21</sup> a different set of beliefs, attitudes, or understandings, a different vocabulary or analytical perspective, a different collection of life experiences or outlooks. This is of course a richly developed—if contested—element of feminist literature. As cultural feminists have demonstrated extensively, women can be shown to share a distinct set of ethical and conceptual categories and sensibilities that have been missing from public life for too long.<sup>22</sup> Although espousing a competing narrative of women's liberation, power (“radical”) feminism has also insisted as much, in its claim that the subordination of women has effectively precluded the elocution of an independently female voice in public (and private) life.<sup>23</sup> Even those critical of the idea of a distinct female “voice,” seeing in it an anachronistic reification of gender roles and stereotypes,<sup>24</sup> cannot deny the liberating (to liberal feminists) or destabilizing (to postmodern feminists) force of having women hold “men’s” positions and make “male” choices, including ones detrimental to women, such as going to war or cutting welfare payments.

Whatever feminist (or nonfeminist) position one takes, the fact is that we do not know what a “female presidency” means in the U.S. since it has never been tried. It might be distinguishable in consistent, impactful ways from a “male presidency,” and it might turn out to be significant in diverse and contradictory ways. We

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women’s issues”) with Dixon, *supra* note 18, at 334 (claiming “there is, in fact, no female-feminist jurisprudential correlation”).

20. For a review of indicative literature, see Richard L. Ogmundson, *Does it Matter if Women, Minorities and Gays Govern?: New Data Concerning an Old Question*, 30 CAN. J. SOC. 315, 316 (2005) (stating “females in authority positions differ from males in both their attitudes and their behaviour.”).

21. See, e.g., Alice H. Eagly & Mary C. Johannesen-Schmidt, *The Leadership Styles of Women and Men*, 57 J. SOC. ISSUES 781, 794–95 (2001).

22. For some of the most famous pronouncements, see CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT 2 (1982); ROBIN WEST, CARING FOR JUSTICE 5–6 (1997).

23. See CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 45 (1987) (stating “I say, give women equal power in social life. Let what we say matter, then we will discourse on questions of morality. Take your foot off our necks, then we will hear in what tongue women speak.”).

24. See, e.g., *id.* at 39 (claiming “[w]omen value care because men have valued us according to the care we give them, . . . [w]omen think in relational terms because our existence is defined in relation to men. . . . [T]he damage of sexism is real, and reifying that into differences is an insult to our possibilities.”).

have good reasons to believe that such a thing exists though, and therefore it ought to become part of a nation's collective life story as a republican democracy, if it is to finally fulfill its egalitarian and pluralist ideals of membership and leadership. Some people would surely learn to value and appreciate the political possibilities revealed by female presidents; just as others are likely to prefer the male alternative after all. The current Article takes no stake in that question—it just accepts as its premise that it is a question we ought to finally explore through politics.

## II. THE NEXT FORTY PRESIDENTS

### A. *The Model*

Under the “forty female presidents rule,” no men would be allowed on the ballot for the next forty presidencies, from hereon and for several generations—basically replicating the status of women in presidential elections since independence to the very near past, *de jure* or *de facto*.

Why forty? First, because this is a catchy proximate to the number of male presidents the U.S. has elected since George Washington. The exact number is forty-five, but “the forty-five female presidents rule” lacks the elegance and brevity of the round-numbered title, and since part of the project—if it ever came to political mobilization—will have to gain public appeal, aesthetics matter (to some extent). In addition, the last four or five presidential cycles have arguably already begun to relax some of the systemic biases entrenched in the electoral process and in the executives it has generated—with the election of an African American president, the presidential candidacy of a woman in a major party, the nomination of a Jewish senator and a female governor to major-party vice-presidential candidacies, and the non-trivial primary campaigns and cabinet and judicial appointments of other women and members of minorities. We can therefore treat these last several administrations as a transition period, laying the ground for the full gendered reform of the next forty presidencies.

Still, there is no sanctity in the number forty, and one can imagine a shorter—but long enough—period of exclusively female presidencies that would achieve most of the goals of the proposed reform. The exact extent of the project could therefore be calibrated on the go, contingent primarily on the achievement of a sufficient diversity of women presidents over the years, in terms of ideology, party affiliation, background, and intersectionality (i.e., representation of other identity groups).

The idea of reserving certain seats or positions, even in democratically elected bodies, for members of specific identity groups, is not new. Other countries have done so openly, usually for one of two reasons: to secure some degree of representation for women (and sometimes other minorities), notably in developing countries with traditionally patriarchal political cultures (e.g., Afghanistan, Algeria, Bangladesh, China, Iraq, Jordan, Kenya, Morocco, Niger, Pakistan, Saudi Arabia, Uganda);<sup>25</sup> or to preserve an intergroup balance of power in a multicultural setting, from token assurances of representation (e.g., Croatia, Slovenia)<sup>26</sup> to structured arrangements of consociational power-sharing (e.g., Belgium, Bosnia and Herzegovina, Burundi, Lebanon).<sup>27</sup> Informally, this has become a consistently followed practice in the U.S. and other countries in such areas as judicial and ministerial positions, some of which are reserved to appointees of specific group affiliations, more or less explicitly: it is, for example, difficult today to seriously imagine an all-white, let alone an all-male, appointed court or cabinet.

What is unique about the forty female presidents model, however, is that it is not about representation within a collegial body or a class of public officials. Rather, it is directed at occupying a single elected office which *cannot be shared*, at least not contemporaneously. If the reform is adopted, therefore, and assuming no other change is made in the relevant constitutional (and biological) fabric, this would mean that for the next 160–320 years (depending on single- or double-term tenures), the U.S. will only have women presidents. That is a good thing, and below I explain why.

## *B. Justifications*

### *1. Justice for Women, Corrective and Affirmative*

For over two centuries, legal, institutional, economic, and cultural barriers have intentionally and effectively foreclosed the possibility of a woman's election to the Office of the President of the United

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25. See *Gender quotas around the world*, QUOTA DATABASE, <http://www.quotaproject.org> [<http://perma.cc/2X2Y-9VAY>]. These countries have legislated quantitative quotas for seats for women in parliament. See also Aili Mari Tripp & Alice Kang, *The Global Impact of Quotas: On the Fast Track to Increased Female Legislative Representation*, 41 COMP. POL. STUD. 338, 338 (2008) (describing the significant achievements to women's political representation that have resulted from the burgeoning use of parliamentary gender quotas).

26. *Gender quotas around the world*, *supra* note 25.

27. See Mona Lena Krook & Diana Z. O'Brien, *The Politics of Group Representation: Quotas for Women and Minorities Worldwide*, 42 COMP. POL. 253, 257–58 (2010) (reviewing state-mandated quotas for minorities in single or lower houses of parliament).

States and, for most of that time, the possibility of a woman's serious candidacy to the Office as well. It is fair to assume that not many people today still think this is a morally defensible state of affairs, nor that it was objectively justifiable at any time in the past (even if we can rationally relate to why some people might have thought so in earlier generations). To the extent that there are people who still support such a policy,<sup>28</sup> this Article is not meant for them. If, however, you believe that not allowing women to become presidents—as, of course, a host of other public offices, though they are not the focus here—is unjustified, then you must agree that all women have been subjected for generations to an egregiously discriminatory wrong, which warrants correction.

The first and immediate way to correct the wrong is to stop it, that is, to prevent it from carrying into the future. Many decades of fights for women's franchise and civil and economic equality, in addition to other changes in cultural and social norms, seem to be getting us closer to that point. The election of a woman as president seems today an actual possibility, at least one not completely foreclosed by discriminatory structures. Women in the U.S. today serve with relative regularity as governors, senators, cabinet ministers, Supreme Court justices, university presidents, and chief officers of corporations. This is of course not to say that gender discrimination and the gaps it begets in income, status, and well-being are relics of the past—none of these roles are held in equal measures by members of both genders, and many institutions like banks, churches, and the military are still far behind in positioning women in high-ranking offices.<sup>29</sup> It does tell us, however, that the political sphere can today fathom a woman president—an idea completely unrealistic just a few decades ago.

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28. See Dominique Mosbergen, *Female CEO Says Women 'Shouldn't Be President' Because Of 'Different Hormones,' 'Biblical Reasoning,'* HUFFINGTON POST (Apr. 15, 2015), [http://www.huffingtonpost.com/2015/04/15/ceo-women-shouldnt-be-president-cheryl-rios\\_n\\_7067564.html](http://www.huffingtonpost.com/2015/04/15/ceo-women-shouldnt-be-president-cheryl-rios_n_7067564.html) [<http://perma.cc/ENF7-K8PV>]. Individual sensibilities notwithstanding, some conservative religious traditions:

[S]uch as Catholicism, conservative Protestantism, Orthodox Judaism, Mormonism, and some sects of Islam, . . . promote strict gender relationships based on male headship and women's submission. These religions tend to emphasize ontological differences between men and women, noting that men are predisposed to leadership, activity, and a strong work ethic, while women are naturally nurturing, passive, and receptive.

Kelsy C. Burke, *Women's Agency in Gender-Traditional Religions: A Review of Four Approaches*, 6 SOC. COMPASS 122, 122 (2012).

29. For comparative data on such persisting disparities in the post-industrialized world, see, e.g., *Gender wage gap*, OECD, <http://www.oecd.org/gender/data/gender-wage-gap.htm> [<http://perma.cc/5XQA-FBK2>]; *Share of employed who are managers, by sex*, OECD, <http://www.oecd.org/gender/data/employed-who-are-managers-by-sex.htm> [<http://perma.cc/4WWC-P3MA>].

Making institutions eliminate a discriminatory policy only prevents the wrongs of the future, though; it does not correct the wrongs of the past. The injuries imposed on generations of women due to the elimination of access to the highest political office in the land still stand, and call for rectification. These are the harms to women who sought, or wanted to seek, election but were denied the possibility to do so through formal exclusions or other means of social ordering; women who would have sought political careers but whose ambitions were curtailed by the prevailing norms against female leadership; and women who sought to identify in the presidency and experience the civic bond it is supposed to offer to its subjects, but could not do so because they knew this office excludes them and all of the other members of their gender group.<sup>30</sup> Of course, most of those women of past generations cannot enjoy the reparatory benefits of any corrective measure, rather it would be distributed to the future members of their identity group. While it does not make the harm whole, the demand from society to compensate for it—in a way that would repair the damage done looking forward—is nonetheless just.

There is no need to belabor the point. The arguments in support of compensatory entitlements for current members of groups that have in the past been subject to systemic legal, political, cultural, or economic subjugation have been hashed in detail in the literature.<sup>31</sup> Such entitlements can come in diverse forms such as monetary reparations,<sup>32</sup> territorial spheres of self-rule,<sup>33</sup> and affirmative action in the access to public resources and positions.<sup>34</sup> The consistent exclusion of

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30. Notably, I am not considering here the harm to women who wanted to *vote* for a woman but could not, or wanted to identify with a woman president. These are costs incurred not only by women, and will be tended to below. *See infra* Section II.B.2. The point here is the message of exclusion, which was uniquely directed against women, not men.

31. *See, e.g.*, David Lyons, *Corrective Justice, Equal Opportunity, and the Legacy of Slavery and Jim Crow*, 84 B.U. L. REV. 1375, 1376–77 (2004) (suggesting, under a corrective justice moral paradigm, a National Rectification Project that would seek to erase the remaining structural results of past racial injustices); Margaret Urban Walker, *Restorative Justice and Reparations*, 37 J. SOC. PHIL. 377, 377–79 (2006) (locating the justifiability and feasibility of compensatory mechanisms in the analytical context of restorative, rather than corrective, justice). For a critique of the perception that past wrongs invoke continuing entitlements that can and should be remedied by current generations, *see* Jeremy Waldron, *Redressing Historic Injustice*, 52 U. TORONTO L.J. 135, 143 (2002).

32. *See, e.g.*, Thomas McCarthy, *Coming to Terms with Our Past, Part II: On the Morality and Politics of Reparations for Slavery*, 32 POL. THEORY 750, 750 (2004); Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631> [<http://perma.cc/UE8V-C8ZV>].

33. *See, e.g.*, Tamar Meisels, *Can Corrective Justice Ground Claims to Territory?*, 11 J. POL. PHIL. 65, 65 (2003); Douglas Sanderson, *Redressing the Right Wrong: The Argument from Corrective Justice*, 62 U. TORONTO L.J. 93, 93 (2012).

34. *See, e.g.*, GERTRUDE EZORSKY, RACISM AND JUSTICE: THE CASE FOR AFFIRMATIVE ACTION 1 (1991); RACE AND REPRESENTATION: AFFIRMATIVE ACTION 9 (Robert Post &

women from public office, and more specifically from the highest executive office in the land, surely falls within this scope of the wrongs that would invoke a corrective entitlement, and I follow the existing justifications for such measures. At the same time, we should not overstate the extent of the harm imposed upon women *qua women* due to their generations-long exclusion from the presidency. Women have been subject to much harsher forms of subjugation than the inaccessibility of presidential office—in the biased and discriminatory institutional design, governance, and legal regulation of politics, markets, and families, and in the cultures of sex and subordination that have underlined these social constructs. Not being able to become president was an injustice to women, but it fails even to hint at the extent of gendered injustice embedded in our civilization, and so the argument for the forty female presidents rule cannot rely on this argument alone.

Thus, while the exclusion of women from the presidency was first and foremost an injustice to women, I turn below to focus on arguments that have to do with general injustices, that is, with the harms imposed on the body politic *as a whole* as a result of the exclusion of women. I believe that in this context the argument for the forty female presidents rule holds the most currency.

## 2. *Fairness to the Governed*

The effective exclusion of women from the presidency means that, for generations, Americans have been denied the possibility of being led (politically) by a woman. This has been a social loss for both rights-based and instrumentalist reasons; I detail each below.

### a. *Voting as Autonomy*

One of the cornerstones of membership in a democratic political community—of equal citizenship—is the right to participate freely in the election of the representatives that would govern the polity. Indeed, access to the electoral process is often defined as a “fundamental” right in a democracy,<sup>35</sup> since it is in the periodic freedom to vote for or against our representatives and leaders that we iterate our political membership and sustain the exercise of self-rule and

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Michael Rogin eds., 1998); Owen M. Fiss, *Affirmative Action as a Strategy of Justice*, 17 PHIL. & PUB. POL'Y 37, 37 (1997); Cass R. Sunstein, *Affirmative Action, Caste, and Cultural Comparisons*, 97 MICH. L. REV. 1311, 1311 (1999).

35. See, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 667 (1966); Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 145 (2008).

government by consent.<sup>36</sup> This means that democracy cannot deny members of their right to vote, and exceptions can be accepted only due to a weighty public interest, like the exclusion of the yet-uninformed opinions of minors, or, more controversially, those of criminal convicts.<sup>37</sup> Discounts and exclusions based on race and gender have therefore been set aside in past generations, as equal citizenship became true to its name, and implicit exclusionary strategies—e.g., gerrymandering and voter identification laws—are still being negotiated and litigated to this day.<sup>38</sup>

Access to the ballot is of course only one side of a meaningful right to vote. It also has to do with the *availability of actual choice* in election. Being allowed to vote for only a single candidate (with abstentions not counted), for example, hardly amounts to an exercise of free and equal citizenship—as sham elections in autocratic regimes worldwide prove with regularity. A democratic electoral system is required to allow equal access *onto* the ballot, to enable anyone who is willing and capable to run for office to actually do so, and to have an equal chance of getting elected (again, more or less consensual restrictions may apply, e.g., age or criminal background). While this principle is often cast as an individual's right to run for office—emanating from rights to civic equality, freedom of speech, and personal liberty—I focus here on the functional understanding of the right to run for office as a means for fulfilling the meaningful right to vote. Only in a system that accommodates multiple and diverse candidates for election—only where choice is immanent to the electoral process—can one genuinely state that a meaningful right to vote exists.<sup>39</sup>

The argument for significant choice in the election of our representatives is an extension of the familiar argument about the essentiality of choice for autonomy. To be truly autonomous, that is, to have the capacity of self-authorship, of writing your own life story, the argument goes, we must have access to meaningful choice in

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36. See, e.g., Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1338–54 (2011).

37. See, e.g., Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1362–71 (2003).

38. See, e.g., Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 HOW. L.J. 741, 742 (2006). For the latest—certainly not the last—pronouncement of the Supreme Court on redistricting, see *Cooper v. Harris*, 581 U.S. \_\_\_, \*2 (2017). In its October 2017 term it is scheduled to decide a voting registration case: *A. Philip Randolph Institute v. Husted*, 838 F.3d 699 (6th Cir. 2016), cert. granted, 85 U.S.L.W. 3562 (U.S. May 30, 2017) (No. 16-980).

39. See Bernhard Wessels & Hermann Schmitt, *Meaningful choices, political supply, and institutional effectiveness*, 27 ELECTORAL STUD. 19, 20 (2008) (suggesting a method for evaluating the “supply side” of democratic elections based on the existence of a “meaningful choice set” to elect from).

significant life junctures.<sup>40</sup> If our condition—physical, mental, intellectual, or material—precludes the availability of meaningful choice in life-authoring moments, then we can hardly be said to be sufficiently autonomous, even if we are not subject to explicit coercion in the direction of our life. The essentiality of choice for autonomy imposes significant demands upon public institutions that are entrusted, either morally or legally, with the preservation and promotion of individual autonomy. It requires these institutions to recognize or enable significant alternatives for people to choose from or steer among in the central spheres of their lives, such as family, work, education, and community.<sup>41</sup>

Applying this liberal argument to the electoral process extends the autonomy-as-choice theory to a civic-republican context: it suggests that the act of voting should be properly understood as a life-authoring moment for the engaged citizen. In other words, the act of voting is an exercise in autonomy, not merely in citizenship. Citizenship is not only a mode of living socially, but also an added layer in the multiple spheres of self-authorship we engage in throughout our lives. In voting, one not only fulfills a “civic duty,”<sup>42</sup> but also defines and develops his or her own self through deliberation, discretion, and decision regarding one’s social surroundings. This experience should therefore be subject to the same moral requirements invoked by other significant life junctures, including the sustenance of significant choice among sufficiently distinct alternatives.

This degree of sufficient choice has been denied to generations of voters, devoid of the possibility of electing a woman for president, and so their autonomy has been violated.

Of course, the effective exclusion of women from presidential ballots for centuries did not completely eliminate the electorate’s choice. Significantly distinct ideologies have been regularly represented by competing male candidates, and, at least arguably, the election of one male candidate over another has had real impact on the progress and prosperity of the nation, if not the world. This fact in itself, however, does not diminish the harm inflicted to voters’ autonomies for generations due to the foreclosure of the possibility to

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40. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 373 (1986) (stating “[f]or a person to enjoy an autonomous life . . . [t]here must . . . be adequate options available for him to choose from.”).

41. See, e.g., Hanoch Dagan, *Autonomy, Pluralism, and Contract Law Theory*, 76 L. & CONTEMP. PROBS. 19, 27 (2013) (explaining “given the diversity of acceptable human goods from which autonomous people should be able to choose and their distinct constitutive values, the state must recognize a sufficiently diverse set of robust frameworks for people to organize their lives.”).

42. See, e.g., Philip Jones & John Hudson, *Civic Duty and Expressive Voting: Is Virtue its Own Reward?*, 53 KYKLOS 3, 3 (2000).



vote for women. Robbed of the possibility to vote for a woman candidate, voters have been denied a set of significant choices that could, and likely would, have been available to them without the gendered exclusion. They had the capacity to choose, but the choice presented to them, if not completely sham, was tainted by patriarchal manipulation. Voters did not get to consider the possible costs and benefits of the presidency of any single woman, nor of the notion of a “female presidency” as a whole. People’s capacity to define their beliefs and preferences, and to act upon them, with regard to a large set of viable leadership options, has been curtailed. Their autonomous selves, realized through voting, were significantly diminished.

*b. Selection Effects*

The exclusion of women as presidential candidates also meant that the group of people that has constituted the country’s pool of potential presidents has always been seriously limited. Of the individuals ostensibly capable of serving as president, an enormous share was blocked from accessing the office. This means that the U.S. polity has necessarily missed out on some good candidates and, indeed, some good presidents. Furthermore, over the course of more than two centuries, it is likely that some of the excluded potential candidates would have been better presidents than the ones elected, and that some of these better candidates were also likely to have been elected. Due to the exclusion of women from the presidency, the average quality of the U.S. Chief Executive has therefore been diminished—the country missed out on some good presidents, some better than the ones it got.

This is a familiar social cost associated with discriminatory exclusions in any context: if we fail to enable persons with disabilities to physically access schools or workplaces, if we fail to enable parents to bearably balance their home and work responsibilities, if we dismiss LGBT servicemembers from the military—we are effectively lowering the quality of our institutions and compromising their potential productivity. In the context of the presidency one might argue that the social cost is even more considerable, since successful political leadership has to do—at least to some degree—with the diversity of the human condition and an understanding of the life experiences of the governed. While of course any individual president cannot channel the diverse experiences and conditions of all the groups and classes in society, on average, over generations, we should expect an elected office to do just that, and we should count the inclusiveness of this channeling function as a measure of

success of the presidency. Without women presidents, the possibility of inclusiveness is off the table.

True, typical eligibility-for-office rules often exclude large groups, some of whose members could potentially be better candidates than the ones allowed on the ballot. The U.S. Constitution lets only “natural born Citizen[s]” who are thirty-five years or older serve as president.<sup>43</sup> Clearly, many naturalized immigrants, and many younger Americans, are likely to be highly qualified to serve as president, indeed more so than some of the men who have held the job under the existing rule, and maybe even thanks to the existing rule (since they might have had to run against, and could have possibly lost to, some of the better candidates excluded by the Constitution). There are reasons to question both the wisdom and legitimacy of such rules, which are basically paternalistic means of precluding us from voting for people, who are perhaps less likely on average to be good presidents, through the use of a blunt proxy mechanism.<sup>44</sup> At the same time, such rules at least try to reflect a rational view of presidential qualifications. In other words, they assume—correctly or not—that the social cost incurred by losing some good candidates is worth the benefit of excluding some characteristics that are, on average, likely to be inadequate for the office of the presidency. All of this, of course, is irrelevant to the class of women, whose exclusion from presidency imposes only social costs with no social benefits.

So due to the effective exclusion of women from the presidency, the pool of candidates was significantly curtailed, making us miss some potentially good presidents, and some likely better presidents than the ones we had, for no defensible reason. The thing that was taken from the citizens of the U.S.—the right to live in a country whose president is a woman—ought to be given back, not only as a remedy for violating individuals’ rights as free and autonomous voters, but also so that they get to enjoy in their future presidents the life experiences of women and all that they bring to leadership. One way to fulfill both ends is to decide that from now on, and for several generations to come, presidents will be only women.

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43. U.S. CONST. art. II, § 1, cl. 5.

44. For a history and a critique of the rule, see Lawrence Friedman, *An Idea Whose Time Has Come—The Curious History, Uncertain Effect, and Need for Amendment of the “Natural Born Citizen” Requirement for the Presidency*, 52 ST. LOUIS U. L.J. 137, 139–40 (2007); Jill A. Pryor, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 YALE L.J. 881, 885–88 (1988). On the age limit, see Anthony D’Amato, *Aspects of Deconstruction: The “Easy Case” of the Under-Aged President*, 84 NW. U. L. REV. 250, 250–52 (1989); Stanley Fish, *Still Wrong After All These Years*, 6 L. & PHIL. 401, 403–05 (1987).

### 3. *Quality Voting, Relieved of Some Identity Politics*

In his Republican primary victory speech, Donald Trump notoriously said about his democratic rival that “if Hillary Clinton were a man, I don’t think she’d get 5 percent of the vote. The only thing she’s got going is the women’s card. . . . And the beautiful thing is, women don’t like her.”<sup>45</sup> Trump was mocking Clinton for poorly playing the identity politics of gender—for trying (unsuccessfully, by his account) to get people, and specifically women, to vote for her *because she is a woman*, and not because of any specific qualification, characteristic, or ideology she might have possessed. Intentionally or not, he was also mocking the multitudes who had voted for Clinton in the Democratic primaries (and who would vote for her in the general election), implying that they make their political choices not according to the merit or worth of the candidate, but rather by following some irrational sense of class kinship or affinity, in this case, aligned by gender.

At the same time, the deflating nature of the campaign strategy hinted by Trump’s statement—attack the person, not the issues—should not distract us from the well-documented reality that many people do in fact vote according to class affinities (elect the candidate who is like you according to some identity measure—gender, race, class, religion, ethnicity, education, income, life experiences). Others take the group identity of a candidate to be a significant consideration in their decision-making process when choosing a candidate to vote for (it is important that we have a president who is a member of a gender, race, class, etc. group).<sup>46</sup> In other words, identity politics is a real thing, and it carries significant force in electoral dynamics, especially ones so focused on person and personality—arguably, none more so than presidential elections.

Electoral identity politics can have a redeeming social potential in some contexts. To begin with, identity politics can raise public awareness to important social injustices of class, gender, and race.

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45. Jose A. DelReal & Anne Gearan, *Trump: If Clinton ‘were a man, I don’t think she’d get 5 percent of the vote,’* WASH. POST (Apr. 27, 2016), [https://www.washingtonpost.com/news/post-politics/wp/2016/04/27/trump-if-clinton-were-a-man-i-don-t-think-shed-get-5-percent-of-the-vote/?utm\\_term=.c0254ef17780](https://www.washingtonpost.com/news/post-politics/wp/2016/04/27/trump-if-clinton-were-a-man-i-don-t-think-shed-get-5-percent-of-the-vote/?utm_term=.c0254ef17780) [http://perma.cc/QQ4M-WUDC].

46. See, e.g., Kathleen Dolan, *Voting for Women in the “Year of the Woman,”* 42 AM. J. POL. SCI. 272, 273 (1998); Eric Plutzer & John F. Zipp, *Identity Politics, Partisanship, and Voting for Women Candidates*, 60 PUB. OP. Q. 30, 50 (1996); Michael C. Herron & Jasjeet S. Sekhon, *Black Candidates and Black Voters: Assessing the Impact of Candidate Race on Uncounted Vote Rates*, 67 J. POL. 154, 155 (2005); Atiya Kai Stokes-Brown, *Racial Identity and Latino Vote Choice*, 34 AM. POL. RES. 627, 628 (2006); Katherine Tate, *The Political Representation of Blacks in Congress: Does Race Matter?*, 26 LEG. STUD. Q. 623, 627 (2001).

Group identity is real; it is genuinely and intensely experienced by many people, both as a defining element in one's own life story and as a distinguishing factor vis-à-vis non-members.<sup>47</sup> Given that group membership is central to so many of the injustices inflicted by governments and majorities on those subject to their power, tapping identity as a resource for political energy can often support socially progressive forces, both by setting agendas and consciousness, and by galvanizing group agency and action.

Going beyond the interest of the specific group, the public interest in an engaged polity can also be served by exploiting the power of identity: one way to get a disinterested electorate to re-engage the civic sphere and be involved in political action is to propose a candidate with whom members of the group can identify, engendering trust in a system that has enabled someone "like me" to reach that position, as well as instilling hope in one's own potential of "getting there."<sup>48</sup> The 2008 and 2012 peaks in African American voter turnout, compared to previous decades of presidential elections,<sup>49</sup> are widely understood as one of the collateral social benefits of Barack Obama's candidacy: pulling voters, disenfranchised for generations (*de jure* or *de facto*), back into the fold of civic engagement and incentivizing them to take a stake in the political choices of the constituency.<sup>50</sup>

Still, as has been argued extensively by its many critics, identity politics also poses risks to democracy. If it takes precedence over

47. See, e.g., Nancy Fraser, Lecture on Human Values at Stanford University: Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation (May 2, 1996), [https://tannerlectures.utah.edu/\\_documents/a-to-z/ff/Fraser98.pdf](https://tannerlectures.utah.edu/_documents/a-to-z/ff/Fraser98.pdf) [<http://perma.cc/BHA4-3DDA>]; Martha Minow, *Identities*, 3 YALE J.L. & HUMAN. 97, 112 (1991).

48. For an illustrative review of such literature, see Tasha S. Philpot et al., *Winning the Race: Black Voter Turnout in the 2008 Presidential Election*, 73 PUB. OP. Q. 995, 999–1002 (2009).

49. See THOM FILE, U.S. CENSUS BUREAU, THE DIVERSIFYING ELECTORATE—VOTING RATES BY RACE AND HISPANIC ORIGIN IN 2012 (AND OTHER RECENT ELECTIONS) (2013), <https://www.census.gov/prod/2013pubs/p20-568.pdf> [<http://perma.cc/FE87-KJPV>]; Alan Flippen, *Black Turnout in 1964, and Beyond*, N.Y. TIMES (Oct. 16, 2014), <https://www.nytimes.com/2014/10/17/upshot/black-turnout-in-1964-and-beyond.html> [<http://perma.cc/5UYD-3PET>]; MARK HUGO LOPEZ & PAUL TAYLOR, PEW RESEARCH CTR., DISSECTING THE 2008 ELECTORATE: MOST DIVERSE IN U.S. HISTORY (Apr. 30, 2009), <http://assets.pewresearch.org/wp-content/uploads/sites/7/reports/108.pdf> [<http://perma.cc/D2W9-D69A>].

50. See, e.g., Jennifer L. Merolla et al., *Descriptive Representation, Political Efficacy, and African Americans in the 2008 Presidential Election*, 34 POL. PSYCHOL. 863, 872 (2013) (finding "evidence that having a descriptive representative at the national level increases feelings of political efficacy."). The story gets more complicated, on multiple axes. The fact of Obama's racial identity galvanized not only African American voters, but also affected the choices of white voters, see, e.g., Ray Block Jr., *Backing Barack Because He's Black: Racially Motivated Voting in the 2008 Election*, 92 SOC. SCI. Q. 423, 438 (2011), and other factors—apart from the candidate's racial identity—also worked to enhance African American turnout, see, e.g., Philpot et al., *supra* note 48, at 1002 (stressing the effect of party mobilization on participation).

other political forces in the determination of an election, it risks undermining the republican ideal of the citizen as an agent of a shared common good, who reaps benefits from political membership that transcends the affiliations of group identity, and who is willing to shed (some of) her group-identitarian commitments when making choices that pertain to matters of general welfare.<sup>51</sup> In addition, the quality of voting—measured in the extent of rational consideration of the alternatives and possible outcomes and its impact on the choice made at the ballot<sup>52</sup>—can drop if people choose according to group affiliation rather than (their understanding of) the ideas, ideologies, and qualifications of the candidates. Further, when identity politics are the focus on the electoral campaign, it is harder to get voters to exercise deliberative modes of democratic engagement—seeking to exchange views and beliefs with members of other groups and to enrich one’s set of preferences by taking into account additional points of view. The stronger the identitarian pull on electoral politics, the more difficult it becomes to engender cross-group coalitions that might defy the distinctions of class and party orthodoxies. Again, the potential for an engaged and informed voting process might be curtailed.

Thus, from a (small ‘d’) democratic, as well as a (small ‘r’) republican, point of view, the argument that a voter (female or otherwise) should vote for a female presidential candidate *just because she is a woman* should be rejected. Even if women candidates are on average more likely than men candidates to support policies that favor women’s interests<sup>53</sup>—a questionable assumption, as I pointed out above—and even if “feminist issues” were the single most salient factor in choosing a candidate, it would still be possible for a given female candidate to be “less feminist” than a given male candidate.

True, a feminist voter might rationally decide to treat election cycles as a repeat game, in which she employs a steady heuristic: “always vote for the woman.” Assuming (again, not realistically) that women appear regularly on presidential tickets, and that our feminist voter regularly belongs to the prevailing majority, this might lead over time to the election of more feminist presidents, on average.

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51. See, e.g., AMY GUTMANN, *IDENTITY IN DEMOCRACY* 7–36 (2003).

52. For evidence that voters are capable of making quality choices, in the sense of putting social motivations ahead of immediate personal gains, see Aaron Edlin et al., *Voting as a Rational Choice: Why and How People Vote To Improve the Well-Being of Others*, 19 *RATIONALITY & SOC’Y* 293, 303–04 (2007). For a critique of the democratic assumption that voters are capable of making sound choices on economic policy, see BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* 2–3 (2008).

53. See Tiffany D. Barnes & Erin C. Cassese, *American Party Women: A Look at the Gender Gap within Parties*, 70 *POL. RES. Q.* 127, 128 (2017).

Most of us do not treat presidential voting as a strategic game that spans multiple rounds played once every four years though. Rather, we try to elect the best president we can have at any given time, and justifiably so: the stakes are simply too high. Under this premise, it does seem irrational to choose a president based on nothing but his or her identity group affiliation, without considering other substantive qualifications. Indeed, in some sense it degrades the voter herself, for it requires her to suspend her ability to exercise judgment and instead to act as a “counted head” in the mobilization of a group that transcends the individual.

One way we can resolve the challenge presented by the understandable pull of identity politics and its detrimental impact on rational, quality voting is to diminish the identitarian element involved in the election. In some sense, during the centuries-long era dominated by white male presidential candidates, this was the case: the gender, race, and religion of the candidates were all “non-issues,” since no one seriously questioned the discriminatory norms they reflected, and so voters were able to focus on other, arguably more substantive, qualifications of those running for office. Ironically, the democratizing process that opened up the political field to a diversity of newcomers—non-male, non-white candidates—has at the same time invoked the risk of group cascades trumping individual discretion and diminishing the rational quality of voting. The forty female presidents rule would eliminate at least part of this dynamic, by excluding the “just because she is a woman” factor from the choice process of voters. It would do so, however, not by cynically imagining an election that is “gender blind,” but rather by re-homogenizing the electoral field (in terms of gender), only this time with the formerly excluded having the full chance of being elected.

Of course, members of other groups would still be subject to the existing forces that counter rational, identity-independent evaluation of candidates. In a contest between two women candidates, one black and the other white, race would still be a deciding factor for some voters, regardless of merit or qualification. At least one, and arguably the most salient, aspect of presidential identity politics, however, would be put again off the table for the foreseeable future.

### *C. Summary*

Once we start thinking in terms of overall, over-time systemic justice, rather than here-and-now individual justice, the argument for the forty female presidents rule takes on an intuitive appeal. Assume we kept holding into the future normal, fair, and gender-neutral elections—elections of the kind that, let’s assume, enabled Hillary

Clinton to reach the top of a major party ticket even when opposed by a male presidential candidate. Assume further that women happen to get elected as president with regularity for the next forty election cycles, even with men competing as well. It should be very difficult for anyone to argue conscientiously that something is “wrong” with an electoral system that keeps producing female winners, especially given what we know about the past electoral cycles. In other words, the fact of consistent female presidencies *in itself* does not raise any justifiable objection; just as the fact that in the past women were effectively excluded from presidential politics should not affect the moral evaluation and possible admiration of the individual men who have served in that position (of course, that evaluation would also extend to their roles in perpetuating the exclusion of women).

Given, therefore, that we would not be harmed in any moral or functional way by the mere *result* of having only women as presidents, and given that we have had an (undue) exclusivity of men defining the position of president to this day, it makes sense to let the system run for a while on the alternative. Existing assumptions and entrenched institutional forces will get a chance to recalibrate, but not in a mere adjustment to a single “newcomer.” Rather, with the full structural impact of a deep change in institutional realities. This kind of recalibration requires some institutional stability and foreseeability to become evidently necessary and indeed worthwhile: it cannot hinge on the political ebbs and flows of the four-year electoral cycle. To be able to arrive at a genuinely egalitarian equilibrium, the system of government will first have to learn what it means to have a female president. This can only be done over the span of multiple presidencies, since (as noted before) different women will govern differently, and they will get to do so because they will be elected *not* merely for being women, but because their different political programs will win the day in diverse electoral cycles. Only the accumulated experiences of generations of people governed by such different women will be able to fully express in their institutional formations the implications of gender difference on governance. In short, we know a lot about what it means to be governed by men; to know what it means to be governed by women we must *be governed* by women; there is no shortcut. The forty female presidents rule is the means to accessing that valuable knowledge.

### III. REJOINDERS AND REPLIES

Here I consider some of the possible critiques to the forty female presidents rule. I try to tackle the ones that seem to me the most

viable or challenging, as well as some that are not as strong but are likely to be invoked in any debate of the matter and therefore require a reply. Of course, the forty female presidents rule is hard to swallow (at least at first), let alone make a reality, given existing political and constitutional facts of American life, and some of the objections are significant. The purpose of this Part however is not to establish the model's ultimate superiority or immediate feasibility over all other mechanisms of electoral justice. Rather it is to highlight through discussion some of its virtues, and to open up the field for more nuanced reforms that would track its fundamental justifications.

The discussion consists of two parts. The first tackles external critiques: moral objections to the core of the argument—notably, the idea that men should not be allowed to run for president, for a significant period into the future. The second confronts internal critiques: challenges to the logical integrity of the argument, namely that if it is to hold, then it should not limit itself either to women alone, or to presidential politics alone.

#### A. *External Critiques*

##### 1. *Correcting One Injustice with Another*

The first and perhaps most forceful rejoinder to the forty female presidents rule closely echoes the familiar critique against affirmative action more generally: the fact that women were excluded in the past from the presidency does not justify inflicting the same injustice on present and future men, as well as on future voters who might be interested in voting for men, all of whom bear no individual culpability for bygone practices of gender discrimination. Excluding men from the presidency for the next century or two, the critique goes, would send the boys and men of the future many of the similar disparaging messages women were exposed to in generations back: you are not welcome as our leaders; please adjust your aspirations accordingly. It would penalize a class of individuals for an evil they did not commit.

This critique is essentially correct, and like in the section above setting out the argument for the forty female presidents rule, I do not intend to tackle it fully. The debate over the morality of affirmative action is well-trodden and does not require rehashing here. To support the kind of reform envisaged in this Article, one has to share, at least to a certain extent, a sensibility that accepts the legitimacy of strategies of affirmative action like the ones employed today regularly by educational and other institutions, with varying



degrees of support from the Supreme Court.<sup>54</sup> The gist of the point is that correcting some past injustices could indeed be such a commanding social interest (or, in doctrinal terms, an overly compelling state interest), that innocent people may justifiably be asked to shoulder the burden of the corrective policy as an expression of their commitment to membership in a society striving to moral ends.<sup>55</sup>

True, the suggested model goes far beyond what is today accepted affirmative action practice—namely, taking group identity into account as a factor in the distribution of finite resources—in its insistence on membership in the disenfranchised group as a necessary condition for access to the good. As will be discussed in more detail below, in the context of the presidency, the wrong inflicted on those excluded is of a uniquely limited nature, compared to other contexts of affirmative action: unlike the typical education or employment setting, the exclusion here is not from some finite public resource that would normally be generally accessible, but rather from a post we all have an infinitesimally low chance of acquiring, regardless of the design of the electoral process. The primary harm caused to men by the forty female presidents rule has to do therefore with the dispiriting message it can be thought to project as to the worth of men as leaders. This harm, though not inconsequential, can be mitigated through education and explanation of the policy's justifications—its egalitarian foundations, its compensatory justness, and the social benefits it is expected to generate. Further, in contrast to the message sent to women during their era of exclusion, men are assured from the get-go that they will regain the chance to vie for the presidency in due time: their exclusion is temporary (if extended), and does not reflect a degrading view of their incapacity to lead.

Still, continues the critique, we have worked so hard for generations to reach this current blissful point, in which a woman (and before that, an African American) can become a viable presidential candidate: we should just let the game be played fairly, now that the playing field has finally been leveled. We may have already arrived at the egalitarian ideal to which we should strive. We should not embark instead on a centuries-long process of score-setting through wholesale arbitrary exclusion.

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54. Compare *Fisher v. Univ. of Tex.*, 579 U.S. \_\_\_, slip. op. at 19 (2016) (upholding a university's racial diversity policy in undergraduate admission) with *Ricci v. DeStefano*, 557 U.S. 557, 593 (2009) (striking down a city's decision to invalidate the results of a firefighters' promotion test because it failed to qualify any black firefighters).

55. See ALAN H. GOLDMAN, *JUSTICE AND REVERSE DISCRIMINATION* 165 (1979) (suggesting "short-run violations of the rule [of competence] are justified to create a more just distribution of benefits by applying the rule itself in future years."). For a general canvas of the debate, see Louis P. Pojman, *The Moral Status of Affirmative Action*, 6 PUB. AFF. Q. 181, 190–98 (1992).

The need to correct the past exclusion of women from the presidency, however, is too fundamental to be remedied through the fortuitous results of future elections. If what we seek is to expose society to the reality of the female presidency, then this can only be done through a prolonged, systematic process that would enable the election of diverse (female) presidents from different parties and of different ideologies and life experiences. It does not have to be forty—we might get there with fewer numbers—but a multitude is necessary. Further, we must eliminate the possibility of penalizing female candidates for the failures, or even successes, of previous women that have held the post—a discriminatory tendency that is a familiar reaction to the average performance of newcomer classes in bastions of old elites, like corporate management, military command, or governmental politics.<sup>56</sup>

Relying on the progress already achieved, without a more rigorous corrective policy, would also unduly discount the impact of moral licensing and tokenism of people's choices. The human tendency to allow oneself to be prejudiced following a nonprejudiced act—in other words, to reward oneself for “good” behavior with a license to act “badly”—is well-documented in behavioral research.<sup>57</sup> Thus it is likely to appear that some voters, after casting a ballot in favor of a woman candidate, would feel relieved to go back to the old and familiar practice of voting for men.<sup>58</sup> Ironically, having a woman actually elected president could even exacerbate the effect, as the existence of a female president could be treated as a sufficient token, relieving biased voters of further pressures to keep caring about presidential gender disparities down the road.<sup>59</sup>

Indeed, even though the last election cycle has shown that a woman can be a major party candidate as well as a presidential

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56. See, e.g., Madeline E. Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women's Ascent Up the Organizational Ladder*, 57 J. SOC. ISSUES 657, 671 (2001) (stating “[i]f there is any ambiguity about [women's] competence [in managerial positions], they are likely to be viewed as incompetent, and if their competence is unquestionable, they are apt to be socially rejected.”); Elizabeth J. Parks-Stamm et al., *Motivated to Penalize: Women's Strategic Rejection of Successful Women*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 237, 245 (2008) (concluding “exposure to a woman who has achieved success in a male-dominated work environment, an achievement generally viewed as unattainable by women, can lead to costs in self-evaluation for her fellow women.”).

57. See, e.g., Anna C. Merritt et al., *Moral Self-Licensing: When Being Good Frees Us to Be Bad*, 4 SOC. & PERSONALITY PSYCHOL. COMPASS 344, 354 (2010); Benoît Monin & Dale T. Miller, *Moral Credentials and the Expression of Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 33, 42 (2001).

58. In an analogous effect in the racial context, see, e.g., Daniel A. Effron et al., *Endorsing Obama licenses favoring Whites*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 590, 592 (2009).

59. Cf. Paul Usherwood, *Elizabeth Thompson Butler: A Case of Tokenism*, 11 WOMAN'S ART J. 14, 14 (1990) (providing an example in the context of the art profession).

frontrunner, few believe that this is conclusive evidence to the playing field being leveled, and not merely because Hillary Clinton ended up losing the election. Access to the resources necessary to successfully run for president (financial, political, cultural, institutional, and emotional), as well as the persistent prevalence of latent gender biases in individual choice mechanisms,<sup>60</sup> still favor men considerably and disincentivize women from running.<sup>61</sup> Whether the Clinton candidacy should be measured by its glass-shattering beginning or its poll-defying end is yet to be determined, but it seems fairly safe to predict that if one holds the realities of the current political system constant, most major party candidates, and therefore most presidents, in the coming future are still likely to be men. Suffice it to note the lingering disproportionate representation of men in the circles from which serious presidential candidates still tend to emerge: Congress, cabinet, governorships, military, business, academia, and media.<sup>62</sup>

Very well, says the critique, so we need to institutionalize the election of women as presidents, and accept the price of arbitrary exclusion that comes with it. This could be done in an egalitarian way, for example, by alternating every four or eight years between

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60. See, e.g., Tamar Kricheli-Katz & Tali Regev, *How many cents on the dollar? Women and men in product markets*, 2 SCI. ADVANCES 1, 1 (2016), <http://advances.sciencemag.org/content/2/2/e1500599.full> [<http://perma.cc/5HUG-SMKZ>] (documenting gender disparity, disfavoring women, in the pricing of items sold on eBay).

61. See, e.g., JENNIFER L. LAWLESS & RICHARD L. FOX, IT STILL TAKES A CANDIDATE: WHY WOMEN DON'T RUN FOR OFFICE 161 (2010).

62. "The 19.4 percent of seats (104 of 535) that women hold in the U.S. Congress represents an all-time high. Progress is moving at a snail's pace, however, and if it continues at the current rate of change since 1960, women will not achieve equal representation in Congress until 2117." CYNTHIA HESS ET AL., INST. FOR WOMEN'S POLY RES., THE STATUS OF WOMEN IN THE STATES: 2015—EXECUTIVE SUMMARY 5 (2015), <http://statusofwomendata.org/wp-content/uploads/2015/02/SWS-Exec-Summary-final.pdf> [<http://perma.cc/U7JZ-TKBY>]. In 2015, women occupied 20 of the 100 seats on the U.S. Senate, 84 of 435 seats on the House of Representatives, and six of the 50 state governor positions. *Id.* at 3–5. Of President Trump's 24 cabinet members, four are women. Kate Samuelson, *Women Make up Just 27% of the Trump Administration*, FORTUNE (Mar. 10, 2017), <http://fortune.com/2017/03/10/trump-administration-jobs-women> [<http://perma.cc/XM4A-8TXP>]. Three of the 40 active duty four-star generals in the U.S. military are women, *List of active duty United States four-star officers*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_active\\_duty\\_United\\_States\\_four-star\\_officers#List\\_of\\_designated\\_four-star\\_positions](https://en.wikipedia.org/wiki/List_of_active_duty_United_States_four-star_officers#List_of_designated_four-star_positions) [<http://perma.cc/8WTG-J9WE>], and 32 companies on the Fortune 500 index employ women as CEOs, *These Are the Women CEOs Leading Fortune 500 Companies*, FORTUNE (June 7, 2017), <http://fortune.com/2017/06/07/fortune-500-women-ceos> [<http://perma.cc/LHL4-FQ2A>]. As of 2013, women held 37.5% oftenured positions in U.S. universities. *Women in Academia*, CATALYST (Oct. 20, 2017), [http://www.catalyst.org/knowledge/women-academia#footnoteref28\\_o2tzoS](http://www.catalyst.org/knowledge/women-academia#footnoteref28_o2tzoS) [<http://perma.cc/6VJG-UBPH>]. Finally, as of 2014, "[g]ender inequality exists in print, on television, and online across all media outlets and in all news topics." WOMEN'S MEDIA CENTER, THE STATUS OF WOMEN IN THE U.S. MEDIA 2014 16 (2014), [http://wmc.3cdn.net/2e85f9517dc2bf164e\\_htm62xgan.pdf](http://wmc.3cdn.net/2e85f9517dc2bf164e_htm62xgan.pdf) [<http://perma.cc/WBF8-R2DE>].

electing only men and only women for president. In such a system women would have, with reasonable regularity, the ensured opportunity to run for and be elected president, without having to block men out of the presidency altogether. Such an arrangement would not do. Although it would significantly alleviate two of the major harms of the norm of male-presidency—first by correcting an injustice to women and second by letting the constituency regularly choose among female candidates and be governed by female presidents—such a reform would not tend to the problem of quality voting that results from identity politics. Indeed, we are likely to see electoral politics devolve into two separate cycles—one for women, the other for men. Voters are likely to develop different attitudes to each kind of cycle and to each kind of presidency, expecting different modes of political expression and performance. Consider the analogy of sports, where most competitions are separated by gender, often developing competing ethics, rewards, and fan bases. In order for all voters to be involved in, and committed to, the election of women as presidents, this has to be the only game in town, so to speak. The promise that in four or eight years “my team” will be on display is not a good way to get people engaged in the here-and-now.

## 2. *Loss of Quality Male Candidates*

The second external critique to the forty female presidents rule echoes one of the model’s own justifications: the fact that the exclusion of women from the presidency for so many generations has robbed the American people of a large cadre of potentially quality presidents—all the women that could have been good presidents but could not realistically run for the office or get elected. The reform explored here would similarly deprive us of all the quality male candidates who could potentially be better presidents than the women that would invariably be elected. This is an undeniable social cost. It attaches to any form of exclusion, and is exacerbated the larger the excluded group happens to be—in our case, about half of the population. At the same time, like with the former exclusion of women, there is a mitigating aspect in the fact that the group that is allowed to participate is extremely diverse, so we are still likely to get many different *kinds* of presidents—in terms of party affiliation, ideology, life experiences, and other identity markers (race, religion, sexual orientation, age)—even if they are all women. Again, this is not a solution to the problem of loss of quality candidates, but it makes the cost more bearable, considering the size of the excluded group.

More importantly, only the exclusion of men for some generations will enable us to explore the unique features of the “female

presidency”—to the extent that they exist—through the performance of the variety of individuals that would hold the post. In other words, to know whether and how gender matters in evaluating the quality of a president, we have to engage in a real-life experiment in gender-controlled elections. Since we cannot devise parallel universes in which a man and a woman would face the same leadership challenges and then be evaluated according to their performance, a real-life longitudinal study, so to speak, is the best we can hope for: we have had almost two and a half centuries of male presidents, which should allow us a pretty good picture of the variety of leadership styles and qualities suggested by presidents who are (were) men; let us now see the variety of female performance for a comparable period, and continue from there. Of course, the two cohorts of presidents would serve in very different eras and face very different challenges, but they would still be part of a relatively stable and coherent constitutional system that still draws both institutionally and ideologically from the same founding documents and the expressions of value and sovereignty embedded in them.

### *B. Internal Critiques*

I next consider critiques that are internal to the forty female presidents rule. These critiques are based on an acceptance of the basic moral premise of the model, namely that rules of arbitrary exclusion could be justified in order to correct the kind of harms done by previous exclusion. However, they question the persuasiveness of the boundaries of the model, namely its focus on gender (when exclusion from political participation has extended to many more classes over the generations), and its focus on the presidency (when exclusion from political participation has been the reality in many other elected offices as well).

#### *1. Why Women?*

Put more accurately, the critiques ask “why only women?” or “why women first?” Discrimination and exclusion from political participation have been the share of multiple classes and identity groups over the generations, and it is not clear that women necessarily had the worst of all in this sad competition. Why should they therefore be the beneficiaries of the suggested reform, rather than other historically disenfranchised or chronically under-represented minorities such as Native Americans, African Americans, Mexican Americans,

Asian Americans, Jews, Muslims, or members of the LGBTQ community? What singles out women as the class that most justifies the special treatment suggested by the forty female presidents rule? Further, assuming we accept the suggested model, perhaps we should expect it to replicate all of the other exclusionary aspects that characterized the male-dominated system of previous generations. In other words, perhaps we should expect to see mostly white women from the country's financial, social, and political elites running for and serving as president, like we did with men in the past. If so, the critique goes, then the suggested reform may resolve one significant historical disparity in political participation, but it would not undermine the deeply seated social hierarchies that still define membership, opportunity, and access for most Americans.

Both points are correct and the model cannot fully resolve the challenges they invoke. Arguably, the optimal arrangement would be based on a statistical representation algorithm that would ensure full participation in the presidency to all classes and groups over the years, based on their shares in the population and, perhaps, the extent and severity of their past exclusions: for example, decreeing that every fifth president would be an African American woman, and so forth. The complexity—in both practical and moral terms—of devising such a mechanism, however, is prohibitive. It would also face the problem pointed to before of dedicating different election cycles to different slices of the population.

Perhaps more to the point, the model suggested in this Article indeed does not claim to tend to the full array of historical injustices involved in political exclusion. It seeks to remedy the harms imposed on the electorate as a whole by the exclusion of the consistently biggest and most diverse group of all—women of all sorts and kinds. Exhibiting the quality of intersectionality,<sup>63</sup> women are also distinguishable by their historical subordination and exclusion from leadership roles within both majority *and* minority communities, in national and local politics alike. Forcing only women to run for and be elected to the presidency would not ensure the representation of minority women, but it would make it more likely than before. By eliminating the participation of the class that benefitted most from the exclusion of women in both majority and minority groups, new space is created for minority women to exert agency and seek participation, even under the still-stratified systems of race, ethnicity, religion, and nationality that define class membership and mobility.

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63. For a review, see Leslie McCall, *The Complexity of Intersectionality*, 30 SIGNS: J. WOMEN IN CULTURE & SOC'Y 1771, 1777 (2005).

## 2. *Why Presidents?*

What makes the presidency a position that uniquely fits the suggested reform? Exclusion from political participation has been part of all levels and functions of government for generations. In the branches of the federal government, Congress suffers from underrepresentation of women to this very day,<sup>64</sup> and so does the Supreme Court, with the three current female justices constituting an all-time record.<sup>65</sup> Why not create mandatory gender quotas for other institutions as well? What is the reason to stop with the presidency, or indeed to start with the presidency?

The answer is that, ironically, the presidency is not about representation. A political position held at any time by a single individual, the presidency, by definition, is *incapable* of providing all members of the constituency the sense of presence, belonging, and shared participation that is regularly used to legitimize the coercive power of law in a democracy. Unlike the collegial institution of democratic government—Congress—the presidency is not intended, and is structurally unable, to reflect in its makeup, decision-making process, modes of reasoning, or ultimate actions the diversity of membership and ideology exhibited in the population that elected it. The legitimacy of presidential power derives from its function in promoting the democratic values enshrined in the Constitution, not from popular accountability (especially so in the second term) or representativeness. The Court similarly does not rely on popular acceptance, but it is a collegial institution whose makeup and behavior is susceptible to evaluation and critique along identitarian lines; and it seems to matter to many people whether there are on the Court women, members of racial minorities, and the like.<sup>66</sup>

What this means is that imposing gender exclusions on the access to such collegial institutions does real harm to the notion of representative democracy; while no such harm takes place if the presidency is limited to women alone. In the presidency, a man is no less “represented” than a woman by a female president, since, by

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64. See HESS ET AL., *supra* note 62, at 4.

65. See NAT'L WOMEN'S LAW CTR., WOMEN IN THE FEDERAL JUDICIARY: STILL A LONG WAY TO GO 1 (2016), <https://nwlc.org/wp-content/uploads/2016/07/JudgesCourtsWomeninFedJud7.14.16.pdf> [<http://perma.cc/JW54-V57G>]. In the lower levels of the federal judiciary, the numbers are similar: 35 percent of appeals judges are women, and 33 percent of district judges are women. *Id.*

66. See, e.g., Barbara Luck Graham, *Judicial recruitment and racial diversity on state courts: an overview*, 74 JUDICATURE 28, 29 (1990); Diane S. Sykes, *Gender and Judging*, 94 MARQ. L. REV. 1381, 1383 (2011) (raising qualms about the “prevailing view” that involves identity politics in matters of judicial selection); Joy Milligan, Note, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality*, 81 N.Y.U. L. REV. 1206, 1229 (2006).

definition, only one or the other could serve at any given time. If only women were allowed to run for Congress, then men would have a real claim of under-representation, since Congress can be made up to represent both men and women; unitary positions like the presidency cannot. Put more accurately, the only relevant sense in which we can talk of “representation” in single-person institutions is diachronic: along a temporal line of successive office-holders that, over time, should come to reflect the full diversity of the constituency. As we know, however, the promise of such diachronic representation in the presidency has completely failed women (and other classes) over the generations, hence invoking the corrective measure of the forty female presidents model.

In this sense, the logic of the reform suggested here can extend to other unitary elected positions from which women have been systematically excluded—governors, mayors, and the like. Such extensions of the argument, however, should be treated with care. Establishing a comprehensive “forty female executives” norm across the board would entail the marginalization of men from a broad stretch of political agency, and the accompanying social costs of such an exclusion in terms of civic engagement and public commitment are likely to outweigh the gender-equality-related benefits of the reform. Again somewhat ironically, one of the attractive features of the forty female presidents rule lies in its limited applicability to a single position nationwide, a position that is extraordinarily difficult to attain or even to plan or prepare for in any practical way: few people are likely to change their life choices and behavior following its adoption. In addition, unlike many other executive positions in the states, the president in fact is not elected popularly, but rather through the mechanism of the Electoral College, which presents another buffer between the representation of popular will and the eventual selection.<sup>67</sup>

Given that access to the presidency is so exceptional, and because presidential selection and tenure bely assumptions of representation anyhow,<sup>68</sup> the offense to democratic expectations implied

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67. See Akhil Reed Amar, *Some Thoughts on the Electoral College: Past, Present, and Future*, 33 OHIO N.U. L. REV. 467, 472–73 (2007). Even Electoral College deadlocks are resolved without recourse to popular majorities. See Sanford Levinson, *Why It's Smart to Think About Constitutional Stupidities*, 17 GA. ST. U. L. REV. 359, 368–69 (2000) (criticizing the Constitution's mechanism for breaking presidential selection deadlocks in the Electoral College, which confers the power on the House of Representatives acting on a one-state-one-vote basis).

68. If an inefficient administration may endanger the very existence of a democratic state, and if a lower degree of democratization guarantees a more efficient administration, the less democratic type of administrative organization may be chosen in order to maintain the democracy of the whole. This is certainly the reason why in all modern democracies the method by which the chief executive is appointed is by far less democratic



by the forty female presidents rule is relatively less pronounced than possible parallel reforms in other branches or levels of government. Sometimes, initiating reform at the top can be more readily just than starting from below.

### CONCLUSION

The forty female presidents rule is not likely to materialize in the foreseeable future; less provocative constitutional reforms have been failing the demanding obstacles of the Constitution's amendment process for decades.<sup>69</sup> This does not mean it is not worth considering seriously, as such an exercise can be valuable in helping us recognize our institutional blind spots, as well as our normative fixations. Imagining a truly radical reform, especially one that rests on essentially unassailable moral grounds—here, the clear injustice in the gendered formation of the presidency for centuries—is a useful way to begin discussing real, or more feasible, reforms, but this time with a much broader normative pool of institutional possibilities from which to draw.

There seems to be little dispute that it is “about time” that the United States elect a woman as president. Beyond the symbolic sense of elation that such an election—if it ever comes—could and should give us, it seems just as indisputable that the election of a single female president would mean very little to the institution of the presidency, with its forty-five predecessors spanning nearly 230 years in office. To know that we have in fact arrived at the “time” of the female presidency, we must be aware of the full potential—institutional, ideological, political—that it holds, and this can only be known through the experience of multiple, diverse female presidents. If one accepts this premise, then institutional design has to be part of the discussion, and hence our institutional imagination is called upon to provide material for thought. The forty female presidents rule presents an overall just policy prescription, which is also a thought experiment capable of provoking the mind, if not one's moral convictions.

The Office of the President of the United States is undergoing a fundamental recalibration in front of our very eyes, with orthodoxies of decision-making, discourse, and demeanor being discarded with the flutter of a tweet. As the meaning and the mission of the presidency is being negotiated, the possibility of greater transformations in the future must not be overlooked.

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than the method by which the parliament is elected. The President of the United States, elected indirectly by the people and not responsible to the parliament, is a less democratic organ than the House of Representatives.

Hans Kelsen, *Foundations of Democracy*, 66 ETHICS 1, 76 (1955).

69. Levinson, *supra* note 67, at 371.